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House of Commons
Joint Committee on Human Rights

The implications for access to justice of the Government's proposals to reform legal aid

Seventh Report of Session 2013–14

Report, together with formal minutes

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Joint Committee on Human Rights

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Summary

This Report scrutinises three Government proposals that amend the provision of legal aid funding: the proposed introduction of a residence test for civil legal aid claimants, so as to limit legal aid to those with a “strong connection” with the UK; the proposed restriction on the scope of criminal legal aid available to prisoners; and the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success.

We are surprised that the Government does not appear to accept that its proposals to reform legal aid engage the fundamental common law right of effective access to justice, including legal advice when necessary. We believe that there is a basic constitutional requirement that legal aid should be available to make access to court possible in relation to important and legally complex disputes subject to means and merits tests and other proportionate limitations.

We are disappointed by the Lord Chancellor’s suggestion that we ought to have reported on these proposals earlier. The Government’s modified proposals were published in September and we have reported on them as soon as possible. We regret that the Secretary of State was not prepared to wait for our Report before proceeding further. We are not convinced that there is sufficient urgency behind these proposals, nor certainty about their human rights implications, to justify the Government in proceeding so quickly with bringing them into force.

The residence test

The *vires* of any regulations on the residence test that are introduced fall within the remit of the Joint Committee on Statutory Instruments, and we will draw their attention to our Report. In our view, since the residence test affects the right of effective access to court, which is recognised by the common law to be fundamental, the common law principle of legality applies: clear statutory authority to take away the right is required, rather than a general order-making power. Given the serious implications of the residence test for the right of effective access to court, and the desirability of full parliamentary scrutiny of the details of such a test, including the ability to amend the detail of the scheme, we believe such a test should be introduced by way of primary legislation, rather than under a generally worded power to alter the scope of legal aid by “omitting services”.

We accept that the Government’s rationale for the proposed residence test constitutes a legitimate aim for the purposes of both limiting the right of access to court and treating differently those who do not have the required length of lawful residence in the UK. We therefore conclude that a residence test is not incompatible per se with the right of effective access to court or the right not to be discriminated against in the enjoyment of that right. However, even measures which serve a legitimate aim are capable of giving rise to breaches of those rights in practice if they are not sufficiently carefully drawn to ensure that they only have a proportionate impact, and contain sufficient safeguards against the risk of such breaches occurring.

With regard to the residence test, various matters relating to asylum seekers remain unclear, and we invite the Government to clarify them as a matter of urgency. We also remain
concerned that refugees may be unable to access civil legal aid during their first few months of lawful residence in the UK. We recommend that any proposal excludes refugees as well as asylum seekers, in order to ensure that the UK’s international obligations are met.

We do not agree that the Government has considered all groups of children who could be adversely affected by the residence test, and we note that no Child Impact Assessment has been produced. We are concerned that the Government has not given full consideration to its obligations under Article 2 of the United Nations Convention on the Rights of the Child. We recommend that the Government exclude all children from having to satisfy the residence test.

We acknowledge the Government’s argument that treatment within detention should be dealt with by the internal prisons complaints system. However, we do not accept that individuals who have suffered abuse whilst being detained by the State, so as to breach article 3, should not be eligible for legal aid in order to pursue compensation. We therefore recommend that the Government exclude paragraph 21 of Part 1 of Schedule 1 to the LASPO Act for detention cases from any proposed residence test.

It is clear that there have been, and will continue to be, cases where individuals cannot produce the required documentation to prove their residence in the time necessary to allow the legal process to be of use to them. We believe that the Government has not given sufficient thought to the difficulties some individuals may have in proving lawful residence, nor made a wide enough exemption to the test to ensure that some citizens are not prevented from accessing civil legal aid funding, and we recommend that the Government look at this matter again.

We welcome the Government’s exemptions in certain cases for victims of domestic violence, although we remain concerned about the impact of these proposals on victims of domestic abuse and their ability to access legal aid funding in order to gain practical and effective access to justice for themselves, and in many cases, for their families. In this area we also call upon the Government to review its proposals.

We are also concerned about access to legal aid for the small group of individuals who are protected parties pursuant to the Mental Capacity Act 2005. This group, while small, has an obvious need for legal representation; given that its members are prohibited from litigating in person, any right of access to justice cannot be practically and effectively exercised if (subject to means and merits) they are denied legal aid. We do not think that the residence test can be justified in its application to this group.

We welcome the Government’s decision to exempt certain trafficking cases from the residence test, but conclude that the exemptions do not go far enough. We recommend that the Government’s exemptions be extended to cases where the status of the trafficking victim is contested, and to legitimate challenges to failure to prosecute or investigate.

The evidence we have received on the exceptional funding scheme under s. 10 of the LASPO Act, when taken together with the lack of a procedure to grant emergency funding, failure to exempt children and those who lack capacity, and lack of training provided to Legal Aid Agency employees who are assessing these cases, strongly suggests that the scheme is not working as intended. We therefore conclude that the Government cannot rely upon the
scheme as it currently operates in order to avoid breaches of access to justice rights.

**Prison law**

Amending the scope of criminal legal aid for prison law is not inherently incompatible with the right of access to court. Rather, the human rights question is whether the Government’s proposals for doing so give rise to a reasonable chance or a serious possibility of breaches of the right of effective access to justice in particular cases. Our report considers whether the proposals constitute a proportionate means of achieving the Government’s legitimate aim, having regard to the scope of the exceptions which the Government proposes to carve out of the limitation, the adequacy of alternative avenues of redress for prisoners, and any other safeguards designed to ensure that the right of access to justice is not infringed.

We welcome in principle the Government’s indication that civil legal aid will continue to be available to bring judicial reviews in relation to prison law matters, because this will preserve the possibility of access to court in the sorts of cases where such access is required. However, the Government cannot rely upon prisoners retaining access to funding for judicial review, if the number of matter starts per year per firm remains restricted at the current level. We also ask the Government to give specific consideration to the combined effect of its residence test and prison law proposals, particularly given our criticism of the exceptional funding criteria, and invite the Government, in its response to this Report, to provide a full explanation of how access to justice rights will be maintained where both policies are in operation.

We welcome the commitment from the Lord Chancellor to put the Prisoner and Probation Ombudsman on to a statutory footing and we urge the Government to bring forward legislation as a matter of urgency.

We welcome the Lord Chancellor’s proposal for further work into the issue of mental health and the criminal justice system. We are not satisfied that those prisoners who face mental health or other severe difficulties will be able to use effectively the internal prison complaints system. We recommend that the Legal Aid Agency retains the ability to grant funding for these cases where the implications for access to justice are clear.

We note that there are very few cases involving Mother and Baby Units. We also welcome the assurance given to us by the Lord Chancellor that the best interests of the child are taken into account, especially given the importance of such decisions being consistent with the law relating to children. However, we also note that there may be cases before the internal prison complaints system where legal representation would be desirable – such as those which are urgent or which involve third party evidence. In the light of the paramountcy test and the limited number of children involved, we therefore believe that the Lord Chancellor should urgently consider exempting these cases from his proposal.

We do not agree that advocacy services and internal prison complaints systems will be able to deal with cases relating to young offenders effectively. This could leave young people vulnerable and deny them their rights. The issues concerning young people may involve matters of housing law, social care law and public law of such complexity that they require access to legal advice and assistance in order to investigate and formulate their case. The availability of such funding in appropriate cases would be in accordance with the UNCRC. Nor do we think that the Government can rely upon a right to judicial review where the
claimant is a young offender. We therefore recommend that the Government retain young offender cases, and specifically resettlement cases involving young offenders, within the scope of prison law funding.

**Borderline cases**

The Government’s proposal in relation to borderline cases clearly pursues a purpose which is recognised as a legitimate aim for the purposes of justifying limitations on the right of effective access to court. The question is whether the impact of the proposal on the right of access to court is proportionate, which requires consideration of the sorts of cases likely to be affected by the proposal, the evidence demonstrating the benefits to be secured by it, and the safeguards against the risk that the reform will lead to cases not being brought where human rights law requires that they should be. The Government accepts that many of the cases affected by the removal of exceptional funding for cases with borderline prospects of success will include determination of human rights issues. In our view, this raises equality of arms issues, and a potential problem in relation to the creation of precedent to guide lower courts which will in turn affect a larger number of cases.

We were told in evidence by the Government that only cases that could be considered exceptional on their merits were funded as borderline cases, meaning that such cases could fall within the exceptional funding scheme criteria. However, the problems with exceptional funding that we identified earlier in this Report means that the Government cannot rely upon the law as it currently operates in order to meet its obligations to provide practical and effective access to justice.

In view of the significance of the cases likely to be affected by this proposal, we recommend retaining the Legal Aid Agency’s discretion in these cases, or, if it must be changed, tightening the requirements rather than removing the possibility of such funding altogether.
1 **Introduction**

1. This Report scrutinises three Government proposals that amend the provision of legal aid funding: the proposed introduction of a residence test for civil legal aid claimants, so as to limit legal aid to those with a “strong connection” with the UK; the proposed restriction on the scope of legal aid available to prisoners; and the proposal that legal aid should be removed for all cases assessed as having “borderline” prospects of success.

2. The inquiry initially focused also on the proposal that providers of legal services in applications for judicial review against public bodies should only be paid for work carried out on an application for permission, if permission is granted by the Court. Following publication of the Government’s further consultation paper, *Judicial Review—Proposals for further reform*,¹ we are conducting a separate inquiry into this proposal. We expect to publish that Report in early 2014.

**Legal aid**

3. The right of poor persons to sue *in forma pauperis* is of very ancient origin. In the past legal aid was granted in the High Court and the Court of Appeal under rules of court to persons unable to pay the cost of civil litigation. The right to litigate *in forma pauperis* was abolished by the Legal Aid and Advice Act 1949 in respect of proceedings in all courts in England and Wales except the Judicial Committee of the Privy Council.

4. A new publicly-funded system for assisting persons of small or moderate means, by making both legal aid and legal advice more readily available, was introduced by the Legal Aid and Advice Act 1949, which was replaced by the Legal Aid Acts 1974 and 1979. Originally covering family law cases, legal aid evolved to cover a wide range of cases, most notably criminal cases. Those Acts were in turn replaced by the Legal Aid Act 1988, the purpose of which was to establish a new framework for the provision of legal advice, assistance and representation, with a view to helping persons who might otherwise be unable to obtain advice, assistance or representation on account of their limited means.

5. The 1988 Act removed administration of the legal aid scheme from the Law Society and it became the responsibility of the Legal Aid Board. The 1988 Act was repealed and replaced by the Access to Justice Act 1999, subject to certain transitional provisions. Civil legal aid and criminal legal aid were replaced by, respectively, the Community Legal Service and the Criminal Defence Service. The Legal Aid Board was replaced by the Legal Services Commission.

6. Further reforms, both statutory and non-statutory, which have taken place since the Access to Justice Act 1999 came into force, have largely focused on a more market-based approach. These follow the recommendations made in the 2006 Carter Report and the Government’s response to it.
7. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) provides for further reforms of the legal aid system and the funding of legal services. Section 1 gives the Lord Chancellor overall responsibility for legal aid. Section 13 requires initial advice and assistance to be made available to individuals who are arrested and held in custody at a police station or other premises if the Director of Legal Aid Casework has determined that the individual qualifies for advice and assistance. ‘Criminal proceedings’ are defined by section 14, and under section 15 the Lord Chancellor may prescribe in regulations when advice and assistance must be available to individuals in connection with criminal proceedings. Section 27 makes provision about an individual’s choice of provider of criminal and civil legal aid.2

**Legal aid reform**

8. In 2010 the Government announced that it would 'carry out a fundamental review of the legal aid scheme to make it work more efficiently.'3 On 15 November 2010 the Government published *Proposals for Reform of Legal Aid in England and Wales*. This consultation sought views on a range of legal aid reforms, and fed into certain measures in the LASPO Act.

9. On 1 April 2013 the LASPO Act came into force. The Act amended the way that civil legal aid funding is awarded and limited the scope of issues eligible for civil legal aid funding. Cases that commenced prior to 1 April 2013 remain covered by the Access to Justice Act 1999 scheme.

10. From 1 April 2013, the 2013 Standard Civil Contract outlines the provision for family, immigration and asylum, and housing and debt cases. Other cases are provided for in the 2010 Standard Civil Contract or they are no longer within scope for legal aid funding.

11. Lawyers must now go through the following set of questions before taking on a client intending to receive legal aid funding for the service:

a) Is the case within the scope of the legal aid scheme?

b) Must the client go through the telephone gateway?

c) Is the case covered by the provider’s contract?

d) Do you have sufficient matter starts4 to be able to take the case?

e) Is the client financially eligible?

f) Does the client pass the merits test?

g) Is there any other reason why you cannot take the case?5

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2 Adapted from *Halsbury’s Laws of England*


4 A matter start is a case started under types of legal aid funding called Legal Help or, where Legal Help has not previously been granted, Controlled Legal Representation. Contracts between civil legal aid providers and the Legal Aid Agency set out the number of legally aided cases (or “matters”) that a firm is allowed to start per year.
12. Schedule 1 of the LASPO Act outlines what cases are within scope for funding. Section 10 of the LASPO Act makes provisions for “exceptional cases”. This allows for certain cases to retain funding where an issue is out of scope (not included in Schedule 1). All decisions on exceptional cases are made by the Legal Aid Agency (LAA). LASPO sets out the test for determination of exceptional funding in Section 10 (3) (a) or 10 (3) (b):

3) For the purposes of subsection (2), an exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or
(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

For an exceptional case to be funded the client must also qualify for legal aid under the financial eligibility criteria and the merits criteria.

13. Guidance has been provided by the Lord Chancellor regarding exceptional funding.6 The Guidance for non-inquest cases makes clear that exceptional funding should be used for rare cases:

The purpose of section 10(3) of the Act is to enable compliance with ECHR and EU law obligations in the context of a civil legal aid scheme that has refocused limited resources on the highest priority cases. Caseworkers should approach section 10(3)(b) with this firmly in mind. It would not therefore be appropriate to fund simply because a risk (however small) exists of a breach of the relevant rights. Rather, section 10(3)(b) should be used in those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach of the rights set out at section10(3)(a) but the risk of breach is so substantial that it is nevertheless appropriate to fund in all the circumstances of the case. This may be so, for example, where the case law is uncertain (owing, for example, to conflicting judgments).

Only if legal aid is granted can it be backdated to cover the work involved in making the application. Providers may have to prepare applications pro bono.

14. The LASPO Act 2012 introduced a telephone gateway. The gateway must be used by clients with debt, special educational needs or discrimination problems. These cases will, usually, no longer be eligible to receive civil legal aid funding for face to face advice.

15. There are two types of work that lawyers will undertake. Controlled work (including Legal Help, Help at Court and Controlled Legal Representation) is a form of funding for

5 Adapted from LAG Legal Aid Handbook 2013/14 Edited by Vicky Ling and Simon Pugh, with Anthony Edwards.
advice which can be granted by the organisation directly, under devolved powers from the LAA. Licensed work (also known as legal representation or certificated work) is funding for representation in courts, and is mainly granted by the LAA. Each provider has a set number of permitted “matter starts” — that is to say the maximum number of new controlled work cases in a particular category of law that the provider is permitted to take on during the life of the schedule (usually a year). Legal Help forms are also known as “new matter starts”. Licensed work is not restricted by matter starts, so there is no limit on the number of certificate applications a provider can make, as long as they have a contract in the appropriate category. Clients must be and continue to be below the threshold on capital, gross income and disposable income. For controlled work the provider assesses financial eligibility, whereas for licensed work the LAA makes the decision, subject to some limited exceptions.

16. There are a number of different merits tests, depending upon the nature of the case and the funding sought. Each case must satisfy and continue to satisfy the relevant test.

17. We considered the issue of legal aid and access to justice in our Report, Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill.7 We gave particular consideration to section 10 on exceptional funding, and whether this provision was sufficient to meet the obligation to ensure effective access to court. We noted:

The state’s responsibility under human rights law to facilitate effective access to a court for the determination of an individual’s civil rights does not require the universal provision of legal aid in respect of any disputes concerning civil rights. However, it does require the state to ensure that such aid is available to make such access possible for those with insufficient resources in relation to legally complex disputes concerning matters of fundamental importance.

**Transforming legal aid: delivering a more credible and efficient system**

18. On 9 April 2013, the Ministry of Justice launched a consultation, Transforming legal aid: delivering a more credible and efficient system. This consultation outlined proposals to reduce the scope of legal aid funding, with the estimated savings of £220 million per year by 2018/19. The Government argued that these proposals were necessary to “boost public confidence in and reduce the cost of the legal aid system”.8 This consultation, and the proposals it contained, extended to England and Wales only.

**Transforming legal aid: Next steps**

19. The Government’s consultation closed on 4 June by which time the Government had received nearly 16,000 responses. On 5 September the Government published a second consultation, Transforming Legal Aid: Next Steps. This consultation, among other things, outlined the themes of the responses they received; set out the Government’s new

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7 Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (22nd Report, Session 2010–12, HL Paper 237, HC 1717)

proposals for reform of the legal aid system; and opened a further consultation on a modified model of procurement for criminal legal aid.

20. The Government stated that they would consult further on the proposal for payment for permission work in judicial review cases. This consultation ran from 6 September to 1 November 2013. We will be reporting on the judicial review proposals separately.

**The relevant human rights framework**

21. We have scrutinised the Government’s proposals to reform legal aid for their likely compatibility with the relevant human rights standards. We considered the issue of legal aid and access to justice in our legislative scrutiny Report on the Bill which became the Legal Aid, Sentencing and Punishment of Offenders Act 2012, in which we summarised the relevant human rights framework:

> The right of effective access to court is recognised as a fundamental human right by the common law, the European Convention on Human Rights, the EU Charter of Fundamental Rights and other international human rights treaties to which the UK is a party. Access to legal advice for those with insufficient resources for their right of access to court to be effective is also recognised as being implicit in the right of access to justice by both the common law and the ECHR. This is not a right to legal aid in all cases, but only when such assistance is “indispensable for an effective access to court.” Entitlement to legal assistance under Article 6(1) ECHR will always depend on the facts: in particular, the importance of what is at stake for the individual, the complexity of the relevant law and procedure and the individual’s capacity to represent him or herself effectively.

22. A summary of the relevant legal standards engaged by the proposals is annexed to this Report. Here we only refer to those which have been most central to our scrutiny.

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9 Judicial Review: Proposals for further reform
10 Likely rather than actual compatibility because our inquiry has been an exercise in pre-legislative scrutiny, examining proposals rather than actual measures, although during the course of our inquiry the statutory instrument giving effect to the prison law proposal was laid: see chapter 3 below
11 Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (22nd Report, Session 2010–12, HL Paper 237, HC 1717)
12 See e.g. Raymond v Honey [1983] 1 AC 1; R v Lord Chancellor, ex p. Witham [1998] QB 575
13 Article 47. The Charter is intended to be declaratory of the existing human rights obligations of Member States of the European Union. It only applies to the EU institutions and to Member States when implementing EU law. “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”
14 See e.g. International Covenant on Civil and Political Rights, Article 14
15 See e.g. R v Shayler [2003] 1 AC 247; R v Secretary of State for the Home Department, ex p. Anderson [1984] QB 778
16 See e.g. Airey v Ireland (1979) 2 EHRR 305
17 Ibid Airey
18 Steel and Morris v UK (2005) 41 EHRR 403 at para. 61
Common law

23. The right of effective access to court has long been recognised as a fundamental human right by the common law.20 As elucidated by Lord Bingham of Cornhill,21 the common law right of effective access to justice comprises three distinct rights:

a) The right of access to a court;

b) The right of access to legal advice;

c) The right to communicate confidentially with a legal adviser under the seal of legal professional privilege.

24. Although clearly related to the fundamental right of access to a court, the right of access to legal advice has also long been recognised as a distinct common law right enjoying a fundamental status: “one of the fundamental rights enjoyed by every citizen under the common law”22 and as “inherent and fundamental to democratic civilised society”.23 These rights are regarded by the judiciary as enjoying a common law, constitutional position, inherent in the rule of law.24 The common law also recognises as a fundamental value the principle of equal treatment.25

European Convention on Human Rights

25. The fundamental importance of the right of access to legal advice, and its importance to the rule of law, is also recognised in the relevant international human rights obligations to which the UK is a party. In particular, Article 6(1) of the European Convention on Human Rights, is interpreted by the European Court of Human Rights (ECtHR) to include a right of access to court which may in certain circumstances require publicly funded access to legal advice to be available in order for the right of access to court to be practical and effective.

