

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Response to the MOJ's
Consultation '*Transforming legal aid:
delivering a more credible and efficient
system*'**

June 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. If implemented, the latest proposals put forward by the Ministry of Justice for reform of the legal aid system would deal a devastating blow to access to justice in this country. Plans to distort our criminal legal aid system in pursuit of narrow financial ends, reveal disregard for both the due administration of justice and the fundamental right to a fair trial. These proposals would create startling conflicts of interest between lawyers and their clients, remove the ability of individuals to choose a representative, seriously drive down standards and decimate specialist legal aid provision. Plans to remove most prison law cases from the scope of legal aid risk undermining rehabilitation and allowing abuses of vulnerable prisoners, including those with serious disabilities, to go unchecked. The latest assault on our beleaguered civil justice system includes a requirement that individuals meet a residency test before accessing civil legal aid and is not just arbitrary and unfair, but likely unlawful. This restriction on access to civil justice, when combined with reforms to judicial review funding, will seriously undermine accountability for human rights violations and place justice beyond the reach of countless victims of state misconduct.

Criminal legal aid

2. The Article 6 right to fair trial, protected by our Human Rights Act,¹ lays out specific rights for criminal defendants. In particular, those accused of a criminal offence are entitled to be informed of the offence of which they are accused in a language they understand; to have adequate time to prepare their defence; to defend themselves in person or with legal assistance and, if they have not the means themselves, the right to be provided with legal assistance for free if the interests of justice require it. Liberty is seriously concerned that, by reducing the scope of entitlement to legal aid and causing a decline in the quality of legal service provided, these proposals risk preventing those facing criminal sanction from enjoying the full protection of the right to fair trial to which they are entitled under the Human Rights Act.

Financial eligibility threshold in the Crown Court

3. 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 consultation paper proposes to alter this system by introducing a threshold whereby any defendant with a disposable household

¹ Article 6, European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), incorporated by the *Human Rights Act 1998*.

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.

4. 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 the consultation paper 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 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.

5. 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.

6. 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.

Universal credit

7. The Government proposes to consult in the autumn on “*additional changes to legal aid eligibility criteria in the light of the wider roll-out of Universal Credit.*” Currently, receipt of certain welfare payments triggers an automatic eligibility for legal aid. While any changes to

the structure of the welfare system will entail corresponding changes to legal aid eligibility, Liberty is strongly opposed to any attempts to use this project to go beyond this and further restrict eligibility for legal aid.

Competition in criminal legal aid

8. Liberty is particularly concerned about the proposals in chapter 4 of the consultation paper, which would move from the current system of administratively-set fees to a system of large-scale competitive tendering for criminal legal aid contracts. The 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. A price cap will be imposed on the fixed and graduated fees, set at 17.5% below the current rate. Providers would be required to bid for three-year contracts (extendable for a further 2 years) which cover the full breadth of criminal legal aid work, not just specialist areas. There will be only 400 contracts for the whole of England and Wales, with between 4 and 38 contracts in a particular area. Providers would not be able to take cases outside of the area in which they have a contract. Each contract would be for an equal share of the criminal legal aid work in that area. Clients would no longer be able to choose their lawyer, in order to ensure that providers have enough work – payable at the new much lower rates – to sustain their business. These proposals would indeed require a *“major structural change in the market.”*

9. Liberty believes that these proposals, if implemented, would result in a dramatic deterioration in the quality of services. As providers engage in a damaging race to the bottom to see who can provide the most services at the lowest price: clients would lose their choice of solicitor; and the expertise of smaller firms or specialised departments would be lost as providers are encouraged to take any and all cases. The proposed reform is based on a desire to encourage economies of scale and scope among providers. Liberty believes that these goals are fundamentally misconceived. Focussing on economies of scope and scale is simplistic, and totally inappropriate for a sector which is based on highly-specialised expertise and close personal relationships between providers and clients. In focusing on narrow financial imperatives, these measures show a worrying lack of regard for the basic right to a fair trial.

