Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

Title:	Transforming legal aid: delivering a more credible and efficient system
Source of consultation:	Ministry of Justice
Date:	9 April 2013 – 4 June 2013

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1. Introduction

The Commission welcomes the opportunity to comment on the proposals from the Ministry of Justice (MoJ) for transforming legal aid in order to deliver 'a more credible and efficient system', which raise fundamental questions concerning the rule of law, good governance, access to justice and equality of arms.

The current proposals follow from legal aid reforms under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, expected to deliver savings of £320 miliion per year in 2014-15. The reforms now proposed are intended to address remaining 'anomalies' in the criminal and civil legal aid system, which it is estimated would deliver further savings of £220 million per year by 2018/19. The MoJ recognises that the need to reduce costs, to produce greater value for money for the taxpayer and to increase public confidence in the judicial system must be balanced against the need to ensure the legal aid system is fair.

The Commission's consideration of the current proposals has taken full account of the need for economies to be made in all public services during a period of austerity. However, it is important that reforms to the legal aid scheme take account of the UK's international obligations, including obligations under human rights. Likewise, the consultation paper recognises that the legal aid system needs to support the UK in fulfilling its international obligations and obligations under EU law.

The Commission's scrutiny of the MoJ proposals has been done in its capacity as a National Human Rights Institution, and according to its statutory mandate on equalities. We have had particular regard to the European Convention on Human Rights, along with other relevant international obligations contained in the United Nations conventions (including CEDAW, CERD and CRDP).

We have also had regard to the MoJ's obligations under Part 3 Equality Act 2010, which relates to the provision of services and performance of public functions. Also relevant to these proposals is the public sector equality duty, which requires public bodies to have due regard to the need to eliminate discrimination, advance equality

of opportunity and foster good relations. The duty requires proportionate advance consideration to ensure these aims are properly discharged.

In preparing this submission, the Commission has drawn on its previous work relating to access to justice issues. This includes:

- Our response to the MoJ Green Paper on legal aid reform (November 2010)

- Our Human Rights Review (2012), in particular our analysis of how well public authorities protect rights under Article 6 ECHR.[1]

Prior to drafting this response, the Commission obtained advice from Counsel on the equality and human rights implications of the MoJ proposals and has drawn on this advice in what follows.

It should be noted that our response focuses on those questions that relate most clearly to our statutory equality and human rights duties outlined above, and we respond to these questions in the order that they appear in the consultation paper.

2. Summary of conclusions and recommendations

The Commission's principal analysis is that the proposed changes could have an adverse impact on access to justice which would be incompatible with equality law. Our analysis also suggests that these proposals may have an adverse impact on the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR), particularly for those accused of criminal offences but also for those seeking to pursue or defend civil cases. These impacts may be accentuated for more vulnerable or disadvantaged individuals.

Introduction of residence test

The Commission's analysis is that the residence test may in practice have a substantial adverse impact on large numbers of vulnerable

[1] Recommendation 5 of the Human Rights Review states: 'Providing a system of legal aid is a significant part of how Britain meets its obligations to protect the right to a fair trial and the right to liberty and security. Changes to legal aid provision run the risk of weakening this.'

individuals living in the UK linked to their nationality or national origin, which potentially amounts to indirect discrimination. Our assessment of the Government's Equality Impact (at Annex K of the consultation paper) is that the justification for this is not apparent. The residence test could also preclude persons living abroad from obtaining redress in the courts for fundamental human rights breaches, with potential implications for compliance with Article 6 EHRC. For those living in the UK, the residence test could also have a significant impact on redress for human rights breaches experienced by members of vulnerable groups such as victims of domestic abuse and trafficking.

The Commission recognises that the 'exceptional circumstances' funding provisions provide an important safety net. However, it is recommended that these provisions be supported by more comprehensive and accessible guidelines setting out criteria that would make a claim 'exceptional,' to avoid deterring lawyers from spending unremunerated time in making applications for such funding.

The Commission therefore recommends that the Government reconsiders the scope of this proposal.

Reforms to criminal legal aid

The Commission concludes that the likely impact of the proposed changes to criminal legal aid may render this model incompatible with Article 6 EHRC, unless steps are taken to modify the approach adopted. Our analysis has focused in particular on the impact of the proposed competition model for tendering of contracts, the removal of client choice of representation, and the increased use of fixed fees.

The Commission recommends that the government considers piloting and evaluating the scheme in one or two procurement areas before proceeding to a national roll-out in England and Wales.

Judicial review cases

In the Commission's analysis, the proposal to restrict legal aid funding for judicial review to cases where permission is granted by the court may well have the impact of deterring important applications from

being made in cases which would have succeeded; this could have a negative impact on access to justice for clients, raising potential concerns about compliance with Article 6 ECHR and access to redress for victims of equality law and human rights breaches. In particular, there may be a need to monitor the cumulative impact of current and proposed reforms to judicial review to ensure that adverse effects are identified and mitigated wherever possible.

The Commission recommends that the Government reconsiders this proposal.

Removing the borderline cases category

The Commission's analysis suggests that limited savings to the civil legal aid budget could be expected from implementing the proposal to remove legal aid from cases assessed as having 'borderline' prospects of success. Given the significance of many borderline cases in developing emerging areas of law, the Commission recommends that the government monitors the impact carefully with particular regard to unintended downstream financial costs.

Restricting legal aid for prisoners

The Commission's analysis is that the proposed restrictions on criminal legal aid for prisoners may preclude legal redress for a small number of important prison treatment cases. We note that the distinction made between 'treatment' and 'liberty' cases is not always clear cut, as 'treatment' matters (such as the ability to attend courses) frequently play a part in decisions about release dates. Difficulties may arise for disabled prisoners in using the prison complaints system, especially because systemic problems in the identification of disabled prisoners means that reasonable adjustments may not be offered when they are needed. This may lead to disabled prisoners being unable to obtain redress for breaches of equality and human rights law.

The Commission recommends that the MoJ closely monitors the impact of proposed restrictions to the scope of criminal legal aid for prisoners in relation to treatment cases that engage human rights. The Commission also recommends that, in order to fulfil legal

obligations under equality law, the MoJ should closely monitor the reasonable adjustments provided to disabled prisoners to support access to the prison complaints system.

Equality Impact

The Commission considers that the MoJ's overview of the impact of the proposals on equality is currently very high level. In our analysis, there are gaps in the consideration of equality as follows:

- In many respects, the assessment of equality impact does not appear to provide sufficient information as to the potential impacts of the proposals to form a sufficient basis for any subsequent decisions;

- In concluding that any adverse impact is proportionate, it is not apparent that any consideration has been given to mitigation of the impact (through alternative measures) or to the effectiveness of any proposed mitigating actions for people sharing protected characteristics.