26. In Golder v United Kingdom,26 the ECtHR confirmed that “the right of access [to a court] constitutes an element which is inherent in the right stated by Article 6 (1)” . The link between this right of access and any obligation on the part of the state to provide funding for legal representation is set out in the case of Airey v Ireland, where the ECtHR held that:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance

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20 See e.g. Raymond v Honey [1983] 1 AC 1; R v Lord Chancellor, ex p. Witham [1998] QB 575
21 R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532
22 Lord Hope in R v Shayler [2003] 1 AC 247
23 Lord Cooke in Daly
24 The Queen (on the application of) The Children’s Rights Alliance for England v Secretary of State for Justice [2013] EWCA Civ 34
25 See e.g. Lord Hoffmann in Matadeen v Pointu [1999] 1 AC 98
26 (1979–80) 1 E.H.R.R. 524
before the High Court without the assistance of a lawyer would be effective, in the
sense of whether she would be able to present her case properly and satisfactorily. ... 
Article 6(1) may sometimes compel the State to provide for the assistance of a lawyer
when such assistance proves indispensable for an effective access to court either
because legal representation is rendered compulsory, [...] or by reason of the
complexity of the procedure or of the case.27

The Court concluded that the applicant, Mrs Airey, was entitled to legal aid in order for her
right of access to the court to be effective.

27. Also relevant is the over-arching right in Article 14 ECHR not to be discriminated
against in the enjoyment of Convention rights, including the right of effective access to
court.

**The Government’s view of the relevant human rights standards**

28. We wrote to the Lord Chancellor on 15 July requesting a detailed human rights
memorandum setting out the Government’s assessment of the compatibility of its
proposals with all relevant human rights standards, including Article 6(1) ECHR and
Article 14 in conjunction with Article 6(1) ECHR, and the common law rights of access to
court and effective access to justice.

29. The Government, in its memorandum dated 27 September 2013, accepts that:

> there is a common law right of access to the court [...] However, this is not the same
as a common law right to legal aid. We do not consider that there is any basis at
common law that a litigant is in general entitled to a state subsidy in respect of
lawyers’ fees.

The legal aid reforms do not involve any fundamental right of access to the courts,
rather the question of whether a person should receive legal aid funding. Even if this
were wrong, the limits on legal aid agreed by Parliament through legislation would
be effective to limit the extent of any such common law right.

30. The Government’s position is thus that there is “no common law right to legal aid”, and
the proposals to reform legal aid therefore do not involve any fundamental right of access
to the courts. We agree that there is no general common law right to legal aid, and we
accept that, as the Lord Chancellor said in oral evidence, “it is completely unrealistic to
believe that we can provide legal aid support to give every person in all circumstances
access to the justice system.”28 Rt Hon Chris Grayling MP was also right to say that his role
as Lord Chancellor “does not mean that [...] I should argue that the state should, in all
circumstances, pay for all forms of legal action by people who do not have the means to pay
for that action themselves.”29

31. But in reality none of our witnesses in this inquiry, and no serious commentator,
suggests that such a general common law right to legal aid in all circumstances exists. The

27 [1979] 2 EHRR 305
28 Q26
29 Q27
common law does, however, undoubtedly recognise a right of effective access to court, which means that legal aid may be required in certain circumstances in order for the right of access to court to be meaningful. As we stated in our Report on the LASPO Bill:

The state’s responsibility under human rights law to facilitate effective access to a court for the determination of an individual’s civil rights does not require the universal provision of legal aid in respect of any disputes concerning civil rights. However, it does require the state to ensure that such aid is available to make access possible for those with insufficient resources in relation to legally complex disputes concerning matters of fundamental importance.30

32. **We are surprised that the Government does not appear to accept that its proposals to reform legal aid engage the fundamental common law right of effective access to justice, including legal advice when necessary.** We believe that there is a basic constitutional requirement that legal aid should be available to make access to court possible in relation to important and legally complex disputes, subject to means and merits tests and other proportionate limitations.

**Our inquiry**

33. We did not seek to look at any of the other proposals on legal aid reform that were set out in the Government’s consultation, focusing our attention on the three areas where we considered that the question of access to justice was clearest and where we have particular expertise to scrutinise the proposed policy and its effect. The proposals in relation to criminal legal aid have been considered by the Justice Committee.31

34. We are grateful to those who gave evidence to us. The impact of the proposal to remove legal aid for all cases considered as having “borderline” prospects of success we considered only in written evidence. We took oral evidence in October 2013 from individuals and non-governmental organisations on the other two proposals, the proposed introduction of a residence test for civil legal aid claimants and the proposed restriction on the scope of legal aid available to prisoners. We heard from Tim Buley, Dr Nick Armstrong, The Public Law Project, Asylum Aid, The Children’s Society, Immigration Law Practitioners Association, The Official Solicitor to the Senior Courts, Women’s Aid, Her Majesty’s Chief Inspector of Prisons, The Howard League for Penal Reform, Prisoners’ Advice Service and the Prisons and Probation Ombudsman. We also received evidence from Rt Hon Chris Grayling MP, Secretary of State for Justice and Lord Chancellor. We thank the Lord Chancellor for his contribution.

**Timetable**

35. The Government’s consultation response outlined that these proposals would be laid before Parliament, by means of secondary legislation, in late 2013 or early 2014. We wrote to the Lord Chancellor requesting that our Report be considered before the proposals were laid, but our request was declined. The Lord Chancellor justified his refusal, in oral

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30 Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (22nd Report, Session 2010–12, HL Paper 237, HC 1717)
31 Justice Select Committee, Transforming Legal Aid: evidence taken by the Committee (3rd Report, Session 2013–14, HC 91)
evidence, by stating that the proposals were published in April. But in fact, the proposals were modified in the light of consultation responses, and these were not published until September.

36. The Government laid the statutory instrument (using the negative procedure) to amend the scope of criminal legal aid for prison law cases on 4 November. We note that the House of Lords Secondary Legislation Scrutiny Committee raised a concern about this instrument and the lack of accompanying information:

   The Committee noted with concern that the Explanatory Memorandum (EM) offered by the Ministry of Justice did not give much background information to set the changes in context, for example it did not inform the House which areas of prison law would no longer be eligible for legal aid or give the policy rationale for removing those items as opposed to others. Similarly section 9 of the EM only mentions that revised guidance will be published for legal aid providers and does not explain how prison governors and prisoners will be informed of the new arrangements.32

37. We are disappointed by the Lord Chancellor’s suggestion that we ought to have reported on these proposals earlier. The Government’s modified proposals were published in September and we have reported on them as soon as possible. We regret that the Secretary of State was not prepared to wait for our Report before proceeding further. We are not convinced that there is sufficient urgency behind these proposals, nor certainty about their human rights implications, to justify the Government in proceeding so quickly with bringing them into force.

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2 Residence test

Background

38. There is currently no residence test for access to legal aid funding. Non-residents are (subject to means and merits) eligible for civil legal aid for cases which are within scope and are taking place in England and Wales.

The original proposal

39. In its first proposal, the Government indicated that applicants for civil legal aid funding would have to satisfy a residence test. The Government argued that this would reduce expenditure and preserve legal aid funding for those with a “strong connection” to the UK. The Government argued that this would ensure that only those who paid taxes or had an affiliation with the UK would receive UK funded legal aid.

40. The residence test proposed in the original consultation had two limbs that applicants would need to satisfy:

a) “First, the individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made”; and

b) “Second, the individual would also be required to have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for 12 months. This 12 month period of lawful residence could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past. However the period should be continuous.”

41. The Legal Aid provider would need to see evidence of lawful residence at the time of application, and of the individual having been resident for 12 months prior to the application at some point. The Director of Legal Aid Casework may, pursuant to section 10 LASPO Act 2012, provide for civil legal aid funding to be granted by making an exceptional case determination in relation to the individual and the services, which the Government state will be available on successful application to individuals who do not fulfil the residence test. Serving members of Her Majesty’s Armed Forces and their immediate families are exempt from this test.

42. In the Government consultation it was also proposed that asylum seekers would be exempt from this residence test for civil legal aid funding. If asylum seekers were given leave to remain, and were receiving legal aid for a family or civil case, then they would have continued to receive funding for the case. For any new claim for legal aid, an asylum seeker would have had to fulfil the residence test and would therefore not fulfil the residence test requirements until lawfully resident in the UK for a year. Asylum seekers who had not been successful in their claim and exhausted the appeal process would no longer have been

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33 Transforming legal aid: delivering a more credible and efficient system
34 Ibid, paragraph 3.49
35 Ibid, paragraph 3.50
eligible for legal aid. If asylum seekers made a fresh claim for asylum, and this claim had been accepted as a fresh claim, then they would have been eligible for legal aid again for this claim.

**The modified proposal**

43. The majority of respondents to the Government consultation responded negatively to the Government’s question “Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?” Their key concerns were:

- vulnerable groups including victims of trafficking, domestic abuse victims, homeless people etc. would not be able to pass the test;
- children under 12 months of age would not pass the residence test;
- the test would prevent individuals, not lawfully resident, from challenging and seeking redress for suffering caused through actions of the UK state;
- the process for exceptional funding would not be able to respond in urgent cases and the application process may prevent people from accessing legal aid;
- failed asylum seekers would not be able to access legal aid to judicially review the decision of the Home Office;
- the number of cases that would be affected was unclear;
- the potential knock-on costs would include increased administration costs for the LAA in administering exceptional funding applications, and court costs could increase as a result of a potential increase in the number of litigants in person; and
- individuals lacking the capacity to represent themselves in court, but not qualifying for legal aid funding because of the residence test, would be disproportionately affected as they could not realistically bring a case as a litigant in person.

44. The Government responded to the concerns with the following arguments:

- Exceptional funding, under section 10 of LASPO, ensures that civil legal aid will continue to be provided where failure to do so would breach the ECHR or EU law.
- Asylum seekers who have had their application refused by the Home Office will still be able to access legal aid in respect of a judicial review of that decision.
- Funding for representation at inquests is already provided through the exceptional funding scheme.
- An increase of litigants in person does not offset the justification for bringing in the residence test. Since the LASPO Act has come into force, the number of litigants in person has been monitored and the Government will continue to undertake such monitoring.
45. After considering the consultation responses, the Government said that it would take its original proposal forward, but the following cases would be exempt from having to satisfy the test:

- Detention cases (paragraphs 5, 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to LASPO)
- Victims of trafficking (paragraph 32 of Part 1 of Schedule 1 to LASPO), victims of domestic violence and forced marriage (paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO);
- Protection of children cases (paragraphs 1, 349, 950, 10, 15 and 23 of Part 1 of Schedule 1 to LASPO); and
- Special Immigration Appeals Commission (paragraph 24 of Part 1 of Schedule 1 to LASPO). 36

46. The Government also made the following modifications:

- Children under 12 months will not be required to satisfy the requirement to have a continuous period of at least 12 months previous lawful residence;
- In the case of successful asylum seekers, the continuous 12 month period of lawful residence required under the second limb of the test will begin from the date they submit their asylum claim, rather than the date when that claim is accepted; and
- A break of up to 30 days in lawful residence (whether taken as a single break or several shorter breaks) would not breach the requirement for 12 months of previous residence to be continuous. 37

47. The Government outlined its intention to bring this modified proposal forward using secondary legislation, to come into effect in early 2014. No statutory instrument had been laid by the time we agreed this Report.

**Can a residence test be introduced by secondary legislation?**

48. The Memorandum from the Ministry of Justice states that it intends to implement the residence test using the power in section 9 of the LASPO Act to modify Schedule 1 to that Act. Section 9 reads:

9 General cases

(1) Civil legal services are to be available to an individual under this Part if—

(a) they are civil legal services described in Part 1 of Schedule 1, and

(b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).

36 Transforming legal aid: Next steps. Annex B, para 125
37 Ibid, paragraph 133
(2) The Lord Chancellor may by order—

(a) add services to Part 1 of Schedule 1, or

(b) vary or omit services described in that Part,

(whether by modifying that Part or Part 2, 3 or 4 of the Schedule).

49. Some witnesses argued that the residence test would be *ultra vires* the Lord Chancellor’s powers, on the basis that excluding classes of person, rather than services, is not within the wording of section 9(2):

> According to the now well-established common law principle of legality, the general words of the power to make regulations in LASPO are not apt to allow such a fundamental interference with constitutional rights, which can only be effected by primary legislation.\(^{38}\)

50. During the passage of the LASPO Bill through both Houses, section 9 was the subject of debate as to the nature of the order making power and whether the clause should be amended to allow the addition of services, as well as the power to omit or vary them. We are unaware of any suggestion during such debates that a residence test was contemplated, or that the order making power in this clause would be used to introduce such a test.\(^{39}\) The order making power in question was drawn to the attention of the House of Lords by the Delegated Powers and Regulatory Reform Committee.\(^{40}\) The Government responded to these concerns, again without any suggestion that a residence test would be introduced, as follows:

> 2.1 The intention is that clause 8(2)\(^{41}\) will be a focused power to omit services where, for example, funding may no longer be necessary and it will allow whole or parts of paragraphs to be omitted. Our intentions have been set out in our programme of reform in the response to the consultation paper and are reflected in the Bill. Part 1 of Schedule 1 to the Bill sets out the areas for which we will continue to make funding available. Civil legal aid has been limited to these areas following a thorough review based on the importance of the issue, the litigant’s ability to present their own case (including their vulnerability), the availability of alternative sources of funding and the availability of alternative routes to resolution. We have used these factors to prioritise funding on the highest priority cases, for example, where people’s life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.

> 2.2 Given the importance of the issue of the scope of civil legal aid, of the need to safeguard public funds now and in the future and in light of the historic expansion of the cost to the tax payer of an ever increasing civil legal aid bill, we believe the scope of civil legal aid should be set out in primary legislation, which this Bill places before

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\(^{38}\) The Law Society of England and Wales.

\(^{39}\) See, for example, HC PBC 6 September 2011, 8th sitting col 324 and HL Committee 3rd Sitting 16 January 2012 Col 347

\(^{40}\) Constitution Select Committee. *Legal aid, Sentencing and Punishment of Offenders Bill Report. (21st Report, Session 2010–12, HL Paper 225)*—“The Committee draws clause 8(2) to the attention of the House because it is not limited to routine updating and may legitimately be used to make substantial omissions from Schedule 1.”

\(^{41}\) Now section 9(2)

51. Sarah Teather MP told us that the introduction of the proposed residence test “would mean that many individuals would not be eligible for legal aid even in those cases which the Government has previously accepted are the most serious.”\footnote{Sarah Teather MP} Dr Nick Armstrong agreed, telling us:

> There is a powerful argument that it cannot be done under LASPO, because once one delves into the structure of the LASPO Act, and looks at what Parliament, at the primary legislation level, debated at some length, saying, “This is what we are going to do”, and looks at the parliamentary debates—“These are the cases which we, Parliament, [consider] should be kept within [scope]”—many of those cases, because they will fail the residence test, will now be out. It is very difficult to see what changed between 1 April, when that Act came into force, and 9 April, when the consultation paper and the proposals were published.\footnote{Q5}

52. Barristers Martha Spurrier, Dr Nick Armstrong and Tim Buley, in oral evidence, suggested that it may not be within the order making powers granted by the LASPO Act 2012 for the Government to introduce the residence test. Tim Buley explained this argument:

> There is also a much more straightforward argument about the residence test, which is simply that it is not within the statutory power, because the statutory power is to add categories of work that are or are not included within legal aid ... It is not clear to me ... that that does not contemplate excluding people by a class of person rather than by reference to the kind of legal services that they are seeking, so I think there is a real issue there as well.\footnote{Q5}

53. The Government does not accept these arguments, as it considers that the necessary powers are contained within LASPO.\footnote{Transforming legal aid: Next steps. Annex B, paragraph 117} The Lord Chancellor told us that he had received very clear guidance on this point:

> All I can tell you is that the guidance of First Treasury Counsel is very clear that the LASPO Act gives me the power to do this, so whether or not it was debated at the time I cannot control, but I can assure you that the legal advice I have is very clear that this is absolutely within the powers set out in LASPO.\footnote{Q42}

54. In contrast, Martha Spurrier’s evidence to us was that, whilst there were five potential sections of the LASPO Act 2012 that could allow retrospective amendment, she did not consider that they would allow for an amendment on the basis of a class of person:
Section 149 is a Henry VIII clause, but it is simply intended for transitional measures for tidying up. Section 2 does not appear to allow the Lord Chancellor to make any changes to the class of person, only to the services that are provided. The same is the case under Section 9. Sections 11 and 41 have similar tidying-up provisions to Section 149, so we do not think that there is anything expressed in the primary legislation that would allow these fundamental rights to be transgressed by a statutory instrument.

55. The Administrative Law Bar Association agreed, and suggested that the proposals were *ultra vires*, for the following reasons:

   a) Firstly, nothing in the Act permits the Lord Chancellor to exclude altogether classes of persons from eligibility for legal aid, whether defined by nationality, residence or any other characteristic. Section 1 provides that he “must secure that legal aid is made available”[…] and while, by section 2 he may make “different arrangements […] in relation to (c) different classes of person” this is with a view to carrying out his primary duty to secure legal aid. He may not make arrangements in order to deny legal aid. Section 11 permits the Lord Chancellor to set criteria for the grant of legal aid but the factors to which he may have regard do not include nationality or residence and nothing in this section empowers him to make a blanket rule excluding a class of people that would otherwise be eligible.

   b) Secondly the proposed rule would be inconsistent with other parts of the Act where Parliament has already decided that funding should be available for cases that would inevitably be excluded if there was a residence test.48

56. We considered carefully whether a residence test can be introduced by secondary legislation under the LASPO Act or requires primary legislation. Our starting point in this analysis is that the effect of the residence test is to take away the right of effective access to court for many of those who cannot demonstrate the required length of lawful residence. The right of effective access to court is a right which is recognised by the common law to be fundamental, and for that reason the common law principle of legality applies: clear statutory authority is required, and a generally worded order-making power cannot be relied upon49.

57. We have considered the wording of the order-making power in section 9 of the LASPO Act, and in particular section 9(2), and we can see the force in the argument that the terms “(b) vary or omit services described in [Part 1 of Schedule 1]”, do not necessarily lend themselves to an interpretation whereby a distinction is made on the basis of an applicant’s characteristic, namely whether they have the necessary length of lawful residence. The term “services” is used within the Act to describe the subject-matter of a dispute that may attract funding, and the type of activities that may be provided for different levels of funding. In addition, we are unaware of any debate during the passage of this Act where the possibility of this order making power being used to exclude categories of person, as opposed to services, or to introduce a residence test, was discussed.

48 The Administrative Law Bar Association
58. On the other hand, we recognise that section 41 of the Act expressly provides that orders and regulation made under Part 1 of the Act “may make different provision for different cases”\(^{50}\) and “may, in particular, make provision by reference to [...] services provided for a particular class of individual.”\(^{51}\)

59. We do not necessarily regard s. 41 as a definitive answer to the requirement that there be clear statutory authority for regulations which have such a serious impact on a common law right. The vires of any regulations that are introduced fall within the remit of the Joint Committee on Statutory Instruments, and we will draw their attention to our Report. If the secondary legislation to bring the residence test into force is laid, they may wish to give close scrutiny to these issues. However, the Lord Chancellor told us in his evidence that the purpose of the residence test was to bring legal aid into line with other areas of Government policy where entitlement to certain benefits is subject to a residence test. We note that some of these are currently before Parliament in the Immigration Bill. Given the serious implications of the residence test for the right of effective access to court, and the desirability of full parliamentary scrutiny of the details of such a test, including the ability to amend the detail of the scheme, we believe such a test should be introduced by way of primary legislation, rather than under a generally worded power to alter the scope of legal aid by “omitting services”.

**The rights engaged**

60. Responding to the Government’s consultation paper, *Transforming Legal Aid: delivering a more credible and efficient system*,\(^{52}\) Michael Fordham QC and others questioned the legality of the residence test, and suggested that it could not be objectively justified:

> In our opinion, such a measure would be unlawful. In short, that is because (a) it would attract a justification test and (b) it would not survive scrutiny under such a test. It would not survive scrutiny given its nature and impact, as well as the paucity of the reasoning put forward, and the absence of anything approaching a proper assessment of its implications. The absence of any proper assessment of impacts is likely itself to be fatal for the purposes of the Equality Act 2010, were the decision to adopt such an exclusion challenged on that basis. Ultimately, the exclusion would itself fail a justification test because it denies practical and effective access to justice to what are essentially a group of ‘foreigners’, each of whom have (by definition) a meritorious case and who do not have the means to litigate without the benefit of legal aid.\(^{53}\)

61. Alison Harvey, from the Immigration Law Practitioners Association, highlighted that many of the people who will fail the proposed residence test will also, as a result of not having lawful residence, have a lesser set of rights and entitlements. She concluded that

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\(^{50}\) The Legal Aid, Sentencing and Punishment of Offenders Act 2012, Section 41(1)(a)

\(^{51}\) Ibid, Section 41(2)(b).

