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Motion to Regret

Moved by ***Lord Pannick***

That this House regrets that the Criminal Legal Aid (General) (Amendment) Regulations 2013 restrict the availability of legal aid, advice and assistance in prison law cases (SI 2013/2790).

Lord Pannick (CB): My Lords, another week, another set of legal aid regulations to regret. These regulations will severely limit the availability of legal aid advice and assistance in prison law. I shall mention four examples of issues for which legal aid advice and assistance will no longer be available by reason of these regulations. The first is Parole Board proceedings for indeterminate sentence prisoners—ISPs—where the Secretary of State refers the case before the expiry of the minimum term for advice on a move for the prisoner to open conditions, and also where an ISP is removed from open conditions and the Minister seeks advice from the Parole Board on a return to an open prison. This will no longer be covered. The Parole Board itself said in its written evidence to an inquiry on this subject by the Joint Committee on Human Rights that because most prisoners require a period in open conditions before the Parole Board can be satisfied that they are safe to release:

"There is in consequence, a great deal at stake for prisoners at these reviews".

The need for high standards to be applied at such hearings, in the interests of the prisoner and in the public interest, is obvious, and because of the impossibility of prisoners representing themselves effectively at such hearings and problems such as how to manage a prisoner cross-examining a professional witness giving evidence about the prisoner's conduct in prison, the Parole Board told the Joint Committee in its written evidence that it believed the proposal to remove legal aid,

> "is very likely to impede our attempts to deal with cases fairly, promptly and effectively".

It is very surprising that the Secretary of State should have proceeded with the changes despite the concerns expressed by the Parole Board.

The second example of decisions which will be excluded from legal aid is decisions to place or keep a prisoner in Category A—that is, prisoners assessed to be a high security risk—which of course affects prison conditions. A third excluded category is the allocation of places in mother and baby units. Vulnerable women will be denied access to legal advice on whether they should be separated from their babies. A fourth example is decisions on removal from association—that is, segregation decisions. One could give many more examples.

What are the justifications offered by the Secretary of State for denying legal advice and assistance in such important matters, even if all other eligibility criteria are satisfied? The main answer given by Mr Grayling, the Secretary of State for Justice, in his oral evidence to the House of Commons Justice Select Committee on 3 July 2013 is that the difference

between him and his critics was “ideological”—his word. Indeed, he used that word three times in as many minutes in

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response to questions on this matter. The report of the evidence is published as HC 91. Mr Grayling told the Justice Committee:

“I do not believe that prisoners in jail should have the right to access legal aid to debate which prison they are put in”.

He went on to say that they should not have the right to legal aid to raise other questions about their treatment, with limited exceptions.

This is to reverse 35 years of progress in the approach adopted by the legal system to the treatment of prisoners. The modern era of prison law began in 1978 when the Court of Appeal required fair disciplinary proceedings for those alleged to be involved in the Hull prison riots. Since that decision, our courts have repeatedly made it clear that administrative decisions in prison must comply with basic standards of legality, procedural fairness and rationality.

The application of legal standards to decision-making within prisons has immeasurably improved the quality of those decisions and ensured greater transparency and accountability. No one, with the possible exception of the Secretary of State for Justice, could doubt the public benefits in enabling prisoners to hold prison authorities to basic standards of legality and fairness or the indispensable contribution which has been made in this respect by legal aid. That a Secretary of State, and indeed a Secretary of State for Justice, should now, for so-called ideological reasons, wish to reverse such developments is very much a matter for regret.

Mr Grayling’s second point is that legal aid is not needed because the internal prison complaints system and the Prisons and Probation Ombudsman will provide redress where appropriate. Without legal assistance a prisoner is simply not going to be able to make his or her points effectively and speedily by reference to the applicable legal requirements. Unhappily, many prisoners lack basic skills of literacy or suffer from other problems which impede their ability to present an effective grievance. Her Majesty’s Chief Inspector of Prisons, Mr Nick Hardwick CBE, echoed these concerns in his evidence to the Joint Committee on Human Rights, as recorded in paragraph 174 of the Committee’s seventh report.

As the Law Society has pointed out in its helpful briefing on this Motion, at present many complaints are simply, effectively and speedily resolved by a solicitor’s letter setting out the legal position to the person taking the decision. The Prisons and Probation Ombudsman can only make recommendations and provides a much slower method of seeking redress than a solicitor’s letter. The ombudsman, Mr Nigel Newcomen CBE, told the Joint Committee on Human Rights that he was concerned about the Government’s proposals, in particular because his office was unable to cope with the expected increase in workload.

These regulations will not even save public money. The cost of maintaining legal aid in ISP cases before the Parole Board, for example, is minimal, and the cost of ISPs remaining

unjustifiably in closed conditions when they could safely be allowed to move to open conditions is high. The Howard League for Penal Reform has pointed out that the Ministry of Justice has put the cost of dealing with each complaint to the

ombudsman at £830, which is more than three times the £220 fixed fee for a solicitor doing this work under the legal aid arrangements.

In the Supreme Court last April, in the case of Osborn v the Parole Board, reported in volume 3 of the 2013 *Weekly Law Reports* page 1020, paragraph 72, Lord Reed stated for the court that,

> "procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear".

I suggest that the Minister conveys the suggestion to the Secretary of State for Justice that the words of wisdom of Lord Reed should be displayed on Mr Grayling's desk in very large letters.

These regulations will do enormous damage to the rule of law in prisons and there is no justification for them. I beg to move.

Baroness Kennedy of The Shaws (Lab): My Lords, I echo everything that has been said by the noble Lord, Lord Pannick. I, too, regret that the Government are taking this course and regret profoundly what was said by the Secretary of State for Justice, Mr Grayling, in describing the differences between those who supported the maintenance of legal aid and those who were agin it. It is as though it is not enough to go to prison and lose your liberty, and experience the deprivations that we know imprisonment means, so we are looking for other ways to punish.

I will speak specifically about women. As we in this House all know, women in prison are very largely those who have experienced abuse or domestic violence. They are often in prison because of serious social problems, they have mental health problems, and often have problems of addiction. The panoply of problems that they have do not make them people who will be well able to represent themselves in trying to get their rights in prison.

I will mention the issue of mother and baby units. In the past I have been involved in such cases, where a woman seeks to prepare for an application to have her baby remain with her, and has to secure supportive evidence, expert reports, and so on. It is impossible for a woman to do that without the help of a solicitor. Representations have to be made in relation to any refusal to offer a woman a place in a mother and baby unit, and I can assure noble Lords that that is sometimes done—and not done—for the best of reasons.

Women sometimes make applications for temporary release when something disastrous is happening at home with other children; they seek a temporary licence so that they can spend time at home. Many female prisoners are their children's primary carer. We know that 55% of women in prison have a child under 16 and wish to make use of that release on temporary licence when they have emergencies at home. I know from experience that the application of the release on temporary licence policy is frequently misapplied by prisons, and women who

are eligible are incorrectly refused. Legal help is vital to them for making their application, making representations, drawing on supportive evidence, and so on, but it is no longer available.

Disabled prisoners often have real problems about the suitability of their accommodation or other services they need, and need legal help to acquire them. Mentally ill prisoners do not get legal help to deal with many of the attendant matters that go along with convincing the authorities of the seriousness of their problems, whether that is on the depressive scale or as regards behaviours that clearly show disturbance, but which often bring them into dispute with the authorities in the prison. There are often arguments about the capacity of such women. They present with difficult and challenging behaviour which is often met with a strong disciplinary response from the prison so that they are awarded extra days as punishments, when in fact mental health is the problem. As extended prisoners, women often have the date of release set further and further away because of their behaviour, but that behaviour is due to their mental ill health.

