

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Response to the Ministry of
Justice Consultation '*Transforming Legal
Aid: Next Steps*'**

November 2013

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. Liberty welcomes the opportunity to respond to the Ministry of Justice consultation *'Transforming Legal Aid: Next Steps'*. The latest proposals for consultation, together with a response to the last Departmental consultation on legal aid reform ("the original consultation"),¹ were published on 5th September. Whilst the consultation document seeks views specifically on significantly amended proposals in the criminal sphere, this document will respond broadly to the Government's proposed reforms, including the amended prison law and civil law proposals discussed at Annex B to the consultation document. Whilst Liberty welcomes the concessions made by the Government, particularly those in the criminal sphere, viewed as a whole, the proposed changes would deal a devastating blow to access to justice in this country.

Prison Law

2. The original consultation exercise proposed a significant restriction in the availability of legal aid to prisoners. Legal aid would only be available for prison law cases (i) which involved determination of a criminal charge for the purposes of Article 6 fair trial protections;² (ii) which affect the individual's on-going detention and (iii) where liberty is at stake, thus engaging Article 5(4) protections;³ or (v) which meet the criteria in *R v Home Secretary ex p Tarrant*.⁴ This would exclude from scope several categories of case involving treatment in prison, sentencing, disciplinary hearings, and Parole Board Review. The original consultation paper suggests that the ability of prisoners to have recourse to the internal prison complaints and requests system and the Independent Prisons and Probation Ombudsman is sufficient, and for the sentencing cases which do remain within scope, providers would have to provide reasons as to why the matter could not be resolved through the complaints system.

3. In the *Next Steps* consultation document, two minor changes to the proposals were introduced. Under the latest proposals legal aid is to remain available in parole board hearings where the parole board is considering whether or not to direct release. Secondly, legal aid is to remain available to prisoners who are disputing their date of release. Whilst these two concessions are improvements, they fail to address core concerns with this aspect of the proposals.

¹ *'Transforming legal aid: delivering a more credible and efficient system'*, Ministry of Justice consultation, 9th April 2013.

² Article 6, the European Convention on Human Rights ("the ECHR").

³ Article 5(4) ECHR: *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'*

⁴ [1985] QB 251.

4. Matters relating to categorisation (including potentially, the placement of young offenders), segregation, close supervision and dangerous and severe personality disorder referrals and assessments have obvious implications, not only for individual prisoners, but for the proper operation of the prison service itself. Disciplinary hearings may impose hefty penalties on prisoners, or more significantly dramatically alter conditions of detention including by placing an inmate in solitary confinement. Disciplinary hearings are highly formal, legalistic proceedings and, although the proposals would preserve the *Tarrant* criteria,⁵ Liberty is concerned that these proposals would result in many prisoners being unable adequately to represent themselves in, or even fully to understand, proceedings which carry very significant consequences.

5. Liberty is particularly concerned about the effect of these proposals on vulnerable prisoners, such as those with learning difficulties or mental health issues, including children. The original consultation paper acknowledges that the proposals may have an impact on such individuals, but asserts that the screening carried out by the National Offender Management Service (NOMS) would be sufficient to ensure that reasonable adjustments are made. This position is echoed in the second consultation document.

6. Liberty believes that such an argument simply cannot support the changes under consideration. Even if screening of prisoners is carried out, removal of legal aid will result in individuals being unable to challenge that assessment, or the treatment which is actually provided to them. For example, they would be unable to challenge the outcome or process of the screening decision; the adjustments considered reasonable given that outcome; whether the adjustments are actually made in practice and whether they prove to be adequate. A failure to make appropriate adjustments for prisoners with learning difficulties or other disabilities, or mental health issues, entails a real risk that they will be subjected to inhuman and degrading treatment and may even place lives at risk. Further, many cases which will fundamentally impact upon successful rehabilitation outcomes will also be excluded from scope - including issues around resettlement and licence conditions - seriously undermining the Lord Chancellor's claimed commitment to effective rehabilitation.

7. The original consultation paper asserted that the matters which would fall outside of scope under these proposals "*should be able to be resolved satisfactorily via the prisoner complaints system or probation complaints system without the need for publicly funded legal*

⁵ Which allow legal representation for disciplinary hearings in certain circumstances, including where there is referral to an independent adjudicator.