\(^{52}\) CP14/2013

\(^{53}\) The legality of the proposed residence test for civil legal aid: joint opinion; Michael Fordham QC, Ben Jaffey, and Ravi Mehta of Blackstone Chambers; Judicial Review journal, Volume 18, No 3, July 2013, at page 9
what is at issue was an inability “to enforce that small rump of rights” that they did have.\(^{54}\) Tim Buley told us that the residence test was “plainly discriminatory”.\(^{55}\)

62. The residence test proposal clearly engages both common law and Article 6 access to justice rights. Those rights are not absolute, and are capable of restrictions which serve a legitimate aim and are both necessary and proportionate in the pursuit of that aim. As the Government accepts the test will be easier for UK citizens to satisfy than other nationals, we consider that Article 14, read together with Article 6 is engaged; thus the test falls within the ground of “national origin” as specified in Article 14, and further, following the case of *Bah v United Kingdom*,\(^{56}\) immigration status can be considered as “other status” for the purposes of Article 14.

63. Treating people differently in relation to their access to publicly funded legal advice on the basis of their length of lawful residence requires objective and reasonable justification in order to be compatible with Article 14 ECHR in conjunction with the right of effective access to court in Article 6(1). The difference of treatment must serve a legitimate aim and, be both necessary and proportionate.

**Legitimate aim**

64. The Government stated in its human rights memorandum that the overarching purpose of its legal aid proposals is “to target limited public resources at cases that most justify it, ensuring that the public can have confidence in the legal aid scheme.” In the case of the residence test proposal, the Government’s stated aim is slightly more specific: to ensure that limited public resources, at a time of austerity, are targeted appropriately at people with a strong connection with the UK. The measure will save money because it will lead to fewer people being eligible for legal aid, and, the Government says, will be fairer to taxpayers by prioritising the use of scarce resources to benefit those with a strong connection to the UK over those without such a strong connection.

65. We explored these issues with the Lord Chancellor, who told us that he considered that the rationale for the proposal was “straightforward”:

> Except in those cases, which we will come back to in a moment, where there is an acute need related to vulnerability, I do not believe that people should be able to come to this country and simply access our legal aid system within a few weeks. I think they should have been here for a period of time, to be settled here, to be resident here and ideally to be making a contribution here, and this measure is designed to secure that.

You asked a question about the savings, and, indeed, about our estimate of the number of people affected. The truth is we do not know, because we do not currently retain information about nationality and the right to access our legal aid system. We could discover it is not a large amount; we could discover it is quite a large amount. To me, it is a point of principle, and it is a point of principle that applies in a number

\(^{54}\) Q10

\(^{55}\) Q4

\(^{56}\) Application 56328/07 [2011] ECHR 1448, at paragraph 46.
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of areas of public service: I do not think you should be able to come to this country and, except in cases of significant emergency, be able to access legal aid system without having been here for a time and contributed to this country.  

66. Dr Nick Armstrong had told us that the use of a cost argument as justification was very difficult to make out.  

We asked the Lord Chancellor to explain to us the objective and rational justification for the proposals, and his views as to any connection between the stated aim of saving money and the length of the lawful residence. He told us:

We do not know for certain the financial scale. As far as I am concerned, this is as much about giving confidence in the system as anything else. I am treating people differently because they are from this country and established in this country, or they are not. I personally do not believe that we either should or can afford to, as a nation, simply provide access to public resource to people who have arrived in the country and have been here a very short period of time.

If you come to this country you should come to make a contribution before you can realistically expect to get something back.

Baroness O’Loan: Just to follow that up, you say that you have to have been here some time to have made a contribution; how do you quantify the making of the contribution if that is the test?

Chris Grayling: The test we have set is the 12-month residency. What I would hope is that that, generally speaking, will mean people have come, worked in this country and made a financial contribution; they will have paid taxes, and will then be entitled to get something back for doing so.

67. In relation to the concept of contribution, we raised with the Lord Chancellor the evidence we had received in relation to groups such as retired military veterans who are not resident in the UK, or individuals who provide assistance to the Armed Forces abroad. His answers appeared to emphasise the importance of working in and paying taxes in the United Kingdom as an important factor in his definition of “contribution”.

68. We accept that the Government’s rationale for the proposed residence test constitutes a legitimate aim for the purposes of both limiting the right of access to court and treating differently those who do not have the required length of lawful residence in the UK. We recognise that a residence test is used in other contexts, such as health, to regulate access to services and other public benefits. The European Court of Human Rights has also accepted that it was a legitimate aim for Belgium to seek to keep public money for those who have a certain degree of attachment to Belgium by defining the conditions of entitlement to legal aid so as to confine it to people lawfully resident in Belgium. We therefore conclude that a residence test is not incompatible per se

57 Q29
58 Q4 and Dr Nick Armstrong
59 Q30
60 Ibid
61 Anakomba Yula v Belgium Final Judgment of 10 June 2009, App No. 45413/07 Unfortunately no English translation of this judgment is currently available, although a summary has been published.
with the right of effective access to court or the right not to be discriminated against in the enjoyment of that right.

69. However, even measures which serve a legitimate aim are capable of giving rise to breaches of those rights in practice if they are not sufficiently carefully drawn to ensure that they only have a proportionate impact, and contain sufficient safeguards against the risk of such breaches occurring.

70. The ECtHR in *Anakomba Yula v Belgium*, for example, accepted the Belgian Government’s argument that the conditions of entitlement to legal aid pursued a legitimate aim, but found that Belgium had failed in its obligations to provide for the right of access to a court, in a manner that was compatible with the requirements of Article 6(1) taken with Article 14 (the prohibition of discrimination). The Belgian domestic courts considered that the difference of treatment of the applicant based on her residence status was justified and reasonable in that the lawful residence test required a “minimal tangible connection” with Belgium. However, the ECtHR held that, given the serious issues related to family law before the domestic courts (the applicant was seeking legal aid to help her in proceedings concerning the paternity of her child), there ought to have been particularly compelling reasons to justify the difference in treatment between individuals with a residence permit and those without.

71. We therefore turn to the proportionality of the residence test: is it drawn in a way which avoids disproportionate consequences for particular groups?

**Proportionality**

72. We welcome the fact that the Government introduced further exceptions to the residence test after its initial consultation, in recognition of the potential practical consequences for particular vulnerable groups. Such exceptions from the test make it less likely that it will lead to breaches in practice. However, we received a large number of examples of the types of case where witnesses argued that access to justice and non-discrimination rights would be likely to be breached.

**Asylum seekers**

73. Asylum seekers would be exempted from the residence test. In *Next Steps*, the Government responded to concerns that asylum seekers would have to wait 12 months after being granted leave to remain before being able to prove 12 months lawful residence, by indicating that the 12 month period would start when the asylum claim was submitted. The Government also stated that an asylum seeker would be able to get legal aid funding to help make a claim for asylum, including a fresh claim. If the Home Office did not agree that a further submission amounts to a fresh claim, then legal aid would be available in respect of a judicial review of that decision (subject to means and merits). The

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62 Ibid
63 *Transforming legal aid: Next steps*, Para 132, Annex B
64 Ibid, Para 133, Annex B
65 Ibid, Para 118, Annex B
Immigration Law Practitioners Association, Asylum Aid and others suggested that further clarification from the Government as to the scope of these exemptions would be helpful.

74. The evidence to this inquiry raised concerns over refugees who are legally resident in the UK, after being granted leave to remain. Refugees have to have been resident for 12 months, following the submission of their asylum claim, to satisfy the residence test. Until then they are unable to access civil legal aid, for example in relation to housing claims. We were told that this was “counter-intuitive” as the period after a grant of leave to remain is precisely the time when these individuals would be most in need of services and, without legal advice, they may be unable to enforce their rights to services. Some of those who submitted evidence drew our attention to Article 16 of the 1951 Refugee Convention, which states that:

2. A refugee shall enjoy in the Contracting State in which he has habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance.

Some witnesses therefore argued that the Government was acting contrary to the Refugee Convention by failing to provide an exemption for refugees.

75. Various matters relating to asylum seekers remain unclear, and we invite the Government to consider the evidence we received and confirm in particular, whether given that legal aid will be available to prepare and submit a fresh claim for asylum, that exemption will extend to all other areas of civil legal aid, and not solely to work completed on the fresh claim. We also invite the Government to clarify, in relation to asylum seekers who have submitted fresh claims for asylum which are then accepted, when the 12 month period of lawful residence will be deemed to commence, whether on the date the initial application is submitted, the date the fresh claim is submitted, or the date the fresh claim is accepted.

**Gateway Protection Programme**

76. The Refugee Council raised concern for refugees resettled under the Gateway Protection Programme. These individuals are eligible for settlement immediately on entry to the UK. However, under the proposed residence test they would not be eligible for civil legal aid funding until they had been resident in the country for 12 months.

77. We wrote to the Lord Chancellor asking for clarification in relation to this group of people. He told us that because individuals within the Gateway Programme are applying for resettlement, not asylum, they would be required to satisfy the residence test in the
same way as any other immigrant.71 He noted that this group of refugees receives a twelve month package of intensive support.

78. We remain concerned that refugees may be unable to access civil legal aid during their first few months of lawful residence in the UK. This is particularly worrying as this is the time that many refugees may need assistance in securing services they are entitled to, which could include the twelve month package of intensive support that the Lord Chancellor mentioned in relation to Gateway Protection Programme refugees. We recommend that any proposal excludes refugees as well as asylum seekers, in order to ensure that the UK’s international obligations are met.

Children

79. The Government’s proposals do not provide for a general exception from the residence test for children, apart from children under the age of 12 months (who will still need to prove lawful residence at the time of the application72). Under the exceptions outlined in Next Steps, children will also be exempt if they fulfil any of the specified exceptions: they are a member of the immediate family of serving military personnel, they are asylum seekers; or they fall within the parameter of excluded detention cases; certain trafficking cases; certain domestic violence or forced marriage cases; certain protection of children cases; or they are under the jurisdiction of the Special Immigration Appeals Commission.

80. The Government acknowledged in Next Steps that many consultation responses raised concerns regarding how this test could impact children.73 We also received many submissions with concerns regarding children. The Children’s Society told us they had particular concerns about the impact of the proposal on the following groups of children:

- Unaccompanied migrant children and care leavers
- Refused asylum-seeking children, young people and families who cannot return to their country of origin
- Children who have been abandoned by their parents or carers
- Age-disputed young people including those in immigration detention
- Disabled migrant children and those with special educational needs
- Young victims of trafficking and exploitation who do not access the National Referral Mechanism
- Parents and children who are victims of domestic violence but cannot prove abuse and do not have documentation

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71 Letter from the Justice Secretary to the Chair of the Committee, dated 5 December 2013
72 Transforming legal aid: Next steps, Para 127
73 Ibid, Para 94, 102
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- Undocumented migrant children and young people more generally as those who are already at risk of homelessness, destitution, exploitation and social exclusion because of their irregular immigration status

- Children, young people and families who have lawful residence (including refugee status, discretionary leave or humanitarian protection) who have been in the UK for less than 12 months but have no financial means.

81. We reported on the subject of legal aid and representation for unaccompanied migrant children and young people in our First Report of this Session and stressed the importance of the Government paying particular attention to the impact of withdrawing legal aid from non-asylum immigration cases involving unaccompanied migrant children. We also said the Government “should give serious consideration [...] to the cost benefit case for providing legal aid to all unaccompanied migrant children involved in immigration proceedings.” The Government has not yet responded to this Report.74

82. The four topics below illustrate the problems faced by children in satisfying the residence test: incompatibility with the UNCRC; children subject to local authority care under sections 17 and 20 of the Children Act 1989; undocumented children; and EU and international agreement cases.

**UNCRC**

83. A number of organisations expressed concern that the Government had not considered the proposal’s compatibility with children’s rights under the UN Convention on the Rights of the Child (UNCRC).75 Article 2 of that Convention states:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

84. Some of these organisations who gave evidence to us argued further that the proposal is in contradiction to the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice,76 and the Government’s own guidance from the Home Office’s ‘Every Child Matters’ which states that “Every child matters even if they are subject to Immigration Control”.77

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75 The Children’s Society, Refugee Children’s Consortium, Coram Children’s Legal Centre

76 In particular Guidelines 3.7 and 3.8. Adopted by the Committee of Ministers on the 17 November 2010 at the 1098th Meeting of the Ministers’ Deputies. Available at https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM

77 Refugee Children’s Consortium, The Children’s Society
Section 17 and 20 Children Act 1989 cases

85. The Children’s Society suggested that the current exemption for children was drawn too narrowly:

The changes in the government’s response relating to the ‘protection of children’ cases are very limited. Although some cases will be protected - such as Section 31 care orders or Section 47 investigations (Children Act 1989) - most cases relating to the care, supervision and protection of children will not. For example, any ‘child in need’ cases (Section 17) relating to the additional care needs of a disabled child or support needs for homeless families, will not be covered. Equally cases involving unaccompanied children who are homeless and need appropriate accommodation, support, care and supervision (Section 20) will not be protected.

In oral evidence, Ilona Pinter of the Children’s Society told us that, at a time of budget restrictions, these children, and in particular unaccompanied 16 and 17 year-olds, were particularly in need of legal representation to gain access to care and services, and often to prove their age to local authorities where this is disputed. She told us that a recent “Newsnight” investigation had found that:

16,000 children, 16 and 17 year-olds, had applied for support from local authorities for homelessness protection. In 148 local authorities, they were unlawfully housed in bed and breakfast accommodation. We deal with a lot of young people in similar situations. In respect of the residence test, because a child might not be able to prove their documentation or because they would not in fact meet the residence test, they would not be able to get the vital support from a community care solicitor to be able to challenge those sorts of decisions.78

86. As Dr Nick Armstrong explained to us, and as shown in the examples provided by the Children’s Society, this type of case could include children who have fled from the family home as a result of domestic abuse, or children who, for whatever reason, are at risk of being made street homeless.79

Example provided by Karen May of John Ford Solicitors:

There were three siblings who were granted public funding certificates for judicial review proceedings to be issued. The three children would be homeless on the street if it were not for legal aid. The children’s mother was not permitted to have access to public funds and had been staying with a friend. That arrangement broke down and three children who had been born in the UK (with the older two attending schools in London), and being well established within the communities, were going to be street homeless.

Careful and specialist advice was given regarding the obligations under section 17 of the Children Act 1989, that the local authority owed to these children. There were clear grounds for judicial review proceedings faced with the local authority’s refusal to act to provide accommodation for these children. Very careful negotiations were entered into

78 Q11
79 Q6 and The Children’s Society
and detailed correspondence. In addition, Counsel was instructed and grounds for judicial review proceedings were prepared. However, on the eve of proceedings being about to be issued the local authority recognised their legal obligations and placed the children in accommodation with their mother.

**Undocumented children**

87. Children who are unable to produce documentation to prove their residency will not be able to satisfy the proposed residence test. Many witnesses criticised this and argued that there should be an exception for undocumented children.80 Witnesses cited a study which indicated there were 120,000 undocumented children living in the UK of whom 65,000 were born to undocumented migrant parents,81 and argued that these children were a vulnerable group which should be excluded from the residence test.

**EU and international agreement cases**

88. During the Commons Public Bill Committee on the LASPO Act 2012, the then Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly MP) stated:

> We initially proposed that legal aid would remain to secure the return of a child who had been abducted overseas. After listening to consultation responses, however, we have decided to extend it to cover prevention of abduction in such cases for example for a prohibited steps order. That makes sense on the basis of the complexity, the cost and the consequent practical disadvantages involved in dealing with a foreign jurisdiction.82

However, witnesses have raised concern with us that paragraph 17 of Part 1, Schedule 1 of the LASPO Act has not been included within the list of exemptions and therefore litigants in EU and International agreements concerning children’s cases will have to satisfy the residence test.

89. Witnesses specifically raised concerns over child abduction cases that relate to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.83 The Convention’s aim is to ensure a quick return to their country of habitual residence for those children who are being wrongfully held in another country. Witnesses argued that the proposal could affect child abduction cases for example, cases where a child is wrongfully brought to or retained in the UK, where the non-UK resident parent will be unable to meet the residence test, or where a child is wrongfully removed from the UK and the UK based parent cannot, for whatever reason, meet the residence test. These cases may require urgent advice and representation.

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80 CRAE, Office of the Children’s Commissioner, Refugee Children’s Consortium, Coram Children’s Legal Centre
82 HC Deb, 6 September 2011, Col 348
83 Bindmans LLP, Resolution
Case study of a Hague Convention case from Bindmans LLP:

We represented the father in child abduction proceedings. The child lived with her father in Latvia and he was her primary carer. The mother lived in the UK. There had been agreement that the child would visit the mother in the UK for a holiday, but the mother retained the child in the UK after the end of the holiday and refused to return the child to the father’s care. The application was made under the Hague Convention on Child Abduction 1980, the purpose of which is to ensure that children are returned swiftly to the country where they are habitually resident when abducted. Our commitment to the Hague Convention provides the left behind parent with public funding to bring an application for the return of their child. The father did not speak English and did not have funds to attend court in England. The proposed residence test would mean that the father would not have been entitled to public funding and would therefore have been unable to afford representation in court proceedings for the return of his child to their home in which the child had been settled and happy for some time. In this case, we were able to agree a voluntary return of the child with the mother and the case was concluded within the 6 week timeframe expected of Hague Convention cases. [...] Had the father not been able to instruct specialist child abduction lawyers with public funding, he may not have been able to bring his application at all due to lack of funds to attend court or lack of language skills to make representations to court as a litigant in person, and if he did do so this would have ultimately taken up much more court time.

Conclusions in relation to children and the residence test

90. The Lord Chancellor responded to the concerns of our witnesses by explaining that the modified proposals make concessions for children: babies less than 12 months of age and some cases related relating to protection of children would no longer have to satisfy the proposed residence test.84 The Lord Chancellor also said that for certain cases the exceptional funding route existed to ensure vulnerable individuals remain protected.

91. We welcome the Government’s modifications to the residence test which exempts children under 12 months of age (who are lawfully resident at the point of application) as this group could clearly not have met the 12 month requirement of the residence test.

92. However, we do not agree that the Government has considered all groups of children who could be adversely affected by this test, and we note that no Child Impact Assessment has been produced. Such groups of children include children unable to provide documentation of residence and those who need help to gain access to accommodation and services. There is a particular problem in terms of the complexity and urgency of EU and international agreement cases, acknowledged during the passage of the LASPO Bill, but which have not been made an exception to the residence test. We are concerned that the Government has not given full consideration to its obligations under the second article of the UNCRC.
93. For reasons we explain below, we do not consider that the Government’s argument that cases can always apply for exceptional funding is sufficient to meet UNCRC obligations or the Government’s access to justice obligations.

94. We are sure that the Government does not intend vulnerable children to be left without legal representation. The proposals give little consideration to the access to justice problems that the proposal specifically creates in relation to children, such as the potential complexity and urgency of the cases for which children would need advice and representation, or in some cases, the need to find a litigation friend to assist the child with their proceedings because they have become separated from their families.

95. The Lord Chancellor’s justification for the policy, namely contribution, in particular through the payment of tax, cannot apply in relation to children. Nor can it be said that children have chosen to make their home in the United Kingdom. We do not consider that the removal of legal aid from vulnerable children can be justified and therefore we recommend that the Government extend the exceptions further by excluding all children from having to satisfy the residence test.

**Detainees**

96. The Government’s proposal makes certain exceptions for detention cases, paragraphs 5, 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to the LASPO Act. Dr Nick Armstrong told us that these exceptions were narrow:

    For example, you get a detention case that is now exempt from the residence test, but only if you are seeking to get out of detention. If you are held in very poor conditions or sexually assaulted while in detention, as was recently in a newspaper, or if you are a child and should not be in detention and need to judicially review a local authority that has wrongly assessed you as being an adult, none of that is covered. Trafficking victims may have all of those problems and be in detention.

97. The Immigration Law Practitioners Association (ILPA) also highlighted the omission of paragraph 21 of Part 1 of Schedule 1 of the LASPO Act (claims for damages resulting from abuse by a public authority of its position or powers) from the list of proposed exemptions. Witnesses raised strong concerns particularly in the light of four cases, in the last two years, that found the mistreatment of immigration detainees to breach Article 3. Media reports also give examples of alleged abuse and ill-treatment, including at the Yarls Wood removal centre.