10. We therefore strongly believe that these proposals should not be pursued, and that competitive tendering should certainly not be extended any further, to cover family and civil legal aid, as suggested in the consultation paper. Worryingly, the consultation paper states

that the Government has “*decided in principle to introduce competitive tendering for criminal legal aid services and are now seeking views on the proposed model*”, which suggests that the many objections to idea of competitive tendering itself will be ignored. Our concerns fall into two broad categories.

Quality of provision

11. Liberty is concerned that this model will badly undermine legal service quality as providers, facing lower fixed fees, seek to bid for increasingly large numbers of cases. Lawyers will be incentivised to expend the minimum amount of time and effort on a case, reducing the quality of representation received by clients; removing the strong personal relationship which characterises the client-solicitor relationship; and weakening the integrity of the justice system as a whole, as defendants risk going without the rigorous defence they are entitled to.

12. The model proposed in the consultation paper makes no provision for monitoring standards after the three-year contract has been awarded. The removal of client choice ensures that, while there may be competition as to which provider can submit the lowest bid to the Secretary of State, any meaningful competition based on ‘consumer’ choice is non-existent. The incentive for providers to provide a high quality service to satisfy existing clients and attract future clients would be entirely removed by the reforms. The emphasis on efficiency and scale but without the checks of either client choice or increased regulation risks creating a system of conveyor-belt justice where quantity of cases processed is valued over the quality of service provided. This is compounded by the significantly reduced number of providers who will be awarded contracts to provide much larger shares in the legal aid work in their particular area. This policy attempts to compel providers to amalgamate and find economies of scale but risks creating providers that are overstretched and under-resourced for the quantity of work they must provide, leading to a decline in quality and the removal of vital specialist provision.

Lack of client choice

13. In addition to removing the incentive to provide good quality service, depriving clients of the right to choose their lawyer fails to recognise the value of the lawyer-client relationship, the importance of which has been acknowledged by the European Court of Human Rights. Solicitors who have good on-going relationships with their clients will be able to draw on knowledge of their history and circumstances, and will better be able to advise

and reassure a client with whom a relationship of trust has been developed. Replacing this with the random allocation of clients to lawyers, risks reducing the quality of defence provided for that particular client. The need to start the relationship from scratch will also produce inefficiencies for both providers and the court system, as cases will require greater preparation and clients may be unwilling to follow their lawyer's advice on how best to proceed with their case.

14. There are many legitimate reasons why an individual may wish to choose a particular lawyer, beyond an existing relationship and confidence in the service they provide. For example, clients may wish to choose a lawyer who speaks their own first language or who comes from their own community. Under the current system, clients may choose a provider with particular expertise in the area of law concerned. Removal of client choice, combined with the requirement to bid for contracts covering provision of all legal aid services in a given area, will lead to the disappearance of small firms or departments which focus on particular areas of law. The loss of this expertise will have a detrimental effect on the quality of justice provided by our courts, and also risks creating inefficiencies as lawyers, forced to become generalists, undertake cases in areas with which they are unfamiliar.

Fees

15. Chapter 5 of the consultation paper proposes to "harmonise" the fees paid for guilty pleas, cracked trials and contested trials into a single basic fee. Where a trial is contested, daily attendance fees will be reduced, and will sharply decline from the fourth day onwards. The purported rationale for this change is that the current system, where trials attract higher fees than guilty pleas and contested trials have a daily attendance fee, does not incentivize lawyers to seek an early resolution of cases. The paper also proposes reducing the fees paid to advocates in very high cost crime cases by 30%, and limiting the use of multiple advocates.

16. Liberty is concerned that that the proposed harmonisation of fees for guilty pleas and trials will create a financial environment where 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 a full trial to be held. The new fee structure would provide the same basic remuneration for a guilty plea as for a contested trial, despite the significant difference in the amount of time and work required by an advocate in the two cases. The reduction in trial fees creates a risk that, where a trial continues for longer than four days it may 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. Cases are only classed as 'very high cost crime cases' if they are expected to exceed 60 days, therefore, an advocate in a trial which turns out to last between 1 and two months could find that they are not earning enough to cover their costs by the end of the trial. As a result of these financial pressures, there is a risk that justice will not be done and fair trial protections seriously undermined. 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.

