

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's response to the Ministry of  
Justice Proposals for the Reform of  
Legal Aid**

**February 2011**

## **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>

## **Contact**

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: [rachelr@liberty-human-rights.org.uk](mailto:rachelr@liberty-human-rights.org.uk)

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: [sophief@liberty-human-rights.org.uk](mailto:sophief@liberty-human-rights.org.uk)

## Introduction

1. Liberty welcomes the opportunity to respond to the latest addition to a raft of proposals for the reform of the legal aid system. We recognise the challenges that will face the Ministry of Justice in these coming months and years, but would caution the Government to think again before implementing reforms which will decimate the legal aid system, precluding access to justice for many and hindering attempts to foster a meaningful human rights culture in the UK. The main purpose of this response is to address the wider constitutional and human rights implications of the proposed reforms. Liberty is particularly concerned that the following considerations inform any future changes to legal aid provision:

- Principles of accessibility, transparency and due process are fundamental to an effective justice system and must not be compromised.
- The provision of legal aid is in some cases demanded by the UK's obligations to provide a fair trial under the European Convention on Human Rights. Beyond this legal aid is fundamental to enforcing individual liberties across the board and ensuring a thriving culture of rights.
- The principle of equality of arms will never be achieved if publicly funded legal representation is of a lesser quality than privately funded representation, or is so scarce as to be in practical terms unavailable.
- Legal aid is an important public service and should be recognised as such. The role of civil legal aid in reducing social exclusion and protecting the vulnerable cannot be overstated.

2. In excluding large areas of the law from the scope of legal aid, Liberty believes that the proposed reforms will create alarming gaps in protection, denying justice to many but hitting the most vulnerable the hardest. Tougher eligibility requirements will mean that only the very poorest will be able to access legal aid in the limited areas where it remains; those dwindling few are likely to face a diminishing quality of services as the clamp down on remuneration of already poorly paid professionals renders legal aid work the domain of the most junior and the least qualified. Individuals with extremely modest means will face the prospect of significant legal bills which will deter many from seeking legal redress. This will not simply lead to injustice for the individuals involved,

but will contribute towards a culture of impunity amongst the rich and the powerful. The ever-present prospect of legal intervention is the surest way of securing a society in which respect for human rights and values of equality and due process guide the behaviour of decision makers.

### **Proposals for Reform**

3. The proposals can be split into five broad areas, covering the scope of legal aid provision, eligibility for legal aid, remuneration of professions, consideration of alternative sources of funding, and changes to the administration and governance of the legal aid scheme. Restrictions on scope will see many areas of law completely excluded including employment, the vast majority of immigration cases, welfare benefits issues and most family law work; additional restrictions will be implemented in other areas such as claims against public authorities.<sup>1</sup> There will be a new and more restrictive test for assessing whether cases falling outside of scope qualify for exceptional funding and there are wide-ranging plans to channel requests for legal assistance through a telephone advice line.<sup>2</sup>

4. Tightening up of the restrictions on eligibility for legal aid will mean all those with £1000 in savings or disposable monthly income of over £316 per month will have to pay towards their legal assistance and anyone, even those receiving benefits, will be ineligible for legal aid if they have capital in excess of £8,000 or have a disposable monthly income of over £733 per month. Percentage income based contributions will be increased across all income categories and capital disregards will be largely abolished, meaning anyone with equity in a family home is likely to be ineligible for legal aid.<sup>3</sup>

5. The ultimate aim is to introduce competitive tendering in all areas of the legal aid system, but in the interim wide-ranging cuts are proposed. Whilst criminal fees will not be cut by a set amount across the board, the proposals recommend the harmonisation

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<sup>1</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 57-77: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>2</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 77-81 and 82-84 respectively: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>3</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 85-93: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

of fees in cases where a defendant pleads guilty, whether in the Crown or the Magistrates' Court and irrespective of the stage at which the plea is entered. The proposals would also see the removal of the separate fees paid to lawyers for committal hearings for all cases committed to the Crown Court for trial.<sup>4</sup> Remuneration for civil legal aid practitioners will be reduced by 10% across the board, enhancements paid to civil practitioners will be cut to 50% for cases heard in the Family Proceedings Court. There are to be tighter restrictions on the use of multiple counsel and QCs in criminal matters and a new, higher hurdle for the use of QCs in family matters. Benchmark rates for barristers in civil and family matters will be codified and subject to a 10% reduction and expert rates across the board will be codified and cut.<sup>5</sup>

6. A potential role for alternative sources of funding, such as recouping funds from the damages of successful claimants and greater use of conditional fee agreements and legal protection assurance is mooted.<sup>6</sup> There will be an explicit requirement that legal aid be refused in any case where alternative sources of funding are available. Finally, governance of the system will change with functions of the Legal Services Commission passing to an executive agency of the Ministry of Justice.<sup>7</sup>

### **Diluting criminal justice**

7. Liberty is pleased to find that there have been no attempts to remove areas of criminal law from scope and would have strongly resisted any such move. This notwithstanding, we are profoundly concerned about proposed measures which risk fundamentally diluting principles of transparent justice and due process.

8. The Government believes that *'[t]oo many cases that could adequately be dealt with in the Magistrates' Court are going to the Crown Court.'*<sup>8</sup> The Green Paper proposes to amend aspects of the scheme for remuneration of criminal practitioners which may

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<sup>4</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 101-106: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>5</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 106-128: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>6</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 129-137: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>7</sup> Proposals for the Reform of Legal Aid in England and Wales, pages 138-141: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>.