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85 Transforming legal aid: Next steps, page 87, para 125
86 Q2
87 Q9, HMIP
88 Cohen, N. (2013) ‘Yarl’s Wood affair is a symptom, not the disease’, The Observer, 14 September
The implications for access to justice of the Government’s proposals to reform legal aid

R (on the application of S) v The Secretary of State for the Home Department

The circumstances of S’s detention passed the high threshold required for a violation of Article 3 and amounted in inhumane or degrading treatment. I find that there here was a breach of both the negative and positive aspects of Article 3.

98. The Lord Chancellor argued that there was a robust complaints procedure within the detention system. He further argued that not all cases could be funded and that decisions had to be made as to which received funding and which did not, and that treatment cases should be dealt with by the internal prisoner complaints system rather than the courts. Asked whether an individual entitled to claim damages would be able to use legal aid funding to do so, the Lord Chancellor responded:

I have little doubt in a case like that, that if there was a gross and blatant example of abuse, there would be no shortage of lawyers willing to take the case on a no win, no fee basis.

99. We look at the effectiveness of the internal prisoner complaints system in Chapter 5 of this Report. We do not believe that the Lord Chancellor has given due consideration to the human rights implications in cases where the high threshold that is required to prove a breach of Article 3 is capable of being met, or indeed to the seriousness of the abuses the state can and has been accused of.

100. We note that abuse in detention cases is likely to engage article 13 rights to an effective remedy before a national authority. The ECtHR held in Silver v United Kingdom that the possibility of making a complaint to the Board of Visitors or Parliamentary Ombudsman was not an effective remedy because the Board could not enforce its decisions and the Ombudsman depended on voluntary compliance with a report presented to Parliament; we note that the Prison and Probation Ombudsman can similarly only make recommendations. Furthermore, in Chahal v United Kingdom the Court held, that where there was a real risk of inhuman treatment contrary to article 3, article 13 required an independent scrutiny of the claim. Given the number of cases where the Court has recently concluded that article 3 rights have been breached, this is something we expect the Government to be aware of.

101. We acknowledge the Government’s argument that treatment within detention should be dealt with by the internal prisons complaints system. However, we do not accept that individuals who have suffered abuse whilst being detained by the State, so as to breach article 3, should not be eligible for legal aid in order to pursue compensation. We consider that this bar could affect an individual’s article 13 right to an effective remedy from a national authority. We specifically recommend that the Government

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89 [2011] EWHC 2120 (Admin) (5 August 2011), at paragraph 210
90 Q38
91 Q39
92 (1983) 5 EHRR 347 [115]
93 (1996) 23 EHRR 413
excludes paragraph 21 of Part 1 of Schedule 1 to the LASPO Act for detention cases from any proposed residence test.

**Individuals unable to produce documentation**

102. Several witnesses expressed concern for individuals who may struggle to provide documents to satisfy the residence test, particularly in order to prove 12 months residence. Concerns were also raised as to the knowledge required in order to determine whether an individual is lawfully resident, which lawyers who do not practice in immigration law are unlikely to have. The two groups which we have looked at are (i) individuals who have a right to settle permanently and of whom the Home Office does not have a record, and (ii) victims of domestic abuse.

**Right to permanent settlement**

103. A core element of the residence test is the belief that the majority of citizens will be able to demonstrate lawful residence. Whilst we do not dispute this, we have received evidence that highlights cases where individuals are unable to produce documentation. The Islington Law Centre raised concern for individuals who entered the UK prior to the Immigration Act 1971 and have a right to settle permanently in the UK; some of these individuals no longer possess documents, such as a passport, to prove their permanent settlement rights.

104. The Lord Chancellor suggested that individuals who are unable to prove residency should be seeking immediately to rectify their lack of documentation with the Home Office, as a lack of ability to produce documentation to prove residency has wider consequences than eligibility for civil legal aid funding. He also told us that individuals who have lived here lawfully for sometime should not have difficult proving their residence if they pay rent or bills.

105. However, we were told by groups representing some of these individuals that the Home Office has informed individuals who entered the country prior to the Immigration Act 1971 that they do not keep records of foreign nationals granted historic settlement, as they claim that they are obliged to destroy papers pursuant to the Data Protection Act 1998. Islington Law Centre explained that many of their clients would be unable to satisfy the residence test, despite having been lawfully resident for many decades:

> The proposals do not exclude British people that meet the test, but many in our communities do not travel and do not have a passport. A birth certificate does not confer nationality. Obtaining a passport is expensive and it is reasonable to envisage a likely scenario of a family requiring homelessness assistance in circumstances where no-one in that family has a passport. The proposals will seriously prejudice the most economically and socially disadvantaged British people. It will also prejudice elderly people from the Commonwealth and elsewhere who have lived,

94 Q12
95 Sarah Teather MP
96 Q34
97 For example, Migrant and Refugee Children’s Legal Unit (MiClu) and Islington Law Centre (ILC)
worked and voted in the UK for most of their lives, in circumstances where it becomes apparent that they have lost their original passport, which included an immigration stamp confirming they were entitled to settle here when they entered the UK or they entered prior to the coming into force of the 1971 Act, which means they are settled automatically but do not have the evidence for it. At ILC we have seen many such cases concerning people who came to the UK in the two or three post-war decades, as family members of Caribbean parents who were invited and came to the after the war. This lost generation of post-war Commonwealth citizens increasingly faces huge prejudices in accessing employment, retirement, health and other facilities.

106. They also told us of a recent freedom of information request submitted by Lambeth Law Centre, which confirmed that, for cases where the Home Office does not retain records of settlement rights granted many years ago, “the Home Office writes to applicants and MPs to advise seeking legally aided assistance”. The problem of the Home Office losing identity documents was also raised with us by a number of witnesses.98

**Victims of domestic abuse**

107. The Government’s consultation response detailed an exception for victims of domestic violence and forced marriage. This was seen as a welcome step, as many consultation responses raised concern for these individuals, although Women’s Aid told us that it considered the residence test to be in breach of access to justice rights guaranteed by the Convention to Eliminate All Forms of Discrimination Against Women. Many witnesses told us that it was unrealistic and unfair to expect individuals fleeing domestic abuse to be able to access or retrieve their residency documents when fleeing their home.99

108. Witnesses argued that the Government’s list of required evidence would exclude many women who have suffered domestic abuse.100 They said that women who are victims of domestic abuse often do not report the abuse, which is one of the ways of providing evidence of abuse. They also argued that women using the legal aid services are unfamiliar with UK law and procedures and have limited support networks. They told us that many of these women rely on legal aid advice although they may not be able to satisfy the proposed residence test.

109. Other witnesses criticised the narrowness of the exception for domestic abuse as it only applies to certain matters such as applications for indefinite leave to remain under the Domestic Violence Rule in immigration law.101 They argued that domestic violence cases were complex and overlap with other issues that were not excluded from the residence test.

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98 Q7. See also Q12

99 Rights of Women’s consultation response to ‘Transforming legal aid: delivering a more credible and efficient system’, as referred to in their written evidence.

100 Women’s Aid. Rights of Women

101 Southall Black Sisters
Bindmans LLP gives a case study of a domestic violence case:

We acted for FC, a Bolivian national, who was an overstayer in the UK. She lived with her husband and two young children aged 2 and 4. FC was subjected to serious physical and sexual domestic violence from her husband. She was assaulted and repeatedly raped by him in front of their two sons. FC tried on many occasions to flee the family home but was repeatedly refused assistance by the local authority. She always had to return to the family home and face further violence as she had no recourse to public funds. She sought advice from a local charity, which put her in touch with Bindmans. The local authority finally agreed to assist FC and her two sons under of the Children Act following receipt of a letter before action. This case would fail the residence test because community care cases of this kind are not subject to any exemption.

110. The Lord Chancellor said that the Government would make an exception for “cases of significant vulnerability [...] related to domestic violence”. However, he went on to say that in other cases individuals must have demonstrated a strong connection to the UK by being established here to be eligible for civil legal aid funding.

111. We accept as a general matter of common sense the Lord Chancellor’s answer that individuals who lack documentation should seek to rectify this with the Home Office. However, we are clear that there have been and will continue to be cases where individuals cannot produce the required documentation to prove their residence in the time necessary to allow the legal process to be of use to them. We are also concerned by the different examples we were provided with by our witnesses where documents have been lost by the Home Office, or indeed, for individuals who entered the country prior to the Immigration Act 1971, where such records have been destroyed by the Home Office. We ask the Government in its response to this Report to set out what the practice has been in the Home Office with regards to such records. We believe that the Government has not given sufficient thought to the difficulties some individuals may have in proving lawful residence, nor made a wide enough exemption to the test to ensure that some citizens are not prevented from accessing civil legal aid funding and we recommend that the Government look at this again.

112. We welcome the Government’s exemptions in certain cases for victims of domestic violence, although we remain concerned about the impact of these proposals on victims of domestic abuse and their ability to access legal aid funding in order to gain practical and effective access to justice for themselves, and in many cases, for their families. This group of people is likely to experience practical problems in proving residence, and in any event may need to satisfy a further test to show evidence of domestic abuse in order to gain access to certain forms of civil legal aid funding in family cases, and we would ask the Government to review whether the exemptions should be extended to meet these concerns.
**Individuals who lack specific mental capacity**

113. The Government’s consultation response made clear its intention to provide exceptions to the residence test for those persons who are ‘particularly vulnerable’. The Government also indicated that, in further limited circumstances, applicants for civil legal aid funding would not have to satisfy the residence test. We are surprised that these considerations do not extend to protected persons.

114. Mr Alastair Pitblado, the Official Solicitor to the Senior Courts, told us about the relatively small group of individuals that he represents who could be affected by the residence test and who are not covered by one of the specific exceptions mentioned above. These are individuals who are deemed by the Court to lack specific capacity, within the meaning of the Mental Capacity Act 2005, to conduct their affairs including litigation. These individuals are a protected party (‘P’) for the purposes of the Court of Protection.

115. The Official Solicitor said that these individuals are, as a result of their lack of capacity, much less able to provide evidence to satisfy the residence test without assistance. In addition, individuals who lack this specific mental capacity are prevented, under the Rules of Court, from litigating in person, since the rules of court prohibit the court continuing if the individual litigating does not have the capacity to conduct proceedings. The Official Solicitor describes this situation as an “elephant in the room”, and he told us that he had responded to the Government’s initial consultation, raising these specific concerns for protected parties.

116. The Official Solicitor acts as a last resort litigation friend for individuals who are a protected party and have no other means of litigating. For these individuals he is required to make “his appointment as litigation friend conditional on the costs of obtaining or providing legal services being secured either from the person’s own funds or from external sources”. The external sources include the Legal Aid Agency. The Official Solicitor argued that “where a party lacking litigation capacity is not in a position to meet the costs of legal representation [...] or a CFA arrangement cannot be entered into, or an undertaking to meet the costs is not forthcoming from the other side, legal aid is the only way forward”.

117. The Official Solicitor gave the following case study:

Mr IS is aged 60, with a heart condition, is registered blind and is diagnosed with vascular dementia, which is progressive. IS is unable to provide very much factual information to his solicitor but from enquiries that have been made his solicitor has ascertained that he has been resident in the UK for some 12 years and does not appear to have made an application for leave to remain. IS appears to have worked as a tailor prior to going blind but now exists on limited handouts from a family member and begging. He is supported by a charity to access his medical appointments. IS’s lack of immigration status means that he is not entitled to

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103 *Transforming legal aid: Next steps*, paragraph 2.14
104 *Ibid*, Annex B, paragraph 125
105 Q13
107 The Official Solicitor
benefits. A different charity has now agreed to consider assisting him to regularise his immigration status. As IS has become unwell he has become unable to manage his day to day life and is being evicted from his privately rented accommodation; he will therefore shortly be homeless, without alternative accommodation or the possibility of obtaining such. Currently his legal advisors, through the Official Solicitor acting as proposed litigation friend are seeking to obtain care and support for him; if his solicitor is unable to do so by way of negotiation then he will challenge the local authority’s position by way of Judicial Review. If the residence test had applied IS would not have had any legal representation in either the possession proceedings nor for the purpose of attempting to access community care support and provision. It was his solicitor, instructed by the Official Solicitor, who identified a charity to help him in trying to regularise his immigration status; it is unlikely he would have been able to do so by himself. Given his limited capacity it is likely he would not have been able to access any real help and given the time it takes to glean any idea of his position it would be very unlikely that he would have progressed to a point where he could have convinced a solicitor to seek exceptional funding to pursue these issues for him.

Mackintosh Law provided a case study of a man who would no longer be eligible for legal aid under a proposed residence test:

We acted for ‘P’ in a Court of Protection case. P’s family had come from Pakistan to the UK. P had learning disabilities. He lived with his family. He attended a day centre. Staff were concerned because when he arrived he started to rummage in the bins and looking for food because he had not been fed. They also noticed that he had evidence of severe bruising. It was discovered that he was being kept in a concrete shed in the yard of the family home, like a dog, and being regularly beaten by the family. He was being starved. He wanted to leave. We represented him in Court to remove him from his family home into a supported living project where he could be fed and was safe. The application was vigorously contested by his family who wanted to keep him at home because they would have access to his benefits. The Judge decided that he should not be returned to the family.

It is entirely possible that our client would not have met the residence test.

118. The Government pointed out that individuals who arrive in this country, even if they did not appear to have mental capacity to represent themselves, will have to satisfy the residence test before being able to apply for civil legal aid funding. The Lord Chancellor cited cost restraints as the justification behind this decision:

I am afraid that the reality is that, at a time of straitened finances, we cannot simply offer public services to anybody who arrives in the country and requires them immediately.108

119. This response does not appear our address the concerns we raised regarding protected parties. We wrote to the Government urgently seeking clarification as to whether
individuals who lack specific mental capacity, under the Mental Capacity Act 2005, and who may not be able to prove lawful residence, are covered by this exception to the residence test. This is likely to concern a very small number of individuals.\textsuperscript{109}

120. In light of the evidence we had received, we asked the Lord Chancellor to clarify whether individuals who lack mental capacity will be exempt from the residence test. He told us that he had considered these arguments carefully as part of the consultation process, particularly in terms of the difficulties for some individuals in providing documentary evidence of residence.

121. The Lord Chancellor noted that individuals who lack capacity must nonetheless pass a funding means test. The Official Solicitor’s evidence on this point was that this was already an area of some difficulty, particularly where there was no person with lawful authority to manage the individual’s financial affairs:

There are already cases where the incapacitated person is ineligible for legal aid because their sole asset is their home and the equity exceeds the capital disregard, but the reality is that the equity is practically unavailable and their income is unable to fund legal services. It is unclear how the Government expects such a person to utilise their capital to fund litigation or otherwise to take steps to secure alternate funding for legal representation. I would also point out that there may be no person with lawful authority to manage that incapacitated person’s financial affairs, that such persons are often at risk of, or have in fact suffered, financial abuse, and because of their impaired mental capacity will be particularly vulnerable in the context of alternate funding arrangements.\textsuperscript{110}

122. We are concerned about access to legal aid for the small group of individuals who are protected parties pursuant to the Mental Capacity Act 2005. This group, while small, has an obvious need for legal representation; given that its members are prohibited from litigating in person, any right of access to justice cannot be practically and effectively exercised if (subject to means and merits) they are denied legal aid. We do not think that the residence test can be justified in its application to this group.

123. We do not accept the Lord Chancellor’s response on this issue. The response does not take sufficient account of the obstacles already faced by litigants lacking mental capacity, as explained by the Official Solicitor in his evidence. If protected parties fail the residence test, they are prohibited from appearing before the Court as a litigant in person. To refuse funding to a protected party would mean that they could not litigate, there would be no need to assess whether their access was practical or effective, as they would have no access to the court whatsoever.

124. We do not consider that the exceptional funding scheme, even if it were operating correctly (a question we consider below), could appropriately satisfy the needs of those who are protected parties pursuant to the Mental Capacity Act 2005 because, as the Official Solicitor made clear in his evidence to us, the discretionary nature of the scheme is not a sufficient safeguard to meet the concern about the position of those with impaired mental capacity, who cannot gain access to justice in any other way.

\textsuperscript{109} Q13

\textsuperscript{110} The Official Solicitor
**Trafficking victims**

125. Paragraph 125 of Next Steps states that victims of trafficking will be exempt from the residence test for cases under paragraph 32 of Part 1 of Schedule 1 to the LASPO Act. Some witnesses were concerned that this exemption was narrow and only included cases that are immigration claims, certain employment claims and damages claims connected with the trafficking (against the trafficker). They were concerned that this meant that cases to establish whether an individual is a victim of trafficking (with the attendant rights such a status provides), or cases which challenge failures to prosecute, will not be exempt from the residence test.

126. Other witnesses argued that legal representation was required in all cases of trafficking victims in order for the UK to comply with Article 12(2) of the EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims. Article 12(2) states:

> Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.

127. In England and Wales parts of the Directive which were not already part of English and Welsh law were brought into force pursuant to the Trafficking People for Exploitation Regulations 2013. As explained in Part 7 of the Explanatory Notes to the Protection of Freedoms Act 2012, the United Kingdom applied to opt in to the Directive in July 2011, and in October 2011 received confirmation that its application had been accepted. At this stage the United Kingdom was already compliant with most of the requirements of the Directive, and it is presumed that this would have included provision of legal aid in compliance with Article 12(2).

128. The Lord Chancellor considered that the exceptions to the residence test were broad enough to meet the requirements of the EU Directive. He suggested that a victim of trafficking who wished to remain in this country could apply for asylum, and that they would then be exempt from the residence test. However, he said that in most cases the Government would wish to help victims return to their families so they will be eligible for civil legal aid funding for advice concerning their status in the country and damages claims in relation to trafficking or exploitation.

129. *We are concerned that the Government may not meet its current international obligations, given the narrow list of cases for which victims of trafficking will be eligible to receive civil legal aid funding under this proposal. It is not always practical for a victim of trafficking to return to their country of origin, although we acknowledge that these individuals may apply for asylum and would then be exempt from the residence test. We seek assurances from the Government that assistance and advice would be given to victims in this situation about this course of action.*

111 Dr Nick Armstrong, Bindmans LLP, Coram Children’s Legal Centre
112 ECPAT UK
113 SI 2013/554 commenced 6 April 2013
130. **We welcome the Government’s decision to exempt certain trafficking cases, but conclude that the exemptions do not go far enough.** We recommend that the Government’s exemptions be extended to cases where the status of the trafficking victim is contested, and to legitimate challenges to failure to prosecute or investigate.

131. **We acknowledge the specific concerns regarding victims of trafficking who are children, or whose age is disputed, and we repeat our earlier recommendation, that all children be exempt from the proposed residence test.**

### Exceptional funding

132. The Government’s ultimate defence of the compatibility of the proposed residence test is that anyone excluded from accessing civil legal aid because of the residence test will be able to apply for “exceptional funding” under section 10 of LASPO. This, the Government says, ensures that civil legal aid will continue to be provided in any individual case where failure to do so would breach the individual’s rights to legal aid under either the ECHR or EU law. In relation to the cases we have considered above, for example, it would be possible for members of the groups concerned to apply for exceptional funding. Section 10 exceptional funding only applies to civil legal services, and is relied upon by the Government to ensure that both the residence test and borderline test are article 6 ECHR compliant.

133. We gave particular consideration to whether the section 10 arrangements on exceptional funding were sufficient to meet the obligations of effective access to court, when we scrutinised the Bill which became the LASPO Act:  

> The Bill makes provision for funding in exceptional cases where the Director determines that it is necessary to make legal services available to an individual because failure to do so would be a breach of the individual’s Convention rights or of any rights of the individual to the provision of legal services that are enforceable EU rights.  

> We are concerned about whether the Bill’s provision for funding exceptional cases is likely to make the right of access to justice practically effective. In many of the areas of law which are no longer in scope under the Bill, a decision on the availability of legal services will be required swiftly in order for the right of access to justice to be practically effective. We are not convinced that the provision in the Bill to fund exceptional cases, including where a failure to make the services available to a person would be a breach of their Convention rights or EU rights, is a sufficient guarantee that the new legal aid regime will not create a serious risk that its operation will lead to breaches of Convention rights.  

134. We took the opportunity, in this inquiry, to explore whether the exceptional funding regime is operating in practice in the way in which the Government said it would when the LASPO Act being passed, and whether it can be relied upon to ensure that legal aid continues to be provided where Article 6(1) ECHR requires it. The evidence from research by the Public Law Project (PLP), which assists applications for exceptional funding,  

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114 Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (22nd Report, Session 2010–12, HL Paper 237, HC 1717)
suggests that the scheme is not operating as envisaged, and cannot currently be deemed Article 6 compliant. The Government’s estimate of the number of applications for exceptional funding was between 5000-7000 applications in the first year of the LASPO Act. The PLP has found that:

There have been 746 applications received for Exceptional Case Funding since 1st April 2013 [...]. 680 of the total 746 applications have been processed and of these 15 were granted [...]. The LAA has received 42 direct client applications [...]. 40 of these applicants have been sent preliminary views. None of these have been positive.

