Transforming Legal Aid: Consultation Paper

Briefing for MPs and Peers

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On 9 April 2013, the Ministry of Justice ("MoJ") published *Transforming legal aid: delivering a more credible and efficient system* ("the Consultation Paper"). The proposals in the Consultation Paper will have far reaching consequences for the accessibility and credibility of our justice system and for the rule of law. JUSTICE considers that the changes proposed are rushed, ill-considered and unsupported by evidence.

Many individuals and organisations have called on the Ministry of Justice to rethink its approach, including judges, organisations representing people who will be adversely affected (including victims, particularly of trafficking and domestic violence, and homeless people), the Criminal Cases Review Commission, the Parole Board and Her Majesty's Inspectorate of Prisons. Unfortunately, the public narrative on this debate has been dominated by a caricature of those opposed to change as "fat-cat lawyers" acting in their self-interest. JUSTICE does not act for individuals that are represented through public funding, although we have in the past supported individual victims of miscarriages of justice. This debate is not just about lawyers, but about fair access to our justice system for us all, the credibility of our courts and the responsibility of Parliament for their continuing efficacy.

We have prepared this briefing for MPs and Peers to highlight our key concerns about the proposed changes. Principally:

- **The changes proposed to the provision of criminal legal aid will drastically limit the ability of people accused of crimes by the State to access quality legal advice that they can trust. This will increase the likelihood of miscarriages of justice and may make the criminal justice system as a whole more expensive, and less fair, as more people attempt to represent themselves.**

- **The removal of prison complaints from the scope of legal aid, the introduction of a residence test for eligibility and the proposal to limit access to legal aid for judicial review will all shield public authorities from legitimate challenge, including in serious cases which engage the protection of individual rights, including, for example, challenges to family separation, removal of access to services to support independent living for people with disabilities and access to support for victims of domestic violence.**

Introduction

1. JUSTICE has a number of preliminary concerns about the conduct of the consultation:
    a. ***The constitutional and legal significance of legal aid:*** The Consultation Paper entirely neglects to consider the significance of legal aid for the rule of law. Our legal obligations support effective and equal access to justice within the civil and criminal justice system, in order that individuals can protect their rights in law without unjustifiable exclusion on the basis of means, status or other characteristics. The common law, the European Convention on Human Rights (ECHR),[1] the European Charter of Fundamental Rights[2] and the International Covenant on Civil and Political Rights[3] expressly recognise the right of access to legal aid in complex legal proceedings. In the words of the late Lord Bingham, "denial of legal protection to the poor litigant who cannot afford to pay is [the] enemy of the rule of law."[4] In light of the specific statutory duties on the Lord Chancellor to uphold the rule of law, the Consultation Paper falls far short of his responsibility to justify change and safeguard individual protections.[5]
    b. ***Timing:*** Closely following implementation of the Legal aid, Sentencing and Punishment of Offenders Act 2012, these proposals are rushed and unsupported by evidence. The Consultation Paper recognises that the Government has been incapable of assessing the impact of LASPO, yet sets an ambitious timetable for reform. Offering less than 40 working days to respond and showing a clear disregard for evidence-based policy making, JUSTICE is concerned that this consultation process appears to be a "tick-box" exercise. The introduction of badly-planned legislation, which is then subjected to early, costly challenges, would undermine even the Government's least ambitious plans of public litigation savings.
    c. ***Legality of the proposals:*** The Government considers that these changes can be made in secondary legislation with limited need for further parliamentary scrutiny. We are concerned that a number of the relevant proposals will be open to challenge under the Human Rights Act 1998,[6] the Equality Act 2010 and LASPO itself.[7]

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[1] Article 6(3)(c), and see *Airey v Ireland (1979)* 2 EHRR 305

[2] Article 47 of the EU Charter of Fundamental Rights

[3] Article 14 (3) (d) of the International Covenant on Civil and Political Rights

[4] The Rule of Law, (Allen Lane, London: 2010), page 88

[5] Constitutional Reform Act 2005, sections 1 and 17; Legal Services Act 2007, section 1.

[6] For example, the removal of the right to choose may be unlawful pursuant to article 6(3)(c) ECHR. The residency test may operate to violate article 14 ECHR and the positive procedural obligations on the State to investigate and prevent violations of the Convention.

