Ministry of Justice

TRANSFORMING LEGAL AID

1. Further to my letter of 13 August 2013 I now write in response to the second, third and fourth requests of your letter of 15 July. I address below each of those three requests in relation to the proposals which are the subject of the Committee's inquiry.

2. I published *Transforming Legal Aid: Next Steps* on 5 September 2013. I am consulting on a revised proposal in relation to payment to legal aid providers in judicial review cases as part of the separate consultation *Judicial Review: proposals for further reform*, published on 6 September 2013.

The need for reform

3. As set out in the document of 5th September, the justice system in England and Wales has a world class reputation for impartiality and fairness and is a model for many other systems the world over. The provision of legal aid where necessary is an integral part of that system.

4. However, any legal aid scheme needs to be properly targeted at the cases and people most in need of assistance. And publicly funded legal services must be provided in as efficient a way as possible to ensure value for the taxpayer on the one hand and the availability of sustainable high quality services for clients on the other. These objectives go with the grain of the Government's wider approach to enable Britain to succeed in the 21st Century. Public services must be fair to the taxpayer and the recipient, standards must be high and we must reduce costs so the country can live within its means as we build a strong, sustainable economy.

5. The Government is committed to reducing spending and the legal aid scheme cannot be immune. Overall, by 2015/16 the Ministry of Justice budget will have reduced by a third since 2010, and our reforms to the legal aid scheme, once implemented, would see that particular budget fall by a similar proportion.

6. If we are to maintain the credibility of legal aid as an integral part of our justice system we have to be able to demonstrate to the public and hard-working families on whose taxes this system depends that we have scrutinised every aspect of legal aid spending to ensure that it can be justified and that services are being delivered as efficiently as possible. Unless the legal aid scheme is targeted at the people and cases where funding is most needed, it will not command public confidence or be credible.

7. The overarching purpose of each of the four proposals discussed below is to target limited public resources at cases that most justify it, ensuring that the public can have confidence in the legal aid scheme

Human rights and the common law rights of access to court and effective access to justice; implementation

8. I set out below, as requested, an assessment of the compatibility of the proposals which are the subject of the Committee's inquiry 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. I also set out, as requested, the powers in primary legislation that it is intended to use to implement the proposals.

Common law

9. The Committee refers to the common law rights of access to court and effective access to justice. The relationship between the common law rights and legal aid was the subject of correspondence between the Department and the House of Lords' Constitution Committee during the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill[1]. As confirmed in that correspondence, we accept that there is a common law right of access to the court, see for example the case of *ex parte Leech* ([1994] QB 198) and more recently *The Children's Rights Alliance for England v Secretary of State for Justice and others* ([2013] EWCA Civ 34). 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.

10. Of course, issues as to how the legal aid system should be set up and which cases should be eligible for legal aid involve the exercise of judgement and balance given that resources are finite and there are other calls on the public purse. I am satisfied that such judgements have been and will continue to be carefully and lawfully made.

Human rights

[1] http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtrtoMcNally231111.pdf; http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtfromMcNally121211.pdf; http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtrtoMcNally180112.pdf; http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/LtfromMcNally240112.pdf

11. I am also satisfied that our reforms are compatible with all relevant human rights standards, including, for example, the United Nations Convention on the Rights of the Child. I have specifically addressed in more detail below their compatibility with Articles 6 and 14 of the ECHR.

Residence test

12. I consider that individuals should in principle have a strong connection to the UK in order to benefit from the civil legal aid scheme. As with any other public service, legal aid must be fair to the people who use it but also fair for the taxpayer who pays for it. The Government believes that those who do not have a strong connection should not be prioritised for public funding in the same way as those who do have a strong connection. I believe that the residence test I have put forward is a fair and appropriate way to demonstrate such a strong connection. We must ensure that limited resource is targeted appropriately. This is always an important responsibility of Government but even more so at a time of financial constraint. This is why I will be introducing a residence test for individuals who are applying for civil legal aid.