17. 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. 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.

Prisoners

18. The consultation proposes significantly restricting the availability of legal aid to prisoners. Legal aid would only be available for prison law cases which involve determination of a criminal charge for the purposes of the Article 6, right to a fair trial, as protected by the Human Rights Act;² which affect the individual's on going detention and where liberty is at stake, thus engaging Article 5(4) protections;³ or 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 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 will be sufficient, and for the sentencing cases which do remain within scope, providers will have to provide reasons as to why the matter could not be resolved through the complaints system.

² Article 6 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

19. 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 which allow legal representation for disciplinary hearings in certain circumstances, including where there is referral to an independent adjudicator, 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 could carry very significant consequences.

20. 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 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) will be sufficient to ensure that reasonable adjustments are made. 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 or 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 licence conditions - seriously undermining the Lord Chancellor's claimed commitment to effective rehabilitation.

21. The consultation paper asserts that the matters which would fall outside 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 advice and assistance."*⁵ Liberty does not believe that this argument is sustainable. An internal, administrative complaints system is not an adequate substitute for judicial due process. A

⁵ MoJ consultation paper: 'Transforming legal aid: delivering a more credible and efficient system,' April 2013, para 3.18.

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. They also 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.

22. 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 Prisons Advisory Service, non-urgent cases are not being allocated for 10-12 weeks, with decisions not made for up to 8 months. Further, the suggestion that an internal complaints system, backed up by an Ombudsman is an answer to concerns about standards and accountability in our prisons, fails entirely to acknowledge that many prisoners have mental health problems, low levels of literacy and learning difficulties, all of which will render their ability to navigate the system alone extremely limited.

23. The consultation paper claims that these changes are required to “deal with claims which undermine the credibility of the system”. 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, presumably to ensure that legal aid money does not end up being spent on “frivolous” cases. 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, it is not at all clear that the safeguards in the current system are inadequate and that a near-total exclusion of these areas from scope is a proportionate response to any such problem that exists.

Civil Justice

24. Plans for a further assault on our civil justice system reveal a woeful undervaluation of the role of access to justice in our society; an approach which has come to characterise the policies of this Government. Over the past few months alone, we have seen plans to import secretive closed hearings into our civil justice system pass into law,⁶ the implementation of unprecedented cuts to civil legal aid and damaging reforms to civil litigation funding,⁷ the creation of additional obstacles to judicial review⁸ and threats to withdraw from the Council of Europe because decisions of the Court of Human Rights are unfavourable to the Government.⁹ It is hard to avoid the conclusion that this Government is one which not only shows a lack of respect for justice and the rule of law, but one which seeks to avoid accountability for its mistakes and misdeeds at all costs.

The residency test

25. The proposed residency test would remove legal aid funding for any individual who cannot 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 are for asylum claims and claims involving serving members of the military. The consultation document states that legal aid would continue to be available on an exceptional basis to meet the UK's obligations under EU or international law.¹⁰

26. 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*”.¹¹ The

⁶ The Justice and Security Act 2013 received Royal Assent on 25 April 2013. For Liberty's objections to the provision made by this legislation, see Liberty's Report Stage Briefing on Part 2 of the Justice and Security Bill in the House of Commons, March 2013, available at <http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-report-stage-briefing-on-the-justice-and-security-bill-in-the-hous.pdf>

⁷ See Liberty's Second Reading Briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill, June 2011, available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-legal-aid-sentencing-and-punishment.pdf>. The Legal Aid, Sentencing and Punishment of Offenders Act 2013 came into force in April 2013.

