



**Transforming Legal Aid: Consultation Paper  
(CP14/2013)  
JUSTICE Response**

**4 June 2013**

**For further information contact**

Angela Patrick, Director of Human Rights Policy (*Civil proposals*)

email: [apatrick@justice.org.uk](mailto:apatrick@justice.org.uk) direct line: 020 7762 6415

Jodie Blackstock, Director of EU and Criminal Justice Policy (*Criminal proposals*)

email: [jblackstock@justice.org.uk](mailto:jblackstock@justice.org.uk) direct line: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100  
fax: 020 7329 5055 email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)



## Summary

**JUSTICE considers that the proposals in *Transforming Legal Aid* are rushed, ill-considered and unsupported by evidence.**

**We regret that less than a year after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), the Government has published a Consultation Paper which entirely fails to engage with the important constitutional function of legal aid. Taken cumulatively, the Government changes could have a devastating impact on our justice system. This could critically undermine the centuries-old reputation of the United Kingdom courts as the home of fair, transparent and accessible justice for all. In the words of the late Lord Bingham, “denial of legal protection to the poor litigant who cannot afford to pay is [an] enemy of the rule of law.” (*The Rule of Law*, Allen Lane, London, 2010, page 88).**

**While any system of legal aid must be subject to proper administrative oversight – and cannot remain set in stone – it must remain independent, accessible and effective. We are concerned that the Government has not tested these proposals against this basic, internationally accepted, standard.**

**We are sceptical that the changes proposed can deliver the savings predicted as they will undoubtedly lead to further individual and systemic costs across the justice system and against other public budgets. None of the analysis conducted by Government has considered how the increased burden of many new litigants in person reaching our criminal and civil courts will impact on the public purse.**

**The short timetable for consultation – fewer than 40 working days – and the limited information and analysis provided therein makes it difficult for stakeholders to participate in a genuine exchange about the merits of these specific proposals and alternative opportunities for efficiency across the justice system. JUSTICE strongly criticises the failure of the consultation to properly engage with judges, legal professionals, victims and offenders’ organisations.**

**JUSTICE considers that vastly limiting the number of solicitors available to provide advice and support to people accused of offences amounts to a wholesale reorganisation of our domestic system of criminal defence. Proposing that this new system operate on the basis of price alone – and at rates significantly below existing remuneration at legal aid rates – will risk a downward**

drive towards the lowest common denominator, reducing the likelihood that individuals will be able to access fair, independent, quality advice throughout the country.

The removal of the right to choose a legal advisor save from those who can pay for the privilege, lies at the heart of our critique. Choice is the ultimate arbiter of quality and independence in legal services provided by our adversarial system. The Lord Chancellor has prejoratively suggested that client choice – a right enshrined in the European Convention on Human Rights – is irrelevant as clients are incapable of exercising an informed decision. This plainly neglects the role that client trust plays in securing a fair defence and the proper functioning of the criminal justice system.

Further changes proposed to legal aid for judicial review and stark limitations on assistance for prisoners and non-residents appear designed to insulate public decision makers (including central Government) from effective judicial oversight. We express our concern that none of the arbitrary and hastily drawn restrictions appear to be supported by evidence, including of any related, significant savings. 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, shows a profound misunderstanding of administrative law in practice.

JUSTICE strongly opposes the proposal to introduce a blanket ban on eligibility for legal aid based on residence. This discriminatory bar would stop one step short of an arbitrary exclusion from justice within the jurisdiction for non-nationals. However, it could exclude homeless people, victims of domestic violence or human trafficking, infants and newly settled refugees fleeing persecution from justice, even when their claim satisfies a stringent merits test and the cleanly carved out provisions for assistance in LASPO.

In our detailed response, we explain our view that the proposals may be open to legal challenge on the basis that they may go beyond the scope of the powers delegated to Ministers and that they will directly conflict with Convention rights protected by the Human Rights Act 1998.

We encourage the Government to step back from its proposed short timetable for the consideration of responses to this Consultation Paper, and the implementation of speedy reform, to allow fuller time for reflection and analysis. JUSTICE regrets that without such opportunity for pause, the changes proposed may irrevocably damage the reputation of our courts, will inevitably risk individual miscarriages of justice, and could undermine transparency, accountability and good administration by shielding Government from effective judicial oversight.

## Background

1. JUSTICE is an independent law reform organisation and is the United Kingdom section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve access to justice and to promote 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 defenders<sup>1</sup> 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”).<sup>2</sup> 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 access to justice for all.
2. On 9 April 2013, the Ministry of Justice published *Transforming legal aid: delivering a more credible and efficient system* (“the Consultation Paper”)<sup>3</sup> for consultation.<sup>3</sup> The consultation closes on 4 June 2013, allowing around 40 working days for response.
3. JUSTICE considers that the proposals in this consultation exercise are rushed, unsupported by evidence and fail to consider the wider constitutional function of legal aid within our justice system. Many of the changes proposed are unlikely to deliver the savings predicted and will lead to further individual and systemic costs across the justice system and against other public budgets.
4. Taken cumulatively, the consultation proposals could have a devastating impact on our system of civil and criminal justice. This could critically undermine the centuries-old reputation of the United Kingdom courts as the home of fair, transparent and accessible treatment for all.<sup>4</sup> To protect this reputation, the starting point for reform must be the protection of the rule of law. In the words of the late Lord Bingham:

---

<sup>1</sup> See JUSTICE, *A Public Defender*, (1987) and *Public Defenders: Learning from the US experience*, (2001).

<sup>2</sup> 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>).

<sup>3</sup> CP 14/2013

<sup>4</sup> On 15 March 2013, shortly before the publication of these proposals, the Lord Chancellor himself acknowledged that the reputation of UK Legal Services and the credibility of our Court system added significant value to the UK economy,

[D]enial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law.<sup>5</sup>

5. Our response is in four parts: a) The consultation; b) The right to representation for people accused of crime; c) Civil legal aid, judicial oversight and good government and d) Experts and equality Impact Assessments. In the first section, we outline a number of serious shortcomings in the consultation process, which inform our substantive response to the detailed proposals outlined by the Government. In the second, we consider the wide-ranging proposed reforms to criminal legal aid, which we consider will undermine the right of individuals accused of criminal offences to a fair trial and could fatally damage the credibility of our criminal justice system. In the third section, we set out our concerns that the Government's proposal to further restrict access to civil legal aid, principally by reference to the characteristics of a claimant or the nature of their claim, will shelter public authorities from scrutiny, encourage poor public decision making and simultaneously remove access to a remedy for some while leaving others to pursue ill-advised litigation, to the detriment of the efficiency and credibility of our civil courts. We include in this section proposals to remove access to criminal legal aid for prisoners who seek to challenge their treatment in custody. Finally, we raise concerns over two elements of the consultation which impact on both the civil and criminal proposals: a) the proposed restriction on experts fees and b) the likely impact of the proposals on the basis of characteristics recognised by the Equality Act 2010.
6. In so far as possible, we indicate where our response relates to a specific question posed by the Consultation Paper. Where JUSTICE does not specifically respond to an individual consultation question, this should not be taken as support for the Government's proposals.

---

speaking at an event to promote UK services overseas. He said "People all over the world know that for dispute resolution you come to... London". See reports, including: <http://www.lawgazette.co.uk/news/uk-best-litigation-says-justice-secretary>

<sup>5</sup> 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".

## A) The Consultation

### *The constitutional and legal significance of legal aid*

7. The Consultation Paper entirely neglects to consider the significance of access to legal aid for the rule of law or the wider constitutional importance of access to legal advice and representation for the effective operation of our civil and criminal justice system.
8. We return to this fundamental oversight in further detail throughout our response. However, 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.<sup>6</sup> As recognised by Lord Bingham, any other approach would fundamentally undermine our commitment to the rule of law.
9. The case law of the European Convention on Human Rights (“ECHR”) expressly recognises the right of everyone accused of a crime to access a lawyer of their choice and for such representation to be provided by the State if the accused cannot afford it (article 6(3)). The Strasbourg Court also 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. In determining access to legal aid in civil proceedings in cases where an individual is unable to fund civil litigation to protect their rights, the importance of the issue to be determined, the complexity of the case and their capacity to otherwise participate in the proceedings will be key.<sup>7</sup> The European Charter of Fundamental Rights builds on these standards where it is relevant.<sup>8</sup> Most recently, the United Nations (“UN”) has recognised

---

<sup>6</sup> See for example, *ex parte Khawaja* [1984] AC 74

<sup>7</sup> *Airey v Ireland* (1979) 2 EHRR 305

<sup>8</sup> The Government ought to recall its obligations to comply with article 47 of the EU Charter of Fundamental Rights when implanting 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.’ It is anticipated that the European Commission will present a proposal for a measure concerning the provision of legal aid in criminal proceedings in the autumn, pursuant to the commitment that all EU member states, including the UK, made in the Resolution for a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1. It would be extremely disappointing if the UK could not contribute to the raising of standards elsewhere because of diminishing them at home.

the need to provide assistance to States on the important role played by legal aid in ensuring democratic principles.<sup>9</sup>

10. 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.<sup>10</sup>

11. 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

---

<sup>9</sup> Several international and regional human rights treaties recognise access to free legal assistance as an essential component of the right to a fair trial. Article 14 (3) (d) of the International Covenant on Civil and Political Rights lists, among the procedural guarantees available to persons charged with a criminal offence, the right “to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, construes “legal aid” as including “legal advice, assistance and representation for victims and for arrested, prosecuted and detained persons in the criminal justice process, provided free of charge for those without means. Further statements elaborate on the approach of States to both civil and criminal legal aid. 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. The Government will also recall its recent agreement of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNGA/Res/67/187 (26 March 2013), which provide, amongst other concrete measures, at Principle 2 that States should consider the provision of legal aid their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is “accessible, effective, sustainable and credible”. States should allocate the necessary human and financial resources to the legal aid system.

<sup>10</sup> 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](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/43)



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.<sup>11</sup>

12. These concerns are exacerbated by the Government's view that these proposals can be brought forward in secondary legislation and without close parliamentary scrutiny. We have some doubts over the Government's analysis, expressed below, but would expect that where such a significant degree of change is being proposed, any consultation would proceed in full and considered recognition of the potential implications for the rule of law, for access to justice and the ability of individuals to protect their rights in law.
13. 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 Consultation Paper, in our view, falls far short of this responsibility.

### ***Evidence-based policy making***

14. A number of flaws in the Consultation Paper undermine the Government's commitment to evidence-based policy making:
  - a. **The case for reform is broadly based on assertions and implications and expressed in pejorative language.** The repetitive assertion – first found in the title of the Consultation Paper – that the existing legal aid system is inefficient and lacks credibility appears throughout the Consultation Paper. The Lord Chancellor implies that this credibility is undermined by cases described as “frivolous” by the in his introduction.<sup>12</sup> Similarly, the Consultation Paper and Ministers have repeatedly referred to our system of legal aid as one of the most most expensive

---

<sup>11</sup> 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. So help me God."* 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.

<sup>12</sup> Consultation Paper, Introduction.

in the world (“our legal aid bill has risen dramatically, so that it is now one of the highest in the world”).<sup>13</sup> Again, described by the Minister as a system “spiralled out of control”.<sup>14</sup>

- b. **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.** There is no evidence for example provided to support the Government’s view that the public considers that the provision of legal aid lacks credibility. This statement is used to support the case for most of the Government’s proposals. Yet, little evidence has been provided, beyond assertions by the Lord Chancellor that the public has written to support the Government’s case for change (without publishing correspondence or specific complaints).<sup>15</sup> Similarly, the statement that our costs are among the most expensive in the world are unsupported by clear comparative analysis which can draw a direct comparison with countries with similar common law adversarial systems. This assessment does not acknowledge that the cost of legal aid in an adversarial system will be far higher than in many other countries (including continental countries within the EU) which adopt an inquisitorial system of justice. In those countries, costs related to witness evidence and disclosure for example, are borne by the court system. Equally, no adjustment is made for the vast promulgation of criminal offences over the past two decades. A significant range of activities are criminalised within the United Kingdom which might be dealt with administratively or at a local level in other countries. Another contributing cost to the expense of legal aid is the exceptionally low age of criminal responsibility, which means that the activities of children are criminalised (with the associated costs attributed to criminal legal aid) which are dealt with by childrens services or other administrative processes in other countries. Yet, Ministers continue to use this broad statement that the United Kingdom spends more on legal aid than most, implying waste and inefficiency, without context. The inference that these costs are being permitted to “spiral” without check neglects existing controls on legal aid applied by the Legal Aid Agency and its predecessor, means-testing and provision for recovery of contributions from those with significant incomes and other relevant reforms, including measures to increase the efficiency of the

---

<sup>13</sup> Consultation Paper, para 2.1

<sup>14</sup> Consultation Paper, Introduction

<sup>15</sup> We note, in this regard, that recent polling figures produced by the Bar Council indicate that the public are broadly supportive of the legal aid system and its function. See <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/may/7-out-of-10-of-the-british-public-fear-legal-aid-cuts-will-lead-to-injustice-%E2%80%93-new-poll/>

operation of the CPS and significant reductions in specific budgets, outlined below (for example, around £3 million cut from the prison law criminal budget).

- c. **The Impact Assessments provided lack information and are not fit for purpose.** For example, the figures given are extremely limited and predicted savings and costs are roughly estimated by the Ministry of Justice without any clear or significant analysis of how the sums have been calculated. In other sections, the Ministry asserts that information is unavailable or “not collected” without making any further effort to assess impact. For example, the costs of changes of residence proposals are not estimated. The Government does not appear to have taken any proactive steps to gather information on the financial impact of its proposals beyond the gathering of already available figures and statistics. Equally, the likely success or failure of existing borderline cases which are now eligible but which would be excluded from legal aid is not explored in the Government’s analysis. The limited assessment of impact on vulnerable applicants, including those individuals who share protected characteristics under Equality Act 2010, is covered in our detailed response below, but raises questions on whether serious efforts have been made by the Government and officials in considering the real impact of the proposed reforms.
- d. **Ministers appear to have taken a view and are approaching the consultation with a closed mind.** The statements made by the Lord Chancellor have made clear that the proposals outlined by the Government will proceed, unless exceptional evidence is proposed for an alternative model. The Lord Chancellor, for example has said:

We’re changing the legal aid rules so that you’re not going to be able, your lawyer won’t be able to get legal aid...unless the judge says, “yep, this is a case that has merit and needs to be heard in court”. That’s reasonable because otherwise we end up paying for endless cases... That’s one of our changes.<sup>16</sup>

Quite aside from the fact that this suggests that no merits test is applied at the moment in connection with the award of legal aid (currently assessed by the Legal Aid Agency (“LAA”) in judicial review claims), this gives the impression that this consultation exercise is a sham.