*advice and assistance.*⁶ Liberty does not believe that this argument is sustainable. An internal, administrative complaints system is not an adequate substitute for judicial due process. A complaints system and the Ombudsman cannot adjudicate on the rights of individuals, nor on the lawfulness of state action in the same way as a court. Their judgments - or rather, recommendations – are not binding on parties in the same way as a legal judgment and they do not have the same powers to award damages or to require remedial action. Further the system simply does not have the operational independence necessary to ensure the effective and impartial resolution of disputes. Before a complaint can even be brought to the Ombudsman, it must be pursued through internal complaints system which offers no independence from the institution which is the subject of a complaint. Further the Ombudsman’s investigators are not legally qualified and are given no legal training. Particular concerns remain around the ability of the Ombudsman system to deal with cases involving those categories of prisoner who may be particularly vulnerable to abuse on the grounds of age, gender, race or disability, given that the office has no specialism in cases of this type.

8. On a more practical level, Liberty fails to see how the already stretched Ombudsman’s office will be able to absorb the additional workload which these changes would create. The Prisons Ombudsman is already subject to systemic delays and according to the Prisoners Advisory Service, non-urgent cases are not being allocated for 10-12 weeks, with decisions not made for up to 8 months. In response to this concern, the MOJ argue that the current complaints system is “robust”, incorporates avenues of appeal and is unlikely to see an increase in its caseload. An avoidance of increased caseloads, it claims, will be achieved by providing information to prisoners which will reduce the number of ineligible complaints. Liberty is extremely sceptical about claims that increased information will prevent a rapid increase in complaints to the Ombudsman in the absence of alternative avenues to address legitimate grievances. These claims ignore the reality that many prisoners face problems with literacy, many more have learning difficulties or mental health problems. All prisoners face a huge disparity in terms of the power and resources at their disposal when challenging an aspect of the prison regime.

9. Prisoners are amongst those most vulnerable to rights violations in our society, a point amply demonstrated by recent reports of appalling conditions at HMP Bristol. Prisoners were found to be subject to arbitrary punishment, including deprivation of meals, were denied clean clothing and bedding and forced to live in cock-roach infested

⁶ *‘Transforming legal aid: delivering a more credible and efficient system’*, paragraph 3.18.

accommodation.⁷ If we remove effective means of redress and an important avenue of external scrutiny, we can expect prison conditions to deteriorate, which will not only place prisoners at unacceptable risk of abuse, but will hinder rehabilitative outcomes to the detriment of all in society.

10. The original consultation paper claims that these changes are required to “*deal with claims which undermine the credibility of the system*”.⁸ Yet no evidence is given to substantiate the claims that there has been a loss of public credibility in the legal aid system. Many of the supposed “frivolous claims”, for example that prisoners used the *Human Rights Act* to demand access to hard-core pornography, have been revealed to be false, or at least grossly distorted. In any case, under current law, applications for criminal legal aid already have to meet an ‘interests of justice’ test, and since July 2010, for treatment cases, providers have also had to obtain prior approval from the Legal Aid Agency (“the LAA”). In the absence of any evidence that legal aid money is currently being wasted on frivolous treatment cases, or indeed other cases that could undermine the credibility of the legal aid system, a near-total exclusion of these areas from scope is an entirely unjustified and deeply damaging course of action.

Criminal Legal Aid

Financial eligibility threshold in the Crown Court

11. Under the current system, all defendants in the Crown Court are automatically entitled to legal aid upfront, and their means are subsequently assessed to determine how much they should contribute to their legal aid bill. The initial consultation paper proposed to alter this system by introducing a threshold whereby any defendant with a disposable household income of £37,500 or over would not qualify for legal aid. Those who exceed the threshold but still cannot afford to pay for their defence may apply for hardship review.

12. The consultation paper asserts that these changes are needed to ensure that the taxpayer does not have to pay for the defence of “wealthy criminals.” However, there is no evidence provided in either consultation document to support the argument that this is a problem under the current system. If a wealthy individual is charged with an offence to be tried in the Crown Court they automatically receive legal aid to pay for their defence, but then are later assessed and must make a contribution to their legal costs depending on their

⁷ See the Report on an unannounced inspection of HMP Bristol by HM Chief Inspector of Prisons, available here: <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/bristol/bristol-2013.pdf>.