A) The right to representation for people accused of crime

2. JUSTICE considers that the wide-ranging proposals for criminal legal aid will undermine the right of individuals accused of criminal offences to a fair trial.[8] The Consultation Paper suggests that the reforms have been guided by the ambition to encourage providers to work efficiently and the need to ensure that defendants continue to receive the services they require.[9] Yet there is no evidence that providers of criminal legal aid advice are not currently working efficiently, or that the British public lacks confidence in the system. In our view, the reforms will significantly undermine the quality of advice and assistance available to legally aided defendants and increase the likelihood of miscarriages of justice.

3. The availability of criminal legal services has already been heavily squeezed by cuts. Yet these proposals contemplate the wholesale re-organisation of the system by which access to criminal advice and assistance is provided through PCT and further significant cuts to fees for solicitors and barristers. JUSTICE considers the proposals fail to recognise the adversarial nature of our justice system, which requires significant input from lawyers who, with a higher case load to maximise returns, are bound to invest less time in the preparation of the defence case. This will lead to poorer defence representation and could significantly increase the likelihood of miscarriages of justice. For example, lawyers may decide they can no longer listen to lengthy interview tapes; check case law; follow up witness leads; verify factual and technical details in prosecution evidence or instruct experts, all of which could lead to acquittal. They could even miss the fragile mental health of a person accused of crime who may not be fit to stand trial.

4. Further, legal aid should not be considered in a vacuum: cuts to representation will impact upon other agencies within the criminal justice system – the courts, prisons and probation services in particular. It is misleading to estimate savings without considering the wider spending that will be pushed onto other services.

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[7] For example, the removal of the right to choose may be unlawful pursuant to section 27(4) LASPO. The Government maintains its view that the residency test may be introduced through secondary legislation following LASPO. While LASPO clearly permits the Secretary of State to make arrangements for the provision of legal aid, it is difficult to argue that this power includes the ability to exclude whole classes of persons from eligibility without further scrutiny by Parliament.

[8] JUSTICE's full response to the Consultation ("JUSTICE Response") is available online: http://www.justice.org.uk/news.php/97/legal-aid-vulnerable-will-suffer-most-if-access-to-justice-and-a-fair-defence-for-all-withdrawn-says. The full consideration of our response to the criminal legal aid proposals is at pages 14-38.

[9] Impact Assessment, p 5.

Imposing a financial eligibility threshold in the Crown Court

5. JUSTICE does not agree with the imposition of the proposed financial threshold for means tested legal aid in the Crown Court. The criminal justice system must ensure that those without means are afforded legal protection in accordance with article 6(3) ECHR. Reducing the threshold to those with a disposable income of less than £37,500 will lead to a significant number of people being unable to access defence assistance; particularly given that the computation of disposable income will not include many routine expenses (household bills, debts or dependants who are not children). Moreover, the figures provided do not accurately reflect private rates for litigation and representation services. In most instances, the suggested £5,000 average is a gross underestimate of the value of work involved in a defence.

6. Under the proposals it is inevitable that self-representation will increase, but a defendant acting in their own cause cannot hope to have equality of arms. There are no provisions for vulnerable defendants who may lack the cognitive or physical capacity to conduct their own defence. It equally ignores the impact on witnesses of examination by an unskilled and inconsiderate litigant in person. The risk to the administration of justice; the cost of aborted and protracted trials; and the effect of victims and witnesses proving too reluctant to give evidence have largely been ignored in the proposals. In our view, if an eligibility threshold is pursued, it must be set at a realistic rate according to the estimated length of proceedings and an accurate assessment of costs - not a rough computation of the 'paradigm' case.

7. We also consider that reimbursement from central funds upon acquittal ought not to be limited to legal aid rates. Clearly private rates are going to be significantly higher than legal aid: even where the defendant is found innocent, they will not be able to recoup their full expenses from the State. Looking at the choice available, many defendants may see no option but to represent themselves and risk conviction. This is an unacceptable interference with the right to a fair trial.

Introducing Competition in the Criminal Legal Aid Market

8. JUSTICE is strongly opposed to the Government's proposal for price competitive tendering ("PCT"). The nature of the criminal justice system is such that it cannot be reduced to a competitive tendering process based on price alone. It determines the most serious interferences with the lives of individuals, and those individuals must have access to trained and experienced advice to ensure an effective defence. JUSTICE considers that vastly limiting the number of solicitors available to provide advice to people accused

of offences amounts to a wholesale reorganisation of our system of criminal defence. Proposing that this new system operate on the basis of price – at rates significantly below existing remuneration – will risk a downward drive towards undertaking the least possible work in each case, reducing the likelihood that individuals will be able to access fair, independent, and quality representation.