135. The Ministry of Justice gave us the following breakdown of applications and successes by area of law:

<table>
<thead>
<tr>
<th>Area of Law</th>
<th>Applications</th>
<th>Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt/Consumer/Contract</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Family</td>
<td>415</td>
<td>4</td>
</tr>
<tr>
<td>Housing/Land Law</td>
<td>45</td>
<td>1</td>
</tr>
<tr>
<td>Immigration</td>
<td>144</td>
<td>2</td>
</tr>
<tr>
<td>Inquest</td>
<td>78</td>
<td>8</td>
</tr>
<tr>
<td>Inquiry/Tribunal</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>PI/Clinical Negligence</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Welfare Benefits</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>746</strong></td>
<td><strong>15</strong></td>
</tr>
</tbody>
</table>

136. Criticisms of the exceptional funding scheme include that:

a) The process is onerous, highly detailed, requiring analysis of the applicability of ECHR, EU and common law rights in order to prove that the case is exceptional, as well as the submission of evidence, for example medical evidence, which may attract a fee, and means and merits forms;

b) The form is completed without funding unless exceptional funding is granted, meaning that it is completed at risk by solicitors; it is suggested that the low percentage of grants of funding creates a chilling effect on applications;

c) Litigants in person may apply for a “preliminary view” from the LAA to take to a provider, but so far no such views have been positive, and it is questionable whether the vulnerable people whom the scheme is meant to assist are in fact able to present their case to the LAA, even at a preliminary stage;

115 The Public Law Project—“At a meeting on 26 February 2013 the Ministry of Justice told stakeholders (including the Public Law Project) that they anticipated that there would be between 5000–7000 applications for exceptional funding in the first year of LASPO 2012.”

116 Hodge Jones and Allen Solicitors—“The current requirements for an Exceptional Funding application are completion of a 14 page form with specific details of the case and submissions as to how it satisfies the criteria, completion of a second 14 page form with details of the case, the steps to be taken in proceedings, the expected costs and justification for funding, and completion of a 13 or 21 page form providing the applicants’ financial information, supported by evidence. For inquest proceedings the latter must be provided for every single immediate member of family of the deceased.”
d) There is no procedure for urgent cases;

e) There are no exemptions for children or people who lack capacity;

f) No or inadequate training is provided to LAA employees to apply the test.117

The Public Law Project (PLP) has an applicant who is registered blind and has a cognitive impairment that means he functions at the level of a dementia sufferer. The applicant cannot access the community care that he needs unless he has an outstanding immigration application. The Official Solicitor is acting for the applicant in his community care proceedings but cannot act in the immigration proceedings because the Official Solicitor does not have jurisdiction to do so. The Official Solicitor, through the applicant’s community care solicitor, approached five reputable immigration firms to see if the case could be taken on and exceptional funding applied for. All of those immigration firms refused to take the case on. PLP completed an application for exceptional funding so as to seek a preliminary view of the applicant’s eligibility for legal aid, which could then be used to persuade a solicitor to take on the case. Without a solicitor to help him, the applicant would be completely barred from exercising his right to make an immigration application, because he does not have capacity to do the application on his own. Furthermore, the applicant cannot be advised by anyone who is not an immigration solicitor because it is a criminal offence for someone to provide immigration advice who is not qualified or regulated to do so.

The application for a preliminary view was refused, and the refusal was upheld on the internal review. As instructed by the Official Solicitor, PLP has now sent a pre-action letter to challenge this refusal.

137. We asked the Lord Chancellor about the low number of grants of exceptional funding, and whether he considered that the scheme was working satisfactorily. He told us that he was not surprised that the numbers are relatively low, and that he was “equally ... not surprised that there are still a lot of people who are applying for funding in the hope that they will get it.” He confirmed that his Ministry would be looking at the scheme to ensure it was working correctly.

138. A further potential problem was explained to us by Tim Buley:

The LAA [...] is the “gatekeeper” for the grant of funding [...] At present, judicial review is within part 1 of Schedule 1, and hence the LAA is not called upon to make decisions whether to grant legal aid for potentially controversial claims against the government under section 10. If a residence test is introduced, that will change. The LAA, a central government body overseen by a member of the Cabinet, will make decisions on whether to fund claims which may be highly inconvenient to other government departments or the MOJ itself. In the extreme case [...] where funding is sought to challenge its own determinations on residence or section 10 itself, it will be
in a position to stifle such claims. Even if [...] it acts in good faith in such cases, it is bound to be influenced by its own view of the legality of its underlying decision.\textsuperscript{118}

The independence of decision making, and in particular the role of the Director of Legal Aid Case Work, was a particular concern in our Report on the LASPO Bill.\textsuperscript{119}

139. We also received some evidence that questioned whether section 10 was drafted widely enough to allow funding for claims excluded on the basis of a characteristic of the claimant, namely lawful residence, as opposed to the exclusion of a type of civil legal service. We received mixed evidence on this point.\textsuperscript{120}

140. The exceptional funding scheme is in its early stages of operation, but the evidence we have received suggests that it is not working as originally envisaged. The number of applications made is far below the expected number envisaged, and very few grants have been made. Whilst the types of cases that were expected to receive grants were always intended to be “exceptional”, we do not believe that the number of applications or grants is representative of a properly functioning scheme.

141. We do not have sufficient evidence to draw conclusions as to whether the lack of funding to complete what is a detailed and lengthy application process is creating a chilling effect on the numbers of applications, and we invite the Government to investigate this as a matter of urgency.

142. The evidence we have received, when taken together with the lack of a procedure to grant emergency funding, failure to exempt children and those who lack capacity, and lack of training provided to LAA employees who are assessing these cases, strongly suggests that the scheme is not working as intended. In our opinion this is borne out by the number of grants of exceptional funding. We therefore conclude that the Government cannot rely upon the scheme as it currently operates in order to avoid breaches of access to justice rights.

143. We also recommend that the Government review the potential problems regarding the independence of decision-making at the Legal Aid Agency that may be created by the introduction of a residence test, and respond with detailed suggestions as to how it intends to prevent any appearance of a conflict of interest arising in residence test cases, where the LAA refuses to grant exception funding given that refusal can be challenged by way of judicial review, which itself requires exceptional funding, requiring the LAA to review its own funding decision.

144. For these reasons, we do not consider that the exceptional funding scheme is operating in such a way as to guarantee that legal aid funding will always be available whenever Article 6 ECHR requires it, and we therefore conclude that the Government cannot rely upon the scheme to ensure that the residence test is ECHR compliant.

\textsuperscript{118} Tim Buley

\textsuperscript{119} Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill (22\textsuperscript{nd} Report, Session 2010–12, HL Paper 237, HC 1717)

\textsuperscript{120} Tim Buley. See also Hodge Jones and Allen LLP, and Q4
Associated Community Legal Service Funding

145. A discrete topic is the effect of the residence test on civil legal aid funding under what is currently known as "Associated Community Legal Service" funding.121 Such funding is granted for judicial reviews of decisions taken in the Magistrates’ Courts and some civil orders which may arise as a result of or following criminal proceedings, such as gang injunctions.

146. Both of these areas are currently funded by way of civil funding and would therefore appear to be subject to the residence test.122 The potential for a breach of access to justice rights is particularly acute in relation to judicial review, whereby a non-lawfully resident defendant in a criminal case could have their options for challenging decisions within the course of criminal proceedings restricted as a result of the residence test, thereby engaging Article 6(3)(c) rights to legal assistance for criminal offences. The problem is less acute for civil orders arising after the conclusion of criminal proceedings, though the same general access to justice issues arise.

147. It is not clear from the Consultation Paper whether the Government intends Associated Community Legal Service funded cases, such as judicial review in the context of a criminal case, to be subject to the proposed residence test. We invite the Government to consider exempting such cases from the residence test if it proceeds with the implementation of the proposal.

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121 Or in relation to the proposed criminal legal aid reforms contained in Transforming Legal Aid: Next steps "Associated Civil Work".

122 See, for example, Blackstone’s Criminal Practice 2014, D29.25 onwards, and D32.15–32.16
3 Prison law

Background

148. Civil and criminal legal aid is currently available to prisoners subject to means and merits. No distinction is made for civil legal aid funding between prisoners and non-prisoners. Prisoners are currently able to apply for funding for legal advice and assistance, which is funded under the criminal legal aid scheme for:

a) Complaints regarding treatment;

b) Sentencing issues;

c) Disciplinary matters;

d) Parole Board reviews.

Advocacy Assistance funding is provided for some disciplinary matters and Parole Board reviews. In addition, in certain cases the matter may move into or commence within the scope of civil work – for example, applications for judicial review or habeas corpus – and this will be funded under the civil legal aid scheme.

149. Since July 2010 providers of criminal legal aid to prisoners have had to seek approval from the LAA before providing any advice or assistance in relation to claims regarding treatment in prisons. Part of the merits criteria for the approval of legal aid funding was to approve funding only if there would be a sufficient benefit to the client and a realistic prospect of a positive outcome. In addition, since 2010 funding has not been available for matters which could be resolved using the internal complaints procedures unless the providers demonstrate that their client would not be able to use the system. The LAA indicated to the Government that 11 treatment cases have received approval since July 2010,123 of which most involve prisoners with mental health issues or learning disabilities.124

The original proposal

150. In its first proposal, the Government proposed to restrict access to legal aid funding to cases that:125

a) “involve the determination of a criminal charge for the purposes of Article 6.1 ECHR (right to a fair trial);

b) engage Article 5.4 (right to have lawfulness of ongoing detention reviewed); and

c) require legal representation as a result of successful application of the “Tarrant” criteria”.126

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123 Legal aid: delivering a more credible and efficient system, paragraph 5.1.1
124 Ibid
125 Legal Aid: delivering a more credible and efficient system, paragraph 3.14
The modified proposal

151. The Government received numerous responses to its first consultation question concerning the restriction of criminal legal aid for prison law matters. The key concerns were:

- the impact would be disproportionate on under-18s in custody, particularly around resettlement issues and the ability of young people to engage with the complaints system;

- the removal from scope of categorisation and licence conditions matters could have an impact on sentence length as well as increased costs as a result of keeping a prisoner in more secure conditions for longer than necessary;

- prisoners with mental health issues, disabilities or where English is not their first language would face difficulties using the complaints system;

- a complaints system that prisoners have confidence in is needed to ensure safety within prisons;

- the Prisons and Probation Ombudsman (“PPO”) would not be able to handle the increased workload;

- the PPO and Independent Monitoring Board (“IMB”) can only make recommendations and not binding decisions;

- there would be no funding for serious treatment cases. Prisoners could be held in segregation or be making a serious complaint against a member of staff but would have no legal way of challenging these decisions;

- treatment issues involving allocation of places in mother and baby units would be excluded from funding, and the nature of such cases requires provision of legal advice and assistance; and

- that the proposal would not save money as the fixed fee for legal aid advice and assistance is £220 as opposed to the cost per complaint investigated by the PPO of £830.

126 When a prisoner attends a disciplinary hearing before a governor the prisoner is asked whether they want to obtain legal advice or representation. If the prisoner does not want any legal assistance the hearing proceeds. However, if the prisoner requests legal advice, the adjudicating governor will consider each of the following criteria (resulting from the case of R v Home Secretary ex parte Tarrant) and record their reasons for either refusing or allowing representation of a friend:

- The seriousness of the charge/potential penalty;
- A substantive point of law being in question;
- The prisoner being unable to present their own case;
- Potential procedural difficulties;
- Urgency being required; or
- Reasons of fairness to prisoners and staff.

If the adjudicating governor allows the request they will adjourn the hearing for a reasonable time to allow the prisoner to telephone or write to a solicitor.

127 The Woolf Report 1991 into the Strangeways prison riots
152. The Government responded to the concerns with the following counter-arguments:

- the internal systems within youth institutions are sufficient to enable young people to address issues relating to their detention;
- young people in Secure Training Centres can appeal to the statutory Monitor, and advocacy services are found within the secure estate to assist young people with the system;
- from 1 July 2013 Barnardos have provided the advocacy services across all Secure Training Centres and Young Offender Institutions;
- since the end of September 2013 young people in Secure Training Centres have been able to take their case to the PPO and refer a complaint to their Local Authority. Young people in Youth Offender Institutions can also refer their complaint to the PPO or the IMB;
- cases where sentence calculation or direct release were being considered would be given legal aid funding although re-categorisation cases could be dealt with using the internal complaints system; and
- the processes and assistance available are sufficient to help prisoners with disability or mental health issues—prisons must inform prisoners about the complaints system and allow prisoners to make a complaint and receive the response in a format suitable to them.

153. After considering the consultation responses, the Government decided to proceed with their original proposal but decided that two further types of cases would be exempt from the restriction to prison law legal aid funding. These two types of cases are:

a) “all proceedings before the Parole Board, where the Parole Board is considering whether to direct release (as opposed to all cases that engage Article 5.4 ECHR); and,

b) advice and assistance in relation to sentence calculation where the date of release is disputed.”

154. In addition, as Simon Creighton told us, the Government decided to exclude legal aid from matters related to sentence planning and minimum term review applications, despite having stated its intention to retain these cases within the scope of legal aid in the first consultation paper; this exclusion was therefore not subject to consultation.

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129 Statutory Monitor appointed under section 8 of the Criminal Justice and Public Order Act 1994. Further information on this has been requested from the Ministry of Justice.
130 Transforming legal aid: Next steps, paragraph 48
131 Simon Creighton
132 Transforming legal aid: Next steps, paragraph 46. The Government accepts, however, that legal aid should continue to be available for sentence calculation, because, where it is disputed, this has a direct and immediate impact on the date of release from prison. Legal aid for sentence calculation matters, however, should only be available once alternative means of redress have been exhausted.
133 Transforming legal aid: Delivering a more credible and efficient system, para 3.18
155. The Government laid a negative instrument before both Houses of Parliament on 4 November 2013 to make the necessary amendments to secondary legislation to give effect to the proposal to limit the scope of criminal legal aid for prison law cases. The praying time in respect of this instrument expires at the end of the Lords sitting on 18 December 2013. Lord Pannick QC has put down a regret motion in relation to the instrument.

The rights engaged

156. The issue of prisoners’ access to justice has been a matter of interest to the UK’s national courts and the ECtHR. Many of the key cases on Article 6 and common law rights of access to justice involve prisoners, including *Golder v United Kingdom*, where a prisoner who wished to bring defamation proceedings against a prison officer was refused permission to consult a solicitor. In this case the ECtHR held that Article 6 contained an implied right of access to the courts, which had been violated by this refusal.

157. It is also clear from the history of the development of prison law that the common law principle of legality is firmly engaged by these proposals: Parliament is to be presumed to intend its laws to be interpreted in accordance with the rights recognised by the common law to be fundamental, including the right of access to court, unless it makes clear by express language its intention to do otherwise. In the absence of such express statutory language, any interference with common law rights of access to justice must be the minimum necessary to achieve the proposed legitimate aim. Indeed, some of our witnesses argued that the protections afforded prisoners by the common law go beyond those afforded by the ECHR:

> What is strikingly strange about the Lord Chancellor’s comments about where legal aid will be allowed is that he has restricted it to where he believes the Convention applies and has ignored where common-law standards of fairness apply. We have a history of common-law cases, for example in relation to Category A prisoners, that say that while you are a Category A prisoner you will not be released on parole licence, so it directly engages the liberty of the subject. That does not engage Article 5 of the European Convention on Human Rights, but in common law engages liberty.

158. The right of access to court is not an absolute right but may be subject to limitations: this was recognised by the European Court of Human Rights itself in *Golder v UK*, in which it said that the right “by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals.” Such limitations on the right of access to court must pursue a legitimate aim and comply with the principle of proportionality. The State is also afforded a certain margin of appreciation by the European Court of Human Rights when deciding on such limitations, particularly when the limitation on effective access flows from decisions about the allocation of scarce public resources to legal aid funding. Even such limitations, however, must not be arbitrary or impair the very essence of the right.

134 SI 2013 No. 2790, *The Criminal Legal Aid (General)(Amendment) Regulations 2013*.


136 Q19
**Legitimate aim**

159. The Government has been clear about the rationale behind its proposals on amending the scope of criminal legal aid for prison law: it is “to focus public resources on cases that are of sufficient priority to justify the use of public money,” in the conviction that better targeted legal aid spending ensures that public can have confidence in the legal aid scheme. The explanatory memorandum to the statutory instrument that has been laid to introduce this proposal states that “the primary objective of the reform package is to bear down on the cost of legal aid.”

160. The Lord Chancellor elaborated on the rationale behind the proposals in his oral evidence to us:

> I started from the point of principle: that I think it is important, at a time when we are taking some very difficult financial decisions, to have a legal aid system that people look at and say, “That is fair, and I can have confidence in it”. I struggle personally to believe that it is sensible to have a system where we have prisoners able to access the courts, and access public funds, to argue that they should be detained in a different prison [...] I think it is necessary to have non-judicial complaints procedures that have a final say, and that is what I believe should happen in our prison system [...] There are limitations to how much you can use the courts as a backstop, with all the costs that carries with it.

161. Several witnesses disputed the suggestion that prisoners were applying for legal aid because they did not like their prison. They told us that this type of issue had already been removed from the scope of funding, precisely because it could be dealt with by internal procedures, but that the remaining rights of access to legal funding had remained because they were considered to engage legal issues, and the witnesses provided clarification as to how some treatment matters had continued to receive funding after the changes.

162. Indeed, providers of criminal legal aid, since July 2010, have had to seek approval from the Legal Aid Agency before providing any advice in relation to treatment in prisons. The Specification to the Standard Crime Contract specifies that:

> “We will not ordinarily expect to fund a Treatment Case, which concerns a complaint by a Client about his or her living conditions in Prison ... unless the Client has severe mental health problems or severe learning difficulties such that, even with the help of other prisoners or staff, he or she is not able adequately to formulate his or her complaint effectively.”

163. We have not seen any evidence to suggest that legal aid is being abused to enable prisoners to complain about what prison they are put in or about their living conditions: legal aid is already unavailable for such claims. Nevertheless, it clearly constitutes a legitimate aim for the Government to seek to focus public resources on cases that are of sufficient priority to justify the use of public money, and this is a

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137 Letter dated 27 September from the Lord Chancellor to the JCHR; Next Steps, para. 11.
138 Explanatory Memorandum, para. 7.1.
139 Qq15–16 and Standard Crime Contract Specification B, Chapter 12 Prison Law
The implications for access to justice of the Government’s proposals to reform legal aid

164. **Amending the scope of criminal legal aid for prison law is therefore not inherently incompatible with the right of access to court.** Rather, the human rights question we have considered is whether the Government’s proposals for doing so give rise to a reasonable chance or a serious possibility of breaches of the right of effective access to justice in particular cases.\(^{140}\) To answer that question, it is necessary to consider whether the proposals constitute a proportionate means of achieving the Government’s legitimate aim, having regard to the scope of the exceptions which the Government proposes to carve out of the limitation, the adequacy of alternative avenues of redress for prisoners, and any other safeguards designed to ensure that the right of access to justice is not infringed.

**Proportionality**

165. The Lord Chancellor told us that he was satisfied that his proposals for restricting the scope of criminal legal aid and advice and assistance for prison law matters comply with Article 6. He provided the following reasons:\(^{141}\)

Firstly, if the matter involves a determination of a criminal charge within the meaning of Article 6.1, it will remain within the scope of criminal legal aid advice and assistance under the revised scope criteria.

Secondly, the proposals in relation to criminal legal aid advice and assistance do not in themselves affect the availability of civil legal aid within the scheme under LASPO. Accordingly, if a prison law matter involves the determination of civil rights or obligations within the meaning of Article 6.1 ECHR (and is not within the scope of criminal legal aid advice and assistance) civil legal aid may be available, subject to merits and means, for example for judicial review of a decision in that prison law matter. [...].

**Availability of judicial review**

166. As the written evidence from the Lord Chancellor makes clear, the type of legal aid under consideration within these proposals is for advice and assistance with internal prison complaints and appeal mechanisms, including, where appropriate, advocacy assistance. The written evidence from the Government suggests that the prison law proposals do not affect access to civil legal aid or judicial review funding. However, both these streams of funding are subject to the proposed residence test, and the current judicial review consultation proposals may also, if proceeded with, have an effect on access to judicial review.

