BRIEFING: CIVIL LEGAL AID AND ACCESS TO JUSTICE

Nick Armstrong, Matrix Chambers, 15 September 2013[1]

Chris Grayling's 5 September 2013 response to his *Transforming Legal Aid* consultation:

- Still threatens the rule of law;
- Is subject to an investigation by the Joint Committee on Human Rights;
- Still takes the dangerous and unprecedented step of removing groups of people from accessing justice on grounds of their status;
- Will still prevent people from using judicial review to hold the state to account; and
- Will cost far more than it will save.

The consultation ran between April and June 2013. A record 16,000 responses were received. Although there have been significant concessions with regard to criminal legal aid, little has changed with respect to civil.

This briefing addresses the key points, which concern prisoners; those who cannot show 12 months lawful residence; changes to judicial review; and the "borderline case" test.

General points

First of all, some general points:

1. Legal aid has never before been cut from classes of people on grounds of status alone. Even, and arguably particularly, the most unpopular groups are entitled to the protection of law. Preventing certain classes of people from accessing the courts opens a very dangerous door: who might be next?

2. The reforms cannot be justified on costs grounds. Even on the MOJ's own figures, the total projected savings for these aspects of the reforms are £6m. By contrast, an earlier paper by the present author identified on-costs of at least £30m, particularly around prisoners, if the proposals are implemented[2].

3. The Justice Secretary has not attempted to meet these costs arguments. Before the Justice Select Committee, when asked whether the prison aspects were about costs, or whether they were ideological, Mr Grayling answered in stark terms: "It is ideological"[3]. He went on to say: "Those who end up in our prisons should rightly have a route of complaint, which they do through the internal complaints service and through the ombudsman, *but I do not believe that the taxpayer should be paying for them to go to court*" (emphasis added).

4. Similar sentiments may be found in Mr Grayling's approach to judicial review. Writing in the *Daily Mail* on 6 September 2013, he decried judicial review as a left wing campaign tool. Referring specifically to cases as diverse as those concerned with the HS2 rail link and that concerned with the bedroom tax, Mr Grayling said "Britain cannot afford to allow a culture of Left-wing dominated, single-issue activism to hold

[1] For any inquiries about this briefing and its contents please contact Julianne Marriott on juliannemarriott@me.com or 07976 821960; or Nick Armstrong on nickarmstrong@matrixlaw.co.uk.

[2] Nick Armstrong, *Costing the Transforming Legal Aid Proposals,* 25 June 2013, available at www.legalaidchanges.wordpress.com.

[3] Transcript of Justice Secretary's evidence also on the legalaidchanges.wordpress.com site.

back our country from investing in infrastructure and new sources of energy and bringing down the cost of our welfare state."[4]

5. On any view, changes which purport to shut out sections of the population from access to the courts, and to prevent legal scrutiny of state action, and to do so on "ideological" grounds, are profound, and carry constitutional implications. Yet these reforms are to be introduced at speed, in secondary legislation only, and so with only very limited Parliamentary scrutiny. The MOJ says that the prisoner cuts will be introduced later this year. The residence test will be introduced in early 2014.

Prisoners

The prison proposals concern the work done by solicitors making representations on behalf of prisoners, and resolving their cases without the need to resort to judicial review. Save for work concerned directly with release on parole, and with prison disciplinary charges that can result in prisoners serving additional time in prison, all such work will now be outside legal aid. This includes:

1. Making representations that prisoner should be held in a lower security category so they can progress and prepare for release.

2. Making representations that a prisoner should have access to offending behaviour courses, and that their risk should be properly assessed.

3. Work preparing the ground for release on parole, including ensuring that work has been done, an appropriate release address found, and employment or support identified (what is commonly known as "resettlement" work).

4. Representations and investigations concerning matters such as admitting new mothers into a mother and baby unit (so babies can remain with their mothers for the first few months of their lives); the lawfulness of segregation; and assaults in prison (whether committed by other prisoners or by staff).

The MOJ says all this work must now be done by way of internal complaints and the Prisons and Probation Ombudsman. No-one people working in the area think that is realistic. The real points about the prison law reforms, however, are:

1. The costs implications of keeping people in prison longer (because resettlement work has not been done, or representations about progression have not been made), or in more expensive prisons longer, are enormous.

2. There are also implications for the safe management of prisons. Lord Woolf's report into the disturbances at Strangeways prison in 1990 founds that many of the problems stemmed from prison conditions. Yet conditions cases will now be out of scope.

Another problem is that prison law is actually part of criminal legal aid work, which means it is caught by the 17.5% rate cut. Prison work, however, and particularly the good prison work, tends to be done by small niche practices. They are not fat cats. They cannot survive a 17.5% cut. This will therefore drive out the specialist, quality providers.