---

<sup>16</sup> Transcript, Radio 4, 23 April 2013. Available at the Public Law Project, <http://www.publiclawproject.org.uk/documents/TranscriptChrisGraylingToday.pdf>

15. We return to these themes throughout our contribution, but JUSTICE is deeply concerned that the consultation process appears to be a “tick-box” exercise without any genuine attempt to consider alternatives, to engage stakeholders and to consider the likely implications of reform.

### ***Timetable and next steps***

16. The consultation period is eight weeks, including two public holidays and allows stakeholders roughly working 40 days to respond. Regardless of our concerns about the insufficient information provided by the Government in connection with the consultation, outlined above, this falls far short of the timescale envisaged in the Government’s own guidelines on consultation.<sup>17</sup>

17. The Consultation Paper was published days after the entry into force of LASPO and the significant cuts to civil legal aid set out in that Act. The Consultation Paper itself recognises that the Government has been incapable of assessing the likely impact of LASPO in evaluating the subsequent impact of these proposals. The Consultation seems to proceed with a lack of understanding on the limitations imposed by LASPO or the important safeguards which Parliament imposed upon that Act in order to secure legal aid for vulnerable persons. In addition, the Consultation Paper acknowledges that further changes will be necessary in order to consider how changes to Universal Credit might affect the gateway to legal aid. The impact of planned reforms to judicial review, for example, expected to come into force this summer, will not be considered before further changes are to be implemented.

18. Yet, the Government sets out an ambitious timetable for further reform. The Impact Assessments make clear that the Government intends most reforms to be enacted and in force by mid-2014, including the wholesale reorganisation of the funding and provision of

---

<sup>17</sup> The Government Consultation Principles provide a number of guidelines to ensure stakeholders sufficient time to provide a considered and effective response. Depend on the nature and impact of the proposal, the consultation period might typically vary between two and 12 weeks. 12 week consultation periods are accepted as standard in complex cases or where a new and contentious policy is suggested in order to ensure effectiveness of the consultation. The length, complexity and controversy of *Transforming Legal Aid* clearly militate in favour of a maximum consultation period. See *Government Consultation Principles, 17 July 2012*. Further, the capacity of the groups being consulted to respond should be taken into consideration. In particular, the Government has advocated that the principles of the Compact between government and the voluntary and community sector will continue to be respected, committing to conduct 12-week formal written consultations where it enables meaningful engagement.” See *The Compact (Cabinet Office 2010) para. 2.4*.

criminal legal aid. Others will be better placed to highlight the practical barriers for the implementation of such massive changes over such a short timescale. We remain skeptical that, in the face of major opposition these proposals can be produced as described and according to timetable without a major legal challenge and associated costs. Most worryingly, we are concerned that without further time for reflection, the drive to overhaul the provision of criminal defence services could result in serious miscarriages of justice in individual cases.

19. Specific reforms to civil legal aid rely on the Government's view that it may implement these further restrictions to legal aid through secondary enabling legislation under LASPO. We have some doubts whether all of the proposals made will be within the scope of those existing enabling powers, as we explain, below. In any event, we remain concerned that a number of the relevant proposals will be subject to challenge under the Human Rights Act 1998, as incompatible with Convention rights.<sup>18</sup> Where the secondary legislation is incapable of being read in a manner which avoids a violation (for example, as might arguably be the case in a blanket exclusion based on residence), it may be set aside. Further costs associated with legal challenges to LASPO (and this legislation) are expected by Government.<sup>19</sup> However, the introduction of rushed, badly-planned legislation which is likely to be subject to an early, costly challenge, would undermine even the Government's least ambitious stated plans for savings to public litigation costs.

---

<sup>18</sup> We have kindly had the benefit of draft submissions prepared by Doughty Street Public Law Team and the Constitutional and Administrative Law Bar Association and the Bar European Group, both of which support our view that the stated enabling powers in LASPO are subject to ordinary public law challenge. We reiterate here our view that the failings in this consultation compound the likelihood that the introduction of measures based on these proposals will themselves be subject to judicial review.

<sup>19</sup> In this planning document, the Government has clearly planned for delays to the implementation of LASPO as a result of legal challenges [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/203319/gmpp-data-MoJ-q2-2012-13.xls](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203319/gmpp-data-MoJ-q2-2012-13.xls).

## **A) The right to representation for people accused of crime**

### ***Introduction***

20. The Consultation Paper suggests that the proposed reforms to criminal legal aid have been guided by the following considerations:
- a. the ambition to encourage providers to work efficiently and enable the earliest possible resolution of cases, thereby supporting our wider objective of a more efficient and proportionate criminal justice system, which gets it right first time;
  - b. the need to ensure that people accused of criminal offences can continue to receive the services they require at the time that they need them.<sup>20</sup>
21. There is no evidence that providers of criminal legal aid advice and representation are not currently working efficiently, nor that the earliest resolution of a case is not already a guiding principle for practitioners, both under the Criminal Procedure Rules, and in the best interests of suspects and defendants. In our view, the proposed reforms – far from ensuring that clients can continue to receive the services they require – will significantly undermine the quality of advice and assistance available to legally aided defendants and will undermine the right of us all to a fair trial, increasing the likelihood of miscarriages of justice and risking the reputation of our criminal justice system irreparably.
22. There is also no evidence of a lack of public confidence in the criminal justice system. Rather, in our view, the British public is proud of our legal aid system in criminal cases since it is believed to afford a fair trial and ensure that when people are suspected of committing an offence, help is there which guarantees the same quality of assistance as under privately paid representation. This is particularly illustrated by the reluctance reflected in the media to recognise the validity of extradition requests where it is widely believed that many other countries – including, for example, the United States – do not offer the same protections as the United Kingdom.
23. The Consultation Paper fails to acknowledge that criminal legal aid fees have been reduced year on year for the past 15 years, demonstrated by the Legal Services Commission annual reports, and set out in detail in the responses of the Law Society and Criminal Bar Association, amongst others. The availability of criminal legal services have already been heavily squeezed by these significant cuts. It can only impact upon the

---

<sup>20</sup> Impact Assessment, p 5.

quality of representation to impose more. Yet, the proposals in this Consultation propose not only cuts, but the wholesale reorganisation of the system by which access to criminal advice and assistance is provided in the United Kingdom. The approach proposed is ill-considered, fails to recognise the adversarial nature of our justice system, will lead to poorer defence representation and could significantly increase the possibility of miscarriages of justice.

24. Further, legal aid should not be considered in a vacuum. The impact of cuts to representation services is bound to have an impact upon other agencies within the criminal justice system – the courts, prisons and probation services in particular – as it must be contemplated that less, or an absence, of representation services will lead to delay in the process through a criminal case, and more convictions. There has been no analysis of the impact upon the budgets of these other parts of the system. It is misleading to estimate savings without considering the wider spending which will be pushed onto other services.

25. The Government has also not contemplated alternatives to further cuts to the cost of defence representation. Members of both professions and other commentators have repeatedly suggested alternatives:

- a. Restraint upon assets being used to fund representation, rather than freezing assets and then having to award legal aid as the person has no means to pay. It is often very difficult after conviction to confiscate assets and costs a substantial amount in the attempt to do so. If persons accused of fraud are suspected of having the means to pay for their representation, they should be expected to do so, rather than having their assets restrained and thus inaccessible. The possible savings to legal aid from these cases should be considered before cutting legal aid further.
- b. It is also disappointing that the Government is again focussing on reducing funding to defence representation, and thereby risking the quality of that representation, when significant savings can be made by reducing the overuse of custodial sentences. With an average annual spend of £34,000 on each prisoner, and 86,000 in the prison population, almost £3 billion was spent last year on

housing prisoners.<sup>21</sup> Releasing the 3,570 people continuing to serve indeterminate sentences for public protection alone would save £121m from the annual Ministry of Justice (“MoJ”) budget.<sup>22</sup> The prison population is starting to fall<sup>23</sup> but has a long way to go to rectify the rapid and unnecessary increase in incarceration that has taken place over the last 20 years, which has done nothing to prevent recidivism and is widely acknowledged as a failure. If the prison population were returned to 1995 levels, of just over 50,000 people incarcerated, the savings per year would be over £1 billion. The proposed saving to legal aid of £220m per year pale in comparison, particularly the savings that are anticipated from cuts to prison, judicial review, Very High Cost Cases and advocacy funding, which alone are small amounts compared to the impact they will cause to the individual in need of assistance.

- c. We regret that no acknowledgement has been made of the role played by the Crown Prosecution Service (“CPS”) and other parts of the criminal justice system in maintaining its efficiency. Other respondents to the consultation have recommended further measures where the CPS and the Courts Service could improve the efficiency of trials and share the burden of some of the savings proposed in this consultation.

26. A holistic approach must be taken to achieving savings which considers where the most effective savings overall to the system can be made, whilst maintaining the right to an effective defence. These proposals in our view do not satisfy this requirement.

---

<sup>21</sup> NOMS, Annual Report and Accounts 2011-2012, Management Information Addendum, *Costs per place and costs per prisoner* (Ministry of Justice Information Release, 25 October 2012)

<sup>22</sup> Prison Populations Tables, Quarter 4 2012, to 31 March 2013 (Ministry of Justice)

<sup>23</sup> Offender Management Statistics Quarterly Bulletin (Ministry of Justice, 25 April 2013)



### **Chapter 3: Imposing a financial eligibility threshold in the Crown Court**

**Q2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons**

**Q3: Do you agree that the threshold is set at an appropriate level?**

27. We do not agree with the imposition of a financial threshold for access to legal aid in the Crown Court, as proposed. The criminal justice system must ensure that those without the means to pay are afforded legal aid in accordance with article 6(3) ECHR. The proposals do not accord with this fundamental principle of justice.

28. The proposal is to lower the eligibility threshold for means tested legal aid so that those who have a disposable income of £37,500 or more will not be eligible for legal aid at all. We are concerned that imposing this cut-off will lead to a significant amount of people being unable to access defence assistance. The figures provided in the proposal do not accurately reflect private rates for litigation and representation services. It is a false premise that where legal aid rates in the Crown Court are an average of £5,000 per case, a person can therefore find someone to represent them for that fee. The average legal aid cost of a case is calculated at legal aid rates. These rates have been cumulatively cut over recent years and do not accurately reflect private market rates. It is also inaccurate to suggest that all cases can be valued at £5,000. This is an average figure and clearly cases vary in duration and complexity. In many instances, £5,000 is a gross underestimate of the value of work that will be involved in a defence. The figures provided elsewhere in the Consultation Paper for advocacy services demonstrate this.

29. The computation of disposable income proposed does not include all expenses, such as household bills, debts other than mortgages, and dependants who are not children. We are concerned that the assessment of disposable income should be personable, not based on household income. Eligibility for a legally funded criminal defence should not include a partner's earnings, since they should not be penalised for allegations which they are not suspected of, particularly if the partner is an alleged victim of the relevant crime. If this were the case it would be an outrageous interference with their access to justice. It is not clear what factors will be considered in the hardship review and whether

this will deal with these concerns. An application for a hardship review may well become routine if there is a failure to properly calculate disposable income, length of proceedings and partner's position. It is notable that the costs associated with the hardship review are not estimated in the Impact Assessment.

30. There has been no estimation as to how many people will find that they have to represent themselves as a consequence. The changes are bound to interfere with the right to a fair trial because a defendant in their own cause cannot hope to have equality of arms in the adversarial model that applies in England and Wales. It is not the judge's role to intervene and ask questions on the defendant's behalf, yet unless they do so, it is almost inevitable that vital evidence will not be presented to the jury. Judges rely on advocates to bring to their attention the relevant procedural and substantive law that ensures the correct evidence is before the jury, but a defendant acting in their own cause will not know the law. Defendants will have to attempt to put their case forward against the significant resources of the State, which in the Crown Court pertain to the most serious allegations against a person with the possibility of a custodial sentence upon conviction. They cannot hope to succeed against police evidence and a barrister acting for the Crown. The current system recognises this by only requiring contributions to legal aid rather than imposing a cut off to any assistance.

31. Furthermore, there is no recognition or provision here for vulnerable defendants who may lack the cognitive or physical skill to conduct their own defence. It further ignores the impact of witness examination by an unskilled and inconsiderate litigant in person. Giving evidence in court is a difficult experience for anyone, it is far more difficult to bear if the defendant is entitled to ask questions of victims and witnesses in their own cause, particularly where the witnesses are children or vulnerable themselves. There is no consideration of the impact in domestic violence or sexual abuse cases where such examination will be wholly inappropriate and advocates will be necessary to conduct this portion of the case. The risk to the administration of justice, the cost of aborted trials, of victims and witnesses proving too reluctant to give evidence in court due to the defendant acting in person, has simply been ignored. It is likely that the additional administrative burden in assessing eligibility and hardship; the length of trials due to defendants acting in person; and the impact upon witnesses is not worth the meagre projected savings of lowering the threshold. As Ward J recently observed in a civil appeal:<sup>24</sup>

---

<sup>24</sup> *Wright v. Wright* [2013] EWCA Civ 234, at [2].

What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.

32. The administration of the system will also have to factor in assessment of eligibility, any change in the defendant's circumstances, hardship applications, and the likely length of trial without delaying the decision on whether the person is eligible for legal aid. Any delay in this decision may amount to interference with the fairness of the trial process as a trial must taken place within a reasonable period of time in accordance with article 6 ECHR, as well as common law principles. The introduction of means testing in the magistrates' court resulted in delays in the assessment of legal aid across the country.<sup>25</sup> This should not be repeated.
  
33. In our view, if an eligibility threshold is to be pursued notwithstanding the interference with the fairness of the trial which will ensue, the threshold must be set at a realistic rate according to the actual estimated length of proceedings in each case and not a rough computation of one average case. It must take into account the type of proceedings and whether it is appropriate for the defendant to act in person, according to their vulnerabilities and those of the witnesses in the case, and a proper assessment of the

---

<sup>25</sup> C. Baski, 'High Court Slams Delays,' *Law Society Gazette*, 3 July 2012

accurate cost of administering the system must be undertaken before pursuing the change.