<sup>8</sup> 6.10

*'potentially discourage'* early guilty pleas and may lead to pleas in either way offences being made in the Crown rather than the Magistrates' Court. As such the Green Paper proposes to implement a system in which practitioners receive the same fee whether a defendant pleads guilty before the Magistrates' or the Crown Court. Similarly in all cases heard in the Crown Court, the Government proposes to harmonise the fees paid to representatives when a defendant pleads guilty irrespective of the stage at which the plea is entered and to remove the separate fee paid to lawyers for committal hearings. These proposals are apparently fuelled by the idea that unscrupulous lawyers are discouraging their clients from entering early guilty pleas or from pleading guilty in the Magistrates' Court to further their own financial ends. There is no evidence that such an unethical form of professional misconduct is taking place and Liberty rejects this premise. What is particularly alarming, however, is that the Government seeks to reverse this perceived trend by aligning the financial interests of lawyers with early guilty pleas in the Magistrates' Court. Liberty strongly believes that placing financial pressure on criminal lawyers to influence the plea of their clients is an unacceptable affront to justice.

9. Liberty is further deeply troubled about the potential of these measures to erode the constitutional bulwark of the right to trial by jury. Whilst we welcome recent legislative proposals to remove the power for prosecutors to apply for fraud cases to be conducted without a jury, the jury system in England and Wales has nonetheless faced attack in recent years.<sup>9</sup> Legislation passed by the last Government allows for trials to take place without juries in a wider range of circumstances,<sup>10</sup> and last year saw the first serious criminal trial in 400 years to take place in the absence of a jury.<sup>11</sup> In a recent consultation paper on the criminal justice system, the Government openly expressed a desire to see more cases dealt with summarily where Magistrates deem them appropriate for such disposal.<sup>12</sup> Restrictions have also been advocated by the Government appointed Victims' Commissioner who has called for the right to trial by jury to be rolled back for many 'lesser' offences. Liberty is extremely concerned at this latest attempt to restrict

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<sup>9</sup> Protection of Freedom Bill, s. 99:

<http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html>.

<sup>10</sup> The decision to proceed without a jury was upheld by the Lord Chief Justice in *R v Twomey and others (No 2)* [2011] EWCA Crim 8; [2011] WLR (D) 10.

<sup>11</sup> Criminal Justice Act 2003.

<sup>12</sup> *Breaking the cycle: effective punishment, rehabilitation and sentencing of offenders*: <http://www.justice.gov.uk/consultations/breaking-cycle-071210.htm>.

the right to trial by jury by the back door. The jury system is of fundamental constitutional importance, encouraging openness and transparency and boosting confidence and legitimacy in the criminal justice process. Where a case is determined by twelve independent members of the public, justice is both done and seen to be done. Without trial by jury, the professional classes appear to sit in permanent judgment over ordinary people. Liberty believes that some principles of justice are too important to put a price on: the right to trial by jury is one.

### **Weakening rights protections**

10. Liberty believes that we cannot foster a meaningful human rights culture in the UK without access to justice. It is now over a decade since the Human Rights Act came into force. Many public bodies have put great efforts into changing their policies and practices to ensure that they are compliant with the European Convention on Human Rights ('the Convention'). But not all have made the effort and even where they have there may be legitimate dispute about the scope of Convention rights and how to achieve the balance between the individual and collective interest that is at the heart of the Convention. Access to the courts to uphold individual rights does more than simply vindicate the individual in the particular circumstances of his or her case. Successful challenges set precedents, raise awareness and help to instil human rights considerations into public sector decision making.

#### *Exclusions from scope*

11. Liberty was relieved to find that the Government plans to retain funding for public law cases which provide a vital means of challenging the decisions of public authorities, including those which impact upon individual freedoms. However, important human rights are at stake in many of the areas of law earmarked for removal from scope. In family and immigration matters, for example, the right to respect for family life is frequently at issue.<sup>13</sup> Without legal aid, many individuals, and particularly those ill-equipped to navigate the court system, may remain separated from family members abroad or lose access to their children. Liberty is extremely concerned to note that, even where cases reach the highest courts in the land, if they concern an 'excluded' area of

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<sup>13</sup> Article 8 of the European Convention on Human Rights

law they will remain beyond the scope of legal aid, leaving all but the wealthiest litigants to present extremely complex legal arguments before the Court of Appeal and the Supreme Court.

12. Whilst public law actions in excluded areas will fall within the scope of legal aid, such a course of action will not always be available to claimants challenging administrative decisions: there will, for example, be cases in which the prescribed form of redress is an appeal before a court or tribunal for which no publically funded legal assistance will be available. In circumstances where judicial review is the appropriate legal avenue for challenging the decision of a public body, such action will ordinarily only become possible following initial legal interventions which will now fall outside the scope of legal aid.<sup>14</sup> Cases apt for judicial review rarely land on the desks of solicitors primed and ready for work to begin on an application to the High Court. Judicial review is a legal avenue of last resort, and those cases appropriate for such a course will generally be drawn from a wider pool of work dealt with by solicitors. As such the removal of areas such as immigration, family, employment, welfare and debt law will effectively reduce access to public law remedies for those unable to pay.