In those sorts of cases you need to have the representation of someone who is legally qualified to help take the appropriate course and find the appropriate expertise to support applications. The Government's response is that prisoners should use the internal complaints procedures—the noble Lord, Lord Pannick, described the inadequacy of that. The process of appealing to the ombudsman is often slow and does not give the remedy that is sought. Add to all that the poor educational attainment of most women in prison and the situation is hopeless.

Before this debate a Member of this House said to me, "Are you speaking in the legal aid debate?", to which I replied, "Yes". He said, "You know it's hopeless". My response to that was that it may be hopeless, but I hope that by having this debate some members of the Government will feel shame. I am speaking of the most vulnerable today. I hope that a feeling of shame will enter into discussions among the Government and between the coalition partners about the impact of this on the lives of some of the most fragile people in our society.

7.45 pm

Lord Lester of Herne Hill (LD): My Lords, like the noble Baroness, Lady Kennedy of The Shaws, I am a member of the Joint Committee on Human Rights, and both of us took part in the evidence session with the right honourable Lord Chancellor and Secretary of State for Justice. That was just at the moment when the noble Lord, Lord Faulks, who has the misfortune to have to reply to this debate, was no longer able to be with us because he had been told that he was about to become a Minister. Therefore tonight we will have an excellent example of the poacher who has now turned gamekeeper, as it were, for Her Majesty's Government. I will make one point that I put to Mr Grayling, which I do not think he answered in a very satisfactory way.

If the Government stick to their regulations, as they will, the consequence will be that more cases will go to Strasbourg for want of effective domestic remedies in this country. That is not something we should want; it is much better that effective remedies are provided in this

country. Why do I say that? I have the cases of Sidney Golder and Reuben Silver in mind. Sidney Golder, many years ago, was a prisoner who thought

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that he had been defamed by a member of the Prison Service, and he wanted to go to a solicitor to see whether he could sue for libel. The Home Office said, "Sorry—you can't go to a solicitor while you're a prisoner", so Mr Golder had to go to Strasbourg. The Strasbourg court said, years and years ago, "There must be an effective domestic remedy. Access to justice is a fundamental right, and prisoners are entitled to that right". Therefore Golder led to reform of the prison rules, or was meant to do so. I was working in the Home Office with Roy Jenkins on the subject, and I am sorry to say that Home Office officials did not do as they were instructed, so that led to the case of Mr Silver.

Reuben Silver was an Orthodox Jew, and he wanted to know whether the food he was receiving in prison was kosher. He wrote a letter to the editor of the *Jewish Chronicle* marked "not for publication". It was stopped on the ground that you must not write to the press. He also wrote to the Chief Rabbi, but was prevented from sending that letter on the ground that he had not known the Chief Rabbi before he became a prisoner, under the rule that said that you had to know the person beforehand. Therefore Mr Silver was one of my seven prisoner clients who went to the Strasbourg court complaining of the absence of a domestic remedy. The Strasbourg court had no difficulty in finding that the prison ombudsman could not provide and had not provided an effective remedy, and the same would be true today.

Those cases are not just routine internal disciplinary matters. I lost another case called Boyle and Rice in which they complained about being moved from one place to another and not having artwork, and so on. That is the kind of case which Mr Grayling is perfectly right to say should be dealt with by the ombudsman system. However, there are other, grosser, cases where that is not so. When I put this to Mr Grayling in evidence his reply was, "Well, I'm sure that in that sort of case you can find barristers who do no-win, no-fee cases". That is no answer; for a prisoner to have to find such a barrister and to negotiate with the clerk and all the rest of it is patently absurd. One overwhelming reason to regret what has happened is that it will lead inevitably to more cases going to Strasbourg, which is not in the interests of anybody.

Lord Hope of Craighead (CB): My Lords, I suppose that one should be grateful for small mercies and welcome what is provided for in Regulation 4(2) and (3): advice and assistance for issues relating to the release by the Secretary of State or for consideration for release by the Parole Board, and for proceedings that involve the determination of a criminal charge. However, they are very small mercies: these provisions were, of course, unavoidable. They are essential to protect against the risk of challenge by prisoners whose basic rights under Articles 5 and 6 of the convention were being infringed.

The point is this: there are very real grounds for concern as to what is being left out, a list of which is set out in paragraph 7.6 of the Explanatory Memorandum. For reasons of time, I will not go over the details, but one is bound to ask how robust the

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system of complaints is on which there is so much emphasis and to draw attention—as the noble Lord, Lord Pannick, has done—to the effect of the absence of legal advice, which always focuses the issue more directly and saves money by directing attention to where the problem really lies.

The other major gap is that to which the noble Baroness, Lady Kennedy, has drawn attention; namely, the position of the vulnerable, of whom there are so many, both male and female, in prisons and in young offender institutions too—for example, those with language or learning difficulties. I am struck by one of the provisions in paragraph 9.2 of the Explanatory Memorandum, which tells us that a note has been issued for distribution to prisoners to explain the changes to the system—but what provision is being made for those who cannot read or who do not speak English? Can we really be confident that steps are being taken to deal with their needs and give them the advice they need?

At the heart of this is something else, which, I suggest, is profoundly worrying: the increasing tendency to treat prisoners as some kind of an underclass. They are to be regarded as having surrendered their right, when they go into custody, to be treated like everyone else, except to the extent necessary to serve their sentence. We are all familiar with the debate about prisoner voting; but the effect of denying them the vote is really quite trivial when compared with what these changes will mean for many who are in a position that puts them at such an obvious disadvantage when compared with everyone else, having been locked up by the state.

Paragraph 7.4 of the memorandum states that the amendments aim to target limited public resources at the cases that really justify it. So far so good; but then there are the words,

> "to ensure that the public can have confidence in the scheme".

Those really are weasel words. What is the basis for that claim? Who are the public? What do they know about the effect of all these provisions on prison law? What about the prisoners, their wives, parents or children? What about the many organisations and individuals who really do care about the mistreatment of prisoners or their rehabilitation?

Some years ago Justice Breyer of the US Supreme Court observed in a lecture in London that it is not the job of judges to be popular. That is why we have judges who are not elected. If you want to be popular, you have to win votes: you must appeal to the majority. Of course, one way of doing that is to devalue the rights of the minority. When it comes to the use of resources, there is a temptation: they can be diminished or left to one side because the majority can be relied upon not to care about them and not to object. That is all about winning the confidence of the majority, which is what this sentence really refers to. It is not difficult to imagine what, in the wrong hands, this may eventually lead to. The line of thinking, therefore—the political philosophy that seems to underlie these proposals—is perhaps even more worrying than all the details which, in themselves, are so troubling.

I join others in expressing my thanks to the noble Lord, Lord Pannick, for bringing this Motion before the House.

Baroness Butler-Sloss (CB): My Lords, I, too, regret very much these legal aid regulations in relation to prisons. The amount concerned is apparently about £4 million. The cost of each

lawyer to give advice or representation is a fixed fee of £220. As the noble Lord, Lord Pannick—who, in my view, has done the House a great favour by bringing this issue before noble Lords—has already said, that is achieved very often by a letter that resolves the problem.

I received a very interesting and useful e-mail from a committee member of the Young Legal Aid Lawyers, which is a group of students, lawyers and barristers committed to practising areas of law traditionally funded by legal aid, which includes prison law. They raised three points that I want to make to the House, which identify three vulnerable groups. They have been referred to already, so I hope that the House will forgive me for referring to them again.