⁸ See Liberty's response to the MoJ's consultation 'Judicial review: proposals for reform,' January 2013, 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>

⁹ 'Teresa May: Tories to consider leaving European Convention on Human Rights', BBC News, 9 March 2013 <http://www.bbc.co.uk/news/uk-politics-21726612>

¹⁰ 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

¹¹ MoJ consultation paper: 'Transforming legal aid: delivering a more credible and efficient system,' April 2013, para 3.44.

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 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.

27. It is not hard to think of extremely vulnerable people who will be denied any effective access to justice under the scheme, regardless of the strength of their claim or the seriousness of the violation they have suffered. Victims of domestic servitude seeking redress for the failure of police to bring their persecutors to account, victims of domestic violence seeking to regularise their immigration status, vulnerable victims of human trafficking including children and detainees who face the kind of violent ill-treatment that has sadly been uncovered all too often in immigration detention centers. Similarly those seeking to challenge discriminatory decision-making may find themselves without redress, creating a society in which intolerance and discrimination can thrive without effective challenge.

R (VC, K and others) v Newcastle City Council [2011] EWHC 2673 (Admin)

This case concerned two failed asylum seekers, who successfully challenged the decision by their local authority to stop providing vital support to them and their children, which was found to be unlawful under statute. Under the new proposals, as is admitted in para 3.49 of the consultation paper, failed asylum seekers like these families would not be able to challenge an unlawful decision to deprive them of their means of support.

CN v United Kingdom [2012] ECHR 4239/08

The applicant CN had entered the UK from Uganda using a false passport, and was a victim of domestic servitude for four years. She came to the notice of the authorities when she managed to escape the house in which she was being held and went to a local bank where she asked them to call the police. She then collapsed and was hospitalised for a month. At the request of the applicant's solicitor the Metropolitan Police investigated her claims, but the investigation was discontinued. CN was granted legal aid which allowed her successfully to challenge the UK authorities' failure properly to investigate her claims. As she was never lawfully resident in the UK and her application for asylum had been rejected, under the new proposals she would be unable to access legal aid to obtain such redress.

28. 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.

Abdel Hakim Belhadj

Mr. Belhadj, a leading figure in the resistance against the Gaddafi regime in Libya, is taking legal action against the UK government and the security services for their part in the illegal rendition and barbaric treatment of himself and his pregnant wife. Mr. Belhadj was not resident in the UK, and had been living in China when he was detained and forcibly taken by aircraft to Bangkok, Diego Garcia and Libya. Under the proposals, he and others in similar situations would have no access to legal aid to challenge the UK government's involvement in his rendition. See http://www.reprive.org.uk/press/2011_12_19_belhadj_action/

R (on the application of Baha Mousa) v Secretary of State for Defence and another [2011]
EWCA Civ 1334

The Secretary of State for Defence established a team to investigate allegations of ill-treatment by members of the British forces against detainees in Iraq. The team was led and staffed by members of the UK Royal Military Police. The Secretary of State decided against ordering an immediate public inquiry. Mr. Mousa, an Iraqi national who had been detained by British servicemen in Iraq, alleged that he had been subjected to ill-treatment, and applied for judicial review on the grounds that the decision not to order an immediate public inquiry was unlawful under the Human Rights Act in light of the investigative obligation placed on the UK by the Article 3 right to protection from torture. The application was initially dismissed, however on appeal the Court of Appeal found in Mr. Mousa's favour, holding that the practical independence of the team had been substantially compromised. Members of the team had been clearly involved in matters concerning the detention of suspected persons in Iraq, and the head of the RMP would likely have been questioned during an inquiry. Therefore, there was a reasonable risk of perception that the team was not sufficiently independent.

Mr. Mousa had never resided in the UK, and under the new proposals neither he nor any other foreign resident with a claim against the acts of the UK armed forces abroad would be granted legal aid to bring their claim.

29. 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.

30. 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.¹² 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,¹³ 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."*¹⁴

31. 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."*¹⁵ 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.¹⁶ Liberty believes that requiring a class of foreign nationals to meet strict additional criteria of exceptionality before they can

¹² 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, para 2. Available on Liberty's website.