The Commission recommends that further steps are taken whilst at the formative stages of policy development to better identify adverse impact of the proposals on people who share protected characteristics. In addition, the Commission recommends that, when the proposals are implemented, mechanisms be put in place for monitoring and assessing the cumulative impact of legal aid reforms on these groups.

Cost savings

On the Commission's analysis, taking into account the potential downstream costs to the justice system, there is a risk that estimated reductions in expenditure derived from the proposed forms will not be achieved.

The Commission recommends that the economic Impact Assessment relating to these proposals be revisited, to take account of potential downstream costs that have not been identified.

3. Responses to specific questions in the consultation

Question 1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

The consultation paper proposes to remove all prison law matters from the scope of criminal legal aid except for:

- cases involving the determination of a criminal charge for the purposes of Article 6 ECHR

- cases affecting the individual's ongoing detention and liberty (engaging Article 5 ECHR); and

- cases which meet the criteria set out in case law, primarily the decision in R v SSHD ex parte Tarrant [1985] QB 251, which would require a consideration of:

    - the seriousness of the charge/potential penalty;
    - whether a substantive point of law is in question;
    - whether the prisoner is unable to present their own case;
    - any potential procedural difficulties;
    - whether the matter is urgent; and
    - fairness to prisoners and staff.

The consultation paper proposes that for cases that would no longer qualify for criminal legal aid – primarily those relating to prisoners' treatment in prison ('treatment cases') – the internal prisoner complaints system, prisoner discipline procedures and probation complaints system should be the first port of call, leading to an anticipated more efficient and effective resolution for the prisoner.

The Impact Assessment published alongside the consultation paper suggests that this would create an estimated reduction of 11,000 prisoner cases annually. The same document acknowledges uncertainty in estimating the impact of the proposal on the volumes of cases, as data from the Legal Aid Agency does not permit this

analysis. However, the Commission notes that, since July 2010, the grant of criminal legal aid for prison treatment cases has in any event required pre-authorisation by the Legal Aid Agency (formerly the Legal Services Commission). According to the consultation paper's assessment of equality impact, only 11 treatment cases have been authorised since July 2010, mostly concerning prisoners with learning difficulties and mental health issues. This represents a very small proportion of expenditure on criminal legal aid.

Additional safeguards are provided by the right of prisoners who have failed to obtain satisfaction from the prison complaints system to complain to the Prison and Probation Ombudsman (and in the event that a prisoner's MP agrees to take up an issue, the Parliamentary Commissioner for Standards). It is apparent that the role of these regulators in providing sufficient protection for treatment cases and monitoring the fairness of the prisoner and probation complaints systems – including their compliance with human rights principles - would increase in the light of the proposed changes.

We note that almost all, but not all, of the recommendations made by the Ombudsman are accepted by NOMS and UKBA. In its Annual Report 2011 – 2012, the Ombudsman expressed concern that, with reducing budgets, there may be less willingness to accept recommendations that come with a price tag. Inevitably, also, the Ombudsman is not infallible in all its investigations. The proposed changes to public funding for judicial review cases – discussed below – may reduce the prospect of the courts subjecting internal complaints mechanisms to external scrutiny, leading to the possibility of some prisoners being unable to obtain redress for breaches of human rights.

The following are examples of 'treatment cases' engaging human rights, which potentially would give rise to claims under the Human Rights Act and for which criminal legal aid would no longer be provided:

- potential challenges to failures to grant childcare resettlement leave to women prisoners, (engaging Articles 8 and 14 ECHR)
- the removal of babies from mothers in prison (R (P) v SSHD, R (Q) v SSHD [2001]) (engaging Articles 8 and 14 ECHR).

- failure to provide suitable (vegetarian, halal or kosher) food to prisoners (engaging Articles 9 and 14 ECHR).

The scrutiny of the courts in treatment cases has over time improved and clarified the lawfulness of practices restricting the common law right of access to justice of prisoners. It is important that these challenges have the means to continue, where appropriate. Previous cases have highlighted the following treatment issues:

- interferences with prisoners' mail, a treatment issue, which may engage Article 6, 8 and 10 ECHR (R v SSHD, ex p Simms [2000]) and
- cases concerning the lawfulness of practices which jeopardise the confidentiality of communications between prisoners and their lawyers (R v SSHD, ex p Leech [1994] and R (Daly) v SSHD [2001].

The Commission notes that prisoners would still be entitled to civil legal aid for matters that remain within the scope of this scheme, such as discrimination law. However, there is a risk that specialist legal advice and representation may be less accessible in future, because legal aid providers currently offering expertise in prison law would not be able to continue this work unless they are able to expand their remit to cover other aspects of criminal defence litigation.

Impact on disabled prisoners

The Commission's assessment is that the impact of the proposals on disabled prisoners, especially those with mental health or learning difficulties, is also a major consideration.

At Annex K, it is stated that 6 per cent of prisoners had a declared disability and 66 per cent no declared disability, with disability status unknown in 29 per cent of cases. The Commission is aware that there are no accurate figures on the number of prisoners with a disability. Estimates vary from 5 per cent on the prison database to

34 per cent of surveyed prisoners self-reporting disability.[2] In relation to mental health, the proportion of mentally ill people in the prison population is also not measured routinely.[3] However, research indicates that 62 per cent of male and 57 per cent of female sentenced prisoners have a personality disorder.[4] One in ten prisoners has serious mental health problems,[5] and over 70 per cent of adult prisoners have a severe mental illness, substance misuse problem or both.[6] During 2012, there were over 23,000 recorded incidents of self-harm.[7] Research has also identified that 20 – 30% of offenders have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system.[8] These statistics all indicate the importance of reasonable adjustments being made to support prisoners' access to the prison complaints process.

The removal from eligibility of treatment cases in which it would be 'practically impossible' for the prisoner to use the internal complaints procedure may deprive those with mental health or learning difficulties of their right to a fair hearing in the determination of their civil rights and obligations under Article 6 ECHR. Although Article 6 does not grant an automatic entitlement to legal aid in civil cases, it includes the right to be provided with legal aid in certain circumstances where the withholding of legal aid would make the assertion of a civil claim practically impossible (Pine v Solicitors' Disciplinary Tribunal [2001] All ER (d) Oct - Court of Appeal) .