One group of young people—they are children—have advocates from Barnardo's, which is a step forward. As far as I know, however, they are not lawyers and do not provide that specialised help which, for instance, is needed in the resettlement of young people who come out of secure accommodation or youth prison. Those young lawyers are of course experts in dealing with these problems.

The second group is mothers and babies. The issue of mothers and babies has been raised already, but let me take a different point. As a former family judge, it is the baby that I worry about. There is no one to speak for the baby; he or she is removed from the mother, with all the emotional harm that is done to a baby in those circumstances, even if that mother and baby are reunited at a later stage. In that instance, a lawyer can help to organise it so that the mother and baby remain together.

The third group that has already been referred to is that of vulnerable adults. I will make two points. First, in our prisons there is a very high percentage of people with mental health problems. Some have single mental health problems; many have multiple problems. There is also no shortage of people without education and with learning disabilities. How on earth are they to cope with putting forward whatever is the issue that needs to be put forward if they do not have someone to help them? I doubt very much whether the internal arrangements or even the ombudsman will meet the specialised help which, for a very minor cost to the public, these lawyers can give. If, as the noble Lord, Lord Pannick, suggests, it is ideological, the money does not matter; but I suspect that for the rest of the Government money matters very much. It is not very much money and it saves a great deal. Therefore I urge not just the Lord Chancellor and the Secretary of State for Justice, but the Government generally, to rethink the balance of saving money and the damage caused by taking away this facility and the lack of appropriate legal advice and representation that to me, as a former judge, is a denial of access to justice.

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Lord Brown of Eaton-under-Heywood (CB): My Lords, I, too, rise to support this Motion and also, in part, to atone for my own part as Treasury Counsel 30 years or more ago, when I did all that I could to obstruct the recognition of prisoners' rights—sometimes successfully in the short term, although generally not in the longer term. Preparing for the debate tonight has involved me in a wander down memory lane. In 1981, in a case called Payne against the then chairman of the Parole Board, Lord Harris of Greenwich, I succeeded in persuading the Court of Appeal under Lord Denning that it was quite unnecessary to give prisoners any reasons whatever as to why their parole applications had been refused. In 1984, in a case called King,

I persuaded the Court of Appeal that prison governors' disciplinary proceedings were wholly immune from judicial review, lest their authority be undermined.

8 pm

I now look back on these forensic triumphs of yesteryear with some astonishment—and, indeed, each of them proved to be short lived. Nor, indeed, were all my attempts to obstruct and restrict prisoners' rights successful. Anonymous reference has already been made this evening to the famous case of Raymond v Honey in 1982, in which I failed to persuade the House of Lords that prison governors were entitled to prevent a prisoner applying to the courts to commit them to prison for contempt. In 1983, in the Tarrant case—another case that features in the Joint Committee's report—I failed to persuade the Divisional Court that prisoners should never have the right to legal representation before boards of visitors. Indeed, in a case that has already been mentioned this evening by the noble Lord, Lord Lester—Silver v the United Kingdom—which was aptly named, considering it followed on from the case of Golder v United Kingdom, I failed to persuade the Strasbourg court that the prison authorities were entitled to read every letter that a prisoner sent out, even those sent to his solicitors. Enough of reminiscences—but I hope that they at least indicate that I have some experience and understanding of the importance of prison law in prisoners' lives.

Others in the debate have focused—and, no doubt, will continue to focus—on a number of detailed objections to the regulations, and have pointed to particular situations where the withdrawal of legal aid will be especially harmful and problematic. However, I wish to make a single, substantial point, which to my mind is a point of overarching importance and which has already been touched on by others. By these regulations, legal aid will cease to be available for a number of cases which otherwise would have passed all the relevant merits and qualifying tests and would have been funded. That must be so, because otherwise there can be no point in the regulations.

It follows that these cases are no longer to be funded for the very reason that those who wish to bring them are prisoners. It is no answer to say that there are other complaints procedures available to them in prison. To the extent that these are, indeed, sufficient, a legal challenge would in any event be impermissible because judicial review is always regarded as a remedy of last resort. So it is by virtue only of

their status as prisoners—an unpopular group and thus perhaps regarded as a soft and popular target for cuts—that prisoners will have fewer rights to funding and so less access to justice than the population at large. And yet—it is this that I regard as the key point which makes the point one of overarching importance, as I have called it—prisoners, as members of a closed community uniquely subject to the exercise of highly coercive powers, far from having fewer rights of recourse to independent courts than most of us, should, rather, have at the very least equal access to justice.

Just yesterday, the *Independent* newspaper contained an article headed:

"Medomsley young offenders centre: over 140 alleged victims of abuse have come forward".

The article detailed all these cases of alleged sexual or physical abuse from the late 1960s to the mid-1980s. I have no wish to comment on the allegations, or, indeed, to consider how the regulations in question here could bite in that situation. However, the article highlights—if, indeed, highlighting is required—just how vulnerable prisoners are, particularly young prisoners, and therefore how essential it is that they should have full and proper access to justice rather than be discriminated against as prisoners under the legal aid scheme. These are mischievous and misguided regulations, and the noble Lord, Lord Pannick, is right to regret them.

Lord Carlile of Berriew (LD): My Lords, given the current clamour for repentance in some quarters, it is a real pleasure to follow a sinner who hath repented. The noble and learned Lord, Lord Brown, makes an extremely powerful point in reminding us that these are cases in which the merits test has been passed. Therefore, the Government are deliberately excluding from access to litigation people who have been advised that they have merit in their case. That is a matter of real concern.

I, too, applaud the noble Lord, Lord Pannick, for moving this Motion of Regret—the third Motion of Regret, or similar, in a run of these legal aid regulations. This fact, in my view, should cause Ministers and the Government Front Bench real concern. There is more or less united opposition to these regulations among the informed. I would have thought that that evidence was as good as one could wish for.

I also want to pick up a point on mental health made by the noble and learned Baroness, with all her experience of the judiciary. It is often a matter of pure chance whether a child or adult with a serious multiple mental health history ends up in prison or in hospital. It may depend on where they were standing when a florid episode took place, whether there was a sympathetic or an unsympathetic police officer present or whether or not their family was there to protect them. It is purely because of a small event that one person may now be in a hospital, with all the care that a hospital provides, and the capacity to obtain legal aid for important litigation that may establish the course of the rest of their lives, and another may be in prison, where, apparently, they are to be deprived of access to that litigation. That seems to me profoundly unjust.

The third and final point I will mention—trying not to take up too much of your Lordships' time this evening—relates to children and young people and the

work of the Howard League for Penal Reform, of which I was president but am no longer. On 13 December last, the Joint Committee on Human Rights stated that it was "disappointed" that the Government had pursued the removal of matters from legal aid relating to young people and, in particular, resettlement cases. The committee said:

"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".

There are, of course, some very good lawyers in this House, but there is not a lawyer in this House who would not be challenged by some of these cases. The Howard League has a legal team that has helped literally hundreds of children make fresh starts and secure long-term

support on statutory funding. The result has often been to allow them to be released safely, having served the shortest appropriate time in prison. They have often been able to move on not just to lives which are free of crime but to lives which are positive in a much broader sense.

In turn, this has led not only to justice on their part but has saved the taxpayer a huge amount of money. It is extremely expensive keeping young people locked up. Therefore, I say to my noble friend the Minister that I doubt very much that any robust cost-benefit analysis has been done on removing legal aid from children in custody rather than allowing them the legal aid which the expert legal team at the Howard League—and, of course, elsewhere—has utilised to bring benefit to those children's lives.