⁸ *Transforming Legal Aid: delivering a more credible and efficient system*, para 3.15.

means. The reference to “wealthy criminals” neglects the crucial fact that, at the point at which they receive legal aid, the individuals are not “criminals” but merely accused and, like all of us, enjoy the Article 6 rights, protected by the *Human Rights Act*, to be presumed innocent and to test the prosecution’s case against them in a fair trial with the benefit of professional legal representation.

13. There is no evidence given in the consultation paper suggesting that there are problems compelling defendants to make these retrospective payments. If there were, it seems that the simpler way to reduce the burden on the taxpayer would be to improve the enforcement of the payment of these contributions. Similarly, if the problem is that wealthy defendants are not contributing enough to their legal aid bill then the solution would appear to be a reassessment of the scale by which means and corresponding payments are calculated. Totally excluding a whole category of defendants from receiving legal aid, unless they can show exceptional circumstances, is an extremely blunt tool to employ to deal with such a problem.

14. The consultation paper further fails to address the principled argument in favour of ensuring that all individuals facing a serious criminal charge and the consequent risk of a significant criminal sanction have access to adequate legal representation. Even if persons above the threshold do have the financial means to pay for their own defence and ultimately end up paying for a large proportion of it, the proposed system removes the safeguard that, at the point when the trial takes place, every defendant will be guaranteed legal representation.

15. We remain concerned that this proposal is being taken forward, and has not been revised by the *Next Steps* consultation.

Competition and cuts

16. The original consultation paper proposes inviting tenders for all criminal legal aid work except advocacy in the Crown Court; very high cost cases; Defence Solicitor Call Centre and Criminal Defence Direct. Providers would have been required to bid for three-year contracts (extendable for a further 2 years) covering the full breadth of criminal legal aid work, not just specialist areas.

17. In the *Next Steps* consultation a ‘modified model’ is proposed, in which price is dropped as a tendering requirement and a degree of client choice is reintroduced. Under the modified model providers would be able to apply to undertake ‘Own Client Work’ as well as

'Duty Provider Work'. This would mean that those in need of legal advice would be able to either utilise the duty solicitor, or use a representative of their own choice, provided this representative has an 'Own Client Work' legal aid contract.

18. The revised proposals mark a significant improvement on original plans to introduce price competitive tendering (PCT) across the board for criminal legal aid provision, eliminating client choice and driving down quality in the process. We remain concerned, however, at Government plans to push ahead with cuts which, in the view of the Law Society, will pose "*significant risks to the long-term sustainability of the supplier base*".⁹ Whilst the Government has decided to implement these cuts in phases (8.75% in February 2014, and a further 8.75% in 2015), the level of cuts ultimately proposed remains at the original level of 17.5%. Proposed cuts in this field are part of a relentless and unfeasible drive to achieve more for less. Whilst the concessions on PCT and the phased role out of cuts may allow some firms to hang on in the short-term, many will not survive the full extent of cuts which exceed austerity measures in other areas of the public sector. Liberty believes that the extent and nature of proposed criminal legal aid cuts reflect a serious undervaluation of the importance of a well-functioning justice system for defendants, victims and the public at large. Specialist providers of advice compete on the quality of their services and cannot provide the same economies of scale as large generalist firms. Where small, niche firms are forced to close, we can expect considerable impact on the quality of provision and consequent damage to our justice system.

Criminal Advocacy Fees

19. The original consultation proposed to "harmonise" the fees paid for guilty pleas, cracked trials and contested trials into a single basic fee. For contested trials, daily attendance fees would have been reduced, and would have sharply declined from the fourth day onwards. Liberty expressed strong concern about these proposals which would have created a financial environment in which advocates were discouraged from taking on complex cases and were incentivised to seek the fastest resolution of a case even where it may be in the interests of justice for a full trial to be held. We welcome the decision in the *Next Steps* consultation to consider alternative options. Advocacy option 1 would harmonise some fees but differentiate between guilty pleas and fully-contested trials. Trial fees would still decrease over the course of the trial, but a bottom limit would be introduced. Advocacy option 2 involves new provision with many of the same features as the current scheme for prosecutors.