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[2] Ministry of Justice (2012) Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey, London: Ministry of Justice

[3] Ministry of Justice. 25 April 2013. *Safety in Custody Statistics England and Wales . Update to December 2012.*

[4] Stewart, D. (2008) The problems and needs of newly sentenced prisoners: results from a national survey, London: Ministry of Justice

[5] Michael Spurr, Chief Operating Officer of the National Offender Management Service, speaking on the Today Programme, 2 September 2008

[6] Offender Health Research Network. 2009. *A National Evaluation of Prison Mental Health In-Reach Services.* University of Manchester. Page 129.

[7] Ministry of Justice. 25 April 2013. *Safety in Custody Statistics England and Wales. Update to December 2012.* Prison figures from MoJ population statistics.

[8] Talbot, J. (2008) Prisoners' Voices: Experiences of the criminal justice system by prisoners with learning disabilities and difficulties, London: Prison Reform Trust, and Talbot, J, (2007) No One Knows: Identifying and supporting prisoners with learning difficulties and learning disabilities.

7% of prisoners have an IQ of less than 70 and a further 25% have an IQ between 70 - 79.

prison staff, London: Prison Reform Trust.

In the Commission's analysis, it may be difficult to maintain the distinction between cases concerning 'treatment' which would fall outside the scope of legal aid, and those case where liberty is at stake which would continue to be eligible for funding under the proposals. In some cases there may be overlap, for example when liberty is denied because a prisoner has been unable to access an offender behaviour course for reasons connected to their disability.

We are aware that the National Offender Management Service is committed to providing screening to ensure that reasonable adjustments are made for disabled prisoners but our evidence shows that, for a variety of reasons, many prisoners with disabilities are not recorded as such. One reason is that the initial screening in many prisons is by means of self-declaration and many prisoners are reluctant to declare a disability for fear of exposing their vulnerability, or are unaware of their disabled status. Furthermore in some cases, even with reasonable adjustments, some prisoners using the internal complaints procedure will lack the equality of arms required by Article 6 ECHR.

Although the consultation paper asserts that the government has had due regard to the impact of these proposals on those sharing protected characteristics, including those with learning difficulties and/or mental health issues, the Commission considers that the impact assessment appended to the consultation paper has not analysed the impact on this group in sufficient detail or taken into account that the data relied upon by the MOJ in relation to disabled prisoners may significantly under-record their numbers. We return to this point below.

Sentencing matters

The Consultation proposes to continue to make legal aid available for matters related to sentence planning and minimum term review applications but to remove from scope matters relating to 'categorisation, segregation, close supervision centre and dangerous and severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions', which would be resolved via the prisoner or probation complaints systems.

In the Commission's assessment, there are difficulties with this approach because categorisation can impact on the release date of prisoners. For example, it was recognised by the Court of Appeal in R v SSHD, ex p Duggan [1994] that, as no Category A lifer would ever be considered for release on licence, so a Category A decision affected the ultimate release date for a life sentence prisoner. In R (Hirst) v SSHD [2001] EWCA Civ 378, the Court of Appeal accepted that the re-categorisation of a post-tariff life sentence prisoner from "C" to "B" would delay his or her eventual release by a period of at least two years.

A similar problem may arise in respect of 'disciplinary matters.' Criminal legal aid will remain available for certain disciplinary matters, principally those that are serious enough to involve the award of additional days if the prisoner is found guilty. However, other disciplinary matters, if upheld, may impact on subsequent decisions concerning (re)categorisation of prisoners, release on temporary licence, home detention curfew and/or parole.

The Commission's analysis is that the proposed restrictions on criminal legal aid for prisoners may preclude legal redress for a small number of important prison treatment cases. We note that the distinction made between 'treatment' and 'liberty' cases is not always clear cut, as 'treatment' matters (such as the ability to attend courses) frequently play a part in decisions about release dates. Difficulties may arise for disabled prisoners in using the prison complaints system, especially because systemic problems in the identification of disabled prisoners means that reasonable adjustments may not be offered when they are needed. This may lead to disabled prisoners being unable to obtain redress for breaches of equality and human rights law.

The Commission recommends that the MoJ closely monitors the impact of proposed restrictions to the scope of criminal legal aid for prisoners in relation to treatment cases that engage human rights. The Commission also recommends that, in order to fulfil legal obligations under equality law, the MoJ should closely monitor the reasonable adjustments provided to disabled prisoners to support access to the prison complaints system.

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

Civil legal aid is currently available regardless of nationality or residence, including for foreign nationals living outside the UK when they are bringing or defending proceedings in this country.

Under the proposed changes, applicants for civil legal aid would need to satisfy a test of lawful residence in the UK at the time of application plus previous residence of at least 12 months (either immediately preceding the application or at some point in the past). The residence test would be applied by the legal aid provider assessing the civil legal aid application.

The Commission's assessment is that the denial of legal aid to individuals under the residence test may, in particular cases, result in breaches of Article 6 and the procedural aspects of other Convention rights for both individuals currently in the UK and people living abroad whose human rights have been breached by the UK. On the Commission's analysis, in some circumstances the residence test may be exposed to legal challenge by individuals who do not satisfy it – both people living in the UK and those living abroad.

Individuals currently living in the UK

From an equality and human rights perspective, particular vulnerable groups who would be excluded from the scope of legal aid, and therefore the ability to claim their legal rights, include:

- Survivors of domestic violence who ceased being lawfully resident when they left their violent partner or are unable to assemble proof of residency
- Vulnerable individuals living in the UK without lawful residence, such as: migrant children, migrant domestic workers, victims of forced marriage and any trafficking survivors without grounds for asylum

- Immigration detainees, including those with serious mental health problems[9]
- Foreign nationals whose human rights were breached by agents of the UK state
- Persons whose claims to remain in the UK are based on Article 8 of the European Convention rather than asylum.

Under the MoJ proposals, EU nationals and overseas students who have not been in the UK for 12 months would also be deprived of legal aid to enable them to exercise these rights.

The impact would be to remove these groups from exercising their legal rights in important areas of law which otherwise remain within the scope of legal aid, such as housing repossession cases, community care challenges, legal action to prevent the unlawful removal of children from the UK, or to secure the return of such children; actions against the police, and applications for a civil injunction following assault, battery or false imprisonment.

Exceptions would apply to asylum seekers whose claim is pending (but not to failed asylum seekers unless they have submitted a fresh claim), and in cases where the Director of Legal Aid Casework agreed to grant 'exceptional circumstances' funding.

'Exceptional circumstances' funding provisions

The consultation paper states that legal aid would continue to be available where necessary to comply with obligations under EU or international law (§3.53) and that the 'exceptional circumstances' provisions of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act would apply to such cases (§3.54). The grant of 'exceptional circumstances' funding requires the Director of Legal Aid Casework to find that failure to fund 'would be a breach of the individual's Convention rights (within the meaning of the Human Rights Act 1998), or any rights of the individual to the provision of legal services that are enforceable EU rights' or that funding 'is

[9] The Commission's Human Rights Review (Article 5 chapter) considered the right of anyone deprived of their liberty to have an opportunity to challenge their detention, and noted that access to legal advice and assistance is a particular difficulty for immigration detainees.

appropriate … in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach'.