Lord Goldsmith (Lab): My Lords, it is a privilege to follow the statements that have been made by so many of your Lordships universally condemning these regulations and identifying the specifics of why they are wrong in principle and wrong in fact.

I have not been someone who has objected to any legal aid cut. I have been concerned about some but, as a member of a Government who themselves had to look at legal aid issues, that was not the concern. However, what particularly concerns me about these regulations is the point that the noble Lord, Lord Pannick, made early in his contribution when he referred to the reasons given by the Secretary of State, the Lord Chancellor, for making this change—said to be ideological.

While there may be that ideology so far as the Lord Chancellor is concerned, noble and learned Lords have already made it plain why it is legally wrong: because prisoners have rights. Therefore, if the justification is that, ideologically, they should not have rights, he is saying that they should be in the same position as the people in the black holes of Guantanamo.

I am still shocked by the piece that the Lord Chancellor wrote in the *Daily Mail* on 11 September 2013, in which he described judicial review, not once but twice, as,

> "a promotional tool for countless Left-wing campaigners".

That is completely untrue, of course. I do not think that the *Daily Mail* would be regarded as a left-wing campaigner, yet it used judicial review to challenge the Leveson inquiry. Much as I admire it, I do not think

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that the Countryside Alliance, when it brought a judicial review against hunting, would have regarded itself as a left-wing campaigner.

It is deeply worrying that that is the ideology that underlies these changes. It would be deeply worrying if it came from anybody, but coming from a Lord Chancellor—a Secretary of State for Justice—it is a matter of the gravest regret, which is why I am very happy to support the noble Lord, Lord Pannick. It is wrong for these reasons. It is wrong because legal aid is about justice, not about ideology. It should be about ensuring that people can vindicate their rights where properly those rights deserve to be vindicated. Therefore, the Lord Chancellor—the Secretary of State—is ideologically unsound and also legally wrong.

This measure is, I regret to say, shabby, and a political and populist move which does no credit at all to a Government. Equally, it does no good, as noble and learned Lords and noble Lords have pointed out, in terms of cutting the budget. I very much hope that the noble Lord—and I, for one, welcome him to his place on the ministerial Bench—will do his best to make sure that that point is driven home within the Ministry of Justice and that the Secretary of State recognises eventually that this sort of move, which he regards as ideological, is in fact utterly to be regretted.

Baroness Stern (CB): My Lords, my memory of the gradual application of the rule of law in prisons also goes back a long way—as far back as that of my repentant noble and learned friend, whom I have the great honour to be sitting next to and of whom my opinion has warmed considerably as the years have gone by.

I recollect the days when prisoners were found guilty of disciplinary offences and sentenced to lose many days of remission without being heard or allowed to defend themselves. I remember a riot at Wormwood Scrubs prison in which 54 prisoners and 11 prison officers were injured. It was hushed up. The full facts emerged after two and a half years and no one was ever held to account. I am sure that there would be no support in 2014 for the rule of law not being maintained in prisons. The arrival of lawfulness improved immeasurably the working conditions of staff, the treatment of prisoners and the safety of the environment in which they both lived. My noble and learned friend Lord Woolf was right to say in his report on the Strangeways riot in 1991 that,

> "the system of justice which has put a person in prison cannot end at the prison doors".

Therefore, within this context, since this is a Motion of Regret, I regret very much that the framework of lawfulness in which prisons operate is to be reduced. I understand the argument about cost, but these measures will certainly save no money at all, and they will shrink one of the elements that keep prisons fairly safe and fairly manageable—that is, the provision of access to a remedy when a decision seems arbitrary and unjust.

Perhaps I may mention one specific situation so that it may be on the record. I refer to prisoners who are held in extreme conditions, such as in the case quoted by the Chief Inspector of Prisons when he gave evidence to the Joint Committee on Human

Rights. It concerned a woman with severe mental health problems in Bronzefield prison who was held for five years in conditions that amounted, in his view, to cruel, inhuman and degrading treatment. In future, such a woman seems very unlikely to be able to get legal aid to challenge her conditions and her placement. Women who have their babies taken away have already been mentioned, and I endorse the comments of the noble Baroness, Lady Kennedy.

I end by endorsing the remarks of the noble Lord, Lord Carlile, about the excellent work done by the Howard League and the Prisoners' Advice Service. Neither of those specialist legal aid prison law firms will be able to continue under these arrangements, and that, too, is a matter for profound regret.

8.15 pm

Lord Ramsbotham (CB): My Lords, I, too, congratulate my noble friend Lord Pannick on bringing his regret Motion before this House. I do not dissent in any way from what he said. He has outlined why this House should regret the restrictions being imposed on legal aid, advice and assistance in prison law cases with his usual clarity and skill. I want to focus instead on the Government's justification for those restrictions, which I believe to be deeply flawed. I have to admit to serious alarm when I saw that the justification was the internal prisons complaints system, about which, when I was Chief Inspector of Prisons, I had frequent cause to complain. I was equally alarmed when I saw that the tough Mr Grayling had said in his evidence to the Joint Committee on Human Rights:

"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",

to which the Joint Committee responded:

"What is strikingly strange about the Lord Chancellor's comments about where legal aid will be allowed is that he has … ignored where common-law standards of fairness apply".

It also said:

"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"—

in other words, both drawing attention to his ignorance of the facts and suggesting that he was on a collision course with Winston Churchill's conviction that the way in which it treats its crime and criminals is the true test of the civilisation of any country. Ideology appears to dictate his policy-making, rather than reality.

Mr Justice May, when recommending the reformation of the Inspectorate of Prisons after a break of 102 years, following widespread unease about the efficacy of the self-regulation that had been introduced by the first Prison Commissioner in 1877, recommended that the chief inspector be given statutory responsibility for the inspection of efficiency, propriety and the investigation of grievances. In the event, the investigation of grievances was denied. However, when the first prisons ombudsman was appointed in 1994 following similar unease about the internal prisons complaints system, he was not given statutory responsibility for the investigation of grievances—something for which he and his successors have fought, unsuccessfully, ever since, and a fight which I warmly support.

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I was therefore interested to note that in his evidence to the Joint Committee, far from having the confidence in the complaints system held by the Lord Chancellor, my successor as chief inspector, Nick Hardwick, confirmed that,

> "prisoner confidence in a complaints system was crucial to the safety of a prison".

He added 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 that,

> "about one in 10 say they have been prevented in some way from accessing the complaints system".

So much for advice and assistance that is equal to that being denied.

Like my noble and learned friends Lord Brown and Lady Butler-Sloss, and the noble Lord, Lord Carlile, if there is one group of prisoners about whom I am particularly concerned in all this, it is young offenders. For a whole variety of reasons, including immaturity and lack of trust, they tend not to use the complaints system. When I was inspecting, what worried me was that prison staff tended to interpret this lack of use of the formal complaint system as meaning that all was well when the opposite was true.

My final word to the Minister is that, in reflecting on all that has been said by noble Lords in regretting the proposed restrictions, he and the Secretary of State should reflect that this is not a stand-alone measure. Their restrictions come on top of a whole host of other cuts and deliberately tough sanctions against prisoners, and are resulting in mounting unrest. Prisoners are deprived of their liberty for a period by the courts following conviction for an offence but, in the civilised society about which Winston Churchill spoke, they are not deprived of justice. My noble and learned friend Lord Woolf observed that justice was a crucial ingredient of safety in a prison, which confirms that there is no place for ideologically imposed injustice in a civilised prison system.