167. In addition, our witnesses drew our attention to the structure of legal aid funding for public law challenges in the field of prison law, which restricts the number of “matter

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\(^{140}\) This was the test applied in the case of Medical Justice v Secretary of State for the Home Department [2010] EWHC 1925 paras 39–40.

\(^{141}\) Letter dated 27 September 2013 from the Lord Chancellor to the Chair.
The implications for access to justice of the Government’s proposals to reform legal aid

starts\textsuperscript{142} that solicitors may commence, which they suggested would prevent access to the courts in practice. Firms may at present commence publicly funded public law cases arising from prison law cases under a prison law contract through an ‘associated Community Legal Service’ (ACLS) scheme where the number of cases is not limited or a public law contract where the number of matter starts for all forms of public law challenge is limited to around 15 per year per firm. Our witnesses told us that if the majority of prison law work is removed from scope, it will only be possible for firms with a public law contract to provide representation with a consequent restriction on the number of matter starts. We asked the Lord Chancellor whether he intended to increase the number of matter starts. He told us that he thought the current balance was sensible, commenting that:

In a very small number of cases where something very untoward happens, of course, JR remains an option, but I am not saying that I want suddenly to replace all the prison law cases with judicial review cases.\textsuperscript{143}

168. We welcome in principle the Government’s indication that civil legal aid will continue to be available to bring judicial reviews in relation to prison law matters, because this will preserve the possibility of access to court in the sorts of cases where such access is required. However, we agree with our witnesses that the Government cannot rely upon prisoner’s retaining access to funding for judicial review, if the number of matter starts per year per firm remains restricted at the current level. If a matter is outside the scope of criminal legally aided prison law funding, we can envisage cases where a prisoner is unable to receive legal advice and representation because firms do not have enough matter starts to take on the case. Since there is no obvious practical alternative means for prisoners to seek legal advice such as attending a Law Centre, there is a clear risk of breach of Article 6 and common law rights in such a case.

169. We have also considered the effect of the proposed residence test on prisoners’ access to civil legal aid funding, for example to bring a judicial review challenge. We question whether the combination of the restriction in scope of prison law matters and the residence test will in practice allow access to legal advice by prisoners. When issues relating to the restrictions in the number of matter starts are added to this, it may become practically impossible for some prisoners to gain access to legal advice so as to be able to exercise their common law and article 6 rights effectively. \textit{We ask the Government to give specific consideration to the combined effect of its residence test and prison law proposals, particularly given our criticism of the exceptional funding criteria above, and also invite the Government, in its response to this Report, to provide a full explanation of how access to justice rights will be maintained where both policies are in operation.}

\textit{Internal prison complaint systems}

170. As stated above, the Government relies upon the internal prison complaints system as part of its argument that the modified proposal in relation to prison law is a proportionate means of achieving the legitimate aim of targeting scarce public resources. Throughout our inquiry many witnesses raised concerns about this reliance, suggesting that the system

\textsuperscript{142} A matter start is a case started under a form of funding called Legal Help or Controlled Legal Representation where there has been no previous legal help.

\textsuperscript{143} Q45
was inadequate, and required significant changes in order to meet the proposed enhanced role.

171. All prisons must have an internal prisoner complaints system. Complaints should be responded to within 5 days. A prisoner can appeal the outcome up to 7 days after receiving the response, and a more senior member of staff will respond. A prisoner can make a confidential complaint to the governor, the Deputy Director of Custody or the local Independent Monitoring Board (IMB) if the complaint is of a serious or sensitive nature. A prisoner can pursue the complaint with the IMB at any time. If an issue is not resolved through the internal system a prisoner is able to apply for civil legal aid funding, subject to means and merits, for judicial review of a decision on a treatment matter case. Alternatively prisoners can pursue their complaint with the Prisons and Probation Ombudsman (PPO). Prisoners are given the PPO’s response in writing. The PPO is an independent body and can make recommendations on a case. However, it cannot make binding decisions.

172. The Government considered that the current internal prison complaints systems were “sufficiently robust” for areas removed from the scope of criminal legal aid for prison law to be dealt with appropriately and adequately. It cited, for example, the Prison Service Instruction 02/2012 which sets out the procedures that are designed to ensure that complaints from all prisoners are dealt with properly. The Government said that the instruction ensures that all prisoners are able to understand how to make a complaint, through information provided in formats that are suitable for the prisoner. As discussed below, other witnesses disagreed with this analysis and questioned the Government’s reliance on the current system.

173. In Next Steps, the Government also explained the role of the NationalOffender Management Service (NOMS) with regards to the internal prison complaints systems. NOMS audits the complaints procedure and reports on whether systems are compliant with the instructions. The Government argued that the NOMS report found that overall the system is operating as set out with the instructions. The report made recommendations regarding provision of information in other languages and appeals. The Government said that these recommendations have been accepted.

174. In contrast, Her Majesty’s Chief Inspector of Prisons, Nick Hardwick CBE, told us that the Government’s response to concerns with the internal prison complaints system was “disappointing”. For example, he argued that individuals with disabilities, particularly mental health problems, struggle to use the complaints system. He also told us that prisoner confidence in a complaints system was crucial to the overall safety of a prison. He said that the “fundamental issue is that two-thirds of people who have had a complaint dealt with through the existing system do not think it has been dealt with fairly, and about one in 10 say they have been prevented in some way from accessing the complaints system”. This echoed Lord Woolf’s conclusions on the importance of standards of

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144 Transforming legal aid: Next steps, para 28
145 Prison Service Instructions (PSIs) are the rules, regulations and guidelines by which prisons are run. They have a fixed term expiry date.
146 Q17,Q18
147 Q17
justice to the overall safety of a prison in his 1991 report into the riots at the Strangeways prison. 148

175. We also heard from the Prisons and Probation Ombudsman (PPO), Nigel Newcomen CBE, who told us about his concerns with the Government’s proposal, particularly in relation to his lack of statutory independence and his office’s ability to deal with any increased workload. He described his representations to the Government on the proposed changes as “fairly basic and blunt”, suggesting that the Government needed to recognise the potential pressures that would be put on his organisation if there was a “very significantly increased demand and significantly reduced resource.” 149

176. Mr Newcomen discussed the difficulties that arise because his organisation does not have a “statutory footing that allows [him] to impose any formal decision of the kind [...] that a court process would allow”, though he acknowledged that his recommendations are almost always accepted. 150 He also questioned whether “acceptance means action”, and raised concerns that “there will remain a question as to how far a body that can only make a recommendation can guarantee that action will subsequently follow”. 151 The Lord Chancellor told us that he did “intend to put the Prisoner and Probation Ombudsman on to a statutory footing when legislative time permits [...] It is something that is very much on our agenda and we will do it as soon as we can.” 152

177. We welcome the commitment from the Lord Chancellor to put the Prisoner and Probation Ombudsman on to a statutory footing and, given that the statutory instrument to bring the prison law changes into effect has already been laid, we urge the Government to bring forward legislation as a matter of urgency.

178. Witnesses also questioned the role of the Independent Monitoring Board, with the Prisoners’ Advice Service arguing that 90-95% of the IMB’s caseload is to do with property complaints (these are not funded through legal aid currently). Her Majesty’s Chief Inspector of Prisons told us that 34% of prisoners said they did not know who the IMB were.

179. As to the legality of restricting legal aid so that only the internal or Ombudsman type procedures remain, the Bingham Centre for the Rule of Law drew the following conclusions:

It is uncontroversial that prisoners do not, by virtue of their incarceration, surrender their basic rights en bloc. 153 However, the retention of certain of their rights is likely to amount to very little if such rights are rendered practically unenforceable. The Consultation Paper argues that adequate alternatives exist, including the prison complaints system and the Prisons and Probation Ombudsman, and that these

148 The Woolf Report 1991 into the Strangeways prison riots
149 Q23
150 Q23: In a thematic of recommendations I undertook recently, 99% of recommendations in the complaints context and 96% of recommendations in the death in custody context are accepted.
151 Q23
152 Q44
The implications for access to justice of the Government’s proposals to reform legal aid should be the “first port of call”. However, this misses four crucial points. First, courts already normally require alternative remedies to be exhausted before granting permission to seek judicial review. Other modes of redress are therefore already the first port of call. Second, the proposals would render non-judicial remedies not merely the first, but (in many situations) the only port of call. Third, while such modes of redress may in some circumstances constitute adequate alternatives to litigation, the rule of law requires the possibility, at least as a last resort, of recourse to independent courts capable of issuing legally binding remedies. And, fourth, that rule-of-law imperative is particularly compelling in settings—which prisons are a paradigm example—in which individuals are subject to the exercise of highly coercive public law powers.

We accept that not all disputes concerning prisoners require the intervention of, or provision of advice by, lawyers and we do not consider that there is a general problem with the internal prisoner complaints systems. However, the evidence from our witnesses highlights areas where those systems are not working effectively. In the light of the Government’s reliance on these systems, when seeking to justify the proposed restriction on legal aid as a proportionate means of achieving its legitimate aim, improvements are necessary.

As we set out below, however, we consider that in some cases only the retention of public funding will be sufficient to prevent infringements of prisoners’ right of access to court arising in practice.

Disability, mental illness or lack of capability

The Government argued, in Next Steps, that the PSI 02/2012 provides procedures for complaints, including complaints made by prisoners with mental health issues and/or learning disabilities. It further stated that prisoners must have access to information in a format that they can understand—for example, if they have a disability or because their first language is not English. The Government, though, acknowledge that the NOMS audit of the complaints system tested only its overall adequacy, effectiveness, reliability, not whether the system catered adequately for different prisoners but its overall adequacy, effectiveness and reliability.

Her Majesty’s Chief Inspector of Prisons argued that prisons did not make provision for prisoners with mental health issues and that staff were not properly trained to assist these prisoners. He argued that his inspections had found that prisons do not make reasonable adjustments for groups that have mental health or learning disabilities. He said that prisoners with identified communication problems, mental health problems and learning difficulties should be able to obtain legal advice for making complaints. He said

154 Transforming legal aid: Delivering a more credible and efficient system, para 3.15
155 Bingham Centre for the Rule of Law
156 Transforming legal aid: Next steps, page 70, para 29
157 Ibid, para 31
that his view accorded with the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.\textsuperscript{158}

184. The Prison Reform Trust claim that 72\% of male and 70\% of female sentenced prisoners suffer from two or more mental health disorders. 20\% of prisoners have four of the five major mental health disorders. 10\% of men and 30\% of women have had a previous psychiatric admission before they come into prison. Neurotic and personality disorders are particularly prevalent - 40\% of male and 63\% of female sentenced prisoners have a neurotic disorder, over three times the level in the general population. 62\% of male and 57\% of female sentenced prisoners have a personality disorder.\textsuperscript{159} As we noted above the LAA indicated to the Government that 11 treatment cases have received approval for funding since July 2010,\textsuperscript{160} of which most involve prisoners with mental health issues or learning disabilities.\textsuperscript{161}

185. He was supported in his comments by the Mission and Public Affairs Division, Archbishop’s Council, Church of England, which disagreed with the Government’s reliance on PSI 02/2012. It acknowledged that the instruction makes certain appropriate provisions, such as allowing foreign national prisoners to write a complaint in their own language. But, it outlined these concerns:

- that written complaints should not be seen by any member of staff who may be directly involved with the prisoner (the suggestion that those who cannot write their complaint should speak to a member of staff contradicts this principle);
- that prisoners unable to write their own complaint should seek help from peers (in some cases this may be apt, but this group of prisoners is more likely than others to be vulnerable to influence or intimidation from other prisoners, so that reliance on those peers to write down their complaints is not appropriate); and
- that the PSI lays down a special process for ‘confidential access’ complaints (likely to concern the most sensitive matters) while there is no provision for those with specific needs in this case—the whole system presupposes ability to write on one’s own behalf.\textsuperscript{162}

Nick Hardwick CBE, Her Majesty’s Chief Inspector of Prisons, gave us the following case study—

When we inspected Bronzefield women’s prison, we identified a woman in the segregation unit there—a restricted status woman—who had been there for five years. In our report of that inspection, I described her treatment as “cruel and degrading”, and I used those words advisedly. She was undoubtedly a woman who did not have the

\textsuperscript{158} Principle 10: United National Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. A/RES67/187. 28 March 2013. This calls for special measures to be taken to ensure “meaningful access to legal aid” for, inter alia, persons with disabilities and persons with mental illnesses, taking into account their special needs.
\textsuperscript{159} http://www.prisonreformtrust.org.uk/ProjectsResearch/Mentalhealth
\textsuperscript{160} Legal aid: delivering a more credible and efficient system, paragraph 5.1.1
\textsuperscript{161} Ibid
\textsuperscript{162} Mission and Public Affairs Division, Archbishop’s Council, Church of England
capacity to make a complaint about her treatment herself. The HM Prison Service would say that they were concerned about her treatment and perhaps did not necessarily agree with our concerns. It seems to me the problem is that if a woman in that very unusual but extreme situation is unable to get legal aid, what is her remedy? She absolutely could not deal with that situation herself; she would need someone to support her.  

Witnesses argued that the lack of legal aid for prisoners with specific communication vulnerabilities in the complaints system meant that certain prisoners would slip through gaps. Witnesses also highlighted the fact that whilst Governors are able to use the Tarrant Test, in reality very few do. One of the criteria under the Tarrant test, which allows Governors to accept a request for legal representation, is ‘the prisoner being unable to present their own case’.

The Lord Chancellor acknowledged concerns about prisoners who are unable to articulate their problems as a “valid point”, but went on to argue that he did not feel that this necessarily meant that legal advice was necessary, as these prisoners had access to the internal complaints procedure, PPO and the IMB. He told us that he wanted his department to pursue the area of mental health in the criminal justice system, particularly within prisons, where there is “an as yet significantly unaddressed challenge”.

We welcome the Lord Chancellor’s proposal for further work into the issue of mental health and the criminal justice system. We note that the majority of the treatment cases funded since 2010 have been for prisoners who face mental health or other severe difficulties in effectively using the prison complaints systems. We are not satisfied that these prisoners will be able to use effectively the internal prison complaints system. We do not think that, given what appear to be very low numbers of funded cases, the extension of the restriction can be justified if it is to include prisoners with mental health problems or learning difficulties so severe that, even with the help of other prisoners or staff, they are not able adequately to formulate their complaint effectively. We recommend that the LAA retains the ability to grant funding for these cases where the implications for access to justice are clear.

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163 Q17  
164 When a prisoner attends a disciplinary hearing before a governor the prisoner is asked whether they want to obtain legal advice or representation. If the prisoner does not want any legal assistance the hearing proceeds. However, if the prisoner requests legal advice, the adjudicating governor will consider each of the following criteria (resulting from the case of R v Home Secretary ex parte Tarrant) and record their reasons for either refusing or allowing representation of a friend:

- The seriousness of the charge/potential penalty;
- A substantive point of law being in question;
- The prisoner being unable to present their own case;
- Potential procedural difficulties;
- Urgency being required; or
- Reasons of fairness to prisoners and staff.

If the adjudicating governor allows the request they will adjourn the hearing for a reasonable time to allow the prisoner to telephone or write to a solicitor.

165 Q18  
166 Q47
189. We further recommend that the Governmentformulates and issues specific
guidance to Governors as to the application of the Tarrant Test in light of the proposed
changes to prison law funding.

**Mother and Baby Units**

190. Mother and Baby Units (MBUs) allow women who give birth in prison to keep their
baby with them for the first 18 months, or allow women prisoners with a child under 18
months old to apply to bring their baby to prison. Children over 18 months old are usually
cared for externally, and social services may make these arrangements. However, there are
generally fewer places available in the MBUs than the number of women with babies, and
prisoners must apply for a place.\(^\text{167}\) An admissions board decides whether or not to allocate
a space, and its principal consideration is what is in the best interests of the child. The
decision as to whether to award a place in an MBU can be taken in consultation with a
local authority’s social services department. If the admissions board awards a place but
there are no spaces available at the prisoner’s current prison then she may be offered a
place at a unit elsewhere. There is an appeal process for mothers who are not awarded a
place in a unit.\(^\text{168}\) The statutory instrument laid on 4 November 2013 would remove legal
aid funding for women seeking legal advice and assistance to appeal a refusal to grant a
MBU space. Subject to means and merits (and the residence test), a judicial review case for
the decision taken by the admission board could still be funded.

191. In *Next Steps* the Government acknowledged the concerns raised regarding the
exclusion of mother and baby units from legal aid funding,\(^\text{169}\) but provided a general, rather
than a specific, response to these concerns, namely that the complaints system was robust
and decisions could be appealed to the Ombudsman, or, subject to means and merits, be
subject to judicial review.\(^\text{170}\)

192. The Prisoners Advice Service raised concerns regarding this issue, particularly
concerning the urgency of these cases and the inability of the internal complaints system to
deal with them:

> This is one of the most serious concerns that has been raised. The problems that are
> engaged cannot properly be resolved by the prison complaints system, because they
> will often involve decisions by outside agencies such as the social services. They often
> require very immediate emergency action. For that reason, even if they are able to
> make some form of internal complaint and it does not resolve it in the way they wish
> it to, alternative sources of redress such as the Prisons and Probation Ombudsman
> simply do not have the speed to deal with something where you are talking about a
> separation taking place overnight.

> We are also dealing with people who are in an incredibly vulnerable position. It is
> often somebody who is about to give birth or has just given birth in a custodial

\(^{167}\) The Ministry of Justice reports that that the number of MBU places nationally is 77 (84 spaces in total to allow for


\(^{169}\) *Transforming legal aid: Next steps*, para 9.2.4

\(^{170}\) *Ibid*, para 9.2.32
setting and may be told that they are not allowed to remain with their baby because of their behaviour, which may be linked to the whole range of vulnerabilities they have in custody. The concept that these people are in any way capable of presenting their own case is an absolute fiction.

The only way these cases will now progress in any sense is if the mother in that situation is miraculously somehow able to find a solicitor that can take on a judicial review without having done any previous preparatory work and will then suddenly start judicial review proceedings without any background to the case, if legal aid is still available for the judicial review.171

The Association of Prison Lawyers gave the following example—

B, a foreign national with no previous convictions was sentenced to a year in prison when her son was 9 months old. B was his sole carer, had never left him and was still breastfeeding. On admission to prison, she was immediately separated from him. B could not speak or write English very well, was isolated and had no experience of how the prison system works. B was traumatised by being separated from her baby and on her first few nights in custody she screamed for him. B was placed on report for threatening behaviour and placed in segregation for the night. B was not aware that she could make an application to be transferred to a mother and baby unit (she was unaware of mother and baby units), so that she could be reunited with her baby. Her son was being looked after by an elderly aunt who was finding it difficult to cope with such a young child.

B’s lawyers advised that she was entitled to apply for transfer to a mother and baby unit and assisted her with the application, liaising with the prison, the local Council and expert social workers. Despite unequivocal medical evidence warning of the detrimental impact on their well-being that continued separation would have on both her and her baby, her application for a mother and baby unit was rejected on the basis of her record of "poor behaviour in custody". B’s lawyers successfully appealed and she was transferred to a mother and baby unit, where she was reunited with her baby. B was reported as being a calming and positive presence within the unit.

193. The Prisoners’ Advice Service and other witnesses argued that the current arrangement (of legal advice being available to prisoners in this situation) saved money, as the cost of legal representation is a fixed fee amounting to a few hundred pounds, whereas the cost of keeping a baby in care is significantly higher.

194. The Lord Chancellor told us that very careful consideration had been given to this issue:

We have looked at this one quite carefully, and the process will be that initially the decision to admit a mother and child to a mother and baby unit is taken by the governor; it is taken on the advice of an independent admission board, chaired by an independent chair. The independent chair has to be a certified social worker. The board’s job is to take into account the best interests of the child, and what is best: is it
best for the child to be with the mother in prison or is it not. There is also the issue
of the health and safety of other mothers and children within the unit. If a mother is
refused a place she can go through the independent prisons complaint systems. She
can also, in extremis, access civil legal aid for judicial review, if there is a real issue
around the case. I think there are plenty of safeguards there.\textsuperscript{172}

When pressed as to whether, given the potential urgency in these cases, these processes
were sufficient, he responded that he was “not really convinced that this should be a legal
matter.”\textsuperscript{173}

195. \textbf{We note that there are very few cases involving Mother and Baby Units. We also
welcome the assurance given to us by the Lord Chancellor that the best interests of the
child are taken into account, especially given the importance of such decisions being
consistent with the law relating to children. However, we also note that there may be
cases before the internal prison complaints system where legal representation would be
desirable—such as those which are urgent or which involve third party evidence. In the
light of the paramountcy test and the limited number of children involved, we therefore
believe that the Lord Chancellor should urgently consider exempting the cases from his
proposals.}

\textbf{Young Offenders}

196. In \textit{Next Steps}, the Government states that it did not consider its proposal to be in
breach of the UK’s obligations under UNCRC.\textsuperscript{174} The Government gave specific details of
the complaints system in place for each of the three different types of establishment: Secure
Children’s Homes (SCHs); Secure Training Centres (STCs); and Young Offender
Institutions (YOIs).