#### *Reforms to the exceptional funding regime*

13. In excluding so many areas of law from the scope of legal aid, the proposed reforms throw into sharp focus the need for a robust mechanism for bringing appropriate excluded cases back into scope on a case by case basis. The proposals set out a new regime for the funding of exceptional cases, which is confined to cases in which *‘the Government is satisfied that the provision of some level of legal aid is necessary for the UK to meet its domestic and international legal obligations, including those under the ECHR (and in particular under Articles 2 and 6)’*.<sup>15</sup> Outside of this context individuals will be entirely unable to obtain exceptional funding. This will severely disadvantage many of those currently able to access this funding, for example litigants who find themselves facing the obvious hardship of presenting a particularly complex case without help.

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<sup>14</sup> Such as the drafting of further submissions mitigating against removal in an immigration case or exhausting internal complaints procedures.

<sup>15</sup> *Proposals for the Reform of Legal Aid*; paragraph 4.250.

14. Liberty further has serious reservations about the proposed mechanism by which cases engaging the UK's obligations under the European Convention on Human Rights are to be brought within the exceptional funding regime. The Green Paper frames this new procedure in terms of the right to life and the right to a fair trial.<sup>16</sup> For these substantive rights to be vindicated an element of due process is required. In the case of the right to life, this may entail a thorough investigation of the circumstances surrounding an individual's death; in the case of entitlement to a fair trial, this involves the allocation of appropriate time and facilities to prepare a defence and the right for individuals of limited personal means to be given free legal assistance where the interests of justice so demand.<sup>17</sup> The formal nature of these requirements does not render them any less a part of the substantive human rights regime, and Liberty believes that disputes about the requirements of the Convention in a particular case are the exclusive domain of the judiciary.

15. Notwithstanding the Green Paper's emphasis on aspects of the Convention with specific requirements for due process, effective access to the courts is an integral part of the human rights regime as a whole. Without publicly funded legal representation many individuals will be effectively precluded from seeking redress and thus denied access to an effective remedy before a national authority in violation of Article 13 of the Convention.<sup>18</sup> There is no detail in the proposals about the factors to be considered in determining eligibility for exceptional funding. We assume, however, that in deciding what the Convention demands, the executive will be called upon to consider whether an individual is able to fund representation themselves, or whether a case is of a sufficiently straightforward nature to be appropriate for self-representation. Liberty remains extremely concerned that such decisions are to be made by the executive in circumstances where an arm of government may be the defendant to a claim and where an agenda of cost cutting is an explicit factor motivating decision making on access to legal aid. Most alarming of all, it appears there may be cases in which, whilst a person cannot be expected to represent themselves, or to fund representation, the Government is nonetheless disinclined to fund on an exceptional basis on the grounds that it does not accept that a Convention right is engaged, or is not '*satisfied*' that a right has been

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<sup>16</sup> European Convention on Human Rights; Articles 2 and 6.

<sup>17</sup> European Convention on Human Rights; Article 6.

<sup>18</sup> European Convention on Human Rights; Article 13.

violated. Such a scenario would truly make the executive judge in its own cause and render the protections provided in the Convention of no practical utility.

16. These proposals are particularly concerning in the light of wider structural reforms which will abolish the LSC and hand its functions to an executive agency within the Ministry of Justice. Independence and the appearance of independence in decisions on eligibility for legal aid are critical components of accessible justice. To give the Government the right of veto over claims against itself creates a clear conflict of interest and fundamentally offends against the principle of the separation of powers.

#### *Tougher eligibility requirements*

17. Liberty recognises the importance of maintaining a system in which not just the poorest of the poor, but also those on low or average incomes are not effectively discouraged from vindicating their rights by the considerable costs involved. For the areas of law which remain within scope, including public law actions involving fundamental rights, a lowering of capital and income eligibility thresholds will mean that those with conspicuously modest means will now be required to contribute to, or cover the whole cost of, legal advice and representation. Further, financial eligibility levels have not, for several years, kept pace with inflation and these new proposals will place even more people with low disposable incomes in the unenviable position of choosing between financial hardship and a lack of advice and assistance in upholding their fundamental rights. Similarly the abolition of capital disregards will mean that those who have paid off some of their mortgages, face the prospect of raising loans against their home to fund legal assistance. Liberty believes this will have a chilling effect significantly undermining the effective protection of human rights in this country.

#### **Inequality of arms**

18. Legal aid is an essential safeguard against inequality of arms, both in cases brought between private parties and in situations where a claimant faces an arm of the state with all the resources it can bring to the defence of its corner. Although, as a category, claims against public authorities are to remain within scope Liberty is concerned about proposals to narrow the circumstance in which legal aid funding can be

secured for such actions. At present, in order to qualify for public funding, such claims must either involve (i) serious wrong-doing, (ii) abuse of a position of power, (iii) a significant breach of human rights, or (iv) they must be of significant wider public interest.<sup>19</sup> The Green Paper proposes that in future only cases involving (i) abuse of a position of power, (ii) significant breach of human rights or (iii) negligent acts or omissions falling very far below the required standard of care will attract legal aid funding. Liberty is concerned about the position of individuals who wish to pursue non-qualifying claims against public authorities. Should these proposals be implemented many will have no choice but to face a public authority and their legal team as a litigant in person. In addition to the tangible inequalities the proposals are likely to create in individual cases, there is a real risk that these restrictions will create a sense of impunity amongst decision makers, particularly when dealing with categories of individuals unlikely to have the financial resources to fund private representation.