⁹ The Law Society, *Revised legal aid proposals: Law Society statement*. Available at <http://www.lawsociety.org.uk/news/stories/revised-legal-aid-proposals-law-society-statement/>.

20. Both options are an improvement on the original proposals, but we continue to have significant concerns. Advocacy option 1 is particularly problematic as it is based on the same flawed assumptions as the discredited original harmonisation proposals. Whilst we welcome the decision to exclude full trials from a new fixed fee regime, we strongly urge the Government not to proceed with a measure which pits the interests of a defendant against those of her representative. This proposal would further continue to apply a taper meaning the fee payable for trials lasting more than three days will decrease daily, albeit that the reduction will be less than was originally proposed. Whilst Liberty is relieved at the decision to impose a floor and reduce the extent to which fees are tapered, we remain concerned that, if implemented, advocacy option 1 would create a financial environment in which advocates are discouraged from taking on complex cases and are incentivised to seek the fastest resolution of a case even where it may be in the interests of justice for further evidence to be heard or more detailed submission made. The tapered reduction in trial fees creates a risk that, where a trial continues for longer than three days it may start to become financially unsustainable for a criminal advocate – already facing pressure from the previous and proposed rounds of fee reductions - to continue work on the case. It is impossible to avoid the reality that this creates a very real conflict of interest between clients and their representatives seriously jeopardising the right to a fair trial. Liberty believes that a system of remuneration which by its very structure forces lawyers to choose between the interests of their client and their ability to make ends meet does not serve the interests of justice.

21. Advocacy option 2 takes a preferable approach as it is sensitive to a number of different features of a case which can affect the level of time and effort it demands of an advocate. Under option 2, two fee bands would exist for different groups of offence, namely a standard and an enhanced fee. The level of fee would vary according to the type of advocate instructed and the number of pages of evidence; thresholds would vary with offence type, but the enhanced fee would be designed to capture the top 5% most evidence heavy cases in relation to a particular offence type. We note however, that the Bar Council's original proposals for an approach reflecting features of the CPS was designed as an alternative to the damaging cuts which formed part of the original plans. Unfortunately, option 2 entails significant cuts in rates which will seriously undermine the ability of already hard-pressed professionals to meet the high standards that the proper administration of justice demands.

22. We further remain concerned at the approach to Very High Cost Cases (VHCCs). The Government intends to maintain their proposed drop of 30% in advocacy fees. Counter

intuitively they argue that a difference in CPS fees and defence fees can be justified stating that, “we do not accept that a distinction in legal aid and CPS rates for VHCCs undermines the principle of “equality of arms””.¹⁰ This they base on an assertion that under the new fee regime a defendant will still receive an effective defence. We find it difficult to understand why the defence lawyer and prosecutor should be paid differently for the same amount of work on the same case.

23. Effective fair trial protections are fundamental to a society which values dignity and fairness. When an individual faces prosecution, she faces loss of reputation, loss of livelihood and often loss of liberty on conviction. With the stakes so high, fair trial protections are a non-negotiable. Liberty welcomes the proposal to make interim payments to providers and advocates so as to mitigate against the cash flow issues which are endemic in the legal aid sphere, however we remain concerned at the breadth and depth of the proposed fee cuts. The right of a defendant to the highest standards of judicial due process has its roots in long-standing traditions of British justice; we cannot let these fundamental principles be swept away to further short-sighted and poorly articulated financial ends.

Civil Legal Aid

Residence test

24. As formulated in the original consultation, the proposed residency test would have removed legal aid funding for an individual who could not demonstrate both lawful residence in the UK at time of her application and 12 months consistent lawful residence in the country. The only specific exceptions to the scheme were for asylum claims and claims involving serving members of the military. The original consultation document stated that legal aid would continue to be available on an exceptional basis to meet the UK’s obligations under EU or international law.¹¹

25. In the latest *Next Steps* consultation, the MOJ have amended the original proposals so as to provide a number of additional exceptions to the residency test. The requirement of twelve months lawful residency is no longer to apply to children under 12 months old. The test is now also to allow for a total break in residence of 30 days within the twelve month period. With regards to successful asylum seekers, lawful residence is to be calculated from

¹⁰ *Transforming legal aid: Next Steps*, paragraph 2.46.