9. JUSTICE considers that the PCT proposals are impracticable, as there are no certain or fixed elements of a case upon which to base a tender. Victims, witnesses and defendants can all cause the trial process to be derailed or delayed. Limiting this consultation to the PCT model, is short-sighted, too simplistic and inconsistent with the principles of open and evidence-based public decision making.

10. Furthermore, the long term impact of tendering without safeguards for quality will lead to reduced expertise in solicitors, the advocates they instruct and the judiciary that determines cases, as these will be drawn only from the diminished, less diverse, pool of those able to survive the PCT process. In addition, there is no exploration of how the specialist skills of solicitors litigating in complex areas will be maintained and no provision for specialist firms[10]. The Government has repeatedly lauded the value of localised services, yet the proposals untenably extend the geographic boundaries which providers must serve, significantly reducing the likelihood that people accused of crimes will be able to access advice in their community. There is no evidence of how quality is to be maintained in the face of significant cuts, market forces, and a much wider area of provision. JUSTICE considers that the risks to maintaining a fair system are overwhelming, and are not cured by the Consultation's cursory invitation to the professions to design safeguards of quality.

11. However, if these proposals are taken further, JUSTICE considers that there must be a full and detailed analysis of the consequences and a pilot to test the impact. As of yet, the Government appears to have taken no lessons from the much criticised privatisation of the interpreters and translators service.[11] Members of both professions and other commentators have repeatedly suggested a wide range of practicable alternatives to maintain quality in tender processes (for example mandatory ongoing training; personal

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[10] See in particular the concerns of extradition specialists, http://www.5sah.co.uk/wp-content/uploads/2013/05/RESPONSE-TO-THE-TRANSFORMING-LEGAL-AID-CONSULTATION-EXTRADITION1.pdf

[11] House of Commons Justice Select Committee, Sixth report of session 2012-2013, *Interpreting and translation services and the Applied Language Solutions contract*, HC 645 (London: TSO, 6 February 2013)

commitments from individual advisers; minimum number of advisers, maximum caseloads and mandatory levels of expertise). JUSTICE notes that the Government has not contemplated alternatives to further cuts or ways to make savings (such as drawing funding for representation from restrained assets). A holistic approach to achieving savings must be taken, which considers where significant savings to the system can be made whilst maintaining an effective defence to people accused of crime (for example, a reduction in imprisonment at £34,000 per place[12]).

The Right to Choose Your Lawyer

12. The removal of the right to choose a legal advisor for everyone but those who can pay for the privilege, causes us serious concern. Choice is the ultimate arbiter of quality and independence in legal services. The Lord Chancellor has pejoratively suggested that client choice is irrelevant as clients are incapable of exercising an informed decision. This neglects the role that client trust plays in securing a fair defence, the equality of arms and the proper functioning of the criminal justice system. An individual is more likely to trust a chosen lawyer and therefore more likely to accept strategic advice resulting in the avoidance of a trial. Further, the inability of a defendant to replace his advocate may lead to him to self-represent which could result in lengthier and less fair proceedings for victim and defendant. Further, it goes against the Government's promotion of the right to choose in other public services.[13]

13. JUSTICE considers that the removal of the right to choose may be unlawful pursuant to both article 6(3)(c) ECHR[14] and section 27(4) LASPO. A legal aid system which wholesale removes the ability to choose a lawyer in order to ensure even distribution of contract cases cannot comply with basic domestic and international obligations.

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[12] NOMS, Annual Report and Accounts 2011-2012, Management Information Addendum, *Costs per place and costs per prisoner* (Ministry of Justice Information Release, 25 October 2012)

[13] Cabinet Office Policy Paper, *Open Public Services 2013 – Executive Summary*, 16 May 2013

[14] For a full discussion of the right under article 6(3)(c) see *Pakelli v Germany,* ECHR, application no. 8398/78 (25 April 1983); *Croissant v Germany*, ECHR, application no. 13611/88 (25 September 1992).

B) Civil justice, judicial oversight and good government

14. The proposed further restrictions to civil legal aid have the potential to destroy access to civil justice for some of the most vulnerable people in society and insulate public decision making from judicial scrutiny.[15]

Restricting legal aid for prison law

15. The Consultation Paper proposes restricting the scope of legal aid for claims brought by prisoners. JUSTICE does not consider that the justifications for change stand up to scrutiny: the restriction of access to effective, quality and specialist advice for prisoners threatens to undermine access to justice for an already marginalised group in society.