The Commission recognises that the 'exceptional circumstances' funding provisions provide an important safety net and will go some way towards mitigating the effect of these proposals. However, it is not clear from the consultation paper how these provisions would be applied in practice to clients who cannot satisfy the residence test, nor whether it is proposed that the Lord Chancellor [and Secretary of State for Justice] will issue additional guidance on this matter before the proposal is implemented.

The Commission's analysis is that the requirement on legal aid providers to assess whether a client satisfies the proposed residence criteria may cause practical problems resulting in denial of rights in that:

- anyone, including a British national, who lacked the necessary documentary evidence of their current and previous lawful residence in the UK would be ineligible for legal aid;

- legal aid practitioners who do not specialise in immigration law lack the necessary understanding for determining complex issues of lawful residence, particularly where a person's immigration history needs to be carefully assessed without clear documentary evidence being available.

Further, as indicated in our response to the MoJ Green Paper on legal aid, the availability of exceptional funding does not tackle the problem of clients being deterred from seeking advice in the first place, if they believe they are 'out of scope' - or being turned away by advisers for similar reasons. There also is a risk that disputes about whether cases qualify as 'exceptional' or not will generate satellite litigation by way of judicial review.

The exceptional funding system was introduced in April 2013, and so it is too early to know how effectively it operates in practice. The Commission notes that applications for exceptional funding must be submitted to the Legal Aid Agency on a detailed form, which is 14 pages in length. Legal advisers will not be paid for the work involved

in taking initial instructions from the client or preparing the application for exceptional funding, should the application not succeed. Because providers must take on the financial risk of not being paid for this preparation work, this may well reduce the number of exceptional funding applications that they are prepared to make.

Individuals living outside the UK

The proposed residence test would deny people living outside the UK the opportunity to bring proceedings under domestic law in respect of serious human rights abuses by agents of the UK state.

There is a risk that the removal of legal aid for such cases brought by people living outside the UK - on behalf of themselves or members of their families - would breach the strong procedural obligations which apply under Article 2 ECHR (right to life) and Article 3 ECHR (freedom from torture and inhuman and degrading treatment) where this amounted to a practical bar to legal redress in cases of unlawful killing or torture by agents of the state.

The consultation paper does not clarify how the exceptional funding provisions might apply to cases involving human rights abuses abroad. However, future inability to access legal aid would be likely to preclude cases involving the unlawful killing, torture or improper detainment of overseas nationals by UK troops. Recent examples of such litigation which concerned questions of the highest constitutional importance are:

- Baha Mousa (Al-Skeini) and Al-Sweady, which resulted in public inquiries being established into the ill-treatment of Iraqi civilians and the alleged non-combat killings of Iraqi insurgents by British troops;

- Alaa' Nassif Jassim Al Bazzouni v The Prime Minister & Others, which involved challenges to the guidelines under which British Intelligence and military agents participate in joint combat operations with third party states overseas; and

- Ali Zaki Mousa v Secretary of State for Defence, which concerned whether the processes set up to investigate

allegations of ill-treatment by British forces in Iraq are sufficiently independent to satisfy the investigative duties arising under Articles 2 and 3 ECHR.

UK residents who are not physically present in the United Kingdom when they become the victim of unlawful actions could also be excluded from legal aid funding by the current proposals. The Binyam Mohammed litigation, for example, concerned UK residents who were kept out of the country as victims of unlawful rendition and detention abroad.

If excluded by the residence test, such cases would be unlikely to be litigated in our courts or come to the public attention. This is particularly since the LASPO Act has now removed from the scope of legal aid any judicial review case without the potential to produce a direct benefit for the individual, a member of the individual's family or the environment, thereby excluding the possibility of funding for cases such as Maya Evans' judicial review claim concerning the transfer of detainees to Afghan custody.

The Commission's analysis is that, were this matter to be considered by the European Court of Human Rights, there is a clear possibility that the court would require legal aid to be granted for cases involving human rights abuses abroad that fall within the scope of the ECHR, where public funding is necessary for those claims to be brought.

The Commission accepts that litigation of this type is costly and may at times cause the state a degree of discomfort. However it provides an invaluable mechanism to shine a light in the darkest corners and to hold our state to account for breaching the democratic standards that it espouses. This sometimes leads to a public inquiry - as in the case of Baha Mousa. In his report of the Inquiry the Chairman, Sir William Gage, bestowed praise upon Daoud Mousa, Baha's father, as the 'driving force behind the litigation that led to the inquiry'.

The Commission's analysis is that the residence test may in practice have a substantial adverse impact on large numbers of vulnerable individuals living in the UK linked to their nationality or national origin, which potentially amounts to indirect discrimination. Our assessment of the Government's Equality Impact (at Annex K

of the consultation paper) is that the justification for this is not apparent. The residence test could also preclude persons living abroad from obtaining redress in the courts for fundamental human rights breaches, with potential implications for compliance with Article 6 EHRC. For those living in the UK, the residence test could also have a significant impact on redress for human rights breaches experienced by members of vulnerable groups such as victims of domestic abuse and trafficking.

The Commission recognises that the 'exceptional circumstances' funding provisions provide an important safety net. However, it is recommended that these provisions be supported by more comprehensive and accessible guidelines setting out criteria that would make a claim 'exceptional,' to avoid deterring lawyers from spending unremunerated time in making applications for such funding.

The Commission therefore recommends that the Government reconsiders the scope of this proposal.

Question 5: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application..... if permission is granted by the Court?

Judicial review law provides the principles that govern the exercise by public authorities of their powers.[10] Applications for judicial review act as an effective check on the exercise of power by public authorities, protecting the rule of law and allowing individuals to obtain redress.

Judicial review has become the principal route for testing the compatibility of actions of public authorities with rights under the European Convention on Human Rights. Judicial review is sometimes the *only* means of appeal from an administrative decision or from an internal complaints procedure that is not itself compliant with Article 6 ECHR because it does not qualify as an 'independent and impartial tribunal'.

[10] As noted in the Commission's response to the earlier MoJ consultation on 'Judicial review: proposals for reform' (December 2012),

Legal aid is currently available (subject to means and merits) to support applications for permission in judicial review cases. Under the proposals, funding would remain available to investigate the merits of a potential judicial review and for pre-action correspondence. It would not cover the legal costs of applying for permission except where permission is granted, in which case legal aid would be granted retrospectively.