#### *Litigants in person*

19. The Green Paper attempts to counter arguments about the impact of proposals on the principle of equality of arms by pointing to a range of circumstances in which individuals can effectively represent themselves before courts and tribunals in newly excluded areas of law. The Government maintains that there is 'little substantive evidence on the impact that a litigant in person has on the conduct and outcome of proceedings'.<sup>20</sup> Liberty disputes the assertion that there is no evidential basis for concluding that a lack of representation has an adverse impact on outcomes in individual cases. In research published by the former Department of Constitutional Affairs, referenced in the Green Paper, the following unambiguous statement is made:

*Unrepresented litigants participated at a lower intensity but made more mistakes. Problems faced by unrepresented litigants demonstrated struggles with substantive law and procedure. There was other evidence of prejudice to their interests.*<sup>21</sup>

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<sup>19</sup> *Proposals for the Reform of Legal Aid*; paragraph 4.44.

<sup>20</sup> In this respect reliance is placed on a paper published by the Department for Constitutional Affairs in 2005, entitled *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*: <http://www.law.cf.ac.uk/research/pubs/repository/1221.pdf>.

<sup>21</sup> *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*: page (ii).

20. This research is not, as the Green Paper implies, ambivalent or silent as to the impact of a lack of representation on individual litigants or courts, but rather indicates that litigants in person struggle to present their cases effectively without legal assistance, potentially compromising their interests and imposing additional burdens on the court system.<sup>22</sup> Liberty believes it is at best misguided and at worst disingenuous to suggest that litigants in person will not be disadvantaged by a lack of representation. What is certainly true is that a lack of access to legal help and representation will reduce the overall level of legal interventions. There will be many for whom an adverse decision will seem unfair, but very many fewer who will recognise that they may seek legal redress to uphold their entitlements; fewer still will be adequately aware of the processes for challenge and have the confidence to put forward arguments against formidable opponents in formal court proceedings. In this respect the Government is right to suggest that a reliance on self-representation will significantly reduce the expenditure of the Ministry of Justice, but this will be at the expense of access to justice for those ill-equipped to navigate the justice system alone.

#### *Expanding telephone advice services*

21. The Green Paper also sets out plans to fundamentally change the way people access legal services by channelling all enquiries through a telephone advice line. Little detail is given about how this system would work in practice. Liberty has a number of concerns about the proposals, including the potential impact on choice of representation. Clients should not be prevented from selecting representation on the basis of individual or firm-wide reputation. Further, no information is given about the level of training or qualifications to be expected of those channeling requests for legal advice and assistance. Individuals with an incomplete understanding of the legal issues involved may well misdirect inquiries, which could compromise the interests of individuals who must bring claims within set limitation periods. Legal issues are often complex and an individual's concerns may span areas of law and require a combination of specialisms.

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<sup>22</sup> See, for example, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, page 258: “The evidence of problems faced by unrepresented litigants, their lack of active defence, their generally higher error rates and lower levels of participation all suggest that lack of representation prejudices the interests of unrepresented litigants (and it can put extra burdens on their opponents too).”

There is real risk that telephone operatives will artificially demarcate areas of law and the specific needs of the individual will not be met. Liberty believes that face to face contact with clients is a critical component of good quality legal advice, facilitating a comprehensive understanding of issues and helping to build a relationship of trust and confidence. Plans to role out a 'one stop' telephone advice service are likely to compromise the interests of clients accessing the system.

### *Remuneration of legal aid professionals*

22. Liberty is concerned that significant cuts in the fees paid to practitioners will create a climate in which legal aid work becomes the domain of inexperienced or poorly qualified legal professionals, irrespective of the complexity of the issues involved or the importance of the interests at stake. A consistently good standard of representation, whether publically or privately funded, cannot be assured if junior lawyers are expected to do complex work beyond their experience and without adequate levels of supervision. Liberty believes that the continuing drive to achieve more for less is placing unsustainable pressure on legal aid professionals which will have the inevitable consequence of driving down the quality of legal representation. We further risk a rise in 'conveyer-belt' litigation, with solicitors only willing to take on a core of similar cases requiring less case specific research or initiative; as a result individuals whose cases are complex or unusual will find it increasingly difficult to obtain representation. The proposals also signal significant reductions in the fees paid to expert witnesses; cases often turn on the quality of expert evidence and reduced fees will mean that the most suitably qualified experts will be less likely to offer services.

23. In addition to compromising the standard of advice provided and the caliber of professionals working in the legal aid system, the cuts are likely to significantly restrict the local availability of services effectively creating 'advice deserts'. Clients will have to travel further and wait longer to access the advice and representation they need and the choice of providers available will be curtailed. In rural areas there may be insufficient work to support more than one large firm which could lead to serious conflict issues. If a larger firm goes out of business there could be serious disruption to the level of supply in a given area, which could not easily be replaced. Liberty believes that clients' needs can only be effectively met and potential interruptions in supply limited if there exists a

spread of large and small firms, specialist and generalist, in varied areas of the law and all areas of the country.

24. The expressed long term objective of the Ministry of Justice is to roll out competitive tendering for all civil and criminal legal aid contracts, effectively creating a free market, price driven model for contract procurement. This ignores the fact that suppliers already operate within a quality market which is driven by the needs of clients, rather than by cost. The legal profession is highly dependent on recommendations by word of mouth. Clients follow reputation. The reforms create a conflict between the needs of clients (purely quality-driven since the client does not pay) and the aims of government (largely cost-driven since the government is not the recipient of the legal services paid for).