¹¹ Where necessary to comply with obligations under EU or international law, the Government relies on the exceptional funding regime set out in *the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which provides that civil legal aid funding will be available.

the date of their asylum application, rather than the date their claim was accepted. In addition, categories of cases which “*broadly relate to an individual’s liberty, where the individual is particularly vulnerable or where the case relates to the protection of children*” are to be excluded from the test.¹²

26. Any exclusion of vulnerable groups from the residency test is to be welcomed, albeit as a marginal improvement to an otherwise extremely problematic measure. However, the nuances of the proposed exclusions reveal that in practice even the prescribed vulnerable groups are not properly protected. The MOJ have rightly identified those in detention; victims of trafficking; victims of forced marriage or domestic violence; and children as vulnerable groups who should retain access to legal aid in certain circumstances. In doing so, they have set out a number of express legal aid provisions which will remain accessible to each group. However these provisions are exclusive, and provide remedies for a limited group of legal problems.

27. By way of example, whilst a victim of domestic violence or forced marriage will now have access to legal aid if they wish to apply for leave to remain in the UK, they will not have recourse to legal aid if they were to be unlawfully evicted. Further, someone in immigration detention will now have access to legal aid in order to challenge their on-going detention, however not to challenge their treatment in detention. Liberty notes with concern that if the residency test as it is proposed were in force today, those alleging sexual abuse whilst they were in Yarl’s Wood Detention Centre would not have access to public funds.¹³

28. The Government describes the test as a common sense means of ensuring that legal aid funds are targeted at those with a strong connection to the UK, adding that the wider availability of legal aid may “*encourage people to bring disputes before UK courts*”.¹⁴ The implication is that individuals without a connection to this country are bringing unnecessary litigation, yet the test proposed would operate without reference to the merits of a case or the seriousness of the issues involved. In order to qualify for legal aid, individuals must already demonstrate that they meet tests of means and merit, providing an effective barrier against weak or spurious litigation. The proposed hurdle has no logical connection to the quality of

¹² MoJ consultation paper: ‘*Transforming Legal Aid: Next Steps*’, September 2013, para 2.14.

¹³ See widespread reporting of alleged ill-treatment, for example: <http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-24106338> and <http://www.theguardian.com/uk-news/2013/sep/14/detainees-yarls-wood-sexual-abuse>.

¹⁴ MoJ consultation paper: ‘*Transforming legal aid: delivering a more credible and efficient system*,’ April 2013, para 3.44.

cases reaching our courts, rather it would create an underclass of people unable to access the protection of the civil law no matter how compelling their claim.

29. These measures become even more concerning when viewed in context. In April this year, the *Justice and Security Act* received Royal Assent. The Act, which allows the Government to present its arguments in closed session, with the claimant, his representative and the public excluded, erodes bedrock principles of open justice and equality before the law, seriously weakening Government accountability. These latest proposals seem designed to further reduce accountability for serious wrong-doing, including those cases which implicate this Government in torture and extraordinary rendition. Those bringing claims of this type can, on no analysis, be described as legal tourists. Proceedings are brought in this country because our Government has a case to answer, yet under the proposed residency test, many individuals will be effectively barred from bringing a claim: a denial of justice for them and the kind of impunity for Government which seriously undermines the health of our democracy.

30. Apart from the many principled reasons to oppose these blunt and unjust proposals, Liberty seriously questions the workability and cost-effectiveness of plans which will inevitably lead to satellite litigation around the length and nature of residence in the UK. This additional layer of contested proceedings is likely to involve many litigants in person, creating serious administrative difficulties for courts called upon to hear cases presented by individuals with no legal experience. Those solicitors attempting to evidence their client's claims of consistent lawful residence would be required to adopt the role of immigration official, refusing access to services unless clients can provide evidence of their present and historic immigration status. Not only will Courts and lawyers be bogged down by newly created bureaucracy, the changes are likely to impose significant administrative burdens on the Legal Aid Agency as the body with responsibility for assessing the eligibility of legal aid applications. This in turn will carry implications for the very UK tax-payers the Government calls in aid to justify these extraordinarily short-sighted proposals. Indeed, as highlighted in a recent report by the No Recourse to Public Funds Network, which includes numerous local authorities, the MOJ impact assessments have failed to take into account likely increases in homelessness and the impact upon migrant children. They estimate the residence test could cost local authorities more than £26m annually.¹⁵

¹⁵ No Recourse to Public Funds Network, *Shadow Financial Impact Assessment: Transforming Legal Aid – Proposed Residence Test*, p1.