16. The importance of access to justice for prisoners is simply illustrated in the kinds of cases which would not be covered by legal aid. This should not be treated as an exhaustive list:
    a. *Mother and baby units:* Legal aid has been used to prevent female prisoners being refused access to baby units and being separated from their children.[16]
    b. *Prisoners with disabilities:* Many cases have been brought by disabled prisoners seeking redress for treatment violating the right to be free from inhuman and degrading treatment or torture enshrined in article 3 ECHR.[17]
    c. *Prison communications:* Legal aid has helped secure prisoners' rights to contact their lawyer, the press and others to publicise their treatment without interference.[18]
    d. *Segregation:* Segregation of prisoners can have a serious potential impact on their mental health.[19]
    e. *Categorisation:* The categorisation of prisoners can have a significant impact on their treatment as well as on the likelihood that they will be released on licence.[20]

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[15] For further, see JUSTICE Response, pages 39 – 64.

[16] *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002.

[17] *R (Graham) v Secretary of State for the Home Department* [2007] EWHC 2950 (Admin).

[18] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 : *R v Secretary of State for the Home Department, Ex parte Simms* [1999] Q.B. 349.

[19] *R v Deputy Governor of HMP Parkhurst ex p Hague* [1992] AC 148: *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750.

[20] *R (Vary and others) v Secretary of State for the Home Department* [2004] EWHC 2251 (Admin): *R (Blagden) v Secretary of State for the Home Department* [2001] EWHC 393 (Admin).

f. *Disciplinary matters:* Any disciplinary matters which Governors consider fall short of a "criminal charge" will likely be denied access to legal aid, unless proved that the "*Tarrant*" criteria are satisfied.[21]

17. The Consultation Paper asserts that the criteria proposed are designed to ensure that in any case involving extensions to liberty (engaging article 5 ECHR) legal aid will continue to be available. JUSTICE doubts whether the distinctions drawn will ensure that all decisions affecting an individual's liberty will be open to effective challenge (for example categorisation and segregation will be excluded, despite each likely impacting on a prisoners' release date).

18. The Government makes a bold assertion that prisoners can just use the prisoner complaints mechanism. However, under existing rules, prisoners are only eligible for legal aid if their case cannot be resolved under the complaints mechanism. Further, no effort is made to assess how successful previous claims have been and what impact removal of legal aid would have on their outcome. JUSTICE notes that none of the suggested alternate mechanisms of redress outlined is able to award a binding remedy to the complainant, and in particular that the complaints system operates entirely within the prison service, thereby lacking independence. Further, there is widespread criticism by Her Majesty's Inspectorate of Prisons of the failings in existing complaints management, which is slow and ineffective.[22]

19. The financial analysis of the implications of these proposals is exceptionally scant. It is unlikely, in JUSTICE's view, that these changes will lead to significant savings or that any estimated savings can be justified in light of the disproportionate impact on individual prisoners and associated costs to other parts of the public budget.

Introducing a residence test

20. JUSTICE strongly opposes the proposal to introduce a blanket ban on eligibility for legal aid based on residence. This discriminatory bar stops one small step short of an arbitrary exclusion from justice of non-nationals within the jurisdiction. Limited exceptions to this blanket rule apply only for members of the armed forces and asylum seekers, ignoring

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[21] The case of *Tarrant* considered the circumstances in which an individual might be entitled to representation at an oral hearing. The criteria include the seriousness of the implications of the hearing for the individual prisoner.

[22] For example, in relation to Brixton Prison http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/brixton/brixton-2010.pdf at paras 3.34-3.45. See also the HMIP's response to the Consultation Paper http://www.justice.gov.uk/downloads/about/hmipris/transforming-legal-aid-response-hmip.pdf

the carefully carved out limits to scope identified by Parliament during its lengthy and detailed debates on LASPO. The proposal is novel in rendering a whole class of individuals ineligible regardless of the seriousness of their claim.[23] It creates a two tier justice system for those without independent means based largely on the ability to evidence time spent within the UK.