13. I am satisfied that the proposed residence test complies with Article 6 of the ECHR. An important point to note from the outset 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 (including applications for services which are described in Part 1 of Schedule 1 to LASPO from which the individual would be excluded as a result of the residence test). This ensures that civil legal aid will continue to be provided in any individual case where failure do so would breach the applicant's rights to legal aid under the ECHR or EU law (or, in the light of the risk of such a breach, it is appropriate to provide legal aid). Accordingly, the system has been specifically set up so as to avoid a breach of Convention rights; and any person who is entitled to legal aid under Article 6 ECHR will continue to receive legal aid notwithstanding their ability to meet the residence test.

14. I am also satisfied that the test complies with Article 14 of the ECHR, taken with Article 6. Whilst we recognise that it may be easier for British nationals to satisfy the test than other nationals, we consider that the test is justified and proportionate to the legitimate aim of the provision. It is a reasonable principle that individuals should have a strong connection to the UK in order to benefit from the civil legal aid scheme for the reasons summarised in **paragraph 12** above.

15. The requirement to be lawfully resident at the time of applying for civil legal aid and to have been lawfully resident for 12 months in the past is a fair and appropriate way to demonstrate such a strong connection. A period of 12 months of previous lawful residence demonstrates a meaningful connection with the UK. A test such as this inevitably

involves making a choice on how a strong connection is best demonstrated. We consider that the test proposed, taken together with the exceptional funding provision at section 10 of LASPO, strikes the correct, justified and proportionate balance by focusing on past and current connection to the UK.

16. In the light of these points, we consider that the proposed residence test is lawful, justified and appropriate. However, in the light of the consultation responses, we have modified our approach in some areas. We initially proposed exceptions for asylum seekers and for serving members of Her Majesty's armed forces and their families. Having listened to consultees views, we agree that there are further limited circumstances where applicants for civil legal aid on certain matters of law (as set out in Schedule 1 to LASPO) should not be required to meet the residence test. These broadly relate to an individual's liberty, or where the individual is particularly vulnerable or where the case relates to the protection of children. The test will therefore not apply to the following categories of case:

    - Detention cases (under 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, 3[2], 9[3], 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).

17. We will also make limited exceptions for certain judicial review cases for individuals to continue to access legal aid to judicially review certifications by the Home Office under sections 94 and 96 of the Nationality, Immigration and Asylum Act 2002.

18. In addition to these exceptions, children under 12 months will not be required to have at least 12 months of previous lawful residence. We have also clarified that asylum seekers would continue to be able to get

[2] Exceptions to the residence test for cases under paragraph 3 of Part 1 of Schedule 1 to LASPO would only apply for cases where the abuse took place at a time when the individual was a child.

[3] Exceptions to the residence test for cases under paragraph 9 of Part 1 of Schedule 1 to LASPO would only apply to cases under the inherent jurisdiction of the High Court in relation to children,

legal aid to help with preparing and submitting a fresh claim for asylum. For successful asylum seekers, the 12 month period of continuous lawful residence required under the second limb of the test will begin from the date they submitted their asylum claim, rather than the date when that claim is accepted. We also note again that anyone excluded by the residence test would be entitled to apply for exceptional funding. Finally, for completeness, we also note that we have always been clear that we will ensure legal aid would continue to be available where necessary to comply with our obligations under EU or international law set out in Schedule 1 to LASPO.

19. It is intended that this reform will be introduced, subject to Parliamentary approval of the secondary legislation, to take effect in early 2014. We intend to implement the residence test using the power in section 9 of LASPO to modify Schedule 1 to that Act.

Criminal legal aid for prison law

20. Having considered the responses to the *Transforming Legal Aid* consultation, I have decided to restrict the scope of criminal legal aid advice and assistance for prison law matters to: matters which involve the determination a criminal charge for the purposes of Article 6.1 ECHR; all proceedings before the Parole Board where the Parole Board has power to direct release; cases involving the successful application of the *Tarrant* criteria[4]; and sentence calculation matters where the date of release is disputed. These proposals aim to focus public resources on prison law matters that are of sufficient priority to justify the use of public money. Alternative means of redress such as the prisoner complaints system should be the first port of call for issues removed from scope.

21. I am satisfied that these proposals comply with Article 6 ECHR. 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

[4] 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 or 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.