34. We also consider that reimbursement from central funds upon acquittal ought not to be limited to legal aid rates. When the choice of access to legal aid is removed it is wholly unreasonable to then restrict reimbursement on acquittal to those rates which the State refused to allow the person to access. This is compounded by the proposed cuts to legal aid which will impose a further 17.5% cut to solicitors' rates and 20-30% to the Bar. Clearly private rates are going to be significantly higher than rates on legal aid, and even where the defendant is found innocent of the offence, the person will not be able to recoup their expenses from the State. Looking at the choice available to them, many defendants will see no option but to represent themselves and risk conviction. This is an unacceptable interference with the right to a fair trial.

#### **Chapter Four: Introducing Competition in the Criminal Legal Aid Market**

**Given the inter-related nature of the questions being asked and probable consequences, our response deals with Q7 - Q25 holistically in order to avoid repetition (with the exception of Q17).**

35. We are strongly opposed to the Government's proposal for price competitive tendering ("PCT") in criminal cases. The limited consultation on a change with such massive implications to the criminal justice system is unacceptable. We share the concerns of most commentators on the decision to limit this consultation to the model for PCT, as opposed to the principle of the shift to competitive tendering based on price, is short-sighted and inconsistent with the principles of open and evidence-based public decision making. However, if these proposals are taken further, and before any tender process is undertaken, JUSTICE considers that there must be a full and detailed analysis of the consequences; a pilot to test the impact; and expert guidance on how to arrange it. Otherwise we consider that miscarriages of justice are inevitable.

36. The Government appears to have taken no lessons from the privatisation of the interpreters and translators service. There was a complete failure to properly assess the

potential, and probable, impact of tendering in the way that scheme operated. As the House of Commons Justice Select Committee found:<sup>26</sup>

- The contractor was unable to recruit qualified and experienced interpreters in sufficient numbers, leading to an inadequate volume and quality of interpreting services being available to courts and tribunals (280 instead of 1200).
- The MoJ did not know whether interpreters had qualifications, experience or Criminal Records Bureau checks.
- Numerous hearings were adjourned or severely delayed and there were unnecessary remands into custody. The MoJ was unable or unwilling to provide data on the additional cost to the courts and prisons caused by postponement of judicial proceedings.
- There was widespread concern that lower quality interpreting might increase costs elsewhere in the system - repeated bail and remand hearings, with defendants being remanded in custody unnecessarily in the absence of an interpreter; adjournments and appeals resulting in costs to legal aid; wasted court and police time; and irrecoverable proceeds of crime when prosecutions collapsed.
- Professional interpreters largely boycotted the new arrangements.
- Quality standards were diminished by the imposition of a tiered system to enable a wider pool of interpreters and significantly lower levels of pay.
- The existing safeguards of quality may not be fit for purpose. No quality-associated indicators were included in the Framework Agreement, but the Law Society was aware of 'significant problems in criminal courts'.
- Confidence of important stakeholders was undermined, including the judiciary, magistracy and legal professionals.
- The contract was not financially sustainable with the MoJ's savings effectively being propped up at the contractor's expense.
- The MoJ lacked management information on the previous use of interpreters and did not have a clear understanding of its requirements under the new system.
- The new system was driven by bidders' proposals rather than the actual system requirements.
- The MoJ did not conduct thorough due diligence checks on the contractor before signing the Framework Agreement.
- The MoJ did not act on its findings in the consultation period and although it consulted with stakeholders, including interpreters, it did not take their concerns

---

<sup>26</sup> House of Commons Justice Select Committee, Sixth report of session 2012-2013, *Interpreting and translation services and the Applied Language Solutions contract*, HC 645 (London: TSO, 6 February 2013)

into consideration. The Consultation was too limited as the nature of the new arrangements had been largely determined.

- The MoJ did not effectively draft and implement penalties under the contract to minimise transitional problems.
- Under the draft Framework Agreement, fees for interpreters were reduced and restructured according to tier.
- Over two thousand complaints were received in the first quarter of operation, comprising 13% of assignments fulfilled.
- Professional Interpreters' experiences show that fees were restructured to such an extent that interpreters working under the Contract were being paid less than the minimum wage.
- The MoJ admitted some direct annual costs that it was likely to incur as a result of the problems with the contract, including £4 million for off-contract payments to interpreters under the old arrangements, primarily for short notice bookings, and £60,000 for increases in ineffective trials in magistrates' courts.

37. Although direct costs under the Framework Agreement have fallen - the total spent by the Court Service on interpreters fell by 13% from £49.2 million in 2009–2010 to £47.2 million in 2010–2011 - there are also estimates that there had been reductions in pay of 28–73% for court work and 33–43% for tribunal work, depending on the length of the assignment and the amount of travel. These cuts were acknowledged to be far too low and unintended. Professional court interpreters simply could not operate under these rates. As a result the Government has had to provide an average 22% increase in remuneration for interpreters compared to the current Framework Agreement rates, including mileage payments which were excluded.

38. Similar problems of short supply and poor planning are equally likely to occur under the proposed scheme for PCT for criminal legal aid because the same lack of foresight has been applied to maintaining quality service provision under the proposed contracts.

39. Reference to Criminal Defence Services direct also ignores that this is a very different model to that envisaged and not comparable either in terms of scale or coverage, in that it is applicable only to a tiny number of criminal cases and cannot be used as a basis for learning or development of a national system of criminal legal advice and assistance.

40. The proposal utterly ignores that the nature of the criminal justice system is such that it cannot be reduced to a competitive tender process based on price alone. It operates through the most serious interferences with the lives of individuals, who often by their very involvement with the system have complex needs. Trained and experienced defence representatives must be available to ensure they provide an effective defence to these individuals. In order to do so they must work diligently, without fear or favour, independently and with tenacity. Often they are required to work long, anti-social hours attending the police station or preparing arguments at night and weekends to be ready for court, yet they must be focussed, capable of working under significant pressure and managing the responsibility of defending people whose liberty and reputation is at risk. This is compounded in many cases by the vulnerability of the suspect or defendant who may suffer from addiction, have a chaotic lifestyle, is often incarcerated during the process and is inherently unreliable.
41. The people who undertake this work do it because they recognise the value in providing equality of arms to people who find themselves embroiled in the criminal justice system, and they often do more than the current funding arrangements can provide for, in working hours that cannot be claimed, or assisting with wider problems associated with the criminal case, such as housing difficulties and family concerns. The current system rewards the moral imperative of criminal lawyers to represent a defendant to the best of their ability. Without sufficient remuneration, this imperative can only be influenced by other, corporate and personal, factors bearing upon the individual solicitor. Significant further cuts to provider remuneration and the number of providers available in the market will lead to high volume case work being prioritised. Pressure of work in such conditions may significantly disincentivise those remaining providers against delivery of fuller than contracted, essentially *pro bono* support, whether out of hours, to meet the particular needs of especially vulnerable clients or otherwise.
42. There are no certain or fixed elements of any case upon which to base a tender for all these reasons. The length and complexity of a case are unknown quantities. Trial length estimates are always affected by many human elements which are themselves affected by the trauma and emotional pressure of criminal offending: victims, witnesses and defendants can all cause the process to be derailed or delayed.
43. The current market sustains quality by ensuring there are community-based lawyers who practice through their reputations and experience and who serve local police stations and courts. The Government has repeatedly lauded the value of localised services, yet this

proposal will cut the number of available providers by three-quarters. There has been no exploration of how firms are expected to merge to cover the work as well as maintain a community service. There is no evidence of how quality is to be maintained in the face of significant cuts, market forces, and a much wider area of provision.

44. Equally, there is no exploration of how the specialist skills of criminal solicitors is fostered and maintained, particularly in connection with a range of specialist offences such as complex fraud, regulatory or commercial offences at one end of the spectrum, offences associated with extradition, human-trafficking and war crimes at the other. There is no express consideration of provision for specialist firms that will not be able to bid for generalist contracts. A problem highlighted below, in the specific consideration of whether specialist advice on prison law – which has more in common with public and administrative law than ordinary criminal practice – will routinely be available within the limited number of providers proposed to be awarded a criminal legal aid contract.<sup>27</sup>
45. Whilst the proposal acknowledges that barristers are not organised sufficiently to bid, PCT will have a profound effect upon the Bar because the current providers that send barristers instructions may no longer exist under contracts. Most barristers still operate on a referral basis because in most criminal cases there is still a significant amount of litigation required. Defendants cannot conduct litigation for themselves and therefore need solicitors to do this. The Crown Court and Very High Cost Cases work is derived from police station arrests and magistrates' courts committals; if solicitors cannot access the market, they cannot refer the more complex cases on to barristers. This will impact upon the quality of defence where solicitors have built up a relationship with particular counsel for particular types of case. Contractors are likely to take the work in-house to increase profit, reducing the amount of work going to the Bar, and reducing the calibre of court advocacy and specialist skill in defending at trial. Existing expertise will be lost with no proposal by the Government on how it might be retained or replaced in the new market by a more limited number of providers operating on the basis of price efficiency as a dominating factor.
46. The long term impact of tendering without quality requirements is likely to result in sub-standard skill from solicitors and barristers who have not been able to find better work elsewhere, and a sub-standard judiciary as the bench will be drawn only from the

---

<sup>27</sup> See in particular the concerns of extradition specialists, <http://www.5sah.co.uk/wp-content/uploads/2013/05/RESPONSE-TO-THE-TRANSFORMING-LEGAL-AID-CONSULTATION-EXTRADITION1.pdf>



reduced pool of those who have been able to survive the PCT process. JUSTICE considers that the risks to the system as a whole are overwhelming and have not been considered at all by the Government in this consultation, beyond a cursory invitation to the professions themselves to design safeguards for the maintenance of quality control, referencing professional standards and the use of contract compliance.

*Proposed 17.5 per cent cut to services*

47. In addition to the PCT process, a 17.5 per cent cut on any service contracted for will lead to most solicitors being unable to bid even if they could attempt to estimate a realistic price per case. The proposed cut is entirely artificial and unjustified. There is no evidence that the profession can sustain such a level of cuts on top of long term and recent cuts that have yet to take proper effect.

48. Any firm that is able to bid, on this level of cuts, cannot hope to sustain the current level of preparation and representation, and will be under pressure to reduce the time spent on every case. As a result they will be bound to miss important issues, particularly when they will also have to sustain a higher volume of cases at a lower fee. This is bound to result in miscarriages of justice:

- Will solicitors listen to interview tapes which can last hours in length? This is important to ensure the transcript of the recording is accurate and to capture the emotional response of the defendant to questioning;
- Will they check up to date case law to ensure they make all relevant legal arguments with respect to criminal procedure and the offence being charged?
- Will they follow up all witness leads which the client suggests? These are vital to verify an account provided by the client.
- Will they find character witnesses, which can be very important at the sentencing stage?
- Will they verify the evidence given in prosecution witness statements, e.g. distances over which a defendant is identified, locations and distance between particular locations? There are all sorts of factual and technical assertions in prosecution evidence which must be challenged at trial.
- Will they instruct experts? Finding a suitable expert and providing instructions on exactly what opinion is required can be a time consuming and complex process.

- Will they take as much care over verifying that the client is fit to be detained/interviewed/tried? Suspects and defendants often present with complex mental health and addiction problems. Lawyers need to take time with their client in order to recognise when this will become an adverse impact on their right to a fair trial and an application of unfitness or diminished responsibility is appropriate.

49. The proposal has not considered the increase in costs to the system that will ensue with PCT and 17.5 % cuts; delays are inevitable where overworked and underpaid lawyers miss issues which are only then picked up at court and require an adjournment at the cost of a trial ready court. Worse, a significant issue could be missed entirely and only realised later, leading to an appeal or review by the Criminal Cases Review Commission. These costs will be wholly unnecessary as well as result in the wrongful conviction of unexplored numbers of people.

#### *Disbursements*

50. We consider it unreasonable and unfair to remove the option to claim reimbursement of disbursements and subsume them in a PCT fixed fee, given the expansion of the service area. Disbursements are fixed by external factors which it will be impossible for the provider to estimate in advance, having never covered the wider proposed geographical area before. It is almost inevitable that these costs will be higher than estimated and will cause solicitors to reconsider the cost of providing representation, to the detriment of their clients. For example, solicitors may decide not to attend the police station because of the cost of getting there; they may not visit the client in prison, at their home or office because of the distance, where otherwise this would be routine. A lack of consultation in person will reduce trust between the lawyer and client and inhibit a full understanding of the case, leading to a poorer quality service, complaint by the client and the possibility that the defendant will try to continue without representation, to the detriment of their right to an effective defence. Each of these factors taken alone may seem unimportant. However, taken together we regret that they will contribute to downward pressure on the quality of defence representation available in practice.

## The Right to Choose

**Q 17: Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.**

51. At the heart of JUSTICE's concern about these proposals is the stated intention of the Government to remove the right of legally aided people accused of criminal offences to choose their own lawyer. The Government's intention is justified by a desire to guarantee equal contracts and access to volume work for all of the limited providers which will remain in the market. This reveals each of the fundamental flaws in the system proposed. First, it ignores the overall rights of the individual to an effective defence of their choosing, funded, if necessary from public funds. Second, while reputation and quality guarantees work and maintains high standards in legal aid provision, this also fosters trust between provider and client. It is this trust that lies at the heart of an adversarial justice system and which assures that an individual has access to quality advice on the charges and evidence against him and independent representation at trial in which a person can have faith. Simply guaranteeing cases irrespective of capacity, experience, trust or expertise will drive down quality, not maintain it. The proposal also reveals a concerning attitude that maintaining the contractual market is more important than the delivery of an effective defence – and a fair trial - to the person accused by the State of an offence, which may be life-changing that individual.

52. The Government has recently re-acknowledged the value of the right to choose in other public services:

Wherever possible, we want to give the power of choice to the individuals who use a service, we want funding to follow the choices of service users, and we want to give the professionals providing the service the freedom to respond imaginatively and innovatively to the competition that results.<sup>28</sup>

53. We agree with this endeavour. This, in our view, is provided by the operation of the existing legal aid market. The Consultation Paper proposals appear to be at significant

---

<sup>28</sup> Cabinet Office Policy Paper, *Open Public Services 2013 – Executive Summary*, 16 May 2013

odds with Government policy. Irrespective, the right to choose is enshrined in article 6(3)(c) ECHR which provides that everyone charged with a criminal offence has the right to:

[D]efend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

54. The European Court of Human Rights (ECtHR) has considered when the right to choose applies. In *Pakelli v Germany*<sup>29</sup> the Court, in a full discussion of article 6, noted that there is an important difference between the English and French versions of article 6(3) of the ECHR:

To link the corresponding phrases together, the English text employs on each occasion the disjunctive "or"; the French text, on the other hand, utilises the equivalent - "ou" - only between the phrases enouncing the first and the second right; thereafter, it uses the conjunctive "et". The "travaux préparatoires" contain hardly any explanation of this linguistic difference. ... Having regard to the object and purpose of this paragraph, which is designed to ensure effective protection of the rights of the defence, the French text here provides more reliable guidance. *Accordingly, a "person charged with a criminal offence" who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require.*<sup>30</sup> (Emphasis added).