25. In addition, the proposals ignore the fact that, where Government is the sole purchaser of services, whether it fixes the price or not, no true market can exist. Legal aid rates have been cut or suppressed for the last ten years and legal aid work is presently paid at a fraction of market rates. This has meant that the profit of legal aid firms is incredibly low, and has led to crises in recruitment and retention at these firms and an aging supplier base. Against that background, the idea that significant increases in efficiency, which do not compromise the quality of services, can be achieved is optimistic at the least. It is likely that a surplus can only be generated through the use of inexperienced and unqualified staff and other savings which will directly impact on the quality of service provided. Firms already at financial breaking point may not have sufficient capital or incentive to invest and restructure in the distant and dwindling hope of generating a profit, which will lead to ever decreasing choice for individuals.

### **Failing the vulnerable and the marginalised**

26. The Government itself warns of the wider social cost of the proposed cuts including reduced social cohesion and increased criminality.<sup>23</sup> The impact assessment accompanying the Green Paper notes that legal aid recipients *'are amongst the most disadvantaged in society, reflecting both the nature of the problems they face as well as*

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<sup>23</sup> *Legal Aid Reform: Scope Changes*: paragraph 35, pages 9-10:  
<http://www.justice.gov.uk/consultations/docs/eia-scope.pdf>.

*the eligibility rules for legal aid*.<sup>24</sup> Accompanying statistics bring home the true gravity of the situation for those at the margins of our society. 44% of the cases granted funding for legal representation and 68% for legal help in 2008-2009 would not be funded under the new regime: between 80 and 85% of the people who will now miss out will be in the poorest 20% of the population.<sup>25</sup> Liberty recognises that difficult decisions need to be made in times of financial hardship, but is alarmed to see that the poorest and the most vulnerable will be expected to bear the brunt of this assault on access to justice.

### *Increasing social exclusion*

27. Recent proposals reveal that the Government is planning to make significant changes to the welfare system; housing benefit entitlement is set to fall substantially, disability living allowance is to be replaced by a new system of personal independence payments involving the reassessment of claims and a new tougher system of sanctions and conditionality is to be imposed, with jobseekers potentially losing the right to access benefits for up to three years.<sup>26</sup> Whilst any consideration of the substance of these proposals is beyond the scope of this paper, what is clear is that there is to be a massive upheaval which will create uncertainty and confusion amongst claimants and those responsible for administering the system. Yet just at the time when people will need assistance to navigate new rules and procedures, all access to legal advice in welfare matters is to be excluded from the scope of legal aid. According to statistics produced by the Citizen's Advice Bureau, proposals to exclude most social welfare law issues from scope will result in over half a million fewer people getting help every year.<sup>27</sup>

28. The Government's proposals will mean that the most vulnerable in our society will become increasingly ostracised, unable to access the advice and support they need to resolve their welfare issues. Whilst the Ministry of Justice is committed to encouraging alternatives to litigation and is apparently of the view that many claims are unnecessary or susceptible to alternative resolution, such assertions are not born out by the evidence. According to the Citizen's Advice Bureau, 80% of social welfare legal aid cases dealt

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<sup>24</sup> *Legal Aid Reform: Scope Changes*: paragraph 40 page 11: <http://www.justice.gov.uk/consultations/docs/eia-scope.pdf>.

<sup>25</sup> *Ibid.* paragraph 43 page 11

<sup>26</sup> *Universal Credit White Paper: Welfare That Works*: <http://www.dwp.gov.uk/docs/universal-credit-full-document.pdf>.

<sup>27</sup> [http://www.citizensadvice.org.uk/press\\_20110111](http://www.citizensadvice.org.uk/press_20110111).

with by its staff record positive outcomes for clients: this suggests an issue with the standard of decision making and certainly does not indicate that frivolous or unnecessary legal interventions are taking place.<sup>28</sup> A significant proportion of those embroiled in disputes over welfare entitlements may have poor levels of education and low standards of literacy: without outside assistance, their prospects of resolving valid complaints would be negligible. Furthermore, public funding does not simply fuel litigation. Cuts in this area of law will have a far greater impact on access to legal help than access to representation in court: legal help at an early stage has a significant part to play in resolving issues before they reach the court steps.

29. In removing legal aid funding for advice about debt matters where the home is not immediately at risk, the proposals again hit out at the most vulnerable. This proposal must be seen in the context of the wider cuts programme. The abolition of the Financial Inclusion Fund combined with significantly reduced local authority budgets means that agencies providing free advice about personal financial management will be forced to scale down their operations or close, with the Citizen's Advice Bureau estimating that cuts will lead to their capacity for debt casework being reduced by 75%.<sup>29</sup> This is in a context where, according to statistics published by Credit Action at the end of last year, the Citizen's Advice Bureau dealt with 9,389 new debt problems every working day.<sup>30</sup> The removal of legal help in relation to employment matters entirely from scope is likely to exacerbate these problems, leaving many who are unfairly dismissed unable to challenge decisions.

30. Liberty is relieved that the Government recognizes the life-shattering implications of homelessness and has therefore retained public funding for cases where the home is at immediate risk. What is disappointing, however, is that the link between debt, welfare and employment matters and eventual homelessness is not acknowledged in the proposals. That the exclusion of legal aid in these areas is taking place at a time when many face unemployment and financial hardship, means that the effects will be widely felt.

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<sup>28</sup> Citizens' Advice Bureau, Evidence, Winter 2010, page 8:

[www.citizensadvice.org.uk/evidence\\_winter2010\\_2\\_.pdf](http://www.citizensadvice.org.uk/evidence_winter2010_2_.pdf).