¹³ *Ibid.*, para 4.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para 3.

¹⁶ *Ibid.*

gain effective access to justice will create the kind of discrimination that our Courts have rightly found unlawful time and again.

Judicial Review funding

32. The consultation paper proposes to change the way in which judicial review is funded, so that lawyers will only receive payment for work they have done on a claim, if a judge finds a case “arguable” and grants permission to proceed.¹⁷ Judicial review occupies a role of unique constitutional importance in our society as the means by which individuals can hold public authorities, including the Government, to account. This Government has, disappointingly, demonstrated a degree of contempt for the legal process used to challenge its decisions. At the end of last year, the Ministry of Justice announced troubling plans for reform of our judicial review system, including scrapping rights to renew a written claim orally and removing vital flexibility in the calculation of time-limits. 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. 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. Unfortunately, the latest assault on our judicial review system set out in the MOJ’s consultation reveals the same lack of reasoned analysis as the Government’s earlier proposals; specifically the proposed reform is based on a serious misunderstanding or misrepresentation of the way judicial review works in practice.

33. The justification offered for these latest changes 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.”*¹⁸ No attempt is made to present an evidential basis for this claim in the consultation document, however in an 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:

¹⁷ MoJ consultation paper: ‘Transforming legal aid: delivering a more credible and efficient system,’ April 2013, para 3.69.

¹⁸ *Ibid.*, para 3.61.

“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.”¹⁹

34. 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. The consultation paper addresses this issue in a cursory fashion, acknowledging that, were a claimant receives a favourable settlement *“it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court.”²⁰* In reality it is not safe to assume that a claimant will recover costs where a favourable settlement is reached, furthermore this is a disingenuous claim for the Government to make, given that defendants who settle judicial review claims – Government departments included – frequently argue that there should be no order for costs in the event of settlement. In Liberty’s experience successful claims do not necessarily coincide with costs orders, creating the very real possibility that a claimant and her lawyer, having successfully vindicated a claim, will be left to bare a substantial costs burden.

35. 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 to that created by the Lord Chancellor’s assertion that 98.5% of judicial review claims are a waste of time and Government money.²¹ 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 behavior of decision makers. It is precisely this type of case which is likely to prove a prohibitive risk to claimant representatives in the future.

¹⁹ Transcript available at <http://www.publiclawproject.org.uk/documents/TranscriptChrisGraylingToday.pdf>

²⁰ MoJ consultation paper: ‘Transforming legal aid: delivering a more credible and efficient system,’ April 2013, para 3.75.

²¹ 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

36. On a more practical level, 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.

37. 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.

38. Liberty believes the prospect of unrecoverable costs – even in cases so strong as to attract an early settlement – will place an unsustainable burden on claimant lawyers, making it simply too risky to pursue legal aid claims. This problem is only intensified by the fact that, where costs are in dispute, claimants 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. 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 of Government or 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.

39. Judicial review acts as a great equaliser in our society, helping to ensure that the Government acts lawfully and respects the rights of individuals. The shift proposed by these latest 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.

Borderline cases

40. 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 consultation paper acknowledges, borderline cases are not poor, but rather unavoidably unclear “*by reason of disputed law, fact or expert evidence*”.²² 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 social significance. We will suffer as a society if these cases are stalled by the unavailability funds or brought by litigants in person ill-equipped to present the issues.

Conclusion

41. Liberty is deeply concerned about proposals which, without insight or evidence threaten to undermine fair trial protections, remove access to justice for many vulnerable people and significantly reduce government accountability. The fact that these proposals are to be introduced through secondary legislation, without even the protection of proper Parliamentary scrutiny, reveals an apparent deep and troubling contempt for access to justice and the crucial role it plays in a democratic society.

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²² MoJ consultation paper: ‘Transforming legal aid: delivering a more credible and efficient system,’ April 2013, para 3.84.