55. In *Croissant v Germany*<sup>31</sup> the European Court refined its discussion in *Pakelli*:

It is true that article 6(3)(c) entitles "everyone charged with a criminal offence" to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of

---

<sup>29</sup> *Pakelli v Germany*, ECHR, application no. 8398/78 (25 April 1983)

<sup>30</sup> At [31]

<sup>31</sup> *Croissant v Germany*, ECHR, application no. 13611/88 (25 September 1992)

justice require that the accused be defended by counsel appointed by them. *When appointing defence counsel the national courts must certainly have regard to the defendant's wishes, however they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.*<sup>32</sup> (Emphasis added).

56. Whilst there has more recently been an admissibility decision in *Freixas v Spain*,<sup>33</sup> that article 6(3)(c) ECHR does not guarantee the right to choose an official defence counsel who is appointed by the court, nor a right to be consulted with regard to the choice of an official defence counsel, the Court relied upon Commission decisions only, and did not consider either of the above decisions. In our view, the Convention provides a right to choose a lawyer through legal aid, which can only be interfered with upon relevant and sufficient grounds in the interests of justice in that case. A legal aid system which wholesale removes the ability to choose a lawyer in order to ensure even distribution of contract cases cannot comply with article 6(3)(c) ECHR.

57. Furthermore, section 27(4) of LASPO enshrines the right to choose:

An individual who qualifies under this Part for representation for the purposes of criminal proceedings by virtue of a determination under section 16 may select any representative or representatives willing to act for the individual, subject to regulations under subsection (6).

58. Subsection 6 indicates that the right may be limited in certain prescribed circumstances. Parliament cannot have intended to mean all circumstances otherwise this would be perverse and misleading.

59. As such, we consider that it would be unlawful to restrict the right to choose under PCT contracts, pursuant to both article 6(3)(c) ECHR and section 27(4) LASPO.

60. It is also misguided since the right to choose results in efficient expenditure; an individual is more likely to trust a lawyer that they have had the option to choose and therefore the advice to plead guilty is more likely to be accepted, resulting in the avoidance of a trial, whereas the advice of an unknown lawyer driven by the requirement to fulfil contractual

---

<sup>32</sup> At [29]

<sup>33</sup> *Freixas v Spain* [2000] ECHR 53590/99

obligations is more likely to be ignored and a trial demanded. Furthermore, the limited circumstances in which defendants may apply to the Legal Aid Agency for a change in representation, irrespective of merit, will become more routine and will lead to added administrative burden in assessing the claims, which has not been factored into the assessment of estimated savings.

61. The equality of arms, which is a cornerstone of the criminal justice system, is maintained through safeguarding the right to have a lawyer of choice; there is no equality of arms without the right to choose the lawyer that represents you. The potential impact upon fairness is clear, and also dangerous; there will be a financial incentive on the lawyer to garner a guilty plea or shortest trial possible, yet the individual who is affected by this will have no ability to replace a lawyer who is not acting in their best interests, unless they can afford private fees, or choose to carry on without a lawyer at all. The inability of a defendant to replace his advocate with one he trusts, may lead to the accused deciding to represent themselves. This, again, will not only increase the length of trial, thereby negating any financial savings, but risk miscarriages of justice through the inability of a defendant to properly represent themselves.

62. In conclusion we consider that the proposals for PCT in criminal cases can only reduce the quality of defence representation and impact upon the right to a fair trial. At a minimum, if these proposals are to be pursued, it will be necessary to include provisions in the contract for maintaining quality of service, which, despite an assertion that quality measures will ensure that there is no impact on the quality of advice,<sup>34</sup> there is no consideration in the proposal of what these measures may be. These simply cannot be realised with a further arbitrary cut of 17.5% across litigation services. Research has shown that where funding is inadequate, service quality is affected.<sup>35</sup> Whilst it is difficult to draw comparisons with other jurisdictions, there are some helpful recommendations from public defender systems elsewhere which attempt to maintain quality of service over and above the existing review mechanisms which currently exist and will be maintained under PCT (such as accreditation, training and peer review):<sup>36</sup> mandatory ongoing training, personal commitments from each individual adviser rather than post contract

---

<sup>34</sup> Consultation Paper, para 5.6.2.

<sup>35</sup> See in particular McConville *et al*, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1993) and McConville and Hodgson, *Custodial Legal Advice and the Right to Silence* (HMSO, 1993), and for comparative findings where low legal aid results in inexperienced lawyers conducting the majority of the work, Cape, *Improving Pre-trial Justice: the Role of Lawyers and Paralegals* (NY: Open Society Foundations, 2012) p.44.

agency; minimum number of advisers and maximum caseload per adviser; workplace requirements; levels of expertise for categorised case types and price adjustment for experience/complex cases.

---

<sup>36</sup> Smith, *Legal Aid Contracting: lessons from North America*, Legal Action Group, 1998; and reference to the Chilean system in Roger Smith's response to the Consultation.

## **Chapter 5: Restructuring the Advocates Graduated Fee Scheme**

**Q 26: Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:**

- **introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;**
- **reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and**
- **taper rates so that a decreased fee would be payable for every additional day of trial?**

**Please give reasons.**

63. We consider that these proposed cuts will further impact upon the system already damaged by PCT and cuts in funding of the criminal legal aid service to its detriment. The proposed harmonisation of fees to provide one fee for all cases ignores that the different fees available on the Advocates Graduated Fee Scheme (AGFS) reflect the different type of work that is required in a given case. Harmonisation of fees will create a bizarre situation where barristers are paid less for more work; and more for less work by paying more where a guilty plea is entered and less where a trial takes place. The time, expertise and responsibility engaged in representing a defendant at trial is far more substantial than that engaged for advising a client to plead guilty and presenting mitigation; indeed where a conviction ensues, the work involved in a guilty plea must be conducted in addition to the trial work. To pay significantly less for this work is entirely unfair and will do nothing to retain skilled and diligent advocates in ensuring defendants are given an effective and quality defence.

64. The proposal equally appears to disregard the possibility of innocence and the right of the defendant to put the Crown to proof on its case. In doing so it disregards a cornerstone of the British justice system and article 6 ECHR. The decision whether to plead guilty or not guilty must be an unfettered one, supported by effective and independent advice. However, regardless of the steadfastness of individual professionals, the pressure brought to bear on advocates to procure a guilty plea or face reduction in their earnings,



could significantly undermine the perception of proper professional independence and diligence, if not the practice.

65. The proposal is premised upon a flawed assumption that trials are not efficient simply because a case goes to trial. Yet the defendant is entitled to plead not guilty and to have the evidence against them tested at trial, even if they are guilty. This is not a matter of efficiency, but a fundamental right. The Crown must establish the defendant's guilt. The incentives to procure a guilty plea are already there in the reduction in sentence that is available to a defendant if they plead guilty early in the process. Furthermore, the Criminal Procedure Rules require the courts to avoid delays and to manage cases efficiently. The reduction in payment to a defendant's advocate will do nothing but reduce quality of representation and foster mistrust in the relationship between client and lawyer.

#### *Reduction in daily attendance fees*

66. In particular, we consider it unreasonable that trial fees should be reduced the longer a trial proceeds. If a trial has a number of witnesses and a volume of evidence, it will take longer to hear than one with fewer witnesses and evidence. Punishing the defence barrister in reduced fees because the case put forward by the Crown is complex, or even because the jury takes a long time to deliberate, is irrational.

67. The proposal ignores the fact that trial preparation requires effort throughout the duration of the trial. Trial preparation includes legal argument, preparation of examination of witnesses, physical attendance and representation at trial. Further work on defence arguments and consultation with client to finesse details which on first appearance may seem of little relevance but become so during the course of preparation. Drafting written submissions over night during the course of the trial on the request of the judge, the preparation for the closing speech, and consideration mitigation upon conviction are all routine. The Impact Assessment estimates that these changes will result in an average reduction of 35% to fees of all barristers. Out of this fee the barrister must also pay VAT, chambers expenses, travel and professional fees. It is remarkable that the Consultation considers that this will have little impact upon the Bar. Rather, it is likely to cause many barristers to turn away from criminal work. As with the impact of further cuts and PCT on solicitors, this can only impact upon the quality of defence services which an individual will receive since the best and most experienced will be more able to find alternative work, leaving the least experienced and less skilled to conduct legal aid work. This will impact adversely upon equality of arms, and, again, risk miscarriages of justice.

68. The impact of the proposal will be compounded when delays occur outside the control of the defence team, which is invariably the case. The proposal appears to assume that efficiencies in length of proceedings will be gained by less delay in the progress of trials by tapering defence fees. Yet trials are ineffective not just because of the defence 'dragging out cases which should not be tried' and it is unreasonable to assert as such. There are a multitude of reasons why trials are ineffective: due to the number of people who are involved; non-appearance of witnesses; lack of Prosecution disclosure; a Prosecution not ready to proceed because a review shows that further enquiry/evidence is needed; legal arguments are necessary because of the reforms brought about by the Criminal Justice Act 2003 (hearsay, bad character, etc); double or triple trial listings by the court; transport delays for all court users (including judges and magistrates); delays in bringing the defendant from the prison; technical difficulties with live link for special measures and so on – to this end it is unfair to presume that the defence advocate has control over any of these reasons for adjournment, and they should not be penalised where these delays occur.
69. Statistics indicate that trials are ineffective just as regularly due to prosecution and court problems as they are defence problems. In the Crown Court, in the fourth quarter of 2012, absence of a prosecution witness accounted for 22% of ineffective trials. Other reasons for ineffective trials included court administrative problems (20%), defendant absent/unfit to stand (18%) and the prosecution not being ready (17%).<sup>37</sup>
70. Putting strain on defence barristers to consider whether they can afford to run a trial with due diligence and ensure the best defence for the defendant is untenable. At worst it will lead to some reading transcripts of police interviews which would otherwise be played to the jury, removing potentially significant emotional responses of the defendant from the hearing of the jury; reduced exploration of an issue through cross examination which will diminish the possibility of the witness agreeing with an aspect of the defence case; not calling defence witnesses which could bolster parts of the defence case; not running procedural arguments which might lead to the exclusion of evidence; not making a submission of no case to answer with which the trial judge might agree and discontinue the case in its entirety; agreeing the reading of a witness statement where the witness' oral evidence might reveal a flaw in their assertion; not reading the unused material and missing a significant flaw in the prosecution case. The risks are manifest. At best, a

---

<sup>37</sup> Court Statistics Quarterly, October to December 2012 (Ministry of Justice, 28 March 2012)

defence barrister will continue to take every point as would be expected from a diligent defence, but under so much pressure from financial constraints that their professional skill is so diminished as to put at risk the fairness of the trial. The proposal is remarkable in the extreme with no equivalent comparators in other publicly (or privately) funded professions.

**Reducing litigator and advocate fees in Very High Cost Cases (VHCCs)**

**Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%?**

**Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts?**

**Please give reasons.**

71. With regard to VHCCs, the Impact Assessment states the following:

The provider response to the reforms is highly uncertain. There is a risk that some providers may increase or decrease the number of hours worked on each case. There is also a risk that some existing providers might decide not to supply their services to the Legal Aid Agency (LAA) for VHCC cases. This might impact on the quality of service provided to legal aid clients and the estimated savings to the legal aid fund.

This proposal might lead to more junior legal professionals being allocated to VHCC cases. However, we believe that more junior legal professionals are able to provide a sufficiently good quality legal service to enable individuals to be adequately represented in court.<sup>38</sup>

72. VHCCs are the most complex and lengthy of cases, for which there have already been significant cuts. Whilst they incur a significant proportion of the legal aid budget, this is not unreasonable given the types of cases and work involved. The level of cuts are, again, of an arbitrary and unjustified nature. We are also unclear as to where the

---

<sup>38</sup> Impact Assessment, 9 April 2013, p 3.

calculations have come from in suggesting that advocates earn £500,000 or more, as these are clearly inaccurate; this is not the reality at the criminal bar. These types of cases require specialist advocates given the complexity of the materials in issue, often involving thousands of pages of technical evidence. Without adequate funding, there will be no incentive for the best defence practitioners to undertake the work, and contrary to the above quotation which considers this outcome unremarkable, we believe it will risk inexperienced junior practitioners providing poor quality alternatives. This, again, risks the fairness of the trial and the possibility of miscarriages of justice.

73. We also do not believe it is lawful to unilaterally cut the fees to existing contracts. To do so would breach those contracts and is untenable. Offering the opportunity to withdraw will not assist since the barristers involved have professional duties to their clients which may prevent them from withdrawing notwithstanding the financial consequence, or worse, will cause vast expense by the delay in new representation (should anyone else be willing to undertake work at such a reduced rate) in preparing the case.

#### **Reducing the use of multiple advocates**

##### **Q 29: Do you agree with the proposals:**

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates;**
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and**
- to take steps to ensure that they are applied more consistently and robustly in all cases by the presiding judges?**

**Please give reasons.**

74. JUSTICE does not agree with these proposals. The savings estimates assume that the restrictions on Advocates Graduated Fee Scheme (AGFS) cases employing more than one advocate lead to a 50% reduction in these cases, which have been randomly selected in the data. For those which are assumed to be reduced to a single counsel, we have assumed the more senior advocate remains on the case. Both of these assumptions are uncertain. Cases involving multiple counsel are currently controlled by

the court and limited during case management. The provision of two counsel is due to a requirement for two skilled advocates, not a litigator. The decision of the trial judge to appoint multiple counsel is taken where complexity requires it. Often that will mean multiple Crown counsel have also been appointed. Contrary to the suggestion in the consultation paper, the equality of arms is a cornerstone principle that must be safeguarded in all cases.<sup>39</sup> Where there are multiple Crown counsel, it is often necessary for there to be multiple defence counsel, to ensure equality of arms. Whether this is necessary in the context of the case, and considering the number of co-defendants, is a matter for the trial judge, who is well equipped under the current criteria, and should not have their discretion fettered.