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. However, it is important to note that the standard merits criteria for legal representation under civil legal aid require an individual to have exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution (regulation 39(d) of the Civil Legal Aid (Merits Criteria) Regulations 2013 (S.I. 2013/104). In addition, where a case 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 or within the scope of Schedule 1 to LASPO) exceptional funding under section 10 of LASPO will be available where failure to provide legal aid would breach the applicant's rights to legal aid under the ECHR or EU law (or, in the light of the risk of such a breach, it is appropriate to provide legal aid). Accordingly, any person who is entitled to legal aid under Article 6 ECHR will continue to receive legal aid notwithstanding the restriction of the scope of criminal legal aid advice and assistance.

22. I am also satisfied that these proposals comply with Article 14 taken with Article 6 ECHR. I do not consider that the removal of certain matters from the scope of criminal legal aid advice and assistance involves any difference in treatment of persons in analogous situations on the basis of their status for the purposes of Article 14 ECHR. Further, adequate processes are in place to ensure that all prisoners, including those under the age of 18 and those with mental health and learning disabilities, can use the alternative means of redress, for example the prisoner complaints system and its equivalent in STCs, YOIs and SCHs. We consider that the alternative means of redress are robust. Compliance with published policies, including the need to make reasonable adjustments, will be reinforced through the actions outlined in paragraphs 34 and 35 of Annex B to *Transforming Legal aid: Next* Steps. Thus, while I do not accept that there is any relevant difference in treatment for the purposes, to the extent there were to be any such difference, I consider that it would be justified because for the reasons above the modified proposal represents a proportionate means of achieving the legitimate aim of ensuring that limited public resources are targeted at the cases that justify it.

23. It is intended that this reform will be introduced, subject to Parliamentary approval, via secondary legislation [and amendment to the 2010 Standard Crime Contract], to take effect in early 2014. We intend to restrict the scope of criminal legal aid advice and assistance for prison law by amending regulation 12 of the Criminal Legal Aid (General) Regulations 2013 (S.I. 2013/9), made under section 15 of LASPO and making consequential changes to other regulations.

Removal of civil legal aid for cases with borderline prospects of success

24. I consider that it is a reasonable principle that, in order to warrant public funding through legal aid, a case should have at least a 50% prospects of success. Broadly speaking, the merits test aims to replicate the decisions a privately-paying individual would make when deciding whether to bring, defend or continue to pursue proceedings. I do not think that a reasonable person of average means would choose to litigate in a case that only had a borderline prospect of success, and I do not think it is fair to expect taxpayers to fund such cases either.

25. I am satisfied that the proposal complies with Article 6 ECHR. There are already merits criteria for civil legal aid set out in the Civil Legal Aid (Merits Criteria) Regulations 2013. Caselaw under Article 6 ECHR is clear that it is permissible to impose a merits test for civil legal aid. The refusal of legal aid on the basis that a claim has no reasonable prospects of success does not constitute a breach of Article 6(1) unless it can be shown that "the decision of the administrative authority was arbitrary" (*X v United Kingdom* (Application number 8158/78). In *Winer v UK* (Application number 10871/84), referring back to *X v United Kingdom*, the Commission noted "that even where legal aid may be available for certain types of civil action, it is reasonable to impose conditions on its availability involving, inter alia, the financial situation of the litigant or the prospects of success of the proceedings".

26. I am also satisfied that these proposals comply with Article 14 taken with Article 6 ECHR. I do not consider that the removal of civil legal aid from borderline cases involves any difference in treatment of persons in analogous situations on the basis of their status for the purposes of Article 14 ECHR. To the extent that there were to be any such difference in treatment, I consider that it would be justified as a proportionate means of achieving the legitimate aim of ensuring that limited public resources are targeted at the cases that most justify it.

27. It is intended that this reform will be introduced, subject to Parliamentary approval, via secondary legislation in late 2013. We intend to implement this change by amending the Civil Legal Aid (Merits Criteria) Regulations 2013 under section 11 of LASPO.