31. Liberty believes that the proposed residency test is not just arbitrary and unjust, but ripe for legal challenge. Together with 12 other NGOs, including the Public Law Project, Shelter and Reprieve, Liberty sought expert legal advice on the legality of this aspect of the proposals. The advice of three leading human rights barristers including leading QC Michael Fordham is that these proposals are likely to be judged unlawful under the Human Rights Act, EU prohibitions on discrimination and the common law.¹⁶ The opinion considers the compatibility of these proposals with protections for fair trials (Article 6) and non-discrimination (Article 14) enshrined in the Human Rights Act, concluding that:

“It can be persuasively argued that a prohibition of legal aid is within the ambit of article 6, for the purposes of engaging article 14 and so precluding unjustifiable discrimination... Ultimately, the exclusion would itself fail a justification test because it denies practical and effective justice.”¹⁷

The legal advice further notes that this aspect of the proposals:

“does not focus on legitimacy of resort to the Court, the nature of the issue [or] the viability of the argument. Being a foreigner does not indicate a lesser need, or a lesser justification, for effective access to the Court.”¹⁸

32. The Government offers no coherent justification for proposals which will have an obvious and serious discriminatory impact on the right to a fair trial. The opinion draws parallels with attempts by the Government to single out non-nationals for preventative detention, which were ultimately found to be unlawful. Liberty believes that requiring a class of foreign nationals to meet strict additional criteria of exceptionality before they can gain effective access to justice will create the kind of discrimination that our Courts have rightly found unlawful time and again.

Borderline Cases

33. The Government proposes to remove funding for borderline cases on the basis that scarce funding should only be allocated to cases with at least a 50% chance of success. The rationale appears to be that borderline cases are weak or unmeritorious, yet as the initial consultation paper acknowledges, borderline cases are not poor, but rather unavoidably

¹⁶ Joint Opinion, *The Legality of the Proposed Residence Test for Civil Legal Aid*, Michael Fordham QC, Ben Jaffey and Ravi Mehta, Blackstone Chambers, 28 May 2013, paragraph 2. Available on Liberty's website.

¹⁷ *Ibid.*, para 4.

¹⁸ *Ibid.*, para 3.

unclear “by reason of disputed law, fact or expert evidence”.¹⁹ This acceptance is very difficult to square with the Government’s apparent conclusion that borderline cases are less deserving of funds. It is frequently those cases with the most profound and far-reaching implications that are the hardest to fully assess at an early stage. Cases involving hotly contested and inherently uncertain issues of law set precedents and determine issues of broad significance. We will suffer as a society if these cases are stalled by the unavailability of funds or brought by litigants in person ill-equipped to present the issues.

34. In the *Next Steps* consultation the MOJ go so far as to argue that it does not think that “a reasonable person of average means would choose to litigate in cases which only have a borderline prospect of success and we do not think it is fair to expect taxpayers to fund such cases either.”²⁰ This statesman is symptomatic of a failure to understand the importance of access to justice, and the gravity of the issues which can be at stake in a judicial review case. Firstly, the person of average means may well be prepared to go to great lengths to bring a borderline case to court. Secondly, if a person of average means could not afford to do so, it is of the utmost importance that a scheme is in place to facilitate their access to justice.

Judicial Review funding

35. The original consultation paper proposed to change the way in which judicial review is funded, to provide that representatives only receive payment for permission work on a claim, if a judge finds the case “arguable” and grants permission to proceed.²¹ This proposal was tempered slightly in the *Next Steps* consultation document, in which the Government proposes to retain a discretion allowing the LAA to pay providers for permission work in certain cases which conclude before a permission decision and in which no costs order or agreement has been secured. In their most recent consultation on judicial review, ‘*Judicial Review – Proposals for further reform*’, the Government elaborate on this concession. They establish an exhaustive list of factors to be considered by the LAA in determining whether to grant discretionary legal aid, namely (i) the reason for not obtaining a costs agreement or costs order, including consideration of the conduct of the claimant representative; (ii) the extent to which the claimant obtained any redress or remedy sought; (iii) the reason why the claimant succeeded in securing redress; and (iv) the likelihood of permission ultimately having been granted if the application had been considered (either

¹⁹ ‘*Transforming legal aid: delivering a more credible and efficient system*’, para 3.84.