75. The assumptions relied upon by the Government do not appear to be supported by any evidence. The judiciary already applies a stringent test as to whether multiple counsel are required. The suggestion that this be altered presumes that it is being applied wrongly. There is no evidence to support this assertion. The saving to be made in this area must be a fraction of the overall justice budget and it is remarkable to suggest it is a necessary saving. However, the assumption that £9 million can be saved is wrong because judges are already applying the test appropriately and will continue to do so.
76. If judges did feel compelled to refuse applications for multiple counsel, the presumption that 50% reduction in the claim will occur is also flawed, as the work will still need to be done by single counsel, which will extend the length of pre-trial preparation, and length of trial, thereby incurring not only further fees for a single advocate, but further court costs and prison costs where the defendant is remanded in custody.
77. Furthermore, the junior advocate rather than the leading advocate would remain in the case, not the other way round as the Impact Assessment presumes, which would further impact on the quality of representation.
78. The proposal ignores the practicalities of other professional obligations that might arise during a trial (such as appeals) where junior counsel can continue the proceedings in the absence of lead rather than cause an adjournment. Additionally we see no reason why the presiding judge should have any involvement in this decision – it will add to costs rather than reduce them by increasing bureaucracy. It is a matter for the trial judge who is familiar with the circumstances of the case to make the decision.

---

<sup>39</sup> Consultation Paper, para 5.46

79. The presumption that additional support can come through solicitors attending on counsel is flawed. First, requiring that they attend on counsel in the litigation contract is impossible due to the proposal that litigator fees be cut by a further 17.5%. Solicitors already do not attend court as often as would be helpful because fees have been cut such as to make the cost of doing so prohibitive. Second, solicitors cannot replace counsel where two counsel are deemed appropriate because they provide a difference service. The provision of two counsel is due to a requirement for two skilled advocates, not a litigator.

## **B) Civil justice, judicial oversight and good government**

### **Restricting the scope of legal aid for prison law**

**Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.**

80. The Consultation Paper proposes a) restricting legal aid for claims brought by prisoners and b) that where a claim remains in scope, that representation may only be provided within the scope of a criminal legal aid contract, subject to the wider restrictions associated with the proposed restrictions on price competitive tendering, considered above. JUSTICE does not consider that either of these changes are appropriate. First, the justification for each change does not stand up to scrutiny and second, restriction of access to effective, quality and specialist advice for prisoners threatens to undermine access to justice for one of the most excluded and marginalised groups in society, which would unjustifiably undermine the rule of law and could violate a range of international standards on the treatment of prisoners.

### ***Restricting legal aid for prison law***

81. The Government proposes to restrict access to legal aid – funded from the criminal legal aid allocation – for prison law matters.<sup>40</sup> Currently, prisoners can 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, considering when a disciplinary charge satisfied particular criteria based on the seriousness of a charge, and the ability of the prisoner to present their

---

<sup>40</sup> Consultation Paper, paras 3.1 – 3.22

case).<sup>41</sup> However, legal aid will not be available to challenge an assessment of whether or not the Tarrant criteria is satisfied.

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

- a. The Consultation Paper claims that these prisoners' claims "undermine the credibility of the system";
- b. Savings will be made;
- 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.

*"Credibility" and prisoners' claims*

83. There is no evidence provided in the Consultation Paper to support the Government's claim that the allocation of legal aid for prisoners claims undermines the credibility of the legal system, or that the restriction of legal aid in the manner proposed will enhance credibility. 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".<sup>42</sup> There is no consideration in the 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 and that they can be dealt with appropriately within existing internal prison complaints mechanisms.

84. The importance of access to justice for prisoners is simply illustrated in the kinds of cases which the Government proposes would not now be covered by legal aid. While JUSTICE raises a handful of concerns here, this list could be expanded significantly, and should not be treated as an exhaustive list of issues for concern:

- a. Mother and baby units:** In the past legal aid has been used to successfully challenge the determination of the prison service that a female prisoner might be

---

<sup>41</sup> [1985] QB 251

<sup>42</sup> See for example, 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 *Campbell and Fell v United Kingdom* [1984] 7 EHHR 165, the Strasbourg court stresses that "justice cannot stop at the prison gates". 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



refused access to a mother and baby unit and separated from her child. In future these kind of challenges will be ineligible for criminal legal aid. It is unlikely that the prisoner concerned is likely to be able to challenge such a determination through accessing civil legal aid.<sup>43</sup>

- b. Prisoners with disabilities:** Many cases have been brought by prisoners – specifically, prisoners with disabilities - to seek redress for treatment alleged to violate the right to be free from inhuman and degrading treatment or torture in violation of article 3 ECHR.<sup>44</sup> Other claims have included challenges in connection with access to effective healthcare or to courses designed as part of planning for licence. These would now all be ineligible for criminal legal aid.
- c. Prison communications:** Legal aid has helped secure a prisoners right to contact their lawyer without interference and the right of prisoners who believe they are being treated unfairly, or that they have been subject to a miscarriage of justice, to communicate with the press and others to publicise their treatment.<sup>45</sup> The Government proposes that these types of challenge should be more appropriately settled within the prison system and should be removed from the scope of legal aid. It seems difficult to understand how a prisoner can have faith that a complaints system led by an individual Governor will provide a fair and effective challenge to a decision of the same Governor to restrict his or her correspondence and contact with the outside world.
- d. Segregation:**<sup>46</sup> Segregation of prisoners can have a serious potential impact on the mental health of individual prisoners. Challenges to decisions to segregate will be excluded from legal aid, leaving individual prisoners limited opportunity to challenge a determination which may not only have a long-term impact on release (segregation may make it more difficult for individual prisoners to work towards early release) but on their health.
- e. Categorisation:** The categorisation of prisoners, particularly those with indeterminate sentences, can have a significant impact on their treatment as well

---

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.

<sup>43</sup> *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002.

<sup>44</sup> *R (Graham) v Secretary of State for the Home Department* [2007] EWHC 2950 (Admin). For example, this case involved the handcuffing of a prisoner during medical treatment.

<sup>45</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532

<sup>46</sup> See for example, *R v Deputy Governor of HMP Parkhurst ex p Hague* [1992] AC 148 held that wrongful segregation does not amount to false imprisonment, and as such challenges to segregation decisions will normally be made through judicial review. *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750 established that for youth offenders there should be an opportunity to make comments on the tentative reasons for segregation before any decision is taken.

as on the likelihood that they will be released early on licence. For example, prison conditions and security arrangements obviously vary according to category and it is generally accepted that Category A prisoners are unlikely to secure early release. The likelihood that individuals will be able to enforce any right to such a hearing or effectively make the case for recategorisation is likely to be much reduced in the absence of legal advice and assistance.<sup>47</sup>

- f. Disciplinary matters:** All disciplinary matters which fall short of a “criminal charge” will be denied access to legal aid, unless it is illustrated that the “Tarrant” criteria are satisfied. The Tarrant criteria are a series of criteria applied by individual Governors in disciplinary cases in order to determine whether in their view, legal advice and representation is warranted. However, at present, where legal advice is requested, disciplinary hearings are adjourned to allow legal advice to be pursued, including time allowed for any challenge to a determination by the Governor that the “Tarrant” criteria are not satisfied. Under the new rules, there will be no opportunity to take advice or funding to challenge a prison Governor’s determination that a specific disciplinary action does not involve a “criminal charge” nor is the “Tarrant” criteria satisfied. In these circumstances, a significant amount of discretion is vested in the Governor, without opportunity for independent scrutiny. This may lead to inherent suspicion on the part of prisoners that the consideration of disciplinary action is far from fair or independent within the prison system. The Government does not appear to have sought or considered the views of Governors’ or prisoners’ representative organisations on the likely impact of these changes may have on prison morale and wider discipline. Determinations of extra days aside, other disciplinary findings (the stereotype of “good behaviour”) will also be considered on parole, and so may be relevant to the determination of continued detention..

85. The Consultation Paper appears to assert that the criteria proposed are designed to ensure that in any case involving extensions to liberty (engaging article 5 ECHR), legal aid will continue to be available. As explained, JUSTICE doubts whether the distinctions drawn in the limited information provided are adequate to ensure that all decisions which

---

<sup>47</sup> See for example, *R (Vary and others) v Secretary of State for the Home Department* [2004] EWHC 2251 (Admin) For example, where 22 prisoners who had more than five years of their sentences remaining to serve were recategorised from category D to category C, the decisions held to be unlawful because the individual circumstances of each prisoner had not been properly considered. *R v Secretary of State for the Home Department ex p Peries* [1997] EWHC 712 (Admin) established the requirement to give reasons for categorisation decisions, incorporating the principles of procedural fairness.

impact on an individual's liberty will be open to effective challenge. For example, the Consultation Paper makes clear that categorization, segregation and access to referrals assessment and planning for licence will be excluded. However, each of these determinations may have an impact on the release date of a prisoner, as they are each relevant to the circumstances of their consideration for license and release. For example, if a prisoner is unable to access behavioral courses which are relevant to their work towards licence, eligibility for release may be delayed. Yet, under the proposals, legal aid would be restricted.

86. It is difficult to understand how the Government can proceed with these changes without a more detailed assessment of how these changes will impact upon individuals ability to secure release, or upon the individual rights of particularly vulnerable prisoners including those with disabilities. For example, the Consultation Paper accepts that a significant majority of the 11 treatment cases brought since the changes introduced in 2010 have been brought by prisoners with disabilities. The Government makes a bold assertion that the National Offender Management service will make efforts to ensure that all prisoners can use the prisoner complaints mechanism. No effort is made to assess how successful these previous claimants were, and what impact removal of legal aid would have had on their treatment, including the length of their custody. We return to this issue below. In JUSTICE's view, this is unacceptable and inappropriate. It is likely to lead in practice to disability discrimination and violations of article 14 ECHR in cases where individual prisoners are excluded from securing a legal remedy for violations of their Convention rights and violations of the United Kingdom's wider international obligations (for example, under articles 13 and 14 of the United Nations Convention against Torture, which guarantee access to a proper investigation and redress connected with treatment which amounts to a violation of the Convention).<sup>48</sup>

### *The financial case*

87. The financial analysis of the implications of these proposals is exceptionally scant. It is unlikely in JUSTICE's view that these changes will lead to significant costs savings or

---

*R (Blagden) v Secretary of State for the Home Department* [2001] EWHC 393 (Admin) regarded the transfer of post-minimum term lifers from category D to category C.

<sup>48</sup> A fuller analysis of JUSTICE's concerns in connection with UNCAT can be found in our submission to the UN Committee against Torture dated May 2013: <http://www.justice.org.uk/resources.php/344/justice-evidence-to-un-committee-against-torture>

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:

- a. The Government's financial case again hinges principally on the assertion that prison law claims that would now be excluded are either trivial or unnecessary and an observation that spending on legal aid for prison law has "increased markedly" over time.
- b. No evidence is produced to support any suggestion that the claims pursued by prisoners are unnecessary or somehow trivial. The case examples outlined above show that the kinds of cases which have been supported by legal aid in the past – but which the Government now propose to exclude – are far from frivolous. In fact, this assertion ignores that prisoner applicants for legal aid must satisfy ordinary merits criteria for funding, and enhanced criteria revisited in 2010 in order to further restrict legal aid. These criteria make clear that where other forms of redress are available, such as through the prison complaints mechanism, these must be exhausted and funding will not be provided for matters suitable for resolution in these means.<sup>49</sup> This suggests that any claim that will be excluded under the new proposals but which would have been eligible, will be a claim with merit and unsuitable for resolution through other means.
- c. The figures produced by the Government in Table 1 are highly misleading, without context. They show that between 2001/02 – 20011/12, legal aid spending in connection with prisons expanded from £1 million - £23 million and from 0.06% of all legal aid spending to 1.12%. The table is published without context, but accompanied by the assertion that the proposals in the Consultation Paper would bring the level of spending down, albeit to the level in 2008/09. These figures are pre-judicial, implying that there is an association between the Government's assertion that some claims are not justifiable and the expanded cost of prison law claims over the past decade. It says nothing about the extreme expansion of the numbers of prisoners held on the prison estate between 2001 – 2012, nor anything about increasingly complex provisions for the treatment of prisoners, access to licence or parole and changes to categorisation (for example, in connection with the operation of Indefinite sentences for Public Protection (IPP Sentences)). The expansion of hearings and formal assessments in conjunction with the operation of parole, indeterminate sentences and release have all been developments relevant to the expansion of necessary assistance and representation, which the Government concedes largely must continue despite

---

<sup>49</sup> As per the 2010 Standard Crime Contract. See also Consultation Paper, 3.5 – 3.9.

the proposals in the Consultation, as a result of the significant importance in allowing an individual to effectively be involved in and challenge determinations relating directly to their continued detention and the right to liberty. More simply, the basic financial assessment undertaken fails to acknowledge that legal aid associated with prison law has fallen by around £3 million since 2010, most likely as a result of changes designed to ensure prisoners have recourse to non-judicial complaints mechanisms where suitable.

- d. There is no clear assessment in the Consultation Paper of the proportion of cases which will be affected by the changes to the rules, and precisely how much money might be saved by the restriction on scope proposed.
- e. There is no exploration of how the cases excluded from scope – or the potential limitation on access to specialist legal advice – might affect the ability of prisoners to secure early release when entitled by law to release. As highlighted above, there are a number of areas of prison law which will now be excluded from scope which could have a significant impact on individual prisoners ability to secure early release. The annual cost of maintaining an individual in prison is substantial, as we explain above (para 26(e)). Yet, there is no consideration in the Impact Assessment, or elsewhere, that these costs may be relevant.
- f. The Consultation Paper expects cases which would have proceeded under legal aid to be dealt with using alternative dispute resolution. However, no assessment of any additional cost to the prisons system, Independent Monitoring Boards or the Prisons and Probation Ombudsman (PPO) is provided. For example, the fees for legal advice and assistance in an individual case is set at £220. The cost of an average case conderation by the PPO is around £1,200.<sup>50</sup>
- g. Equally, there is no calculation of the additional cost to the courts system of prisoners seeking to act as litigants in person and continuing to pursue their claims, albeit without proper legal advice and representation.

#### *Access to alternative remedies*

88. The Government's suggestion that the claims excluded by the proposed reform could be more appropriately settled by existing prison complaints mechanisms or alternative dispute resolution is entirely flawed:

---

<sup>50</sup> See Prisons and Probation Ombudsman, 2011-2012 report.