<sup>29</sup> [http://www.citizensadvice.org.uk/index/pressoffice/press\\_index/press\\_20101111b](http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20101111b).

<sup>30</sup> Debt Facts and Figures - Compiled January 2011, page 2:

<http://www.creditaction.org.uk/assets/PDF/statistics/2011/january-2011.pdf>.

## *Targeting the vulnerable*

31. The Green Paper acknowledges the needs of a number of vulnerable groups and for that reason cases involving domestic violence, community care and mental health law remain within scope. Whilst these concessions are welcome, the Government has failed to apply the same sound reasoning in other contexts where comparable issues of extreme vulnerability arise. To justify its decision to remove the majority of immigration cases from scope, the Government characterises them as *matters of choice* which should not attract public funds in straightened economic times. Whilst the Government is entirely right to keep asylum within scope, the proposed cuts will have a direct and profound impact on those seeking and those granted international protection in the UK, including many who have been traumatized by exposure to persecutory ill-treatment in their country of origin. The desire of a refugee and his family to be reunited in the UK cannot be written off as a mere matter of personal preference. A refugee, by definition, does not *choose* to leave his or her country; no member of the family unit has *chosen* separation and a society which respects human rights cannot expect family life to be carried out across continents. This notwithstanding, the Green Paper explicitly excludes refugee family reunion matters from the scope of legal aid. Similarly an asylum seeker, unable to work on arrival in the UK, often has no choice but to rely on the state for the necessities of life, yet he cannot access legal assistance in obtaining the small sums of asylum support designed to meet his most basic needs. Those trafficked into the UK to work in the sex industry or as domestic slaves are forced into degrading and exploitative situations, yet they will no longer be able entitled to legal aid in order to resolve their immigration status.

32. The Government contends that there are organisations which can assist these vulnerable groups, but without the availability of legal aid professionals to carry some of the load, not-for-profit organisations with limited resources will be overwhelmed by desperate people.<sup>31</sup> It is similarly fanciful to suggest that refugees, asylum seekers and victims of trafficking will be able to complete applications alone and represent themselves at tribunal hearings. Most such individuals arrive in the UK friendless and without a knowledge of the language, many have little formal education and are entirely

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<sup>31</sup> See Refugee Council Briefing: *The Impact of the spending cuts on refugee community organisations*, October 2010.

unequipped to navigate a complex, legalistic and bureaucratic system. Helpless people such as these will be left unable to enforce their rights and protect their vital interests.

33. In addition to vulnerable categories of immigrants, victims of crime will be directly hit by the Ministry of Justice's proposals. Those who may have been left severely physically injured or psychologically scarred by criminal attacks, will no longer have the benefit of legal help when making applications to the Criminal Injuries Compensation Authority. One of the rationales for this exclusion is that claims are of a primarily financial nature. The paper fails to acknowledge the wider significance of claims for compensation for victims of crime. Compensation can help people to regain control of their lives and dispel feelings of victimisation; it can make a real practical difference to the recovery and quality of life of individuals who may be rendered temporarily or permanently unable to work. Whilst the Government maintains that these individuals will be able to act without assistance, Liberty understands that the process can be lengthy and complex raising technical issues such as time bars on recovery and the quantification of future losses. No provision whatever is made for those with physical and mental health problems which will effectively prevent them from applying without assistance.

34. In more general terms the Green Paper acknowledges that those with disabilities will be disproportionately affected by the removal of welfare benefits from scope, representing, as they do, 63% of legally aided clients in the welfare system.<sup>32</sup> Liberty understands that, in the current fiscal climate, difficult choices have to be made, but the reality of our economic situation is no answer to the injustice of measures which target those who have an overwhelming need for legal support and are least able to bear the impact of the cuts.

### **Cutting the cost of justice**

35. Liberty believes that the financial objectives pursued by the Government will not be well served by the proposed reforms. Alternative mechanisms put forward for funding advice and representation are problematic, variously failing to provide a realistic alternative to legal aid, placing too much risk on claimants and offending against the

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<sup>32</sup> *Legal Aid Reform: Scope Changes*, paragraph 7.32:  
<http://www.justice.gov.uk/consultations/docs/eia-scope.pdf>.

principle of 100% compensation. Liberty believes that there are avenues open to the Government which will avoid these pitfalls whilst significantly reducing public expenditure.

### *False economies*

36. The Green Paper makes a series of assertions about the favourable financial implications of the proposals for legal aid reform. Liberty believes that many of the assumptions underlying these conclusions are flawed. As a starting point, the Ministry of Justice claims that the legal aid system in this country is far more expensive than those across the EU. Liberty believes that this is an oversimplification and does not account for the increased litigation costs involved in an adversarial system of justice. Whilst litigation costs in England and Wales are significantly higher than in other European countries, our spending on sustaining and managing the Court system is comparably lower than that in other EU jurisdictions. These assertions are born out by research commissioned by the Ministry of Justice and render the claim that our system of legal aid is significantly more expensive than those operating in comparable democracies somewhat misleading.<sup>33</sup>

37. Many of the cost-cutting claims made by the Ministry of Justice are inadequately reasoned and pay little regard to the wider savings that an effective system of early legal help can provide. Findings by the Citizens Advice Bureau indicate that for every £1 spent on legal aid, £10 will be saved in costs to the welfare system.<sup>34</sup> Without early interventions manageable problems can become expensive and complex to resolve. In the context of social welfare law or debt advice, for example, what begins as a small issue which could have been resolved with the early assistance of a lawyer can become extremely costly further down the line. The court time, resources and legal fees involved in a possession hearing far outstrip the small sum necessary to secure legal help from a debt caseworker. Further expenditure may include the significant cost of re-housing a homeless family in bed and breakfast accommodation. A risk of possible resort to crime

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<sup>33</sup> *International Comparison of Publically Funded Legal Services and Justice Systems*, October 2009, summary of findings, page (ii): <http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf>.