²⁰ ‘*Transforming legal aid: Next Steps*’, paragraph 2.22.

²¹ ‘*Transforming legal aid: delivering a more credible and efficient system*’, para 3.69.

based on the LAA's assessment of the strength of the claim, or on the basis of an indication given by the Court).²²

36. This concession is an improvement on the original proposals to make permission costs irrecoverable for all cases resolved before permission could be granted. Liberty and countless other organisations with experience of judicial review proceedings made clear that cases frequently settle before the permission stage because a public authority acknowledges wrong doing and agrees to change its behaviour or to provide redress. It seems that this concession is an attempt to respond to these concerns, but it is at best a partial response, which will leave a great deal of practical uncertainty for practitioners and claimants.

37. It is not clear how the proposed criteria would be applied in practice, forcing representatives to take unsustainable financial risks. In particular, the requirement that the LAA should consider what would have happened had the case proceeded to permission stage is a difficult assessment ill-suited to a non-judicial body and liable to lead to satellite litigation. Under these proposals funding for permission work would remain fundamentally uncertain, placing prohibitive cost risks on claimant solicitors.

38. The concession set out in the latest consultation further does nothing to deal with the concerns around those cases which may be refused permission, not because they are unmeritorious, but because there are myriad factors which impact on the likelihood of a case succeeding at permission stage. In Liberty's experience it is not unusual for defendants to fail to seriously engage with a claim during its very early stages, only producing important evidence or making key arguments when a case comes before the courts. In these cases it is very difficult for a claimant representative to accurately assess the merits of a claim at the outset. In other cases, the law may have moved by the time a case reaches the permission stage; again the kind of eventuality that is an unavoidable feature of a working justice system.

39. Liberty believes the prospect of irrecoverable costs will place an unsustainable burden on claimant lawyers, making it simply too risky to pursue legal aid claims, particularly those in which the law may be uncertain or untested, or in cases where the defendant exhibits a reluctance to disclose relevant material or make its legal arguments at an early stage. This problem is only intensified by the fact that, where costs are in dispute, claimants

²² MoJ consultation, '*Judicial Review – Proposals for further reform*', September 2013, para 125.

will frequently have no choice but to prepare submissions for further contested proceedings. If the claimant fails, her lawyer will have to bear the additional costs burden of preparation for this hearing.

40. Judicial review occupies a role of unique constitutional importance in our society as the means by which individuals can hold public bodies, including the Government, to account. The latest proposals for reform of the system should be seen in the context of wider systemic reforms proposed by this Government. At the end of last year, the Ministry of Justice announced troubling plans for reform of the judicial review system, including scrapping rights to renew a written claim orally and removing vital flexibility in the calculation of time-limits.²³ Liberty strongly opposed these proposals expressing concern at the lack of evidence or reasoned analysis set out in support of the reforms and the complete failure to engage with their impact on disadvantaged groups.²⁴ Thankfully, and following huge opposition, the worst aspects of this scheme were dropped, albeit that plans to introduce new fees and remove some reconsideration rights remain. Notwithstanding this significant climb-down, the most recent consultation on Judicial Review, contains a number of alarming proposals aimed explicitly at taking judicial review out of the “armory” of “countless left-wing campaigners.”²⁵ These measures include drastic changes to the rules regarding standing, which will greatly reduce the ability of NGOs to take legal action through judicial review. In addition the financial risks associated with bringing a judicial review are to be changed in favour of the defendant (i.e. the public body) at the expense of the claimant. Further, the consultation document invites comments on the removal of the Public Sector Equality Duty from the realm of judicial review altogether. Whilst these proposals are not the subject of the current consultation, we are concerned that they reveal a demonstrable disregard for the procedure designed to ensure the Government and public bodies act lawfully.