- a. The prisoner complaints system operates entirely within the prison service and lacks sufficient independence. This mechanism is prison specific and operated by individual Governors. It is incapable of providing redress in relation to systemic decisions made at a national level by the Prisons Service or central Government. Unlike a judicial remedy, this form of redress is unlikely to be adequate when a problem arises as a result of settled law based on statutory interpretation or an interpretation of the common law which has not been subject to earlier challenge.
- b. None of the mechanisms of redress outlined by the Government is able to award a binding remedy direct to the complaining prisoner (including the Prisons and Probation Ombudsman or the local Independent Monitoring Board).
- c. These systems are themselves complex and it is unlikely that prisoners will chose to represent themselves within these mechanisms (which cannot provide a remedy) over the possibility of litigating an issue in person by pursuing a claim through the usual means, but without the benefit of legal advice and representation.
- d. The reference to internal prisons complaints mechanisms is of particular concern, in light of ongoing criticism by Her Majesty's Inspectorate of Prisons of the failings in existing complaints management, which is slow and ineffective.<sup>51</sup>

### ***Prison law and criminal contracting***

89. The Government proposes to require any work done on prison law which remains in scope – including work relevant to sentence and disciplinary matters – to be done under a criminal legal aid contract. JUSTICE is concerned that the implications of the changes proposed above to criminal legal aid contracting will impact adversely upon the ability of individuals to secure specialist prison law advice. Most existing prison law experts are not criminal practitioners, but individuals and firms who specialize in prison law, most often viewed as a niche form of public law. In keeping with the limited assessment of the impacts associated with the changes to criminal legal aid contracting, the Government has not assessed in any substantive manner, the likelihood that these specialist

---

<sup>51</sup> There has been widespread criticism of the complaints procedure by criticism by Her Majesty's Inspectorate of Prisons throughout the Inspectorate Reports. For example, in relation to Brixton Prison, the conclusion was drawn that “[p]risoners had little confidence in the application and complaints systems, despite the receipt of about 200 applications and 50 complaint forms a week. Prisoners complained that applications were not dealt with promptly. Complaints procedures were crudely managed and we were not assured that recording procedures were accurate. Some replies were limited and did not properly address the complaint.” For detail see <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/brixton/brixton-2010.pdf> at paras 3.34-3.45

practitioners would continue to be available under the new proposed arrangements for access to criminal legal aid.

## **Introducing a residence test**

**Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the United Kingdom? Please give reasons.**

90. The Consultation Paper would introduce a residence test for eligibility for legal aid. In short, only people who are “lawfully resident” within the United Kingdom, Crown Dependencies and British Overseas Territories at the time of an application, and who can illustrate that they have been continuously resident for the year before the application, will be eligible for legal aid. Limited exceptions to this blanket rule will apply only for a) members of the armed forces and their families and b) people seeking asylum.

91. JUSTICE does not agree with the proposal to introduce a residence test for legal aid. For the detailed reasons set out below, we consider that this test is likely to be unfair, unlawful and unworkable in practice.

92. The residence test would introduce a blanket restriction on access to legal help which would apply regardless of the merits of any claim or its link to our jurisdiction, based solely on the criterion of residence. It is likely, in our view, that this restriction will violate the common law guarantee of equality before the law and the United Kingdom’s international human rights obligations in practice. It would create – in effect – a two tier system of justice for those without independent means based largely on the ability to evidence time spent within the jurisdiction. This new, wholesale restriction would ignore the carefully carved out limits to scope identified by Parliament during its lengthy and detailed debates on the scope of access to legal aid during the passage of LASPO. Regardless of whether a person will retain a valid claim satisfying the merits test, by virtue of residence, the blanket ban will render a whole class of individuals ineligible regardless of the seriousness of their claim or its impact on their lives.

93. In *ex parte Khawaja*, Lord Scarman eloquently expressed the importance in English law of equal access:

Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law



is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed “the black” in *Somerset’s Case* (1772) 20 St. Tr 1.<sup>52</sup>

94. The Government Impact Assessment deals with these proposals in an extremely cursory manner. The Government has made no effort to source reliable figures on any likely saving, or on the number or types of claimant that will be barred from legal assistance. We return to the issue of equality impact below. However, it also purports to explain away any impact on individuals by asserting without elaboration or support that although “client outcomes may change”, that this will be determined by the responses of people unable to pay to the change to the rules:

The precise behavioral response of the client is uncertain. Individuals who no longer receive legal aid may choose to address their disputes in different ways. They may represent themselves at court, seek to resolve issues by themselves, pay for services...pay for private representation or decide not to tackle the issue at all.

95. This is a phase repeated consistently throughout the Consultation Paper. Individuals who would otherwise be eligible for legal aid are unlikely to have the means to pay for legal advice, the inclusion of paid services as an option for redress is likely a fiction. In effect, the Government accepts that where an individual has an issue which must be resolved, they will need to act as a litigant in person or drop the case (“decide not to tackle”). This brief paragraph fails to deal with a further issue, that in many cases, an individual may not understand that they have an issue to raise without legal advice. In many cases, the withdrawal of legal aid will lead to many individuals either being denied access to a remedy or choosing to represent themselves. Importantly, the Consultation Paper appears to imply that all litigation occurs by choice. Legal aid may be sought to defend actions brought by the State or by third parties, and in these circumstances an individual may have little choice but to defend a claim in person or concede. The increased costs of litigants in person to the courts are significant, and already leading to judicial comment, in the light of LASPO. Yet, the Impact Assessment makes no attempt to grapple with these costs. We doubt that any associated short-term savings will justify the associated wider costs to the public purse, either in terms of public support from other budgets or the costs to the courts service of servicing claims involving litigants in person.

---

<sup>52</sup> [1984] AC 74, at pp 111G-112A. *Somerset’s Case* involved the return of an escaped slave to his owner. His interests were able to be represented as a result of charitable giving. In similar circumstances today – or in the modern equivalent, of a case of human trafficking for the purposes of say, domestic labour - the Government proposals would render the claimant ineligible for legal assistance.

96. Exceptions are provided for Armed Forces personnel and their families and for asylum seekers, with the Government accepting that people fleeing persecution are part of a particularly vulnerable group. However, none of the following illustrative groups would escape the impact of the bar on legal assistance regardless of how serious the risk they faced:

- a. **Victims of domestic violence:** Victims of domestic violence – predominantly women and children - who flee violent and abusive partners are not exempted from the application of the residency test. In some circumstances, people may flee third countries or homes in the United Kingdom without access to documentation capable of proving their immigration status or their length of residence. More worryingly, individuals who remain in such a relationship but without control of their own documentation will find it difficult to secure access to funded legal advice to support them to leave or secure legal redress against their abusive partner, including through the use of injunctive relief and other forms of restraining order.<sup>53</sup>
- b. **Homeless people:** On a similar basis, homeless people and people facing homelessness, including families with children, may find it equally difficult to prove eligibility in order to challenge local authority decisions to refuse support under the National Assistance Act 1948 or the Children Act 1989.<sup>54</sup>
- c. **Human trafficking victims:** Despite lengthy discussion during the passage of LASPO about the need to secure access to legal advice and assistance for human trafficking victims – victims of a modern slave trade, brought to the United Kingdom against their wishes and in violation of international and domestic law – there is no exemption to the residence test for victims, including child victims, of human trafficking. Unless the victim claims asylum, the individual will be ineligible for legal aid. This raises the serious question of the treatment of individuals who may wish to return to their country of origin after assisting an investigation and who are within the United Kingdom by virtue of their status as victims not asylum seekers. In these circumstances, the Government would remove all realistic

---

<sup>53</sup> Rights of Women have produced a detailed briefing on how these issues may affect victims of domestic violence. See for example,

[http://www.rightsofwomen.org.uk/pdfs/Index/Rights of Womens Template response to Transforming legal aid 2013.doc](http://www.rightsofwomen.org.uk/pdfs/Index/Rights%20of%20Womens%20Template%20response%20to%20Transforming%20legal%20aid%202013.doc)

<sup>54</sup> Shelter have produced a lengthy response covering the impact of this proposal on homeless people: [http://england.shelter.org.uk/professional\\_resources/policy\\_and\\_research/policy\\_library/policy\\_library\\_folder/briefing\\_legal\\_aid](http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/briefing_legal_aid)

means for a trafficked person to secure advice about their treatment and representation to challenge determinations which may leave them unsupported or even destitute.<sup>55</sup>

- d. **Newly settled refugees:** The exemption for asylum seekers will end as soon as their claim is determined. This means that newly settled refugees, including families – who may have been living in the United Kingdom without access to benefits or the ability to work lawfully for some time – will be left without access to legal advice or assistance. The vulnerability of persons fleeing from persecution is not lifted at the moment that their immigration status is regularised, yet the new rules would leave these people without advice and assistance on public authority decisions – or third party claims – which affect them or their family.
- e. **Persons refused asylum:** People who have had their asylum claim refused will have their access to legal aid barred. It is unclear whether this will include a bar on access for the purposes of a new claim. People who have an initial claim refused may have a legitimate route to challenge an initial decision and it may take some time to effect a deportation in those cases where a claim cannot be renewed. In other cases, individuals may be refused asylum but there may be other reasons that they cannot be removed from the country (for example, the degree of threat posed in their country of origin). Even in these circumstances, our courts have made clear that in some circumstances, the State has an obligation to provide support to these individuals in order to ensure that they do not fall into a condition which would otherwise equate to State sanctioned destitution, a form of inhuman or degrading treatment. This support can include a decision to remove children of a family to local authority care. Regardless of the degree of destitution, these people would not have access to legal advice and assistance to legally challenge their treatment under the new rules.<sup>56</sup>
- f. **The families of victims of crime within the United Kingdom, who are resident overseas:** For example, the family of Jean Charles de Menezes would not have secured legal advice and representation to assist them to participate in the inquest into his death under this new rule. Where the United Kingdom is involved in the death of an individual, whether through direct State action and in some cases through negligence, it bears the responsibility to provide an

---

<sup>55</sup> The Catholic Church have, 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>

<sup>56</sup> *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396

investigation in which the family may participate effectively. In some circumstances, this may require support.

97. Other high profile claims which would obviously been barred would have included the claims brought by Guantanamo detainees alleging United Kingdom complicity in torture;<sup>57</sup> claims for *habeas corpus* brought by individuals with sufficient evidence to illustrate that the UK might have control over their detention in a third country<sup>58</sup> and claims against United Kingdom armed forces for violations of international human rights standards overseas.<sup>59</sup> JUSTICE has appeared in each of these claims as a public interest intervener (without the assistance of legal aid) and the scrutiny of the domestic courts in these cases has contributed not only to the right of those individuals to access redress for serious violations of international human rights standards, including alleged torture, inhuman or degrading treatment or detention inconsistent with the right to liberty, but has promoted the development of respect for the rule of law in international relations, and recognition of the importance of public and parliamentary scrutiny of the global work of the security services and the Armed Forces on our behalf.

98. We are concerned that many of these restrictions may be incompatible with our international obligations. For example, under EU law, EU nationals and their family members who exercise rights of free movement are entitled to equal treatment.<sup>60</sup> It is unclear whether there will be any specific exemption which will could ensure that the residence test does not operate as a barrier to free movement. Specific articles of the Refugee Convention, the Convention on the Rights of the Child and the Trafficking Convention will be engaged in many of the scenarios outlined above.<sup>61</sup> There is, in JUSTICE's view, a strong argument that in many of those cases the residence test could operate to violate article 14 ECHR or the positive procedural obligations on the State to investigate and prevent violations of the Convention.<sup>62</sup> Yet, none of these obligations are acknowledged, let alone addressed by the Consultation Paper.

---

<sup>57</sup> *Al Rawi and others v The Security Service and others* [2011] UKSC 34

<sup>58</sup> *Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmutullah* [2012] UKSC 48

<sup>59</sup> *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 (Respondents) 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

<sup>60</sup> Article 24(1) TEU

<sup>61</sup> For example: The Refugee Convention, article 16 (guarantees right of access to the court); Council of Europe Convention on Action Against Trafficking in Human Beings articles 10 (provides for identification of the victim), 12 (guarantees assistance for physical, psychological and social recovery) and 15 (guarantees access to legal redress).

<sup>62</sup> 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.

99. The Consultation Paper explains that individual service providers will be required to assess whether the residence test is satisfied. The simplistic analysis adopted suggests that providers may only be satisfied by documentary evidence of eligibility. This neglects the inherent difficulty many clients may have in accessing documentary evidence of such kind. For example, many individuals may never have had a passport. Others, for example, women fleeing domestic violence or people evicted from their homes, may have been separated from their documents through no fault of their own. Many of these vulnerable clients may not have easy access to means to prove eligibility, even through the simple replacement of lost United Kingdom documents. Are providers intended to meet the additional cost of proving eligibility before a claim can be pursued, even in the very limited cases where civil legal aid may still be offered? This is unclear, but implied by the Impact Assessment and the Consultation Paper that providers will be expected to meet this cost and where the evidence of eligibility provided is inadequate, work done will not be paid for from public funds. Equally, there is no exploration of the impact of the time taken to assess residence on time-sensitive issues. In some circumstances remedies – including by judicial review – must be brought promptly or within tight timetables. Equally, in other cases, an individual's rights may be useless without action to secure emergency injunctive relief. In these circumstances individuals who are capable of illustrating residence may be punished by delay where a problem arises in documenting their status. Is the provider expected to take the risk in those cases that the LAA will be satisfied, in order to avoid the overwhelming detriment that might otherwise accrue to the client?

100. We return to the issue of compliance with the Equality Act 2010, below. However, the treatment of the impact of these measures according to race or nationality in the Consultation Paper is cursory. It is difficult to avoid the conclusion that all claimants' residence will need to be assessed in order to avoid a directly discriminatory application of the criteria. This will have a significant administrative impact on the running of legal aid by civil providers more generally. However, the Government has undertaken no serious Impact Assessment of the likely discriminatory nature of this proposal, its direct exclusion of non-residents and its potential for disproportionate impact in practice on non-nationals and persons of a black and ethnic minority background.