197. All three establishments must have an internal complaints system. Civil legal aid will
remain for judicial review, subject to means and merits. SCHs have individualised
complaints systems. Advocacy services are available to children in SCHs (although this is
separate from the contract that provides advocacy services to YOIs and STCs). Children in
SCHs can appeal to the local authority using their complaints process.

198. STCs’ complaints services follow the procedures set out in the Secure Training Centre
Rules 1998. Children in STCs can also complain to Monitor (a statutory independent
appointee). From the end of September 2013, young people in STCs have been able to take
their complaint to the PPO. From 1 July 2013 Barnardos has provided the advocacy
services for STCs and YOIs after winning the new contract for these services.

199. YOIs complaints systems are in accordance with the YOI Rules. Young people in
YOIs can refer their complaint to the PPO and the IMB. Barnardos provides the advocacy
service for these young people.

200. \textit{Next steps} also said that improving outcomes for young people leaving custody was a
key priority under the current Government, and made reference to the Government’s

\textsuperscript{172} Q46
\textsuperscript{173} Q46
\textsuperscript{174} Transforming legal aid: Next steps, Annex B, para 19
consultation, *Transforming Youth Custody: Putting education at the heart of detention consultation*. This consultation closed in April 2013. At the time of reporting, a consultation response had not been published.

201. Witnesses expressed their anxiety about the Government’s decision not to make exceptions to the scope of prison law for offenders under the age of 18. Witnesses were concerned about young people’s ability to interact with the system and their fear of repercussions from making a complaint. One of the main concerns of our witnesses was resettlement for young offenders. Resettlement refers to the accommodation and support provided to young offenders leading up to, during and after their release from an establishment.

202. Laura Janes, on behalf of the Howard League for Penal Reform, argued that legal advice and assistance is necessary in this area as it helps to ensure that young people understand what legal rights they have and that they receive the support and services to which they are entitled. She argued that, whilst advocacy services provide a valuable role within the prison system, they provide an entirely different service to that of legal aid lawyers, particularly with regard to resettlement. For example, advocates cannot provide advice as to the legality of local authority decisions, nor provide representation and bring proceedings against local authorities to force them to act in accordance with their obligations. She was supported in her arguments by Her Majesty’s Chief Inspector of Prisons. Furthermore, Ms Janes warned of reliance only upon advocacy services:

> there is a real danger here. Something can seem fixed on the surface: a child might have accommodation, but a lawyer may be able to appreciate that the accommodation is unlawful under the Housing Act and they are losing their entitlements to leaving care rights, which would provide them with support and care until they are 21. There is a real danger that quick fix solutions may result in lost rights.

203. As outlined for MBUs, the internal prison complaints systems has no remit to investigate the decisions of external agencies nor can they address recommendations to them.

Kevin was 18 and had been a child in care. In prison, he turned his life around and started to engage in education for the first time. But when it came to his release, no plans were in place for his accommodation or support. The local housing authority could not assist as he could not return to his home area due to his offence. In these circumstances the law was clear that he was entitled to help from social services. His prison lawyers wrote to the local authority reminding them of their duties and they agreed to provide a suitable placement so he could be released to a package of accommodation and support.

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175 February 2013, CP4/2013
176 Howard League for Penal Reform, Coram Children’s Legal Centre, Association of Prison Lawyers
177 Q21
178 Q22
179 Q22
204. The Lord Chancellor responded to these concerns by stating that the Government does not think that resettlement issues need to be a legal matter. He noted that “we have got, and are looking to step up and improve, the quality of support provided to people after detention”. He also argued that local authorities and young offending teams work hard to ensure young people have accommodation when they leave an establishment.

205. We recognise the Government’s argument that there are numerous options available to young offenders with regards to assistance for resettlement issues, including advocacy services, appeal procedures and the Ombudsman. However, we have heard examples where local authorities have not met their legal obligations in providing the correct accommodation and support during resettlement. **We welcome the Lord Chancellor’s concern about the need to improve the quality of support provided to people after detention.** However, we are disappointed that the Government has pursued the removal of matters relating to young offenders and in particular resettlement cases from the scope of prison law funding. We are surprised it has chosen to do so before it has published the response to its own consultation—*Transforming Youth Custody: Putting education at the heart of detention consultation*.

206. We do not agree that advocacy services and internal prison complaints systems will be able to deal with these cases effectively. This could leave young people vulnerable and deny them their rights. The issues concerning young people may involve matters of housing law, social care law and public law of such complexity that they require access to legal advice and assistance in order to investigate and formulate their case. The availability of such funding in appropriate cases would be in accordance with the UNCRC.

207. We do not think that the Government can rely upon a right to judicial review where the claimant is a young offender, noting that the young offender would require a litigation friend to pursue such an action, and would need to satisfy judicial review time limits. We recommend that the Government retain young offender cases, and specifically resettlement cases involving young offenders, within the scope of prison law funding.

**Parole Board hearings**

208. The Government set out, in *Next Steps*, the proposal that proceedings before the Parole Board, where the Parole Board is considering whether to direct release, will remain eligible for criminal legal aid funding.

209. The Parole Board outlined the concerns that it had in response to the Government’s consultation, namely that it might substantially impact upon the efficiency of hearings and its costs:

   If every Cat A lifer was to ask for release at every hearing the cost to the system generally and the Parole Board in particular would rise rather than fall. A skilled and experience lawyer would be able to advise prisoners and take a realistic approach and seek alternative ways to enable the prisoner to progress through their sentence at less cost to the system.
And: litigants-in-person elevate costs and delay in the courts. Likewise, it will be time-consuming for the panel to guide an unrepresented prisoner during a parole hearing. The impact may be to halve the number of reviews which the panel conducts in a day, which is inefficient and expensive.  

210. Other concerns raised with us by our witnesses related to the effect of the proposals on the procedures and practices of the Parole Board. For example, Rule 8 of the Parole Board Rules 2011 allows for a legal representative of a prisoner to have access to sensitive material that cannot be disclosed to the prisoner. If prisoners will not have access to a legal representative, it is not practical for Rule 8 to apply.

211. In relation to victims and witnesses, the Parole Board also explained that prisoners usually withdraw from the hearing, and their legal representative remains, when victims appear to deliver an impact assessment. The Howard League and the Parole Board both suggested that prisoners would themselves be cross examining witnesses. They argued that this was not appropriate for the witness or the prisoner as it may result in prisoners personally questioning professional witnesses as to their assessment of their own risk.

212. The Lord Chancellor explained to us that he believed the number of cases that would be affected would be small. However, for cases that were not to do with direct release, he did not think it should be a legal matter. In relation to practical issues arising under Rule 8, or the attendance of victims, the Lord Chancellor told us:

> It is the Parole Board that leads the process, and its highly skilled members, with expertise in risk assessment, are adept at eliciting and assessing the information relevant to the matter under consideration. Parole Board proceedings must be fair. There is no reason to suppose that they will not continue to be so including in the types of case to which you refer. In addition Rule 8 of the Parole Board Rules 2011 provides for representatives other than a barrister or solicitor to represent the prisoner.

213. We have considered the Lord Chancellor’s response to our request for clarification over the practicality of Parole Board hearings without legal representation, in particular where previously lawyers would have remained present instead of the prisoner to hear a victim’s impact statement or to be given access to sensitive material pursuant to Rule 8 of the Parole Board Rules. We are not satisfied with the response we have received, which fails to engage with the underlying problems of applying the prison law legal aid restrictions to the existing procedures and practices of the Parole Board. These are concerns raised with us by the Parole Board, and as such, the response that such hearings will continue to be fair, or that a different representative – unidentified in the Ministry’s response – could be presented with sensitive material, misses the point. We urge the Government to reconsider the practicality of the prison law changes for these cases, even if they are only small in number.

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180 The Parole Board for England and Wales
182 Q48
183 Letter from the Justice Secretary to the Chair of the Committee, dated 5 December 2013
Categorisation

214. In Next Steps the Government stated that categorisation cases could be dealt with by the internal prison complaints system, with civil legal aid, subject to means and merits, remaining for judicial review. For prisoners in category A, representations by prisoners may be submitted to the Parole Board.

215. Many witnesses expressed concern that categorisation cases were being removed from the scope of prison law funding, and in particular argued that categorisation could have an impact on release date. Witnesses argued that categorisation and sentence calculation are related. Simon Creighton, on behalf of PAS, argued that whilst this aspect of the proposal might not engage Article 5 of the Convention, it did engage common law liberty. For example, whilst a prisoner remains a category A prisoner, they cannot be released on parole licence and this therefore affects the liberty of the prisoner. He further argued that the internal complaints system would not be able to deal with such complaints adequately as it would not be able to challenge independent witnesses.

The Prisoners Advice Service recently represented someone who had made numerous attempts to seek his removal from High Risk Category A status, arguing that prison service information was either wrong or was not based on evidence. He had tried in vain to deal with the errors through the complaints procedure but had simply got the same response which was that they either had no knowledge of the errors or that the prison computer system was accurate. Representations were made by us around factual errors involved with his index offence, security intelligence, consistency in public policy decision making, and the policy guidance contained in the National Security Framework, a document which is neither in prison libraries or available on the intranet and so is out of reach for prisoners. The end result was that the prisoner was downgraded to Category B. This had wider implications than simply for the particular prisoner, given that his disabled mother was able to visit more regularly, he was able to engage with external educational courses and was able to start to address the rest of his sentence plan.

216. Witnesses also suggested that removal of categorisation cases could increase overall costs. PAS said that keeping a prisoner in a more secure establishment than necessary had a huge cost, particularly in extra staffing levels. PAS stated that the annual the cost for a category A prisoner is around £61k, for a Category B prisoner it is around £34k, and for a category C prisoner is around £31k. Dr Nick Armstrong told us:

Cat A status is reviewed annually and at the moment, solicitors gather evidence and make representations in support of progressive moves. That work will now be out of scope. In 2011/12 there were 3,228 men in Cat A. If only 100 of them did not now move on because they have no solicitors to help them (so 3%, potentially a very

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184 Prisoners Advice Service, association of prison lawyers, Justice, Bingham Centre for Rule of Law
185 Q19
The implications for access to justice of the Government’s proposals to reform legal aid

217. The Lord Chancellor said categorisation is one issue that could be dealt with through the internal complaints system and the Ombudsman. He conceded that in some cases flexibility should remain with staff on a case to case basis.187

218. Categorisation engages common law rights to liberty, as it can affect the likelihood of a prisoner being released. There are also clear cost implications of a prisoner remaining in too high a category, which may mean that the Lord Chancellor’s cost-saving rationale may not be satisfied. We recommend that the Government look again at these proposals, and give full consideration to the potential for increased costs, which may affect the justification for its policy.
4 Borderline cases

Background

219. Currently a case must satisfy the merits criteria in order to qualify for civil legal aid. These criteria are used to determine whether funding a case is justified. They include the expected costs of the case, the outcome sought and the likelihood that the case is successful. The LAA assesses the predicted outcome of the case, often in consultation with the solicitor handling the case. The LAA currently categorises cases into one of the following:

“very good”, which means an 80% or more chance of obtaining a successful outcome;

“good”, which means a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome;

“moderate”, which means a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome;

“borderline”, which means that the case is not “unclear” but that it is not possible, 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;

“poor”, which means the individual is unlikely to obtain a successful outcome; or

“unclear”, which means the Director cannot put the case into any of the categories in paragraph (i) to (v) because, in all the circumstances of the case, there are identifiable investigations which could be carried out, after which it should be possible for the Director to make a reliable estimate of the prospects of success.188

220. Cases must generally have a 50% chance of success (“moderate” or above) in order to satisfy this part of the merits criteria. However, an exception currently applies for certain high priority cases, in which the prospects of success are “borderline” rather than “moderate”. As the original consultation paper explains:189

“[…] there are certain types of family or housing cases which will receive funding with borderline prospects of success. In other cases funding will be available if there is a borderline prospect of success and the case has special features (that is to say it is a case of significant wider public interest or a case with overwhelming importance to the individual). Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of ECHR rights.”

188 Transforming legal aid: delivering a more credible and efficient system, para 3.84
189 Ibid., para 3.85.
The proposal

221. The Government proposed, in its initial consultation, that cases which were classified as having a “borderline” prospect of success would no longer be eligible for funding. In other words, it proposed to abolish the exceptional “borderline” prospects of success category for high priority cases. In future, all cases to which the merits test applies must have “moderate” or better chances of obtaining a successful outcome. Cases which have been refused funding would be able to appeal the decision to an Independent Funding Adjudicator. The Government outlined that this proposal would also apply to asylum seeker cases. The Government states that it has considered Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.190

222. The Government’s consultation also outlined that certain cases would remain exempt. The following cases are exempt from the merits criteria:

- Under the Civil Legal Aid (Merits Criteria) Regulations 2013 (“Merits Regulations”), these are:
  - Certain family cases under regulation 11(9);
  - Mental health cases under regulation 51;
  - Public Law children cases under regulation 65(2)(a);
  - Certain family cases (where the individual has benefited from legal aid in the country of origin) under regulation 65(2)(b);
  - EU Maintenance Regulation cases under regulation 70; and
  - Hague Convention 2007 cases (concerning international recovery of child support and other forms of family maintenance) under regulation 71.

223. Having considered the responses to the consultation, the Government decided to proceed to remove legal aid for all cases assessed as having borderline prospects of success.192

The rights engaged

224. Like both the residence test and the restriction on criminal legal aid for prison law cases considered above, this proposal potentially affects the right of access to court because it makes it more difficult for certain cases to obtain legal aid funding and therefore to be brought to court. On the Government’s estimate, it will result in approximately 100 fewer cases a year being funded by legal aid.

190 Transforming legal aid: Delivering a more credible and efficient system, paragraph 3.89—“This requires the Government to provide legal assistance for those refused asylum. However article 15(3)(d) of the Directive makes clear that this obligation only extends to those appeals which are ‘likely to succeed’.”

191 Transforming legal aid: delivering a more credible and efficient system—footnote 43

225. Since this is already an exceptional category of funding, available only in relation to high priority cases which have a significant wider public interest, or which have a significant impact on the individual concerned in areas such as asylum or housing, this proposal is very likely to affect the ability of individuals to secure effective access to court in relation to human rights claims. Indeed, the Government, in its response to the consultation, recognises that the proposal will have an impact in cases which have important consequences for the individuals concerned.193

**Legitimate aim**

226. The purpose of the Government’s proposal is “to direct the limited legal aid budget at the cases which really justify public funding by requiring a case to have at least 50% prospects of success in order to warrant public funding.194 The Government considers it to be a reasonable principle that, to warrant public funding, a case should have at least 50% prospects of success. It says that “the merits test aims to replicate the decisions that somebody who pays privately would make when deciding whether to bring, defend or continue to pursue proceedings. We do not think that a reasonable person of average means would choose to litigate in cases which only have a borderline prospect of success and we do not think it is fair to expect taxpayers to fund such cases either.”

227. As with the other proposals that we have considered in this Report, the Government’s proposal in relation to borderline cases clearly pursues a purpose which is recognised as a legitimate aim for the purposes of justifying limitations on the right of effective access to court. The question, again, is whether the impact of the proposal on the right of access to court is proportionate, which requires consideration of the sorts of cases likely to be affected by the proposal, the evidence demonstrating the benefits to be secured by it, and the safeguards against the risk that the reform will lead to cases not being brought where human rights law requires that they should be.

**Proportionality**

228. Critics of the proposal suggested that the Government has failed to consider the importance of the right at stake as against the proportionality of funding a case. One written submission to us stated:

“To apply this blanket rule is likely to result in significant injustice. In some borderline cases funding is justified because of what is at stake. Consider a case in which a child’s entire future depends on the chance to judicially review a local authority. However, for whatever reason, prospects are borderline. The reasonable paying private client would fund such a case.”195

229. The Ministry produced the following table, showing the distribution of case types for borderline cases in 2011/12:196

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193 Ibid., para. 177.
194 Ibid., para. 2.21.
195 Helen Elizabeth Gill para 32
196 Impact Assessment—MoJ194 Source: LAA closed cases in 2011/12, adjusted for LASPO reforms.
230. The Bar Council criticised the table overall, but noted that it shows that many issues within this group of cases engage human rights issues, in particular cases involving the prospect of a loss of a person’s home — engaging the human right to respect for the home, and cases involving the prospect of the loss of a person’s children into the care system— engaging the right to respect for family life. They concluded: “Of all the measures [...], this one is therefore likely to have the most immediate and adverse effect on human rights.”

231. In addition, it has been argued that borderline cases “often involve key points of law that need testing, to see whether new facts or perspectives may change the courts’ perspective on a particular type of case.” An example of this is the housing case of Pinnock which was the culmination of three successive, legally aided cases.

232. Richard Drabble QC highlighted concerns about possible inequality of arms:

these proposals threaten to produce a situation in which the Executive can always access the higher courts if the lower courts establish a proposition which it wishes to challenge on appeal; but claimants do not have the same ability. The system will or may become institutionally “pro-executive”. In this connection, it is necessary to bear in mind the effect of a grant of public funding in providing cost protection for a claimant.

233. The Lord Chancellor when asked about the effect of the proposals on development of the common law, told us:

we have looked very carefully at what the legal position is, we have looked to Strasbourg case law, and we have formed a view this is a sensible measure. It is a balance: you are absolutely right that there are interesting cases debated in law, but we have only so much money. The most important thing, from my point of view, is to ensure that the legal aid system provides for access to justice where it is necessary to do so, and that I use the resources we have available, which are still per capita far more than any other common law system in the world.

234. We were told by our witnesses that the Legal Aid Agency scrutinises the merits of borderline cases closely, and funds very few borderline cases, in effect exceptional cases.

<table>
<thead>
<tr>
<th>Case type</th>
<th>Proportion (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic Violence</td>
<td>8</td>
</tr>
<tr>
<td>Housing</td>
<td>41</td>
</tr>
<tr>
<td>Immigration and Asylum</td>
<td>2</td>
</tr>
<tr>
<td>Private Law Children Act</td>
<td>3</td>
</tr>
<tr>
<td>Other Public Law</td>
<td>8</td>
</tr>
<tr>
<td>Other Public Law Children</td>
<td>38</td>
</tr>
</tbody>
</table>

197 The table gives no information about the number of cases funded in each category, which cases succeeded (in whole or in part) or why those that failed were unsuccessful. Confining the data to a single year makes it impossible to derive anything useful from it.

198 Mission and Public Affairs Division, Archbishop’s Council

199 Manchester City Council v Pinnock [2011] UKSC 6

200 London Borough of Harrow v Qazi [2003] UKHL 43; Kay v London Borough of Lambeth [2006] UKHL 10; and Doherty v Birmingham City Council [2008] UKHL 57

201 Helen Gill
The Ministry estimates that this proposal will save £1 million, based upon an estimated reduction of 100 cases per year. 202

235. The Government accepts that many of the cases affected by the removal of exceptional funding for cases with borderline prospects of success will include determination of human rights issues. In our view, this raises equality of arms issues, and a potential problem in relation to the creation of precedent to guide lower courts which will in turn affect a larger number of cases.

236. We were told in evidence by the Government that only cases that could be considered exceptional on their merits were funded as borderline cases, meaning that such cases could fall within the exceptional funding scheme criteria. However, the problems with exceptional funding that we identified in the previous chapter means that the Government cannot rely upon section 10 as currently operating in order to meet its obligations to provide practical and effective access to justice.

237. The possible saving from the proposal to exclude borderline cases is estimated to be £1 million, and, given the small size of this saving, the accuracy of this estimate is questionable, particularly since the figures produced by the Government appear to consider one year of funding only (2011/12) and do not appear to take into account the likelihood that some of these 100 cases could qualify for section 10 exceptional funding if that mechanism were operating satisfactorily. In view of the significance of the cases likely to be affected by this proposal, we recommend retaining the Legal Aid Agency’s discretion in these cases, or, if it must be changed, tightening the requirements rather than removing the possibility of such funding altogether.