Under the proposals, the bulk of pre-permission work in judicial review cases is likely to be at the provider's risk. Legal Help funds advice and assistance but does not generally pay for legal research. As Legal Help is limited to 15 case starts per year per public law contract holder, there is no guarantee that the provider's allocation of cases will be sufficient to cover all potential judicial review claims.

On the Commission's analysis, the practical effect of the proposal might be to place greater pressure on the courts, as claimants would have an incentive to apply for permission at an earlier stage, rather than incur costs at the pre-action stages that might not be funded by legal aid if the application is refused. Further, there might be less incentive for public authorities to settle cases prior to proceedings being issued, on the assumption that the claim against them might not proceed because of the financial risks involved.

A high proportion of judicial review claims are settled prior to the application for permission being considered and the vast majority of cases that settle do so in favour of claimants,[11] illustrating that these cases are not pointless or frivolous. The promotion of settlement prior to the issue of proceedings accords with the MoJ's aim of reducing legal aid costs and costs to the justice system, and has a positive impact on improving public authorities' performance without burdening the courts.

In addition, there are a number of cases in which lawyers will have brought a strong claim for judicial review which becomes academic by the time of the permission hearing because matters have developed, unforeseeably (other than by reason of a concession by the defendant).

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[11] Varda Bondy and Maurice Sunkin, "Settlement in Judicial Review Proceedings" [2009] Public Law 237, 247.

The consultation paper does not propose retaining legal aid funding either for cases that settle or those that become academic through no fault of the claimant. It would be up to the legal aid provider to seek payment of the claimant's costs by consent or by means of a costs order. However, this will be no means be straightforward. In the experience of public law practitioners, including the Public Law Project, many public bodies continue to argue against an order for costs where claims for judicial review are settled on terms favourable to claimants - especially in cases where permission has not yet been granted.

Thus, every claim for judicial review will, in practice, require the claimant to run a series of cumulative risks: whether or not the case will persuade a judge on the permission test, whether or not it will become academic or be conceded pre-permission, whether or not the defendant will agree to pay costs, whether or not the court will be persuaded to order costs.

"Rolled up" hearings (where the question of permission is adjourned to be decided at the same time as the substantive claim) could not be practically accommodated within the proposed changes. Claimants' lawyers would not generally risk preparing the whole case without knowledge of whether permission would be granted. While 'rolled up' hearings can represent a cost efficient use of the court's time, judges will be mindful of the increased financial risks that this creates for claimants and may be less willing to list legal aid cases in this way.

> *In the Commission's analysis, the proposal to restrict legal aid funding for judicial review to cases where permission is granted by the court may well have the impact of deterring important applications from being made in cases which would have succeeded; this could have a negative impact on access to justice for clients, raising potential concerns about compliance with Article 6 ECHR and access to redress for victims of equality law and human rights breaches. In particular, there may be a need to monitor the cumulative impact of current and proposed reforms to judicial review to ensure that adverse effects are identified and mitigated wherever possible.*

The Commission recommends that the Government reconsiders this proposal.

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?

The current practice is that, for most civil cases, the decision about legal aid is subject to a 'prospects of success' test. Cases are placed into one of several categories, ranging from 'very good' to 'poor'. The 'borderline' category is used by reason of disputed law, fact or expert evidence to (a) decide that the chance of obtaining a successful outcome is 50% or more; or (b) classify the prospects as poor (§3.84 (iv)). Legal aid is, at present, granted for some types of 'borderline' case including certain types of housing and family law cases, cases where there is significant wider public interest or overwhelming importance to the client, public law claims/claims against public bodies and, certain immigration or family claims that involve rights under ECHR.

The MoJ proposes to remove 'borderline' cases from legal aid funding, subject to a right of appeal to an Independent Funding Adjudicator, affecting approximately 100 cases per year.

The Commission's analysis is that the proposal, as it stands, could have negative implications for cases of disputed law, and issues where it is in the public interest for the law to be clarified.

It is widely accepted that predicting prospects of success in individual claims is far from straightforward. This does not sit easily with the hard boundaries between the different 'prospects of success' categories. 'Moderate' prospects are 50-60%, while prospects are assessed as 'borderline' where they are 'not clearly less than 50%' but where it is not possible either to state that they are better than 50%. Thus, the difference between 'borderline' and 'moderate' prospects of success may be as little as 1%. In the Commission's analysis, if the proposal to withdraw legal aid for borderline cases is implemented, too much would rest on the vicissitudes of the 'prospects of success' assessment in deciding whether a case should be granted public funding.

A further consideration is that many important cases dealing with novel legal arguments that ultimately changed the law could not have been categorized in advance as having better than 50% chances of success. British law is developed not just by statute but also by decisions of the higher courts, setting precedents that the lower courts must follow. Cases establishing new points of law are a key part of this process – precisely because they establish new or emerging points of law. For example in Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs & Anor (2012), the Court of Appeal followed by the Supreme Court unanimously accepted that habeas corpus was available to a Pakistani citizen detained by British forces in Iraq. However an advance prediction would not have given this appeal higher than 50% prospects of success, given that the application had originally been refused by the Divisional Court.

Any case in which two of the UK's higher courts have reached different conclusions might logically be described as borderline. For instance, in HJ and HT v SSHD the Supreme Court held for the first time that refugee status could be based on persecution for reasons of homosexuality, and that there was no need to assess whether or not a person could avoid persecution if returned to their country of origin by being 'discreet'. These cases had been considered by the Asylum and Immigration Tribunal and had been rejected by the Court of Appeal (following earlier Court of Appeal authority). Following the Supreme Court's guidance as to how such cases should be dealt with by tribunals in future, the law is now understood quite differently from the accepted interpretation prior to that judgment. In that case, 'borderline' (or even 'poor') might have been a reasonable assessment of prospects of success at each stage – and yet each was a necessary step on the way to the eventual outcome. A consequence of the pursuit of such 'borderline' cases is that the law is clarified for all the parties (particularly government departments) and for the lower courts for future cases, thus potentially saving costs in the long term.

The Commission accepts that the proposal to allow anyone refused civil legal aid funding for a 'borderline' case to appeal to an Independent Funding Adjudicator would go some way towards mitigating the impact of the changes, though it may lead to more such

appeals and there may also be an increase in satellite litigation relating to the refusal of legal aid for such cases.

> *The Commission's analysis suggests that limited savings the civil legal aid budget could be expected from implementing the proposal to remove legal aid from cases assessed as having 'borderline' prospects of success. Given the significance of many borderline cases in developing emerging areas of law, the Commission recommends that the government monitors the impact carefully with particular regard to unintended downstream financial costs.*

Question 7: Do you agree with the proposed scope of criminal legal aid services to be competed?