21. The Government has made no effort to source reliable figures on likely savings or on the number or types of claimant that will be excluded. Instead, it accepts that claimants must act as a litigant in person or "decide not to tackle" the case. In many cases, the withdrawal of legal aid will lead to individuals being denied access to a remedy. Importantly, the Consultation Paper appears to imply that all litigation occurs by choice. Legal aid may be sought to defend actions brought by the State or third parties, and in these circumstances an individual may have little choice but to defend a claim in person. The increased costs of self-representation to the courts are significant, through lengthier proceedings and risk of misapplication of law, yet no attempt is made to address these costs.

22. The following examples illustrate the types and seriousness of issues which will be excluded:
    a. *Victims of domestic violence:* Women and children who flee abusive partners may do so without documentation capable of proving their residence. Those who remain in a relationship may find it difficult to secure access to legal advice to ensure their safety.[24]
    b. *Homelessness:* homeless people and people facing homelessness, including families with children, may find it difficult to prove eligibility in order to challenge local authority decisions to refuse support.[25]
    c. *Human trafficking victims:* Despite lengthy discussion about the need to secure access to legal advice and assistance for human trafficking victims in LASPO,

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[23] For example, all UK born infants under 1 year old would be excluded from support to represent their interests in care proceedings. Victoria Climbié, had she survived the horrific abuse which led to the Climbié Inquiry, would equally have been denied representation.

[24] See Rights of Women on how these issues may affect victims of domestic violence,, http://www.rightsofwomen.org.uk/pdfs/Index/Rights_of_Womens_Template_response_to_Transforming_legal_aid_2013.doc

[25] See Shelter, http://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/briefing_legal_aid

victims of the slave trade brought to the UK against their wishes will not be exempted.[26]

d. *Newly settled refugees:* The exemption for asylum seekers will end as soon as their claim is determined, resulting in vulnerable, newly-settled refugees being left without access to legal advice or assistance.

e. *Families of victims of crime within the UK, who are resident overseas:* Where the UK is involved in the death of an individual, whether through direct State action or negligence, it bears the responsibility to provide an investigation in which the family may participate effectively (for example, the family of Jean Charles de Menezes).

23. Other high-profile claims which would be barred include those brought by Guantanamo detainees alleging UK complicity in torture;[27] claims for *habeas corpus* by individuals illustrating UK control over their detention abroad[28] and claims against UK armed forces for violations of international human rights standards overseas.[29] The scrutiny of the domestic courts in these cases has contributed to redress for serious violations of human rights standards, promoted the development of the rule of law in international relations, and stimulated recognition of the importance of public and parliamentary scrutiny on the global work of the security services and the armed forces on behalf of society as a whole.

24. JUSTICE considers that the residence test will violate the common law guarantee of equality before the law and the UK's international human rights obligations. For example, EU nationals who exercise rights of free movement are entitled to equal treatment, yet there is no specific exemption to ensure the residence test does not operate as a barrier to EU nationals.[30] Specific articles of the Refugee Convention, the UN Convention on the Rights of the Child and the Trafficking Convention will be engaged.[31] There is a strong argument that the residence test could operate to violate the principle of non-

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[26] The Catholic Church has, for example, written to Ministers to raise particular concerns about trafficking victims: http://www.guardian.co.uk/law/2013/may/22/catholic-church-legal-aid-trafficking

[27] *Al Rawi and others v The Security Service and others* [2011] UKSC 34

[28] *Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmutullah* [2012] UKSC 48

[29] *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58; *Al-Jedda v The United Kingdom* (27021/08) [2011] ECHR 1092; Al-Skeini and others v Secretary of State for Defence [2007] UKHL 26; *Al-Skeini and Others v the United Kingdom* (55721/07) (2011) 53 E.H.R.R.18.

[30] Article 24(1) Treaty on the European Union

[31] The Refugee Convention, article 16; Council of Europe Convention on Action Against Trafficking in Human Beings articles 10, 12 and 15

discrimination in article 14 ECHR and the positive procedural obligations on the State to investigate and prevent violations of the Convention.[32] Yet none of these concerns are addressed by the Consultation Paper.

Paying for permission work in judicial review cases

25. JUSTICE is concerned that the proposal to restrict access to legal aid for judicial review beyond the significant restrictions in LASPO (and elsewhere) will limit the ability to access advice on public law only to those with the means to pay privately, making publicly funded work unviable. The changes appear designed to insulate public decision-makers from effective judicial oversight. The determination that the risk of public law litigation should be met by lawyers representing vulnerable people without other means to challenge life-changing decisions shows a profound misunderstanding of administrative law in practice.