Baroness Scotland of Asthal (Lab): My Lords, I, too, bitterly regret the need for this debate. I say to the noble Lord, Lord Faulks, that I feel enormous sympathy for him and bitterly regret that he will have the arduous burden of responding on behalf of the Government. To turn our minds back only a few years, if we had asked any lawyer worth their salt whether it would be likely that any Government, of whatever political complexion, would bring forward regulations such as these, I think that such a suggestion would have been met with incredulity.

I totally endorse what has been said by every Member of the House who has spoken already, particularly the comments made in relation to children, women and the vulnerable. I emphasise the comments made recently by the noble Lord, Lord Ramsbotham, about the need to remember the backcloth against which these additional cuts must now be seen.

I shall take a moment to concentrate on the plight of women. Noble Lords will know that legal aid in family matters has been removed almost in its entirety, except in cases of domestic violence. Even there we are hearing reports from solicitors all over the country

that access to legal aid for those women and individuals who are victims has been severely constrained. Some solicitors say that the drop has been 96% in some areas and 94% in others, and that there has been a real diminution right across the board. We know that women in our prisons are overrepresented in terms of vulnerability. Certainly it was my experience when I

was Minister of State with responsibility for the criminal justice system. I was told in 2004 by the governor of Holloway prison—I have no reason to believe that this has changed—that 89% of women in prison had a history of domestic violence or sexual abuse prior to having offended. We have a highly vulnerable group whose rights already are constrained outside the prison estate and are having them further constrained within it. Two-thirds of children in youth offending institutions come from those same domestic violence homes. We all know that those who graduated from the youth justice estate are overrepresented in the male estate. We are dealing with the most vulnerable in our community.

I add my voice to those who have expressed a degree of shock that the Secretary of State for Justice feels able to phrase these issues in terms of ideology. I commend the Damascene-like conversion of the erstwhile Treasury devil for his change of mind and invite the noble Lord, Lord Faulks, to ask the Lord Chancellor to see the noble and learned Lord, Lord Brown, as an exemplar of what can be done when one really wishes to change, and to say that, from the Lord Chancellor and the Secretary of State for Justice, all of us expect more. I cannot but agree with the noble and learned Lord, Lord Brown, when he says that these provisions are mischievous and misguided.

Lord Bach (Lab): My Lords, yet again this House appears united against the Government's proposals for legal aid. Thanks are owed not just by those of us in the House but those outside, too, to the noble Lord, Lord Pannick, for moving his regret Motion and doing so in so powerful a way. Those who followed him must rank as one of the most impressive lists of dramatis personae of legal luminaries it would be possible to bring together, and we have not heard from my noble friend Lord Beecham yet.

I want to make a couple of fairly short points. At paragraph 161 on page 50 of the JCHR report, there is reference to reforms to the system of prison law that were carried out in July 2010. They were really the work of the previous Government. Indeed, they were from a time when I was privileged to be the Minister with responsibility for legal aid. What we did then was to make comparatively minor changes that we believed were appropriate. We implemented them and, dare I say, they appeared to work fairly satisfactorily. But now, yet again, our successors go much, much too far and take so much out of scope that the balance shifts. Instead of having a system that maintains the essential proposition that prisoners should have reasonable and proportionate access to legal advice and representation, we are now faced with a sort of brave new world where any legal rights prisoners enjoy are granted out of sufferance—the very bare minimum.

The approach is not what is fair and consistent with our legal traditions but rather, "What can we as the Government, the state, get away with?". There is almost

a pride in not taking a balanced view based on judgment and legal reputation. In one of his examples, the noble Lord, Lord Pannick, spoke about categorisation. The Ministry of Justice has decided to remove funding for pre-tariff reviews. He explained much better than I can the value of pre-tariff reviews for prisoners.

Recently, I spoke to a recently retired Parole Board member and a retired High Court judge who told me that not only are these reviews immensely significant in the course of a prisoner's life but that there are huge advantages for the Parole Board and, thus, presumably

for society, in having the best possible information about a prisoner so that the right judgment can be made. Such information is gained by the Parole Board having had the advice and representation before it that has been given to the prisoner. Can anything be more ridiculous than the decision to take pre-tariff reviews out of scope? As the JCHR report so rightly said:

"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".

Two newly appointed Ministers in the Ministry of Justice were on that JCHR, at least for a large part of its hearing into this matter, and we hope that both those Ministers will follow that paragraph and talk to their Secretary of State in those terms.

8.30 pm

The Government's excessive zeal—their going over the top, if I may put it that way—on legal aid is already having harmful consequences. For example, the removal of legal aid from social welfare law is leading to the closure of advice centres. Only today, a round robin e-mail talked about the imminent closure of three law centres in London and one in a major city in the north of England, on top of what has already happened. That e-mail was headed "Glum".

Is this really what the Government intended when they forced the Legal Aid, Sentencing and Punishment of Offenders Act through Parliament? If it was, it does them no credit. They are gradually destroying a civilised system of access to justice—one that was far from perfect but which worked in practice and was, frankly, not very expensive. In its place is emerging a world where the poorest and those without any power, including of course prisoners under this particular regulation, have nowhere to go to get the legal advice that they deserve and need. It is fast becoming a record to be ashamed of.

The Earl of Sandwich (CB): My Lords, I am extremely honoured to be in this learned company and I will try not to take too much time because everything has been said.

We have been here before. I spoke in the debate of the noble Baroness, Lady Deech, as did many other noble Lords. On that occasion, I mentioned the work of the CAB. But today, like others, I am much more concerned about the effect of these regulations on young people in difficulty, including asylum seekers in detention, unaccompanied minors and even young

people released from prison and wishing to make a new life. These young people would normally benefit from professional legal advice at a critical stage in their lives when they are separated from their families or being made homeless at the moment of leaving prison. Specialised agencies such as the Howard League mentioned by the noble Lord, Lord Carlile, have given hundreds of people not just hope but essential practical advice on restarting their lives. This kind of work, as the noble Lord, Lord Ramsbotham, said, characterises fairness in our society. It is not charity.

I notice that the Minister has been a member of the Select Committee looking at mental capacity, so he will be more aware than most of the special problems of the mentally ill already mentioned. Many of those people are in prison through no fault of their own. I said in the legal aid debate that those with mental health problems were especially vulnerable. There were no exceptions for children nor for prisoners accepted to have a disability. A detained child unable to identify legal issues will not have the financial resources, let alone the intellectual resources, to pay for lawyers or even to frame their complaint to the prison authority, as is suggested. That is a serious point that the Minister has to answer. It would be a serious personal crisis for young people.

A case of a 12 year-old boy was mentioned to me by the Howard League. He was an unaccompanied minor who had been detained in a secure children's home. He had behaved well, earned himself early release and had sought help with resettlement. The lawyer concerned approached social services but only then discovered through an interpreter that he had been wrongly detained in the first place and had to appeal against his sentence. None of this will happen if cases are not referred in the future and legal aid is unavailable.

Last September, there were 1,789 immigration detainees spread across the UK in removal centres and short-term holding facilities simply waiting to be removed. Many are moved from place to place and I doubt if the Minister or anyone else can keep count of how many of them are young people. I heard from a Member of Parliament last week that one young detainee, originally from his constituency, had been moved eight times. Mental health problems loom large in these situations because no one knows when they can leave or even when they can receive a hearing. Detainees depend heavily on outside advice. This may be a subject for the Immigration Bill next month, but it is surely highly relevant to the present regulations. Is it fair to exact cuts that will impinge on young people in these conditions and restrict their lives even more than at present?

It is true that the Joint Committee on Human Rights accepted that it was legitimate for the Government to introduce a residence test, as the Minister may mention, and to restrict the scope of prison law funding. But it strongly recommended that there should be more and broader exemptions from these proposals to make it less likely that they will lead to breaches of the fundamental right of effective access to justice.