Question 13: Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas?

As noted by the Commission's Human Rights Review, the additional protections offered by Article 6(2) and 6(3) ECHR in criminal cases are necessary because the sanctions for serious criminal offences are the potential loss of liberty. The presumption that a defendant is innocent until found guilty under the law is central to the principle of a fair criminal trial. Article 6(2) and 6(3) provide that people charged with a criminal offence must be informed promptly and in detail about the case against them in a language that they understand. They need to have sufficient time and resources to prepare a defence; to be able to defend themselves in person or through a lawyer whom they choose; and to be given legal aid if they cannot afford a lawyer and this is necessary for the interests of justice.

Thus, Article 6 ECHR emphasises the importance of appropriate legal representation, recognising that this has a central role in the maintenance of the rule of law and the avoidance of miscarriages of justice.

The MoJ consultation paper proposes a major structural change to the provision of criminal legal aid work. With the exception of Crown

Court advocacy and Very High Cost Cases (VHHC), criminal defence work would be subject to a competitive tendering regime. This would require providers to bid for a proportion of criminal defence work in one or more of 42 procurement areas across England & Wales. As a result, the number of providers would be reduced to no more than 400, by comparison with the 1600 providers which currently contract with the Legal Aid Agency. Within each procurement area, work would be shared in equal proportion between a set number of providers (ranging from 4 to 38). Prison work would come within the scope of criminal legal aid work and so could be undertaken only by those with criminal contracts.

The MoJ considers that the proposed competitive tendering model would encourage providers to achieve economies of scale and provide a more efficient service. The consultation paper proposes that providers within procurement regions would bid competitively for contracts, the starting point being a reduction of 17.5% from the rates currently paid for criminal defence work.

The prospect of competitive tendering for criminal defence contracts was considered by the Commission's Human Rights Review (2012) in relation to Article 6 ECHR. The Commission concluded:

> 'This development may have a negative impact on the quality and supply of legally aided criminal defence work, because lawyers will be competing for the lowest price. Competitive tendering is likely to reduce substantially the number of firms doing criminal defence work, with provision consolidated into a small number of large firms, thus reducing client choice. Such an outcome could have an impact on people's rights under Article 6(2), which will need to be kept under close review.'

In the Commission's analysis, the current consultation paper does little to address the issues that were identified in the Commission's Human Rights Review. In particular, it does not identify any potential negative impact on the quality of legal services which might be expected to result from the proposals. According to the consultation paper, the quality of services tendered need only be 'satisfactory' rather than 'good'. The Commission's assessment is that the 17.5% reduction in the upper limit for fees, combined with further downward

pressure on fees arising from the competitive tendering process, may lead to corner-cutting by providers. Evidence from the USA, particularly research by the Spandenberg Group, suggests there is a risk that the proposed model will not reward quality of service and will disincentivise anything other than a bare minimum approach, with a consequential increase in the rate of guilty pleas. For example, a report commissioned by the US Department of Justice from the Spandenberg Group concluded as follows:

> '.....certain types of contract models, often established in the hopes of saving money, pose significant threats to the quality of representation. Two systems in particular—those that solicit bids solely on the basis of cost; and fixed-fee systems, without caseload caps but with financial disincentives to investigate and litigate cases—are potentially devastating to the quality of representation.'[12]

The MoJ states that, through its competitive tendering model, it is seeking to achieve both economies of scale and economies of scope (that is, providers' ability to provide a full range of litigation services). The Commission's analysis is that this may have an adverse impact on the survival of smaller, specialist criminal defence practices that provide services to some of the most vulnerable and marginalised groups. Examples might include services for defendants who are vulnerable by reason of race, youth, gender or mental health, or for defendants from 'unpopular' groups – for example, Irish republicans in the 1980s and 90s and Islamists since 9/11. As noted above, firms that currently offer expertise in prison law would not be able to continue unless they could expand their remit to cover other aspects of criminal defence work.

Automatically allocating vulnerable/marginalised suspects, charged with the above types of complex/serious crimes, to a 'one size fits all', non-specialist firm may place at risk the possibility of an 'effective' defence as required by Article 6. Under the ECHR, as under common law, there is a principle that similar situations should not be treated differently and different situations should not to be treated in the same way, unless such treatment is objectively justified

[12] Contracting for indigent defense services – a special report. Bureau of Justice Assistance, 2000. https://www.ncjrs.gov/pdffiles1/bja/181160.pdf

(Thlimminos v Greece, 31 EHRR 15, §§42 and 44). The requirement is more pronounced in relation to particular groups such as children (T & V v UK (1999) 30 EHRR 121, §84), women (Tekin v Turkey (2001) 31 EHRR 4, §52), ethnic and/or religious minorities (Sander v UK (2001) 31 EHRR 1003, §§23-34) and the mentally ill (Keenan v UK (2001) 33 EHRR 38, §108).

The Commission concludes, for the reasons outlined above, that the likely impact of the proposed competition model may render it incompatible with Article 6 EHRC, unless steps are taken to modify the approach adopted.

The Commission recommends that the government considers piloting and evaluating the scheme in one or two procurement areas before proceeding to a national roll-out in England and Wales.

Question 17: Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset?

The MoJ proposes that those relying on public funding would no longer be able to choose their solicitor in criminal or prison law cases. Instead, cases would be allocated by the Legal Aid Agency to a single provider with a contract in the area in which the accused is arrested. The consultation paper suggests a number of options for determining allocation. Regardless of the option that is chosen, it is proposed that a client could only switch providers in cases of breakdown in the relationship between the client and provider or where there is some other substantial compelling reason.

The Commission accepts that case law under the ECHR on legal assistance in criminal matters does not mandate absolute choice (X v UK (1983) 5 EHRR 273). However, the European Court of Human Rights (ECtHR) has held that legal assistance must be "effective" in order to fulfil the right to a fair trial under Article 6(1) ECHR: Artico v Italy 3 EHRR 1, §33. While the issue will be judged on a case by case basis, factors that the ECtHR will take into account include the extent to which liberty or a serious fine is at stake, and the extent to which lack of funding otherwise undermined the coterminous

requirements for ‘adequate time and facility for…preparation’ under Article 6(3)(b) (Godi v Italy 6 EHRR 457). In following the ECtHR’s jurisprudence, the Court of Appeal has moved from a previous common law approach to a more Convention compliant test that focuses on whether the overall requirement for a fair trial has been met: R v Nangle [2001] Crim L.R. 506.