26. Judicial review provides an essential opportunity for people aggrieved by poor public decision-making to challenge those decisions before an independent and impartial tribunal with the power to undo or reverse its effects.[33] In a country with no written constitutional guarantee controlling the relationship between the citizen and the State, this function takes on a particular significance. Even a brief review of recent case law shows that judicial review cuts across public decision-making and can impact significantly on public spending and individual access to public services.

27. As elsewhere, the case for change is unsupported by evidence and couched in misleading assertions. The implication that cases withdrawn before permission are futile is undermined by the acceptance in the Consultation Paper that, of those cases which proceed to hearing and do not secure permission, many yet result in a concrete benefit to the claimant. For example, in many cases, the possibility of judicial review may influence a public authority to reverse a decision or to change its practice without resorting to proceedings.

28. Applications for judicial review are already subject to significant restrictions, including eligibility and merits tests. Changes in LASPO restricted public law work substantially, particularly in connection with immigration decisions. Since the implementation of

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[32] Articles 2, 3, 4 and 8 ECHR – and possibly 5 and 6 ECHR which ensure access to an independent and impartial tribunal - will be engaged by the examples set out in this section.

[33] *R (Cart) v Upper Tribunal* [2011] UKSC 2, Lord Dyson at 122.

LASPO, providers can no longer self-certify on judicial review cases, but must obtain permission from the Legal Aid Agency before pursuing a case. In addition, in judicial review claims, the involvement of judicial oversight at a preliminary stage provides for the scrutiny of claims and those deemed "totally without merit" can be dismissed at an early stage.

29. The information provided on projected savings is severely lacking. The Government, on its own best estimate, concedes that the potential savings to be made are minimal at around £1m. There is no acknowledgement of the public good served by judicial review, in particular the preventative and channelling functions which ensure that individuals receive access to services they need at an early stage to avoid further and costly service provision.

30. Ultimately, the Government argues that the ultimate impact of these proposals will be driven by providers "decisions" – providers will only "refuse" to take on cases which "would not be considered by the court to be arguable in any event". This misinterprets the statistics and shows an extremely limited understanding of the operation of judicial review. Refusing to fund any work done on the application for permission unless successful is unsustainable and will discourage most providers from taking on all but the most "open and shut" case. In short, the provider would have to consider the business risks of the claim before its merits. On the best case scenario, some individuals with good claims that the State has acted unlawfully will be deprived of a remedy for want of representation. In any event, these proposals – combined with LASPO restrictions on access to publicly funded public law work – will seriously restrict the ability of practitioners to continue to provide services at all. This will reduce transparency, accountability and the promotion of responsible government, to the detriment of us all.

Civil merits test – removing legal aid for borderline cases

31. JUSTICE is concerned that the decision to remove "borderline" cases from the scope of public funding is ill-considered. The proposals misunderstand the nature of a "borderline" assessment. Despite assertions in the Consultation Paper that borderline cases are "unlikely to succeed", prospects of success can be exceptionally difficult to determine due to uncertainty in the law or variable features of the case which cannot be resolved by further investigation. These include cases which are complex, where the law is in a state of flux or where a fact sensitive proportionality analysis is at the heart of a case. In

recognition of the uncertainty associated with these cases, funding is already only awarded to those cases with particular value to society or the individual.[34]

C) Experts Fees in Civil and Criminal Proceedings

32. JUSTICE does not agree with the proposal that fees paid to experts from legal aid should be reduced across the board by 20%. In our view, there is a real risk that the proposals will:

    a. Reduce the willingness of some expert providers to work at legal aid rates;
    b. Limit the ability of legally aided clients to access quality expert evidence, effecting both the outcome of the instant case and the quality of judgments in the common law;
    c. Create a significant litigation advantage for non-legally aided opponents; and
    d. Increase the risk of miscarriages of justice as a result of flawed expert evidence.

33. The proposal appears to be based on a number of unreliable presumptions, failing to take into account the wider importance of reliable expert assistance to effective litigation. It ignores alternatives (for example, using concurrent evidence procedures or "hot-tubbing", recommended as part of the *Jackson* reforms and introduced in April 2013). Importantly, there is no recognition that cases where expert evidence may be crucial are likely to be cases where the issue in dispute is of significance to the well-being of extremely vulnerable litigants, including children and persons with disabilities.[35]

[34] Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104).

[35] Such as the shaken baby and sudden infant death syndrome cases where initial flawed expert evidence led to miscarriages of justice for Angela Cannings and Sally Clark.