101. The Government maintains its view that this measure 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, including the making of

different arrangements for different classes and groups of persons, it is difficult to argue that this power clearly includes an enabling power to exclude whole classes of person from eligibility without the further scrutiny of Parliament. Although the Lord Chancellor controls the criteria for eligibility under LASPO, the listed statutory considerations he may have regard to do not include either nationality or residence. In light of the constitutional importance of equality before the law as an aspect of the rule of law, Parliament would not arguably have expected to delegate this kind of authority without express words. If the enabling legislation were to survive challenge on ordinary public law grounds, it would be highly susceptible to individual challenges under the Human Rights Act 1998 (HRA), and subject to be quashed by the Courts in so far as inconsistent with Convention rights. As explained in the introduction, in the rush to implement these reforms without proper regard for the constitutional and legal function of legal aid, the Government may find substantial public funds will be diverted to defending a position which the courts may ultimately rule unlawful.

### **Paying for permission work in judicial review cases**

**Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.**

102. JUSTICE is extremely concerned that the proposal to restrict access to legal aid for judicial review will limit the ability to access advice and assistance on public and administrative law to those with the means to pay privately, by making publicly funded work of this nature unviable.

103. The Consultation Paper proposes to further restrict the availability of funding for judicial review by only reimbursing the cost of work done on applications for permission for judicial review if an application succeeds. 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 enhance the power of the court to refuse to hear renewed 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.

104. Modern judicial review and associated administrative law provides an essential opportunity for people who are 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 and to require the decision to be taken again. In a country with no written constitutional guarantee controlling the relationship between the citizen and the State, this function takes on a particular constitutional significance. As Lord Bingham, then Master of the Rolls, explained “the court [has] the constitutional role and duty of

ensuring that the rights of citizens are not abused by the unlawful exercise of executive power” and it “must not shrink from its fundamental duty to ‘do right to all manner of people’”.<sup>63</sup> The public good served by judicial review is not addressed in any detail in the consultation paper, but a brief review of recent case law shows that judicial review cuts across the broad swathe of public decision making and, in these times of austerity, can impact significantly on how public funds are spent and access to services are determined. From local people challenging library closures or private sector outsourcing<sup>64</sup> to major national corporations challenging the outcome of multi-million pound tenders,<sup>65</sup> it is clear that access to judicial review grants the citizen a welcome degree of control over the quality of public decision making. As Lord Dyson recently stressed:

There is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection offered by judicial review.<sup>66</sup>

### *The case for change*

105. Again, the case for change is unsupported by evidence and couched in assertions which are not explored. Neither case based on efficiency or financial savings stand up to scrutiny. Readers of the Consultation Paper are invited to read that in 2011-12 there were 4,074 legally aided cases for judicial review. Of these, 2275 ended before an application for permission, 845 cases proceeded to permission stage and of those cases, 330 were assessed by the provider as of “substantive benefit” to the claimant. The Government then states that these figures support the conclusion that a “substantial” number of claims are found by the Court to be “inarguable”. The implication of this assertion is that legally funded claims are pursued which are unnecessary or unsustainable. However, this belies a complete misunderstanding of the operation of judicial review.

106. Judicial review claims are designed to allow an individual to secure a remedy or overturn a public decision. It is not a means of redress based upon future compensation, but a practical tool. This is reflected in the detailed Pre-Action Protocol which is designed

---

<sup>63</sup> *R (Smith) v Ministry of Defence* [1996] QB 517, 556.

<sup>64</sup> See for example, current reports on the challenge brought by local residents of Barnet against the plan to outsource provision of services wholesale (“EasyBarnet” litigation).

<sup>65</sup> The challenge to the East Coast Mainline franchise was clearly affected by judicial review. The challenge brought by Virgin Trains was able to identify serious failings in central Government processes and in taking the decision in that individual case.



to promote an early settlement. Thus many cases are capable of resolution before permission is even lodged, as a decision maker determines to change a policy or change a practice without need for the cost of litigation. In other cases, an issue might become academic. There are many reasons why a claim might be withdrawn before proceedings are issued or before a permission hearing is determined. The implication that those which are withdrawn before permission are futile is undermined by the indication that, of those cases which proceed to hearing and do not secure permission, many result in a benefit to the claimant (for example, a public authority may make concessions on the way to judgment which improve his or her position).

107. In any event, any conclusion to be drawn from these statistics is difficult to adduce against one year's figures. The wider legal figures available from the administrative court do not break down claims according to whether they are publicly funded or not. However, on a simple comparison, it would appear that on average more publicly funded claims proceed to permission and are successful than those which are not. In those cases the proportion of cases which would succeed despite an application being pursued to fruition is lower.<sup>67</sup> These statistics do not appear to provide any reasonably reliable basis on which to justify change, without further research.

108. The Consultation Paper appears to suggest that these inefficiencies are unbounded. This fails to acknowledge that existing applications for judicial review are subject to significant restrictions: Judicial review challenges are subject to the usual eligibility and merits tests. Changes in LASPO restrict public law work substantially, particularly in connection with immigration decisions. Since the implementation of LASPO, providers can no longer self-certify on judicial review cases. In addition, in judicial review claims, the involvement of judicial oversight at a preliminary stage provides for the scrutiny of claims. Under proposals already set out by Government, cases deemed "totally without merit" can be dismissed at an early stage.

109. The financial information provided on projected savings is severely lacking. The Government, on its own best estimate concedes that the potential savings to be made are minimal, at around £1 million. There is nothing in the Impact Assessment which explores the likely cost to the administrative court of increased numbers of litigants in

---

<sup>66</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 2, at 122

<sup>67</sup> We have had the benefit of reviewing a table of comparison compiled by the Bingham Centre on the Rule of Law. The figures collated from the Legal Aid Agency data available appears to suggest that in 2011-12 that in non-funded cases permission was sought in 65% of cases and granted in only 6% (contrast 57% of legally aided cases, with an 11% rate of success).

person who may proceed with cases which might otherwise have settled or withdrew following legal advice. Nor is there any acknowledgement of the public good served by judicial review, not least in the costs savings associated with ensuring that individuals receive access to services they need at an early stage to avoid any family breakdown (and the costs of supporting children in care, for example) or in the case of people with community or social care needs, to divert someone from services with a higher support cost, for example.

110. If savings truly are sought from within public spending on judicial review litigation, there is no exploration in the Consultation Paper of efficiencies and incentives which might improve the conduct of a defence to ensure a speedy and effective resolution. For example, encouraging early disclosure by defendant local authorities, looking at the role and costs of the defence on permission and exploring current practice on *inter partes* costs orders to encourage settlement where possible might have been explored. Instead the focus here is entirely on increasing the burden on publicly funded litigants and providers of publicly funded advice and representation. This imbalance bolsters the perception that these proposals would, in practice, shield public authorities (including central Government) from scrutiny.

*Restricting expert advice; sheltering public authorities from scrutiny*

111. The Government again argues that the ultimate impact of these proposals will be driven by providers “decisions” or the decisions of applicants for legal aid. The implication being that if providers withdraw from the market, that again individuals will either represent themselves or “decide not to take the issue further”.

112. In our view, it is highly likely that these proposals will make publicly funded advice and representation on public law matters extremely difficult to source and unviable for many existing providers. This will be to the detriment of individuals seeking redress but to the development of a quality body of public and administrative law in England and Wales.

113. The Government argues that providers will only “refuse” to take on cases which “would not be considered by the court to be arguable in any event”. This again misinterprets the statistics set out above, 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, will discourage most providers from taking

on all but the most “open and shut” case, and may distort public law litigation to provide perverse incentives against negotiation on the part of defendant local authorities:

- a. At a number of points, the Consultation Paper equates cases which do not proceed to permission as “unarguable”. As explained above, there are many other reasons why a case might end before permission, beyond the merits of the claim. However, the permission test is not an appropriate “hook” on which to hang the determination at which the financial risk of public law litigation should shift from the service provider to the public purse:
  - i. For many clients, a resolution which does not proceed to permission may be the best result. They may avoid court and achieve a beneficial negotiated settlement using the threat of a well supported judicial review as leverage to bring the relevant public body to the negotiating table.
  - ii. While the Government Consultation Paper provides the assurance that “legal aid would continue to be paid as now for the earlier stages of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings”, this is not a simple reassurance that the bulk of this work will be able to proceed.
  - iii. In judicial review, a significant amount of work must often be done at an extremely early stage, in order to determine the issues in a case. For example, many of the documents relevant to the determination of whether a decision has been lawfully taken will be held by a public authority. These will need to be obtained and assessed to understand the heart of any claim.
  - iv. This makes the assessment of the merits and complexity of a claim at an early stage extremely difficult. This uncertainty is unlikely to provide a basis on which a provider may decide to pursue a case, as it will be difficult to give a consistent assessment of the likelihood of a result which is beneficial for the client at an early stage.
  - v. It is unclear precisely how much of this preparatory work will be considered preparatory for a permission application, as opposed to investigative of a claim. This kind of distinction is difficult to draw in practice and could introduce a degree of uncertainty into the practice of any provider who decides to pursue a case, further to the guidance of the LAA.
  - vi. This is a false distinction which could distort the practice of public law. It appears to provide a perverse disincentive to some public authorities to

resist settlement, even when a defence is weak, in the knowledge that some claimants and providers may be reluctant to issue proceedings without funding.

- vii. The permission test - a test of “arguability” - is not defined in statute and is applied flexibly. What is considered “arguable” can vary according to the application of judicial discretion, although there is some evidence that it is becoming more difficult to satisfy.<sup>68</sup> In any event, this means that the likelihood that permission will be granted can be extremely difficult to predict with a degree of confidence, even for experienced practitioners. Business planning on this basis will be near impossible.
- viii. The Consultation Paper suggests that costs rules between the parties might be used by providers to ensure that they secure payment, even in cases where a beneficial resolution is obtained before settlement. Most judicial review cases settle, but many settle with no order as to costs. On the current costs rules, it can be difficult to establish the grounds for an order as to costs against a public authority. Against the background of these changes, it may become more difficult during negotiation to persuade a reluctant defendant to accept a settlement on any basis other than no order as to costs. Costs orders are discretionary and where difficult to be determined the default position may be “no order”.<sup>69</sup> Where the benefit of the settlement to the party is in dispute or where a defendant has conceded some issues and not others, a costs order between the parties may be difficult to obtain. Thus, on current practice, *inter partes* costs are unlikely to provide a substitution for public funding in cases which settle before the issue of the permission application and the completion of the case. In these circumstances, although a provider might receive a good result – and possibly the best result – for someone, they are likely to lose money.

114. Each of these factors operate as a disincentive to continue public interest work. The Consultation Paper cites the treatment of appeals in immigration cases as a comparator, where providers bear the initial cost of an application for appeal from the Immigration Tribunal to the Upper Tribunal. While we may not necessarily support this model, it is not

---

<sup>68</sup> See *Sharma v Browne Antoine* [2007] 1 WLR 780, where the test was determined to be applied flexibly. See Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review*, Public Law Project (2009), Section 4, which explores the variance among judges in the application of the test.

<sup>69</sup> See for example *R(M) v Croydon* [2012] EWCA Civ 595, [77]

an appropriate comparator. In these cases, the individual will be responding to the rejection of his initial application by the Secretary of State, the issues in his case will already having been defined and prepared (possibly with public funding and possibly by the same provider). The grounds for appeal open to the Upper Tribunal are clearly set in statute and elaborated on in limited jurisprudence. By way of contrast, the assumption of risk to public providers would be far greater. For all of the reasons above, the provider would have to consider the business risks of the claim in the round. It would be difficult to determine the likelihood that the claim would proceed to beyond permission stage and whether costs would be likely to be recovered. In appeals cases, there is only one good outcome for the client (permission to appeal). In every case where permission is secured, the provider will recover. In public law, permission is not always the best or only result for the client, as explained above. Yet, although a good result may be achieved in a variety of circumstances, the public law provider will only see a return on his investment in the narrow range of cases where pushing litigation to completion will be the best resolution. So, the public law provider would need to commit to take on the development of a case from scratch, with significant front-loading of the work involved, with no reliable prospect of any return, even in cases where you achieve the best result for your client. Far from comparable to the illustrative immigration model in terms of commitment, risk and predictability of return.

115. Specialist lawyers funded by legal aid are recognised as playing an important role in upholding the rule of law and ensuring the participation of groups adversely affected by public bodies' work in holding the State to account. However, while these practitioners are professionals, who operate according to agreed and transparent standards of conduct, they are also providers of services, whose work must remain viable in order to continue. As explained by Lord Hope recently, were the businesses of publicly funded lawyers to become "unsustainable", the legal aid system would become "gravely disadvantaged" as reputable solicitors withdrew.<sup>70</sup> Even if some providers remain committed to the provision of publicly funded support in some cases, the Consultation Paper accepts that this proposal might equally affect meritorious claims. On the best case scenario, some claimants with good claims that the State has acted unlawfully will be deprived of a remedy for want of advice and representation. However, for each of the reasons outlined above, it remains JUSTICE's serious concern that these proposals – combined with earlier restrictions on access to publicly funded public law work – will seriously restrict the ability of practitioners to continue to provide services. This will

---

<sup>70</sup> *In re appeals by Governing body of the JFS* [2009] UKSC 1, [25]

reduce transparency, accountability and the promotion of responsible government, to the detriment of us all.

**Civil merits test – removing legal aid for borderline cases**

**Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success? Please give reasons.**

116. JUSTICE is concerned that the decision to remove “borderline” cases from scope is ill-considered. In our view, any likely minimal saving projected by excluding these cases from public funding cannot justify the potential to exclude complex and significant disputes which may impact on the long term development of the law from judicial scrutiny.

117. We are concerned that the analysis of these proposals is cursory and appears to misunderstand the nature of a “borderline” assessment. There are a range of categories of classification for the purposes of a merits assessment. All cases classified of having a less than 50% chance of success are determined “poor” and ineligible for legal aid. In cases where further investigation must be undertaken – and is capable of clarifying the merits in a case (for example through further investigation or disclosure) – prospects are determined “unclear” until further clarification can be provided. Borderline cases are defined as lying between “poor” and “moderate” (clearly identified as a 50-60% chance of success). Despite assertions in the Consultation Paper that borderline cases are “unlikely to succeed”, these cases are circumscribed “borderline” specifically for the reason that their prospects of success may be exceptionally difficult to determine as a result of uncertainty in the law or variable features of the case which cannot be resolved by further investigation (in contrast to cases identified as “unclear”). These include cases which are complex, where the law is in a state of development or where a fact sensitive proportionality analysis is at the heart of a case and judicial precedent or guidance is wanting. Not all “borderline” cases will be granted legal aid. In recognition of the uncertainty associated with these cases, funding will only be awarded to those cases with particular value to society or the individual. So, legal aid is only awarded on evidence of (a) “*significant wider public interest,*” or (b) “*a case with overwhelming importance to the individual*” or (c) where “*the substance of the case relates to a breach of Convention*”

rights.<sup>71</sup> Reflecting the seriousness to the individual, different rules apply in housing cases which involve the sale or possession of someone's home.