The Commission’s assessment is that these proposals may be open to legal challenge in individual cases. Crown Court judges, required to act compatibly with the Convention under s6 of the Human Rights Act, will have to decide on a case-by-case basis whether ‘one size fits all’ representation by solicitors under the competitive tendering model will deliver a fair trial, particularly in complex cases. As long as the proposed system remains inflexible, it will not be possible for such rulings to be acted upon by the Legal Aid Agency, because there is no exceptional funding provision that would allow a specialist firm without a contract to take over the case, or more funding to be provided in a specific case.

The Commission concludes, for the reasons outlined above, that the likely impact of the proposed removal of client choice of criminal legal aid provider may render this restriction incompatible with Article 6 EHRC, unless steps are taken to modify the approach adopted.

The Commission recommends that the government considers piloting and evaluating the scheme in one or two procurement areas before proceeding to a national roll-out in England and Wales.

Question 21: Do you agree with the proposed remuneration mechanism under the competition model?

The consultation paper proposes that the new model for criminal defence contracting is, as far as possible, based on fixed fees; each provider would be remunerated for each stage of a case by way of a separate and unique fee based on their bid price. The most significant change to the current fee regime would be to replace the current Litigators Graduated Fee Scheme for less complex Crown Court cases with a fixed fee for each provider. This would apply

regardless of whether there is an early or late guilty plea or whether the case is contested to trial (§5.15-5.19); payment additional to the fixed fee would not be made until the third day of the trial.

The Commission does not claim to have expertise in relation to the impact of a fixed fee model for criminal defence cases. However, our Human Rights Review did consider the impact of fixed fees for civil legal aid in social welfare law, from which certain parallels may be drawn. The Review noted a study (published by the Ministry of Justice in 2009) which recognised that providers who dealt mainly or exclusively with more complex cases had the greatest difficulty with the fixed fee system. Many respondents pointed out that the fixed fee scheme creates perverse incentives for organisations to 'cherry pick' shorter, more straightforward cases and to delegate casework to junior and less experienced advisers. While concerns about 'cherry picking' are not strictly relevant to the consultation paper's proposed model (whereby clients are allocated to a single provider), similar economic pressures might lead to an overall increase in guilty pleas within the criminal justice system. Research on criminal defence services in the USA would appear to corroborate this.[13]

The Commission's assessment suggests that the fixed fee scheme as a whole may attract legal challenges. In this connection, it is relevant to consider the case of McLean v Buchanan [2001] 1 WLR 2425 at §§45, 65 and 81, concerning a harmonized fixed rate scheme for summary trials in Scotland. The threshold for success of such a challenge would be the relatively high requirement to demonstrate that the scheme 'necessarily', 'inevitably' or 'self-evidently' leads to trials that are not compatible with Article 6 ECHR. However, the McLean decision establishes that, in principle, individual trials could be stayed or convictions quashed, notwithstanding serious charges and strong evidence.

The Commission concludes, for the reasons outlined above, that the likely impact of the proposal for a fixed fee remuneration system may render this remuneration system incompatible with Article 6 EHRC, unless steps are taken to modify the approach adopted.

[13] See footnote 12 above

The Commission recommends that the government considers piloting and evaluating the scheme in one or two procurement areas before proceeding to a national roll-out in England and Wales.

4. General points

4.1 Equalities Impact

The Commission notes that the Equalities Impact analysis set out at Annex K to the Consultation paper does not assess the impact of the proposals on people sharing the protected characteristics of religion or belief, or sexual orientation. The former, in particular, would have been very relevant in the context of reform to legal aid for prisoners.

The Commission's analysis suggests that the Equalities Impact in Annex K gives insufficient consideration to the question of objective justification of proposals with a potentially indirectly discriminatory impact. For example, Annex K accepts (§5.1.3) in relation to the proposed reform to legal aid for prisoners, that 'there may be adverse impacts on certain clients, in particular those with learning difficulties, and providers, in particular male and BAME managed firms.' However, it then merely states that 'If the proposal does result in particular disadvantage to persons with protected characteristics, we believe the impact is a proportionate means of achieving the legitimate aims set out in section 4 above'.

The key passage referred to in Section 4 ((§4.2), essentially refers to the reduction of costs derived from the overall package of reforms.

> 'The primary objective of the proposed reform package is to bear down on the cost of legal aid, ensuring that we are getting the best deal for the taxpayer and that the system commands the confidence of the public. Our aim is to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system'.

Case law makes it clear (Cross v BA PLC [2006] EWCA Civ 549) that costs alone are not a legitimate aim that can support the justification of indirect discrimination.

In relation to prison law, Annex K (§5.1.3] goes on to state that "The prison law cases taken outside of scope of criminal law advice and assistance are not of sufficient priority to justify the use of limited public funds and would be dealt with more efficiently and effectively through non-legal channels, such as the prison complaints system." Here, as with elsewhere in the Equalities Impact analysis, the Commission's assessment is that this does not ascertain whether the proposed aims of the reforms, and the degree to which they are likely to be achieved by the proposals, are proportionate to any likely discriminatory impact.

Similarly, there is no proportionality analysis of disparate impact in relation to the imposition of a residence test and the impact it is likely to have on those who do not satisfy the test. This group will contain a significant proportion of vulnerable people, including victims of trafficking and domestic violence, who will be excluded from access to legal aid (and therefore, in many cases, from access to court) regardless of their means or the merits of their case. Although the effect of these provisions is likely to be regarded as indirect discrimination rather than direct (Elias v SSD [2006] IRLR 934), the nexus between nationality/ national origin and residence is so close that a high threshold of justification would be required for this to be lawful. It is not clear to the Commission that this threshold has been met.

> *The Commission considers that the MoJ's overview of the impact of the proposals on equality is currently very high level. In our analysis, there are gaps in the consideration of equality as follows:*
>
> - *In many respects, the assessment of equality impact does not appear to provide sufficient information as to the potential impacts of the proposals to form a sufficient basis for any subsequent decisions;*
>
> - *In concluding that any adverse impact is proportionate, it is not apparent that any consideration has been given to*

mitigation of the impact (through alternative measures) or to the effectiveness of any proposed mitigating actions for people sharing protected characteristics.

The Commission recommends that further steps are taken whilst at the formative stages of policy development to better identify adverse impact of the proposals on people who share protected characteristics. In addition, the Commission recommends that, when the proposals are implemented, mechanisms be put in place for monitoring and assessing the cumulative impact of legal aid reforms on these groups.