What is especially unfortunate, as the noble Lord, Lord Pannick, mentioned, is that young people in prison had been receiving much better attention over a long period. For example, the Minister will know that

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in 2002 there was a court ruling that the welfare and child protection duties in the Children Act apply to children in prison just as they do to children in the community.

The amount and percentage of cuts has already been discussed. They are surely disproportionate. I shall lastly mention one piece of evidence given to the Select Committee last July. I was surprised to read that the Justice Secretary had changed his mind about equal shares in legal aid work. He told the committee he had been persuaded that competition among legal providers was more essential than advice shared equally. He said:

"That is something that the market has said to me: 'Actually, the principle of choice is one that we regard as more important'",

than equal shares. If the market is speaking in this way, many young people and their families are going to suffer from these regulations.

Baroness Hamwee (LD): My Lords, the noble Earl mentioned the debate in this House last July. I looked back at that and reminded myself that the title of the Motion of the noble Baroness, Lady Deech, was "Effect of Cuts in Legal Aid Funding on the Justice System of England and Wales". I think that that was a very well chosen title because the effect of the cuts is not just on individuals but on our system of justice.

I was not going to talk about whether this was a matter of ideology on the part of the Justice Secretary. I had a look at the transcript and am not sure that that was quite the exchange about ideological differences, but I am tempted to wonder whether that was an admission or a boast.

I want to say very clearly—though noble and learned Lords, and noble Lords who are not technically learned, have put it much better than I can—that for those who are convicted and sentenced by the courts, the punishment is imprisonment. The punishment should not extend to the loss of rights, whether convention rights or at common law.

A number of threads seem to run through the Government's approach. The first is a reference to and reliance on judicial review. I do not need to comment on the paradox in that given the policy regarding judicial review. I was not aware of the *Daily Mail* article quoted by the noble and learned Lord, Lord Goldsmith. I do not think that I need to spend any time on saying how undesirable it is to rely on judicial review. But I will mention the skill that is needed, at what I shall describe as first instance, to ensure that the right points are raised and dealt with in order that there is a basis for an application for judicial review. I think that that is not a job for someone who is not trained.

Another theme which I picked up from the JCHR report is that the Justice Secretary thinks that the number of cases affected will be very small. If that is so, I do not understand why the Government do not give in gracefully. We know about the cost pressures on the MoJ. We know that the Government want to focus public resources on cases with sufficient priority to justify the use of public money and to get value for money for the taxpayer. But I know that I am not alone in this Chamber in setting justice high in my priorities as a taxpayer.

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What seems to be a common theme in the responses to the Government from those who work in the sector is a mention of the "see-saw impact"—that is, cuts here meaning costs there. Concerns around mother and baby units and the cost of keeping a baby in care is one example, undermining the principles of rehabilitation and the costs associated with all that. We will all have seen and read particular cases. I shall mention one which I found very compelling—the story of a 17 year-old who was given a 36-month custodial sentence. He was studying for his A-levels at the time. With the work of solicitors, who engaged in both detailed representations and liaison with a clutch of agencies, he was granted release on temporary licence to attend college part-time and then home detention curfew, and so he lost only one year of education, not the further years which were in prospect.

Of course, there is also the cost of the loss of expertise among solicitors. I have seen, and heard about tonight, a large number of points relating to costs rather than savings. We really have not got any better, have we, at joining up and reading across budgets? I have actually been defeated—my level of energy depleted—in trying to understand the savings projected as against the knock-on costs. I hope that when the Minister—who has everyone's sympathy in this—replies he will be able to unpack this for the House.

The third theme I picked up was the emphasis on the non-judicial complaints system. I do not see this as an either/or. There should be a good complaints system. That should then alleviate to some extent the necessity for lawyers to be involved. There should be an effective system that inspires confidence. However, there are limits to the system that we have—to the powers, to the remit, which does not extend to making recommendations to external agencies or investigating them. These concerns seem rightly to have been stressed.

We have heard, although not tonight, about ambulance chasing—if that is the right term—by some solicitors in prison, soliciting work and planting the idea in prisoners' minds that they have real claims. However, that should not mean that proper advice, assistance and representation is not available.

I do not suppose that the MoJ has found much which it regarded as supportive or constructive in the responses to the proposed changes. The House has managed to cover quite a lot of ground, and I will end by citing a point made by the Council of Her Majesty's Circuit Judges, which noted, according to the Howard League, that:

"The practice of prison law is so unique; its impact on the most vulnerable within society so profound; and the potential savings suggested by these reforms so limited at best, and so obscure in any event, prison law should be removed altogether from the scope of the legal aid reforms".

8.45 pm

Lord Beecham (Lab): My Lords, it is once again necessary for me to thank the noble Lord, Lord Pannick, for putting down a Motion of Regret about a set of regulations on legal aid. I also express my gratitude to all noble Lords who have spoken so powerfully tonight about the regulations and the potential damage that they will do.

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I begin by citing three examples of successful cases for which legal aid was, but will no longer be, available. I am indebted to the Howard League for supplying the relevant information. The first was a mother and baby case of the kind referred to by the noble Lord, Lord Pannick, the noble Baroness, Lady Kennedy, and the noble and learned Baroness, Lady Butler-Sloss. A Spanish mother, who spoke no English, was informed after sentence that her baby would be removed and placed into care because it was not known whether she would be allowed to remain with the child when she returned to Spain. Her lawyers ascertained that she would, and the decision was reversed.

In the second case, a prisoner with severe learning disabilities could not do offending behaviour courses. Experts in the prison recommended he be transferred to hospital for treatment, but nothing happened until his lawyer commissioned an independent report and

persuaded the authorities to transfer him to hospital. Such a sentence case will now be out of scope.

In the third case, a 17 year-old suffering from ADHD and learning difficulties underwent psychiatric therapy in a secure training centre, but the local authority refused to respond to a request for a needs assessment under Section 17 of the Children Act until legal intervention by the Howard League. Resettlement cases of this kind will also be out of scope. I remind your Lordships that the cost of keeping such an offender in custody could be as much as £200,000 a year.

Those are but a few sample cases. The regulations which are the subject of this regret Motion are merely the latest example of this Government's repeated assaults on the legal aid system and access to justice, pushed through by a Lord Chancellor indifferent to their effects and unheeding of the warnings from the judiciary, practitioners, and charities and voluntary organisations. Time after time the criticisms of bodies such as the Justice Select Committee, the Secondary Legislation Scrutiny Committee and the Joint Committee on Human Rights are brushed aside. Impact analyses are vestigial in many cases, and imperfect in most.

Such is clearly the case with the proposals we are debating tonight. Not only are the measures deeply flawed but the process is tainted. Paragraph after paragraph of the Joint Committee on Human Rights report highlights these systemic failures. After their initial consultation, the Government abandoned proposals to exclude two areas from legal aid, namely where the Parole Board considers whether to order release and in relation to the calculation of sentence when the release date is in dispute. That is welcome, but as paragraph 154 of the report sets out, two new matters were excluded from legal aid—contrary to the express intention set out in the consultation that legal aid would continue to be available—namely, the areas of sentence planning and pre-tariff reviews. There was no subsequent consultation on these changes.

At paragraph 163, the committee dismissed the Lord Chancellor's assertion that legal aid was being abused by prisoners complaining about what prison they were confined in, or about prison conditions, saying, damningly and accurately,

> "legal aid is already unavailable for such claims".