<sup>34</sup> [http://www.citizensadvice.org.uk/index/pressoffice/press\\_index/press\\_20101112](http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20101112).

for those finding themselves in financial crisis will contribute to a great social ill and will frequently mean that the state must incur all the costs involved in bringing a defendant to trial, not to mention the wider financial and social implications.

38. Liberty believes that limiting legal advice in the manner proposed will cost this country more in the long term. In addition to ensuring that costly litigation is a measure of last resort, legal aid helps to ensure that public services operate effectively and well and that errors are corrected. Without the checks currently provided by legal interventions, public services will not be called to account and standards may well diminish, resulting in poorer services and greater expenditure in the long term.

#### *Inadequate alternatives*

39. A cornerstone of the proposals for the reform of legal aid is increased reliance on conditional fee agreements as an effective alternative to the provision of legal aid. Liberty accepts that conditional fee agreements have proved a useful means of funding specific types of litigation, but also notes that they are of no assistance to people seeking advice in many of the areas of law excluded from the scope of legal aid, such as social welfare, immigration and debt, where there is little prospect of damages, and a significant proportion of legal aid spend is on non-litigious legal help. Liberty is also concerned about the impact of the Ministry of Justice's proposals for the reform of civil litigation funding, which have implications for the viability of conditional fee agreements as an alternative source of funding.<sup>35</sup> There are some welcome suggestions including the introduction of qualified one way costs shifting which would help protect claimants against the risk of disproportionate and prohibitive costs liability following unsuccessful litigation, but Liberty is concerned that these proposals do not go far enough, particularly in light of the Government's reluctance to extend this measure to judicial review claims. The Government's proposals on the implementation of the Jackson reforms focus on the impact of potential changes on personal injury claims; outside of this context, there is an unhelpful lack of detail which renders a comprehensive response to the reforms difficult.

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<sup>35</sup> Proposals for reform of civil litigation funding and costs in England and Wales:  
<http://www.justice.gov.uk/consultations/jackson-review-151110.htm>.

40. Further proposals for the reform of civil litigation funding, such as the implementation of 25% caps on solicitors' success fees may act as a disincentive for representatives, restricting access to conditional fee agreements for those pursuing low value claims, such as actions against the police. A further serious concern is that representatives will only agree to take on the most winnable cases, and important test-case litigation, which is inherently uncertain, will represent a prohibitive risk for solicitors. In response to this concern the proposals suggest that claimants could be called upon to pay success fees in excess of 25%. Liberty believes that such a shift in liability would act as a deterrent, particularly for less well off claimants and those who do not expect to recover significant sums in damages. We are further concerned that the Government's plans to increase the level of general damages by 10% will frequently fail to provide an adequate counterweight to the new liabilities facing successful claimants.

41. Other alternative methods of funding legal interventions are outlined in brief in both the proposals for the reform of civil litigation funding and the paper on the reform of the legal aid system. The Government suggests securing the interest on clients' accounts which would then be remitted to the public purse or recouping a percentage of funds from successful claims for damages in legal aid cases which will again supplement the budget of the Ministry of Justice. Liberty is concerned about proposals tantamount to a tax on litigants. It would appear to reflect the Government's perception about the excessive use of litigation in the place of other methods of dispute resolution. Liberty believes these perceptions are inaccurate and is further concerned that a strategy of recouping funds from claimants' damages offends against the principle of 100% compensation. Damages awarded by courts in the UK are calculated so as to recompense claimants for their losses; if a proportion of the sum awarded is deducted, claimants will essentially be punished for pursuing their valid grievances through the courts.

42. The Green Paper on legal aid reform posits legal protection insurance as an accessible means of funding legal services without recourse to the public purse. Whilst obtaining insurance in case of future legal disputes may provide protection for some, the legal expenses insurance which currently forms part of household insurance packages excludes many areas of law earmarked for removal from scope including family and the majority of welfare law. In addition many of those who would be eligible for legal aid

under the present system will not be in a position to purchase insurance due to the additional cost or, as will be the case for many, because they do not have household or motor insurance in the first place. Liberty further notes that the Law Society has expressed concerns surrounding restrictions placed on clients in terms of their choice of representatives.<sup>36</sup> Whilst the take up of insurance to cover the cost of future legal expenses should be encouraged and may be a useful resource for some, the accessibility of such a measure for those on low incomes, together with the restrictions on its scope and operation, render it an entirely inadequate alternative to legal aid.