202 Transforming legal aid: Next steps, paragraph 172
Annex—Standards engaged by the proposals

Common law
The right of effective access to court is recognised as a fundamental human right by the common law. More recently the Court of Appeal has considered the right of access in its common law, constitutional position as inherent in the rule of law. The common law, constitutional principle of legality is of particular relevance in relation to prison law, and has been considered in a number of pre-Human Rights Act 1998 prisoner cases.

European Convention on Human Rights
Article 6—Right to a fair trial: In Golder v United Kingdom the ECtHR confirmed that “the right of access [to a court] constitutes an element which is inherent in the right stated by Article 6 (1).”

Article 6 read with Article 14—Prohibition of discrimination: Applies mainly in relation to the residence test, with some potential application to prison law and groups who may be disproportionately affected.

Article 13—Right to an effective remedy: Applies particularly in relation to detainee cases engaging article 3.

European Union law
Article 47 Charter of Fundamental Rights: same scope as Article 6 ECHR
DIRECTIVE 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: in particular article 12(2) and the Council of Europe Convention on Action against Trafficking in Human Beings 2005 articles 10, 12 and 15(2).

Other international treaties and conventions
UN Convention on the Rights of the Child: in particular Articles 2, 3 and 12.

1951 UN Convention Relating to the Status of Refugees ("the Refugee Convention"): in particular article 16 regarding access to the courts

UN Convention on the Rights of Persons with Disabilities: Articles 12 and particularly Article 13: (1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at

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3 (1979-80) 1 E.H.R.R. 524
investigative and other preliminary stages. (2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

UN Convention on the Elimination of Discrimination Against Women (CEDAW): Article 2, requiring access to and effective enjoyment of rights on non-discriminatory grounds and article 15 in relation to equal access to and rights before the law.

International Convention on Civil and Political Rights: in particular Article 2(3)⁴ and also 26.

UN Basic Principles on the Role of Lawyers: paragraphs 2 and 3.⁵

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: in particular Principles 1, 2, and particularly 7 (prompt access for detained persons), 10 (equity of access) and Guideline 6.⁶

Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice: paragraphs 35, 37, 38

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⁴ 3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

⁵ Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

⁶ Guideline 6 paragraph 47(c) To ensure that prisoners have access to legal aid for the purpose of submitting appeals and filing requests related to their treatment and the conditions of their imprisonment, including when facing serious disciplinary charges, and for requests for pardon, in particular for those prisoners facing the death penalty, as well as for applications for parole and representation at parole hearings;
Conclusions and recommendations

Introduction

1. We are surprised that the Government does not appear to accept that its proposals to reform legal aid engage the fundamental common law right of effective access to justice, including legal advice when necessary. We believe that there is a basic constitutional requirement that legal aid should be available to make access to court possible in relation to important and legally complex disputes, subject to means and merits tests and other proportionate limitations. (Paragraph 32)

2. We are disappointed by the Lord Chancellor’s suggestion that we ought to have reported on these proposals earlier. The Government’s modified proposals were published in September and we have reported on them as soon as possible. We regret that the Secretary of State was not prepared to wait for our Report before proceeding further. We are not convinced that there is sufficient urgency behind these proposals, nor certainty about their human rights implications, to justify the Government in proceeding so quickly with bringing them into force. (Paragraph 37)

Residence test

3. The right of effective access to court is a right which is recognised by the common law to be fundamental, and for that reason the common law principle of legality applies: clear statutory authority is required, and a generally worded order-making power cannot be relied upon (Paragraph 56)

4. The vires of any regulations that are introduced fall within the remit of the Joint Committee on Statutory Instruments, and we will draw their attention to our Report. If the secondary legislation to bring the residence test into force is laid, they may wish to give close scrutiny to these issues. However, the Lord Chancellor told us in his evidence that the purpose of the residence test was to bring legal aid into line with other areas of Government policy where entitlement to certain benefits is subject to a residence test. We note that some of these are currently before Parliament in the Immigration Bill. Given the serious implications of the residence test for the right of effective access to court, and the desirability of full parliamentary scrutiny of the details of such a test, including the ability to amend the detail of the scheme, we believe such a test should be introduced by way of primary legislation, rather than under a generally worded power to alter the scope of legal aid by “omitting services”. (Paragraph 59)

5. The residence test proposal clearly engages both common law and Article 6 access to justice rights. Those rights are not absolute, and are capable of restrictions which serve a legitimate aim and are both necessary and proportionate in the pursuit of that aim. As the Government accepts the test will be easier for UK citizens to satisfy than other nationals, we consider that Article 14, read together with Article 6 is engaged; thus the test falls within the ground of “national origin” as specified in Article 14, and further, following the case of Bah v United Kingdom, immigration status can be considered as “other status” for the purposes of Article 14. (Paragraph 62)
6. Treating people differently in relation to their access to publicly funded legal advice on the basis of their length of lawful residence requires objective and reasonable justification in order to be compatible with Article 14 ECHR in conjunction with the right of effective access to court in Article 6(1). The difference of treatment must serve a legitimate aim and, be both necessary and proportionate. (Paragraph 63)

7. We accept that the Government’s rationale for the proposed residence test constitutes a legitimate aim for the purposes of both limiting the right of access to court and treating differently those who do not have the required length of lawful residence in the UK. We recognise that a residence test is used in other contexts, such as health, to regulate access to services and other public benefits. The European Court of Human Rights has also accepted that it was a legitimate aim for Belgium to seek to keep public money for those who have a certain degree of attachment to Belgium by defining the conditions of entitlement to legal aid so as to confine it to people lawfully resident in Belgium. We therefore conclude that a residence test is not incompatible per se with the right of effective access to court or the right not to be discriminated against in the enjoyment of that right. (Paragraph 68)

8. Various matters relating to asylum seekers remain unclear, and we invite the Government to consider the evidence we received and confirm in particular, whether given that legal aid will be available to prepare and submit a fresh claim for asylum, that exemption will extend to all other areas of civil legal aid, and not solely to work completed on the fresh claim. We also invite the Government to clarify, in relation to asylum seekers who have submitted fresh claims for asylum which are then accepted, when the 12 month period of lawful residence will be deemed to commence, whether on the date the initial application is submitted, the date the fresh claim is submitted, or the date the fresh claim is accepted. (Paragraph 75)

9. We remain concerned that refugees may be unable to access civil legal aid during their first few months of lawful residence in the UK. This is particularly worrying as this is the time that many refugees may need assistance in securing services they are entitled to, which could include the twelve month package of intensive support that the Lord Chancellor mentioned in relation to Gateway Protection Programme refugees. We recommend that any proposal excludes refugees as well as asylum seekers, in order to ensure that the UK’s international obligations are met. (Paragraph 78)

10. We welcome the Government’s modifications to the residence test which exempts children under 12 months of age (who are lawfully resident at the point of application) as this group could clearly not have met the 12 month requirement of the residence test. (Paragraph 91)

11. However, we do not agree that the Government has considered all groups of children who could be adversely affected by this test, and we note that no Child Impact Assessment has been produced. Such groups of children include children unable to provide documentation of residence and those who need help to gain access to accommodation and services. There is a particular problem in terms of the complexity and urgency of EU and international agreement cases, acknowledged during the passage of the LASPO Bill, but which have not been made an exception to
the residence test. We are concerned that the Government has not given full consideration to its obligations under the second article of the UNCRC. (Paragraph 92)

12. For reasons we explain below, we do not consider that the Government’s argument that cases can always apply for exceptional funding is sufficient to meet UNCRC obligations or the Government’s access to justice obligations. (Paragraph 93)

13. We are sure that the Government does not intend vulnerable children to be left without legal representation. The proposals give little consideration to the access to justice problems that the proposal specifically creates in relation to children, such as the potential complexity and urgency of the cases for which children would need advice and representation, or in some cases, the need to find a litigation friend to assist the child with their proceedings because they have become separated from their families. (Paragraph 94)

14. The Lord Chancellor’s justification for the policy, namely contribution, in particular through the payment of tax, cannot apply in relation to children. Nor can it be said that children have chosen to make their home in the United Kingdom. We do not consider that the removal of legal aid from vulnerable children can be justified and therefore we recommend that the Government extend the exceptions further by excluding all children from having to satisfy the residence test. (Paragraph 95)

15. We do not believe that the Lord Chancellor has given due consideration to the human rights implications in cases where the high threshold that is required to prove a breach of Article 3 is capable of being met, or indeed to the seriousness of the abuses the state can and has been accused of. (Paragraph 99)

16. We acknowledge the Government’s argument that treatment within detention should be dealt with by the internal prisons complaints system. However, we do not accept that individuals who have suffered abuse whilst being detained by the State, so as to breach article 3, should not be eligible for legal aid in order to pursue compensation. We consider that this bar could affect an individual’s article 13 right to an effective remedy from a national authority. We specifically recommend that the Government excludes paragraph 21 of Part 1 of Schedule 1 to the LASPO Act for detention cases from any proposed residence test. (Paragraph 101)

17. We accept as a general matter of common sense the Lord Chancellor’s answer that individuals who lack documentation should seek to rectify this with the Home Office. However, we are clear that there have been and will continue to be cases where individuals cannot produce the required documentation to prove their residence in the time necessary to allow the legal process to be of use to them. We are also concerned by the different examples we were provided with by our witnesses where documents have been lost by the Home Office, or indeed, for individuals who entered the country prior to the Immigration Act 1971, where such records have been destroyed by the Home Office. We ask the Government in its response to this Report to set out what the practice has been in the Home Office with regards to such records. We believe that the Government has not given sufficient thought to the difficulties some individuals may have in proving lawful residence, nor made a wide
The implications for access to justice of the Government’s proposals to reform legal aid

enough exemption to the test to ensure that some citizens are not prevented from accessing civil legal aid funding and we recommend that the Government look at this again. (Paragraph 111)

18. We welcome the Government’s exemptions in certain cases for victims of domestic violence, although we remain concerned about the impact of these proposals on victims of domestic abuse and their ability to access legal aid funding in order to gain practical and effective access to justice for themselves, and in many cases, for their families. This group of people is likely to experience practical problems in proving residence, and in any event may need to satisfy a further test to show evidence of domestic abuse in order to gain access to certain forms of civil legal aid funding in family cases, and we would ask the Government to review whether the exemptions should be extended to meet these concerns. (Paragraph 112)

19. We are concerned about access to legal aid for the small group of individuals who are protected parties pursuant to the Mental Capacity Act 2005. This group, while small, has an obvious need for legal representation; given that its members are prohibited from litigating in person, any right of access to justice cannot be practically and effectively exercised if (subject to means and merits) they are denied legal aid. We do not think that the residence test can be justified in its application to this group. (Paragraph 122)

20. We do not accept the Lord Chancellor’s response on this issue. The response does not take sufficient account of the obstacles already faced by litigants lacking mental capacity, as explained by the Official Solicitor in his evidence. If protected parties fail the residence test, they are prohibited from appearing before the Court as a litigant in person. To refuse funding to a protected party would mean that they could not litigate, there would be no need to assess whether their access was practical or effective, as they would have no access to the court whatsoever. (Paragraph 123)

21. We do not consider that the exceptional funding scheme, even if it were operating correctly (a question we consider below), could appropriately satisfy the needs of those who are protected parties pursuant to the Mental Capacity Act 2005 because, as the Official Solicitor made clear in his evidence to us, the discretionary nature of the scheme is not a sufficient safeguard to meet the concern about the position of those with impaired mental capacity, who cannot gain access to justice in any other way. (Paragraph 124)

22. We are concerned that the Government may not meet its current international obligations, given the narrow list of cases for which victims of trafficking will be eligible to receive civil legal aid funding under this proposal. It is not always practical for a victim of trafficking to return to their country of origin, although we acknowledge that these individuals may apply for asylum and would then be exempt from the residence test. We seek assurances from the Government that assistance and advice would be given to victims in this situation about this course of action. (Paragraph 129)

23. We welcome the Government’s decision to exempt certain trafficking cases, but conclude that the exemptions do not go far enough. We recommend that the
Government’s exemptions be extended to cases where the status of the trafficking victim is contested, and to legitimate challenges to failure to prosecute or investigate. (Paragraph 130)

24. We acknowledge the specific concerns regarding victims of trafficking who are children, or whose age is disputed, and we repeat our earlier recommendation, that all children be exempt from the proposed residence test. (Paragraph 131)

25. We do not have sufficient evidence to draw conclusions as to whether the lack of funding to complete what is a detailed and lengthy application process is creating a chilling effect on the numbers of applications, and we invite the Government to investigate this as a matter of urgency. (Paragraph 141)

26. The evidence we have received, when taken together with the lack of a procedure to grant emergency funding, failure to exempt children and those who lack capacity, and lack of training provided to LAA employees who are assessing these cases, strongly suggests that the scheme is not working as intended. In our opinion this is borne out by the number of grants of exceptional funding. We therefore conclude that the Government cannot rely upon the scheme as it currently operates in order to avoid breaches of access to justice rights. (Paragraph 142)

27. We also recommend that the Government review the potential problems regarding the independence of decision-making at the Legal Aid Agency that may be created by the introduction of a residence test, and respond with detailed suggestions as to how it intends to prevent any appearance of a conflict of interest arising in residence test cases, where the LAA refuses to grant exception funding given that refusal can be challenged by way of judicial review, which itself requires exceptional funding, requiring the LAA to review its own funding decision. (Paragraph 143)

28. For these reasons, we do not consider that the exceptional funding scheme is operating in such a way as to guarantee that legal aid funding will always be available whenever Article 6 ECHR requires it, and we therefore conclude that the Government cannot rely upon the scheme to ensure that the residence test is ECHR compliant. (Paragraph 144)

29. It is not clear from the Consultation Paper whether the Government intends Associated Community Legal Service funded cases, such as judicial review in the context of a criminal case, to be subject to the proposed residence test. We invite the Government to consider exempting such cases from the residence test if it proceeds with the implementation of the proposal. (Paragraph 147)

Prison law

30. We welcome in principle the Government’s indication that civil legal aid will continue to be available to bring judicial reviews in relation to prison law matters, because this will preserve the possibility of access to court in the sorts of cases where such access is required. However, we agree with our witnesses that the Government cannot rely upon prisoner’s retaining access to funding for judicial review, if the number of matter starts per year per firm remains restricted at the current level. If a matter is outside the scope of criminal legally aided prison law funding, we can
envisage cases where a prisoner is unable to receive legal advice and representation because firms do not have enough matter starts to take on the case. Since there is no obvious practical alternative means for prisoners to seek legal advice such as attending a Law Centre, there is a clear risk of breach of Article 6 and common law rights in such a case. (Paragraph 168)

31. We ask the Government to give specific consideration to the combined effect of its residence test and prison law proposals, particularly given our criticism of the exceptional funding criteria above, and also invite the Government, in its response to this Report, to provide a full explanation of how access to justice rights will be maintained where both policies are in operation. (Paragraph 169)

32. We welcome the commitment from the Lord Chancellor to put the Prisoner and Probation Ombudsman on to a statutory footing and, given that the statutory instrument to bring the prison law changes into effect has already been laid, we urge the Government to bring forward legislation as a matter of urgency. (Paragraph 177)

33. We accept that not all disputes concerning prisoners require the intervention of, or provision of advice by, lawyers and we do not consider that there is a general problem with the internal prisoner complaints systems. However, the evidence from our witnesses highlights areas where those systems are not working effectively. In the light of the Government's reliance on these systems, when seeking to justify the proposed restriction on legal aid as a proportionate means of achieving its legitimate aim, improvements are necessary. (Paragraph 180)

34. We consider that in some cases only the retention of public funding will be sufficient to prevent infringements of prisoners’ right of access to court arising in practice. (Paragraph 181)

35. We welcome the Lord Chancellor’s proposal for further work into the issue of mental health and the criminal justice system. We note that the majority of the treatment cases funded since 2010 have been for prisoners who face mental health or other severe difficulties in effectively using the prison complaints systems. We are not satisfied that these prisoners will be able to use effectively the internal prison complaints system. We do not think that, given what appear to be very low numbers of funded cases, the extension of the restriction can be justified if it is to include prisoners with mental health problems or learning difficulties so severe that, even with the help of other prisoners or staff, they are not able adequately to formulate their complaint effectively. We recommend that the LAA retains the ability to grant funding for these cases where the implications for access to justice are clear. (Paragraph 188)

36. We further recommend that the Government formulates and issues specific guidance to Governors as to the application of the Tarrant Test in light of the proposed changes to prison law funding. (Paragraph 189)

37. We note that there are very few cases involving Mother and Baby Units. We also welcome the assurance given to us by the Lord Chancellor that the best interests of the child are taken into account, especially given the importance of such decisions being consistent with the law relating to children. However, we also note that there
may be cases before the internal prison complaints system where legal representation would be desirable—such as those which are urgent or which involve third party evidence. In the light of the paramountcy test and the limited number of children involved, we therefore believe that the Lord Chancellor should urgently consider exempting the cases from his proposals. (Paragraph 195)

38. We welcome the Lord Chancellor’s concern about the need to improve the quality of support provided to people after detention. However, we are disappointed that the Government has pursued the removal of matters relating to young offenders and in particular resettlement cases from the scope of prison law funding. We are surprised it has chosen to do so before it has published the response to its own consultation—Transforming Youth Custody: Putting education at the heart of detention consultation. (Paragraph 205)

39. We do not agree that advocacy services and internal prison complaints systems will be able to deal with these cases effectively. This could leave young people vulnerable and deny them their rights. The issues concerning young people may involve matters of housing law, social care law and public law of such complexity that they require access to legal advice and assistance in order to investigate and formulate their case. The availability of such funding in appropriate cases would be in accordance with the UNCRC. (Paragraph 206)

40. We do not think that the Government can rely upon a right to judicial review where the claimant is a young offender, noting that the young offender would require a litigation friend to pursue such an action, and would need to satisfy judicial review time limits. We recommend that the Government retain young offender cases, and specifically resettlement cases involving young offenders, within the scope of prison law funding. (Paragraph 207)

41. We have considered the Lord Chancellor’s response to our request for clarification over the practicality of Parole Board hearings without legal representation, in particular where previously lawyers would have remained present instead of the prisoner to hear a victim’s impact statement or to be given access to sensitive material pursuant to Rule 8 of the Parole Board Rules. We are not satisfied with the response we have received, which fails to engage with the underlying problems of applying the prison law legal aid restrictions to the existing procedures and practices of the Parole Board. These are concerns raised with us by the Parole Board, and as such, the response that such hearings will continue to be fair, or that a different representative – unidentified in the Ministry’s response – could be presented with sensitive material, misses the point. We urge the Government to reconsider the practicality of the prison law changes for these cases, even if they are only small in number. (Paragraph 213)

42. Categorisation engages common law rights to liberty, as it can affect the likelihood of a prisoner being released. There are also clear cost implications of a prisoner remaining in too high a category, which may mean that the Lord Chancellor’s cost-saving rationale may not be satisfied. We recommend that the Government look again at these proposals, and give full consideration to the potential for increased costs, which may affect the justification for its policy. (Paragraph 218)
Borderline cases

43. The Government accepts that many of the cases affected by the removal of exceptional funding for cases with borderline prospects of success will include determination of human rights issues. In our view, this raises equality of arms issues, and a potential problem in relation to the creation of precedent to guide lower courts which will in turn affect a larger number of cases. (Paragraph 235)

44. We were told in evidence by the Government that only cases that could be considered exceptional on their merits were funded as borderline cases, meaning that such cases could fall within the exceptional funding scheme criteria. However, the problems with exceptional funding that we identified in the previous chapter means that the Government cannot rely upon section 10 as currently operating in order to meet its obligations to provide practical and effective access to justice. (Paragraph 236)

45. The possible saving from the proposal to exclude borderline cases is estimated to be £1 million, and, given the small size of this saving, the accuracy of this estimate is questionable, particularly since the figures produced by the Government appear to consider one year of funding only (2011/12) and do not appear to take into account the likelihood that some of these 100 cases could qualify for section 10 exceptional funding if that mechanism were operating satisfactorily. In view of the significance of the cases likely to be affected by this proposal, we recommend retaining the Legal Aid Agency’s discretion in these cases, or, if it must be changed, tightening the requirements rather than removing the possibility of such funding altogether. (Paragraph 237)
Draft Report (The implications for access to justice of the Government’s proposals to reform legal aid), proposed by the Chairman, brought up and read.

Ordered, That the Chair’s draft Report be now considered.

Paragraphs 1 to 237 read and agreed to.

Resolved, That the Report be the Seventh Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 18 December at 2.00 pm]
Declaration of Lords’ Interests

Lord Faulks
Practising Barrister who occasionally takes legal aid cases.

A full list of members’ interests can be found in the Register of Lords’ Interests: http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm
## List of Reports from the Committee during the current Parliament

### Session 2013–14

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