At paragraph 168, it pointed up the hollowness of the Government's claim that judicial review would be available given the restrictions being imposed on the number of cases firms might bring and the limitations of the exceptional funding regime. At paragraph 169, it asked the Government to consider the combined effect of the residence test and the exceptional funding criteria and invited them to explain,

> "how access to justice rights will be maintained where both policies are in operation".

What is the Government's response to that very significant question?

The Government airily dismissed the concerns on internal prison complaints but, as we have heard, the Chief Inspector of Prisons is quoted at paragraph 174 as finding the response "disappointing". He emphasised the problems of prisoners with disabilities, especially mental

health problems, and, as the noble Lord, Lord Ramsbotham, pointed out, warned that prisoner confidence in the complaints system was crucial to prison safety. As recent events have demonstrated, prison safety is a real concern. Similarly, at paragraph 174, the Prisons and Probation Ombudsman voiced concerns, especially about his lack of statutory independence that the Lord Chancellor has promised to rectify. I must ask the Minister when the legislation, urgently pressed for by the committee at paragraph 177, will be enacted.

At paragraph 181 the committee identified the need for public funding,

> "to prevent infringements of prisoners' right of access to court arising in practice".

From paragraphs 182 to 188, it identified serious issues for prisoners with mental health problems, the vast majority exemplified by the chief inspector's remarks in the case mentioned by the noble Baroness, Lady Stern, about segregation, in particular of women prisoners. In parenthesis, when I asked a question about women prisoners being held in segregation the reply that I received from the Ministry of Justice was that it was too costly to obtain the details of the numbers and length of time such women had been so confined. To his credit, the noble Lord, Lord McNally, agreed that the answer was ridiculous and procured the relevant information.

At paragraph 188, the Joint Committee noted that since 2010 the majority of treatment cases were mental health cases and it was not satisfied that these prisoners would be able to use the complaints procedure effectively. It recommended that the LAA retain the ability to grant funding for these cases where the implications for access to justice are clear. Noble Lords will not need reminding that the majority of prisoners suffer from mental health disorders: 70% of one or more mental health disorders for adults, 90% for young offenders. Again, what is the Government's response to the case of prisoners suffering from these disorders? In relation to mother and baby cases, of which there are mercifully few, the committee called for an exemption in cases where legal representation would be desirable. Will the Government not accede to this request?

The concerns are echoed in relation to young offenders, as mentioned by the noble Lord, Lord Carlile, where, as the committee pointed out at paragraph 205, such

matters, including in particular resettlement cases, are being removed even before the Government respond to their consultation paper,

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. Trenchantly at paragraph 206 the committee disagreed that advocacy services and internal complaints systems would be effective and asserted that:

"This could leave young people vulnerable and deny them their rights".

This would be not least in key areas such as,

> "housing law, social care law and public law".

Moreover, it dismissed the young offender's right to judicial review, which was raised by the Government, since a young offender would require a litigation friend to pursue the action; it cannot be brought by a minor on his own initiative. It urged the retention of young offender cases within scope, specifically resettlement cases. Finally, at paragraphs 213 and 218, as referred to by my noble friend Lord Bach, it recommended reconsideration of the position in relation to Parole Board hearings and categorisation cases. This is a formidable catalogue of concerns about, and in many cases outright opposition to, what the Government are doing.

Once again, the Minister will shortly stand at the Dispatch Box, like Horatius on the bridge, with no troops behind him. There is not a single voice that has been raised in this Chamber tonight in support of the Government's position. It would be unfair to suggest that the Minister, who was a member of the JCHR and presumably agreed with its report, has changed his mind now that he has taken if not the Queen's shilling, then at least the Lord Chancellor's shilling, if only because he is not being paid a shilling or indeed anything else for the job that he has undertaken. But I hope that he can prevail upon the Government to think again, and quickly, about the direction and extent of travel reflected in these regulations.

I commend to him in particular the response of the Bingham Centre for the Rule of Law to these issues. The centre does not,

> "share the Government's view that treatment cases will never be of sufficient priority to justify the use of public funds, or that sentencing matters such as categorisation and segregation are considered incapable of warranting legal aid".

Importantly, it dismisses the so-called "adequate alternatives" to which the Government refer—for example, the complaints system and the ombudsman—as "first ports of call", in the MoJ's phrase, for four substantial reasons.

First, as per the noble and learned Lord, Lord Brown, whom I welcome back to the side of the angels after his digression over the issues of miscarriages of justice and compensation, the courts require alternative remedies to be exhausted before seeking judicial review, so legal aid would not be the first port of call. Secondly, under the regulations, the non-judicial remedies would be the only point of call. Thirdly,

> "the rule of law requires the possibility, at least as a last resort, of recourse to independent courts",

and, fourthly,

> "rule-of-law imperative is particularly compelling in settings—of which prisons are a paradigm example—in which individuals are subject to the exercise of highly coercive public law powers".

The centre concluded by affirming that,

> "judicial review has exerted a profound and positive influence upon the prison system in recent decades … the nature of any state's prison system … is a key barometer of the rule of law".

Tellingly, it adds:

"It is inevitable that the proposals, if implemented, would substantially undermine the valuable role played by courts in this area. If one of public law's core functions is to safeguard vulnerable individuals against misuses of state authority, then it is hard to think of a more fundamental assault upon the capacity of public law to perform such a role"—

and all the more so when the custodial services are contracted out to oligopolies such as G4S and Serco.

What answer does the Minister have to this critique? Does he agree with the words uttered by Winston Churchill—who has already been quoted here tonight—as Home Secretary in 1910, when he said:

"A calm and dispassionate recognition of the rights … even of convicted criminals against the State … tireless efforts towards the discovery of curative and regenerating processes … are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it"?—[*Official Report*, Commons, 20/7/1910; col. 1354.]

Is the Minister, and are the Government, willing to disavow Churchill's characteristically eloquent formulation of principle for the sake of a possible, but actually unlikely, saving of £4 million a year?

The Minister of State, Ministry of Justice (Lord Faulks) (Con): My Lords, I hope that I can rise to the challenge of the "calm and dispassionate" response to which the noble Lord referred in his closing remarks. This has been a wide-ranging debate, involving very distinguished speakers with great knowledge and awareness of many of the issues which these regulations raise. I hope that the House will forgive me if, in the course of this dinner-hour debate, I do not respond to all the many criticisms that have been made but try to focus on the effect of the regulations and on why the Government have seen fit to bring them into effect.

I will begin by saying something about the wider context of the instrument. It is worth noting that spending on criminal legal aid for prison law in England and Wales has increased markedly in recent years, from around £1 million in 2001-02 to around £22 million in 2012-13.

Legal aid is a vital part of our justice system. However, limited public resources need to be targeted at those who need them most. With departments across government being asked to reduce their expenditure, legal aid cannot be immune. The legal aid scheme is paid for by the taxpayer, and we have to demonstrate to the public and hard- working families that we have scrutinised every aspect of legal aid spending to ensure that it can be justified. Unless the legal aid scheme is targeted at the people and cases where funding is most needed, it will not command public confidence. It was with this aim in mind that the Government proposed a number of changes to legal aid in England and Wales in April 2013. Following public

consultation and careful consideration of the responses, the decision was taken to restrict the scope of criminal legal aid for prison law, among other reforms.

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9 pm

The suggestion has been made that the Government did not respond at all or modify their view. With respect, that is not quite right. As a result of the consultation the Government agreed that they would fund all cases that involved the determination of a criminal charge for the purposes of Article 6, cases that required legal representation as a result of the successful application of the Tarrant criteria—the Tarrant case referred to by the noble and learned Lord, Lord Brown—all proceedings before the Parole Board where the Parole Board has the power to direct release, and all sentence calculation matters where the date of release is disputed.