4.2 Cost savings

The Legal Aid Agency's budget for 2013/14 is £1.8bn, a reduction from £2.2bn the previous year[14], with a budget of £0.94bn for criminal legal aid[15]. According to the Justice Committee's Third Report of 2010-11, legal aid expenditure peaked at £2,414 million in 2003-04 but has since stabilised at approximately £2,100 million in each of the last four years. For criminal legal aid, expenditure peaked at £1,370 million in 2003-04 but has since fallen to approximately £1,200 million per annum. The last ten years has seen a 6% drop in costs for defence services provided at police stations and magistrates' courts. However, the cost of services provided at Crown Courts or the higher courts have risen by 9%. Expenditure on very high cost criminal cases peaked at £125 million in 2007-08, but has subsequently remained stable at approximately £98 million.

The Commission is not convinced that the aim of achieving overall cost savings to the justice system will be met by the proposals in the consultation paper. In particular, individuals denied legal aid may opt to become litigants in person which may place additional burdens on the courts. A literature review by the Ministry of Justice (2011) concluded that litigants in person could face problems in court, such as understanding the rules of evidence, identifying legally relevant

[14] http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf
[15] LAA Business Plan 2013/14 published 16 April 2013: http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf.

facts and dealing with court forms. Research with other court participants, including court staff and the judiciary, suggested a concern that compensating for these difficulties created extra work and potentially presented ethical challenges.[16]

Ward LJ recently commented on the difficulties faced by the judiciary at all levels when dealing with litigants in person (Wright v Michael Wright Supplies Ltd [2013])

> 'Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved.... as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable.'

In addition, the withdrawal of legal aid for cases of alleged serious human rights breaches will inevitably give rise to a certain amount of satellite litigation by way of judicial review applications against the Legal Aid Agency, thus increasing the cost to the public purse.

> *On the Commission's analysis, taking into account the potential downstream costs to the justice system, there is a risk that estimated reductions in expenditure derived from the proposed forms will not be achieved.*
>
> *The Commission recommends that the economic Impact Assessment relating to these proposals be revisited, to take account of potential downstream costs that have not been identified.*

[16] Litigants in person: a literature review. Kim Williams, Ministry of Justice 2/11

5. Conclusions and recommendations

i. The Commission's analysis is that the proposed restrictions on criminal legal aid for prisoners may preclude legal redress for a small number of important prison treatment cases. We note that the distinction made between 'treatment' and 'liberty' cases is not always clear cut, as 'treatment' matters (such as the ability to attend courses) frequently play a part in decisions about release dates. Difficulties may arise for disabled prisoners in using the prison complaints system, especially because systemic problems in the identification of disabled prisoners means that reasonable adjustments may not be offered when they are needed. This may lead to disabled prisoners being unable to obtain redress for breaches of equality and human rights law.

The Commission recommends that the MoJ closely monitors the impact of proposed restrictions to the scope of criminal legal aid for prisoners in relation to treatment cases that engage human rights. The Commission also recommends that, in order to fulfil legal obligations under equality law, the MoJ should closely monitor the reasonable adjustments provided to disabled prisoners to support access to the prison complaints system.

ii. The Commission's analysis is that the residence test may in practice have a substantial adverse impact on large numbers of vulnerable individuals living in the UK linked to their nationality or national origin, which potentially amounts to indirect discrimination. Our assessment of the Government's Equality Impact (at Annex K of the consultation paper) is that the justification for this is not apparent. The residence test could also preclude persons living abroad from obtaining redress in the courts for fundamental human rights breaches, with potential implications for compliance with Article 6 EHRC. For those living in the UK, the residence test could also have a significant impact on redress for human rights breaches experienced by members of vulnerable groups such as victims of domestic abuse and trafficking.

The Commission recognises that the 'exceptional circumstances' funding provisions provide an important safety net. However, it is recommended that these provisions be supported by more

comprehensive and accessible guidelines setting out criteria that would make a claim 'exceptional,' to avoid deterring lawyers from spending unremunerated time in making applications for such funding.

The Commission therefore recommends that the Government reconsiders the scope of this proposal.

iii. In the Commission's analysis, the proposal to restrict legal aid funding for judicial review to cases where permission is granted by the court may well have the impact of deterring important applications from being made in cases which would have succeeded; this could have a negative impact on access to justice for clients, raising potential concerns about compliance with Article 6 ECHR and access to redress for victims of equality law and human rights breaches. In particular, there may be a need to monitor the cumulative impact of current and proposed reforms to judicial review to ensure that adverse effects are identified and mitigated wherever possible.

The Commission recommends that the Government reconsiders this proposal.

iv. The Commission's analysis suggests that limited savings to the civil legal aid budget could be expected from implementing the proposal to remove legal aid from cases assessed as having 'borderline' prospects of success. Given the significance of many borderline cases in developing emerging areas of law, the Commission recommends that the government monitors the impact carefully with particular regard to unintended downstream financial costs.

v. The Commission concludes that the likely impact of the proposed changes to criminal legal aid may render this model incompatible Article 6 EHRC, unless steps are taken to modify the approach adopted. Our analysis has focused in particular on the impact of the proposed competition model for tendering of contracts, the removal of client choice of representation, and the increased use of fixed fees.

The Commission recommends that the government considers piloting and evaluating the scheme in one or procurement areas before proceeding to a national roll-out in England and Wales.

vi. The Commission considers that the MoJ's overview of the impact of the proposals on equality is currently very high level. In our analysis, there are gaps in the consideration of equality as follows:

- In many respects, the assessment of equality impact does not appear to provide sufficient information as to the potential impacts of the proposals to form a sufficient basis for any subsequent decisions;

- In concluding that any adverse impact is proportionate, it is not apparent that any consideration has been given to mitigation of the impact (through alternative measures) or to the effectiveness of any proposed mitigating actions for people sharing protected characteristics.

The Commission recommends that further steps are taken whilst at the formative stages of policy development to better identify adverse impact of the proposals on people who share protected characteristics. In addition, the Commission recommends that, when the proposals are implemented, mechanisms be put in place for monitoring and assessing the cumulative impact of legal aid reforms on these groups.

vii. On the Commission's analysis, taking into account the potential downstream costs to the justice system, there is a risk that estimated reductions in expenditure derived from the proposed forms will not be achieved.

The Commission recommends that the economic Impact Assessment relating to these proposals be revisited, to take account of potential downstream costs that have not been identified.

6. Background: The Equality and Human Rights Commission

The Commission is a statutory body established under the Equality Act 2006, which took over the responsibilities of Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission. It is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, and encourages compliance with the Human Rights Act. It also gives advice and guidance to businesses, the voluntary and public sectors, and to individuals.

The Commission is also accredited as an “A” status national human rights institution by the United Nations, which recognises its authoritative and independent role in promoting and protecting human rights in Britain.