118. The Consultation Paper and the accompanying Impact Assessment provide very little in the way of justification for these proposals. JUSTICE considers that there are few arguments to support the removal of support in these cases, which can be incredibly complex and which can drive forward changes in the law (for example, consider the long standing litigation on the application of article 8 ECHR to possession cases, culminating in the decision of *Pinnock*).<sup>72</sup> By way of contrast, there are good arguments for maintaining a "borderline" criteria which allows cases like these to proceed on the basis of proper legal advice and representation:

- a. The Impact Assessment identifies that around 100 cases will be affected by the rule change. However, neither the Impact Assessment or the Consultation Paper includes an assessment of the kinds of cases likely to be affected, or the statistics on the failure or success of existing borderline cases, or any breakdown of the estimated £1 million saving. This is a significant flaw in stakeholders' ability to analyse the impact of these provisions effectively.
- b. Without further information on the types of cases involved, it is impossible to ascertain costs that might arise should legal aid be withdrawn. So, for example, in housing cases, it is likely that a local authority will incur costs of supporting an evicted family (particularly where children are evicted) if they are unable to resist a possession claim.
- c. Similarly, it is unclear whether the cost savings identified include any *inter partes* costs recovered in the course of borderline litigation. The Consultation Paper gives no indication of whether the Government considered the impact of changes to the rules on *inter partes* costs as an alternative to the withdrawal of legal aid entirely.
- d. The cases that are likely to be excluded under the rules will be cases where a claim is not obviously less than 50% likely to succeed, and where there is a genuine public interest in the claim proceeding. This will include cases involving an individual's physical integrity or their liberty and cases involving an individual's right to remain in their home. Regardless, under the new rules, funding will not be available;

---

<sup>71</sup> Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104).

<sup>72</sup> *Manchester City Council (Respondent) v Pinnock (Appellant)* [2010] UKSC 45

- e. It is likely that these cases will involve important areas of the law which are uncertain or complex;
- f. The Impact Assessment is again based on the repeated assumption that claimants “are assumed to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue).” The breadth of this unsupported assumption is explored earlier in this consultation. However, it is particularly breath-taking in the context of this kind of case, without any wider analysis of the complexity of the issues pursued with previous borderline funding or the seriousness of the issues involved.
- g. If the case is as significant as the public interest criteria suggest – involving, for example, the possession of a person’s home – it is likely that the claimant will proceed in person even if no funding is available. The number of litigants in person are again likely to increase. However, the lack of representation in complex cases is likely to pose a greater burden for the courts, or for defendant lawyers who may be asked to clarify issues by the court when a claimant has been ill-equipped to argue a viable claim in a complex area of law. Alternatively, in other cases, without access to advice, claimants may never understand that they have a chance of protecting their rights in law.
- h. If only self-funded litigants or well-funded representative organizations will be able to litigate on these issues of public importance, it is likely that the development of the law in areas most important to vulnerable people – and particularly, the scrutiny of the State in the provision of public services – is open to distortion. This would be to the detriment of the wider interest of us all in a strong body of public law, in good government, transparency and accountability in public decision making.



## C) Experts and equality impacts

### Expert Fees in Civil and Criminal Proceedings

**Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.**

119. JUSTICE does not agree with the proposal that fees paid to experts from legal aid should be reduced across the board by 20%. In our view, there is a real risk that this decision will:

- a. Reduce the willingness of some expert providers to work at legal aid rates;
- b. Limit the ability of legally aided clients to access quality expert evidence; and
- c. Create a significant litigation advantage for non-legally aided opponents, which may undermine the principle of equality of arms and the adversarial system of justice.

120. The assessment of whether to proceed with this proposal appears to be based on a number of unreliable (or easily challenged) presumptions, fails to take into account the wider importance of reliable expert assistance to effective litigation and neglects to explore alternatives to a blanket cut:

- a. The Government asserts, without foundation, that there will be little or no impact on clients as expert evidence will still be available after fees are cut. No evidence at all is provided for this assertion, which is contradicted by the experience of those working directly with expert evidence in ongoing cases, which indicates that existing cuts have made experts more difficult to source or engage on existing legal aid rates;
- b. No account is taken of steps to improve the efficiency and effectiveness of court handling of expert evidence (for example, increased use of concurrent evidence procedure or “hot-tubbing”, where the court hears evidence from two or more conflicting expert witnesses simultaneously in order to better determine the issues in a case, recommended as part of the *Jackson* reforms and introduced in April 2013); or
- c. That the cost might be shared across the public pool of money available for expert instruction, by means of mitigation of any litigation inequality. As in other areas

where these proposals will have an impact on equality of arms, it is unclear whether the Government has considered spreading the impact more fairly across the public purse, in this case, by limiting fees paid to Government witnesses whether in civil or criminal litigation.

121. Importantly, there is no recognition by the Government in its Impact Assessment that cases where expert evidence may be crucial are likely to be cases where the issue in dispute might be significant to the well-being of extremely vulnerable litigants, including children and persons with disabilities.

122. In our view, the reduction in experts' fees is bound to cause the same risks to the fairness of proceedings that cutting advocates and solicitors fees will have: by doing so the most experienced and qualified in a given field will not be prepared to provide their advice. Experts have less moral impetus to act in cases than the legal professions and, like interpreters and translators, will simply refuse the request, produce a less detailed and lower quality opinion, or the fees will attract lesser qualified experts than otherwise would be the case. If the defence is unable to properly challenge State expert evidence, it will simply be relied on by the court untested. The danger posed by introducing this serious inequality of arms is particularly significant in the context of criminal trials. The saving to be made in this area is not worth the risk of miscarriages of justice as a result of flawed expert evidence. The shaken baby and sudden infant death syndrome cases are but one reminder of how dangerous flawed expert opinion evidence can be.<sup>73</sup>

---

<sup>73</sup> *R v Cannings* [2004] EWCA Crim 01; *R v Clark* [2003] EWCA Crim 1020.

## **Equalities and Impact Assessment**

**Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.**

**Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.**

**Q36. Are there forms of mitigation in relation to impacts that we have not considered?**

123. JUSTICE is concerned that the assessment of the equality impacts included at Annex K is cursory and the lack of evidence or analysis to support the Government's view that any disparate impacts identified may be justified, stark. The whole approach outlined in this section of the consultation is unsurprising in light of the cursory approach to the exercise throughout, but appears to show a fundamental misunderstanding of the scope of the public sector equality duty in s149 Equality Act 2010. The establishment of a new foundation for access to justice which is not scrupulously examined to ensure access to justice will further undermine the common law principles of equality which form the basis for the rule of law in this country.

124. The only analysis provided in Annex K is based on differential statistics (for example, X% of women affected over Y% of men). Where statistics are unavailable, no further analysis is offered nor is any attempt made to explore the actual impact of a proposal. While this kind of quantitative analysis might be highly relevant to the establishment of a likely violation of the prohibition on discrimination under the Act, it falls far short of the kind of qualitative analysis that might support the public sector duty imposed on the Ministry of Justice. Importantly, it appears inconsistent with the guidance of the Equality and Human Rights Commission (EHRC) on the importance of the public sector equality duty in financial planning and decision making.<sup>74</sup> That guidance encourages a holistic approach to assessment, indicating that the more serious the consequences of the decision taken, the broader the analysis of disproportionate impact ought to be in order to satisfy the public sector equality duty. There is no suggestion in the Impact Assessment that the Government has taken any steps to consider the qualitative impact of their

---

<sup>74</sup> See for example, EHRC, *Making Fair Financial Decisions*, [http://www.equalityhumanrights.com/uploaded\\_files/EqualityAct/PSED/making\\_fair\\_financial\\_decisions.doc](http://www.equalityhumanrights.com/uploaded_files/EqualityAct/PSED/making_fair_financial_decisions.doc)

proposals on any particular group, nor to consider the seriousness of the changes for individuals with protected characteristics and the likely proportionality of the decisions proposed.

125. Importantly – both the EHRC and our courts have acknowledged that in order to serve its purpose, an assessment of the impact on persons with protected characteristics must be taken before a public authority has taken its decision and set its mind on a course of action.<sup>75</sup> The cursory nature of the assessment undertaken here, together with the clear signal that the Government has already determined to proceed with its proposed changes in some format, across a number of fora, suggests that the Impact Assessment conducted at Annex K did not form an effective part of the decision making process, but has been prepared after-the-fact to accompany proposals which would raise serious concern if a full and informed assessment of impact on persons with protected characteristics were undertaken. If any public law challenge is posed to the introduction of any changes based on this consultation, JUSTICE considers that the flawed nature of the Impact Assessment is likely to support grounds for a violation of section 149 Equality Act 2010.

126. The predominant flaw in the Impact Assessment process is the incorporation of many of the unevidenced assumptions which undermine the overall assessment of the impact of the proposals. So, for example, the determination that restricting the scope of legal aid available for prison law, is explained away by the Government's view that although more men from black and ethnic minority groups will be affected by the changes, that the opportunity to secure redress through internal prison complaints procedures should be adequate to replace access to legal advice and representation. These inadequacies are compounded, as many of these assumptions are also used to bolster the Government's arguments on justification. Thus, in connection with prison law and scope, the Government's sole justification for the disproportionate impact on men and people from Black, Asian and Minority Ethnic (BAME) groups is that the complaints in question – regardless of the disproportionate effects – are "not of sufficient priority to justify the use of public funds and would be dealt with more effectively through non legal channels, such as the prison complaints system." This kind of circular analysis – unsupported by evidence – significantly undermines the Government's claim that it intends that legal aid should be targeted where it is needed most. Without a full assessment of impact – and specifically impact on groups with protected statistics – it is difficult to see how the

---

<sup>75</sup> *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin).

Government can undertake a full assessment of the need for legal aid nor can they understand any disproportionate impact or the potential for justification.

127. The public sector equality duty does not appear to have been taken at all seriously by the Ministry in preparing Annex K. The question of whether mitigation has been accurately explored is undermined by a failure to consider any alternatives to the proposals identified by the Government in the assessment, to consider options such as the introduction of support for ADR to dissipate adverse and disproportionate impacts, including that supported by funding for groups specifically targeting groups with protected characteristics or to consider the cost of accruing some proportion of the savings target from the litigation costs of public authorities (for example, by the use of costs orders in cases where defences are pursued unreasonably, or examining public costs of panel representation or expert fees and other disbursements incurred).

128. Highlighting only a few shortcomings should serve to illustrate our concerns:

- a. In connection with scope and prison law, it is identified that a significant proportion of the 11 treatment cases brought since July 2010 have involved prisoners with learning disabilities and/or mental health issues. Beyond a bland statement that the National Offender Management team will take steps to ensure that internal prisoner complaints systems will be accessible (para 5.1.3), there is no engagement with this statistical information and the likelihood of a significant disproportionate effect on prisoners with disabilities of taking treatment cases out of scope. The justification given for the disproportionate effect is a simple assertion that these cases are best dealt with internally, rather than through litigation. This limited engagement with a serious impact on a vulnerable group of prisoners is disappointing and illustrates a “tick-box” approach to the assessment process has been taken by the Government.
- b. The only group identified by the Government as disproportionately affected by the determination to limit access to legal aid for judicial review cases is men aged 18-24. The Government accepts that this analysis is flawed by limited access to data. Further information on the cases likely to be affected by these proposals have been specifically requested by the Public Law Project, but none has been forthcoming. However, in light of the likelihood that many claims for judicial review are brought by individuals in connection with access to services provided by public authorities, it would be surprising if the primary impact of these proposals is on young men rather than groups heavily represented among service

users, such as children, older people and people with disabilities. In addition, the Government proceeds on its assertion that impacts will be dependent on provider response, and thus unquantifiable. On the worst case scenario – that many providers refuse to provide advice and representation in judicial review cases, in light of the risk associated with failure to secure permission – the potential impact on those affected by the proposals could be significant. A failure to engage with the likelihood that a shrinking market would create a significant disadvantage for those affected is extremely disappointing and distorts the Government's assessment of impact entirely, including in connection with equality impacts.

- c. The assessment of the residence test is particularly scant. In this connection, many commentators have highlighted the arbitrary nature of the test, which will exclude a potentially large group of applicants from the scope of legal aid by virtue of their nationality and current/past residence. The groups raised in commentary who may be adversely impacted have included children (who may be less likely to be able to satisfy the residence requirement through no fault of their own) and women who are affected by domestic violence or trafficking (and who may yet find documenting their nationality or residence difficult). None of these concerns are acknowledged in the Government's assessment, which suggests a blinkered approach may have been adopted. Instead, the Impact Assessment asserts:

The nationality or immigration status of civil legal aid recipients is not routinely recorded. Our initial view, however, is that the nature of the proposals is such that they are unlikely to put people with these protected characteristics at a particular disadvantage.

It is difficult how, without something more, this kind of deeply flawed analysis could clearly identify the disparate impacts on individuals concerned and allow the Ministry to conduct a proper analysis on the implications for the equality objectives in section 149, Equality Act 2010.

129. We remain concerned that the measures proposed in the consultation will impact disproportionately – and without justification – on persons with protected characteristics. If implemented, in our view, each of the proposals will be at risk of challenge, including for non-compliance with the Equality Act 2010. However, somewhat ironically, the likelihood that any of the groups affected may be capable of bringing a challenge may be seriously restricted by restrictions on individual access to funding for advice and

representation unless a representative body – an NGO or the Equality and Human Rights Commission perhaps – is willing to fund a test challenge.

130. With this in mind, it is our view that the MoJ bears a particularly weighty responsibility for ensuring that its analysis of the disproportionate effect of its proposals on each of the protected groups is accurate, and all forms of possible mitigation explored. The current assessment falls far short of an analysis of the level of accuracy or depth required. The response of groups representing individuals who fall within the protected categories to this consultation should be particularly influential in informing the Government's assessment in the next stages of its consideration. Better still, the Ministry should consider seeking formal advice from the EHRC on how to better assess the likely impacts of its proposals, proportionality and any case for justification before any decision is taken on whether to proceed with these proposals. If these proposals were to proceed without further consideration, it is JUSTICE's view that, barring access to litigation funding, they would be ripe for challenge.