41. The justification offered for changes to legal aid for permission work on judicial review claims is that “*legal aid is being used to fund a significant number of weak cases which are found by the Court to be unarguable and have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme.*”²⁶ No attempt is made to present an evidential basis for this claim in the consultation document, however in an

²³ *Judicial Review: proposals for reform.*

²⁴ See Liberty’s response to the proposals, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-submission-to-the-moj-s-consultation-on-judicial-review-jan-2013.pdf>.

²⁵ Chris Grayling, *The judicial review system is not a promotional tool for countless Left-wing campaigners*, <http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>.

²⁶ *Ibid.*, para 3.61.

interview on Radio 4's Today Program in April, the Lord Chancellor gave a piece of statistical information, which he claimed supported these far-reaching reforms. He said that in 2011:

*"we had 11,359 applications for judicial review. In the end 144 were successful and all of the rest of them tied up government lawyers, local authority lawyers in time, in expense for a huge number of cases of which virtually none were successful."*²⁷

42. This is a serious misrepresentation of the situation. These statistics fail to take account of those cases which do not reach the permission stage because they settle, often with a public authority conceding the claim. Research carried out by the Public Law Project reveals that 34% of the judicial review cases they examined as part of a wide-ranging study, settled at an early stage, many recording a positive outcome for claimants. In terms of the more general assertions made about success rates in judicial review claims, on the analysis of the Public Law Project, the number of non-immigration civil judicial review claims which ultimately record a positive result for claimants is over 40%, presenting a starkly different picture to that created by the Lord Chancellor's assertion that 98.5% of judicial review claims are a waste of time and Government money.²⁸

43. Even in those cases where a claimant actually loses her case, to suggest that the litigation was frivolous and wasteful is to misunderstand the role of legal challenges in our society and particularly those cases which raise important and as yet unexplored issues of law. Cases involving new or evolving legal issues are inherently uncertain, yet these are some of the most important kinds of legal challenges, setting precedents and guiding the future behaviour of decision makers. It is precisely this type of case which is likely to prove a prohibitive risk to claimant representatives in the future.

44. Where legal professionals feel unable to take forward cases because of prohibitive cost risks, claimant's will either be left entirely without redress, or forced to represent themselves in complex, legalistic proceedings before our higher courts. Our courts, in turn, will creak under the additional administrative strain of hearing inevitably poorly prepared and badly presented cases brought by those with no knowledge or experience of the legal system.

²⁷ Transcript available at: <http://www.publiclawproject.org.uk/documents/TranscriptChrisGraylingToday.pdf>.

²⁸ Response to the Government's consultation paper: Transforming legal aid, prepared by the Public Law Project, para 2, available at http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf.

45. As the Government seems all too reluctant to acknowledge, claimants are already required to demonstrate that their case has merit to attract legal aid funding. Far from weeding out weak cases these proposals will make the risk of pursuing even the most compelling cases extremely difficult for claimant lawyers to bear, effectively shutting the route to effective challenge for those whose lives may have been seriously damaged by the actions public authorities. Meanwhile defendants, assured of the recoverability of costs where they succeed in proceedings, will benefit from an extremely strong bargaining position and a degree of impunity.

46. Judicial review acts to level the playing field between the individual and the State, helping to ensure that the Government acts lawfully and respects the rights of individuals. The shift proposed by these measures will weaken the position individuals and strengthen the hand of powerful institutions, fundamentally unsettling a balance central to a democracy under the Rule of Law.

Conclusion

47. Liberty remains concerned about the extent of the proposed legal aid cuts and their inevitable adverse impact on access to justice. Indeed, we believe that the assumptions made by the government that providers will be able to maintain the same standard of service as they do at present, on considerably lower fees, is unfounded. Similarly, there is an explicit assumption that those denied civil legal aid will find alternative resolutions for their problems.

“Civil legal aid claimants are assumed to continue 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).”²⁹

48. Liberty believes these assumptions do not stand up to scrutiny. We urge the Government to rethink proposals which would undermine fair trial protections, remove access to justice for many vulnerable people and significantly reduce government accountability.

Simon Crowther

Rachel Robinson

²⁹ *Transforming legal aid: scope, eligibility and merits (civil legal aid)*, pg 3, (https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/latcivilscooperesponseia.pdf).