[4] Article also on the legalaidchanges.wordpress.com site.

The residence test

The residence test will exclude from all civil legal aid any person who cannot show 12 months lawful residence in the UK, and who is not physically present here. The MOJ has in its consultation response introduced a number of exceptions to this, but they are very narrow and selective. The rule will not therefore apply to asylum seekers, serving soldiers and current immigration detainees. It will also not apply to some (but, inexplicably, not all) children in care, trafficking victims, and victims of domestic violence. Still excluded, however, will be:

1. Anyone who lacks the documents to show the requisite period of lawful residence. This will include British citizens who do not keep documents, have lost them, or who cannot access them (the latter may include those fleeing their homes, and those who lack mental capacity. It may also include those who have simply never had to prove their immigration status before).

2. It will exclude British citizens and residents who are currently abroad, even if they have been unlawfully removed or rendered there. This excludes from legal aid some of the most serious cases of recent years (including for example people held in Guantanamo Bay).

3. There is no exception for children. This means that children without status as a result of the actions of their parents will not be able to sue to secure support and accommodation pending their immigration status being investigated and resolved (something to which they are entitled under the Children Act 1989). It also means that children thrown out by their parents, and who are litigating to be taken into care by social services, will not receive legal aid unless they thought to bring with them evidence of 12 months lawful residence.

4. Similarly, disabled people, and the mentally ill. They too are entitled to support and accommodation pending the regularisation of their status, subject only to them having an arguable immigration claims. No such claims will now be possible.

5. Claims about serious ill treatment, including deliberate ill treatment, at the hands of the state and its contractors will now fail the residence test. This will include claims about torture or unlawful killing in prison or by police, assaults, wrongful arrests, misfeasance in public office, and indeed the case reported on the front page of *The Observer* on 15 September 2013 where it is said that officers employed by Serco at the Yarl's Wood immigration removal centre sexually abused inmates and sought to deport those who complained. Such complainants would fail the residence test.

The MOJ's only answer to these cases is its "exceptional funding" scheme. Yet in the six months that has operated, only 2% of those who have managed to complete that scheme's 17 page application have been granted help. The residence test is therefore a proposal of enormous constitutional significance.

Judicial review

The judicial review proposals mean that lawyers will not be paid for most judicial review cases and, in particular, those very strong cases which settle in the pre-action stage. This will have a significant chilling effect on the ability of people to challenge unlawful decisions and actions by government.

Such was the level of concern about this proposal, there is now to be a further consultation on it. This was launched on 6 September 2013, alongside the *Daily Mail* article referenced above, and contains a number of further measures aimed at limiting judicial review[5]. In particular, the government now has in its sights public interest judicial reviews, that is, judicial reviews brought or supported by a representative body or organisation, as well as cases raising equality challenges. Such cases have sometimes been brought in response to recent cuts to public services.

The legal aid proposal has now been modified, but not in a way that makes any material difference. Lawyers will only be paid for bringing a judicial review where permission for judicial review (the essential first step in any judicial review) has been granted. There is now to be an exception to that general rule, but it will apply to so few cases as to make it virtually meaningless. Consequently, and as consultees pointed out, work done that secures a settlement before a case is issued, perhaps via negotiation or mediation, will not be paid for. Work done in respect of the strongest cases, where the public body simply backs down prior to the case being issued, will also not be paid for. In some other cases, lawyers will be forced to issue cases that they would not previously have issued, because that will be the only route to being paid. That will increase costs for all, including public bodies, and the courts.

The effect of these proposals, particularly when combined with the other judicial review changes, will be to significantly undermine effective scrutiny of government action.

Borderline cases

The final key proposal is to remove legal aid from cases judged to have "borderline" prospects of success. This remains entirely unchanged from the original consultation. The problem here is that many of the most important cases are "borderline" cases: under the law as it stands such cases will only be funded if there is a significant wider public interest or is of overwhelming importance to the individual. This means that these cases usually touch on issues that are genuinely difficult (typically, with judges differing as the case proceeds up through the court levels). These are, in other words, exactly the cases that are most important. There is also a profound inequality here: it is not, nor could or should it be, suggested that the government should leave in place a judgment it considers to be wrong, and which has the potential to affect many other cases, simply because the prospects of success on appeal is "borderline". To do would be absurd. But why then should it be different when it is the individual who wishes to clarify the law?

Preventing these cases from being brought will prevent legal assessment of the most important issues of the day, and will unfairly let the government clarify the law when individuals cannot.

[5] *Judicial Review: Proposals for Further Reform* (MOJ, 6 September 2013).