43. Whilst the Government points to the voluntary sector and pro bono legal representation as means of plugging the gaping hole in legal protection for those who cannot afford to pay, neither source can offer anything approaching the scale of advice and support provided by the legal aid system. Whilst Liberty recognises the valuable contribution made by pro-bono lawyers, professionals cannot be expected to work for free on a large scale to ensure that individuals receive the legal protection they so often desperately need. The legal help and representation provided by the not-for-profit sector is frequently funded by legal aid. Without this resource, and with cuts to local authority budgets, there is likely to be a significant impact on services provided by organisations such as the Citizen's Advice Bureau. Alarming, the Under-Secretary of State for Justice has been reported as saying that he believes that pro bono work is 'a good filler' for unemployed lawyers, or women attempting to re-enter the job market after time spent raising a family.<sup>37</sup> The interests currently defended by legal aid lawyers are amongst the most important and fundamental imaginable; it is critical that such support is provided by motivated and paid professionals committed to achieving just results for vulnerable clients. The Government should certainly not be attempting to use the labour that can be supplied by lawyers unlucky enough to find themselves out of work. Similarly it should not be seeking to take advantage of the notorious difficulties facing women seeking to re-enter the labour market.

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<sup>36</sup> The Law Society, *Access to Justice Review: Final Report*; pages 25-26.

<sup>37</sup> As reported by Afua Hirsch in *The Guardian* 13 October 2010

<http://www.guardian.co.uk/commentisfree/2010/oct/13/legal-aid-justice-lawyers-vulnerable>.

## *Cutting public expenditure without compromising justice*

44. The Government's proposals perpetuate the myth that the legal aid budget has reached its current size as a result of unnecessary litigation instigated by unscrupulous lawyers. The Paper also purports to identify a culture in which individuals resort to legal remedies unnecessarily and before exploring less expensive and less combative ways of resolving their issues. Liberty does not recognise either of these trends and is not aware of any evidence establishing their existence. The implication that there exists widespread profiteering amongst legal aid professionals is an insult to those who work tirelessly, for extremely modest recompense, to support those who cannot afford to pay for legal help. Very few legal aid lawyers are in it for the money and those who remain in this area of practice do so in spite of the low monetary compensation. Similarly for the vast majority of individuals embroiled in litigation, participation in court proceedings provokes great anxiety and is a significant disruption to their lives. For them, as with many people, litigation is very much a last resort reached after protracted attempts to resolve their dispute by means including both formal and informal complaints.

45. Liberty believes that the most effective and just way of curtailing legal aid expenditure is to encourage a better quality of decision making by public bodies. The Citizens Advice Bureau records that 80% of the welfare benefits cases taken on by staff record positive outcomes for clients.<sup>38</sup> Research by Advice UK in Nottingham reveals that 42% of the demand at advice agencies in the city is attributable to failures in the system of public administration<sup>39</sup> and the Community Links advice service records that throughout 2010, 73% of the benefits related cases handled by their staff arose as a result of errors on the part of the Department of Work and Pensions.<sup>40</sup> The impact of this type of work on the public purse could be dramatically reduced by a better quality of administrative decision making.

46. In the same vein Liberty notes that the Law Society identifies a number of bodies which, through bad practice, are creating significant work for the legal aid system.

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<sup>38</sup> Citizens' Advice Bureau, Evidence, Winter 2010, page 8: [www.citizensadvice.org.uk/evidence\\_winter2010\\_2\\_.pdf](http://www.citizensadvice.org.uk/evidence_winter2010_2_.pdf).

<sup>39</sup> Advice UK, *Time well-spent: The importance of the one-to one relationship between advice workers and their clients*, page 3: <http://www.adviceuk.org.uk/news-and-campaigns/sector-news/TimeWellSpent>.

<sup>40</sup> <http://www.community-links.org/linksuk/?tag=dwp>.

Specific reference is made to public bodies who generate the need for legal assistance by a failure to comply with statutory duties, and the CPS which should be held to account for bringing prosecutions doomed to failure in light of a paucity of evidence.<sup>41</sup> It is to be hoped that imposing cost orders on the wasteful activities of these bodies would encourage a better quality of decision making and in turn reduce the number of cases unreasonably pursued by public authorities and others. Liberty also supports calls for public authorities such as the UKBA, whose decisions are overturned by the courts and tribunals to be required to pay the cost of the claim to the legal aid fund. Whilst this might initially seem like a simple shifting of costs from one area of the public sector to another, Liberty believes that increased costs liability in this context will help to combat a culture of poor quality decision making and an overt willingness on part of some Government agencies to make decisions liable to be overturned by the judiciary.

## Conclusion

47. It is telling to note that, in his proposals for the reform of civil litigation funding, Lord Jackson stressed the importance ‘*of making no further cutbacks in legal aid availability or eligibility*’, expressing a view that:

*[t]he legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas. The statistics set out elsewhere in this report demonstrate that the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements. Since, in respect of a vast swathe of litigation, the costs of both sides are ultimately borne by the public, the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest.*<sup>42</sup>

48. Liberty strongly supports this statement. Over a decade of largely unfair and deliberately damaging political attacks on ‘the gravy train of legal aid’ have demoralized the system and tainted it in the eyes of the public. Governments of all colours inevitably under-value those tasked with holding them to account and as the most vulnerable

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<sup>41</sup> The Law Society, *Access to Justice Review: Final Report*, pages 20-21.

<sup>42</sup> *Review of Civil Litigation Costs: Final Report*; paragraph 4.2:  
<http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf>.

people in society (asylum seekers, the homeless, etc) are inevitably highly dependent on government, law and lawyers are a vital counterweight in this unequal relationship. These are straightened times, with the MOJ attempting to operate within unprecedented budgetary constraints. This said Liberty believes that the impact of the proposed cuts will lead to widespread social exclusion and unforeseen future costs which will place a much greater strain on the public purse. We urge the Government to urgently re-think these proposals.

**Rachel Robinson**