Payment for judicial review work

28. In the *Transforming Legal Aid* consultation, the Government proposed transferring the financial risk of a legally aided judicial review application to the civil legal aid provider in order to create a greater incentive to give careful consideration to the strength of the case before applying for judicial review. The Government continues to believe that legal aid should be focussed on those judicial review cases where it is really required. However, the Government has listened to concerns raised by a number of respondents who argued that the original proposal would also affect meritorious cases where permission

is not granted simply because the case concludes prior to the permission decision. The Government is now consulting on a further proposal whereby, in addition to the original proposal not to pay a provider unless a case is granted permission, the LAA will have a discretionary power to pay providers in certain other cases which conclude prior to permission. [https://consult.justice.gov.uk/digital-communications/judicial-review]

29. I am satisfied that this proposal complies with the ECHR. In relation to an individual case in which a provider agrees to act and which passes the means and merits tests for legal aid, the individual will receive representation and therefore there can be no issue of incompatibility with Article 6 ECHR. The financial risk will rest with the provider, not the client, who will remain in receipt of legal aid. Arguments were raised by respondents to the Transforming Legal Aid consultation that the proposal would have a wider chilling effect on judicial review applications, in that providers would be unwilling to take on legally aided judicial review cases at risk. This, it was argued, would lead to individuals being unable to obtain legal aid for a judicial review and inhibit their right of access to a court under Article 6 ECHR. It was argued that this would affect vulnerable clients (who might share certain protected characteristics for discrimination purposes).

30. The Government does not accept these arguments. The purpose of the proposal is to incentivise providers to scrutinise the strength of a judicial review claim before applying for legal aid to issue proceedings. Legal aid will as now remain available to enable the provider to undertake that scrutiny at the pre-action stage. In so far as the proposal is intended to target weak cases, this is a legitimate objective in the context of Article 6 ECHR, in relation to which it is well-established that a State may place limits on the availability of legal aid provision, including by reference to the prospects of success in the case. In relation to this proposal, the limitation is a proper one to encourage providers to assess the prospects before issuing proceedings, and is reasonable in that the risk that the provider bears is not linked to the ultimate outcome of the case, but to whether a court permits the case to proceed at the permission stage.

31. In so far as different views may be taken by a court at the permission stage, a provider who disagrees with the refusal of permission can in an ordinary judicial review (and unless the judge certifies the case as being "totally without merit") apply for an oral renewal hearing and from there may appeal to the Court of Appeal. Taking these steps into account, it is therefore proportionate and reasonable to rely on the permission threshold as a basis upon which to limit the circumstances in which the provider will be paid for the case.

32. Neither does the Government accept that the proposal will have any wider chilling effect on the ability of individuals to access justice in meritorious cases. In addition to the opportunities available to a

provider to challenge a refusal of permission, it should be remembered that providers will still be paid in both arguable and strong cases under the proposal. First, providers will be paid in all cases which are granted permission, even if they are ultimately unsuccessful. Second, where a case settles in the claimant's favour at any stage, including prior to permission, the claimant can apply for a costs order or agree costs as part of settlement. Where costs are ordered or agreed, they will be at *inter partes* rates, which are higher than legal aid rates. The courts have recently affirmed that the principle that the losing party should generally pay the winning party's litigation costs applies to public law claims, regardless of the fact that the defendant is a public body (*R(M) v Croydon London Borough Council* [2012] EWCA Civ 595). Costs should therefore be available to a successful legal aid provider in very many cases on this basis. Finally, under the Government's revised proposal a legal aid provider who concludes a case prior to the permission stage without securing a costs order or agreement may apply to the LAA for payment at legal aid rates. The LAA will consider each case on its facts, applying a set of criteria which is subject to consultation, but which is designed to enable payment in genuinely meritorious cases.

33. The Government will listen carefully to consultation responses before making its final decisions on this proposal. Subject to the outcome of the consultation and Parliamentary approval, this proposal would be implemented though secondary legislation using the Lord Chancellor's powers under section 2 of LASPO.

Equalities impact

34. In relation to the Committee's request for a more detailed equality impact assessment, Annex F of *Transforming Legal aid: Next Steps* sets out our final analysis of the equalities impact of the proposals the Government intends to implement. Annex F and the response to consultation in Annex B addressed the equality issues raised by consultees, including the EHRC. Annex F also sets out a full summary of the equality issues raised in responses from consultees about the payment for judicial review proposal in the *Transforming Legal Aid* consultation. *Judicial Review: proposals for further reform*, at section 9, invites further views on the equality-related impacts of the revised proposal in relation to payment for judicial review.

Chris Grayling
Lord Chancellor and Secretary of State for Justice
27 September 2013