The change to the scope of this legal aid aims to focus limited public resources on cases that are of sufficient priority to justify the use of public money. Criminal legal aid for prison law continues to be available for disciplinary hearings that determine a criminal charge and for ones before a governor where the Tarrant criteria are fulfilled—that is, where the governor has exercised discretion to permit legal representation following consideration of a number of criteria. Criminal legal aid remains available when the Parole Board has the power to direct the individual's release. It also remains for cases regarding an individual's sentence where the calculation by the Secretary of State of the date on which the individual is entitled to be released, or eligible for consideration by the Parole Board for a direction to be released, is disputed.

Criminal legal aid advice and assistance is no longer available for any other prison law matter. This includes all matters related to an individual's treatment in a prison, young offender institution or secure training centre—including, but not limited to, prison conditions, treatment by staff, and communications and visits. Most sentencing matters have also been removed from scope, including, but not limited to, categorisation, resettlement, sentence planning and licence conditions. Further disciplinary cases before a governor where the Tarrant criteria are not engaged are also no longer within scope. Nor are Parole Board matters where the board does not have the power to direct release.

The Government consider that these issues removed from scope do not require the input of a lawyer. They can be, and indeed are, adequately resolved through the alternative means of redress already in place. These alternative means of redress, including the internal complaints system, the prison discipline procedures and the probation complaints systems, should be the first port of call for issues removed from scope. The internal prison complaint procedures, set out in Prison Service Instruction 02/2012, are robust and effective. The system is accessible to all, with measures in place for young offenders and for those with mental health issues and/or learning difficulties—and there has been much reference to those prisoners.

For example, prisons are required to make sure that information is available in formats that all prisoners can understand. In particular, this means that prisoners who cannot read English because of a learning disability or because their first language is not English or who have difficulty reading or writing for any other reason will have information given to them in another format.

Advocacy services are available for young offenders to help them navigate the complaints system and any other processes. If the complaints procedure does not resolve the issue, prisoners can also refer the matter to the Prisons and Probation Ombudsman or the Independent Monitoring Board. Furthermore—and I accept what noble Lords have said that it is very much a last resort and subject to means and merits—civil legal aid may be available for judicial review.

The changes in this instrument came into effect on 2 December 2013. Ahead of this date, the Ministry of Justice produced a series of communications for prisoners, staff and governors about the changes. These included information about how prisoners should seek to resolve issues that were no longer in the scope of criminal legal aid. The communications to staff and governors also reiterated the need for establishments to comply with the relevant Prison Service instructions, including the need to make reasonable adjustments for prisoners with protected characteristics, including those with mental health issues and/or learning disabilities. The Youth Justice Board—shortly to be chaired by my predecessor, my noble friend Lord McNally—has also written to all secure training centres, and Ministry of Justice officials have liaised with the Department for Education with the aim of ensuring that secure children's homes receive the same message.

The National Offender Management Service will formally approach Her Majesty's Inspectorate of Prisons to include a complaints thematic inspection towards the end of 2014 or the beginning of 2015, or early in its 2015-16 programme of work, to allow time for the changes to criminal legal aid for prison law and any impact on the complaints system to take effect. This will test the complaints system after the changes to criminal legal aid have taken effect and will give an independent view on their impact. NOMS will continue to monitor the number of complaints submitted centrally to assess the impact on services. The effectiveness of the complaints process will continue to be assessed on an ongoing basis.

There was a great deal of reference during the debate to mother and baby units. All treatment issues will no longer be in the scope of criminal legal aid for prison law, and that includes help for mothers in relation to places in mother and baby units. The Government believe that that does not create a risk of unfairness and that alternative means of redress, including the prison complaints system, are effective. No mother and baby unit cases have in fact been funded by criminal legal aid since July 2010. The significance of that date is that, since that time, providers have had to gain prior approval from the Legal Aid Agency, setting out the merits of the case before starting work.

PSI 54/2011 sets out the procedures for mother and baby units and includes a requirement on governors to ensure that all women who are pregnant or who have a child below the age of 18 months have the opportunity to apply for a place on the unit. Women must be provided with a booklet about mother and baby units. That information must be available on each residential unit, in the prison library and in reception centres, first-night centres and induction units. The governors and directors of all women's prisons must also appoint

a named mother and baby unit liaison officer or deputy who will be responsible for assisting the woman in completing her application.

The decision to admit a mother and her child is taken by the governor on the recommendation of an admission board chaired by an independent chair who is a certified social worker, so there is independence there. The board takes into account the best interests of the child, the necessity to maintain good order and discipline within the unit and the health and safety of other babies and mothers in the unit. Any mother who is refused a place can appeal against the decision of the admissions board by using the internal complaints system, which does not require a lawyer.

Concern was expressed about the issue of categorisation. Of the areas removed from the scope of criminal legal aid, there are about 6,000 legally aided categorisation cases per year, based on the 2012-13 data. If prisoners were to be held in a higher security category than necessary as a result of that change, there would be an additional cost burden. However, we consider that the alternative means of redress, such as the prisoner complaints system, are sufficient to deal with those matters satisfactorily. In fact, being in a higher category does not of itself prevent release. If, contrary to our view, as a result of the change to criminal legal aid, prisoners were held in a higher category than necessary, there would be an additional cost burden, although we cannot quantify the number of cases. Although the average cost per prison place increases as a result of increases in the prisoner security classification, it will have only a marginal impact on overall costs, as there is an oversupply of high security places and an undersupply of lower security places.

The issue of Parole Board hearings was raised. As many noble Lords will be aware, a Parole Board hearing is invariably inquisitorial, and we do not accept that it requires a legal representative to ensure fairness for the prisoner. I appreciate that the Parole Board has expressed anxiety about some prisoners not being represented, and of course any Parole Board would probably prefer to have a prisoner represented by a lawyer rather than to deal with them directly, but the Government have great faith in the highly skilled members of the Parole Board and their inability to elicit and assess relevant information and do not consider that the additional costs are justifiable.

While dealing with particular costs, reference was made to the standard fee of £220. That is the lower standard fee for advice and assistance; the higher standard fee is about £600 for more complex cases. The average cost of Parole Board representation is, I am told, around £2,000. As noble Lords will appreciate, where release date and the sentence term is concerned, there will be representation before the Parole Board.

I move to another area of concern, which was the general lack of faith that a number of noble Lords expressed in the complaints system. The Ministry of Justice has issued a series of communications for governors, staff and prisoners to reinforce compliance with the relevant PSIs in all establishments, to ensure that staff and prisoners are fully aware of the changes being made and the proposed alternative means of redress. The Youth Justice Board has also written to

all secure training centres, and Ministry of Justice officials have liaised with the Department for Education with the aim of ensuring that secure children's homes receive the same message.

NOMS will formally approach HMIP to include a complaints thematic inspection towards the end of 2014—which, as I have said, will test the complaints system. The changes were made to the complaints system following Prison Service instruction as a result of an audit that was carried out on the National Offender Management Service to assess the adequacy, effectiveness and reliability of controls operating over prisoner complaints. The audit found that the system was generally working as set out in the Prison Service instructions, although a number of recommendations were made and accepted in full by NOMS.

There was also a suggestion that the Prisons and Probation Ombudsman did not have the resources to deal with its role. We expect that the majority of cases that are removed from scope will be resolved via the prisoner complaints system, prisoner discipline proceedings or the probation complaints systems. These are, we suggest, robust systems designed to deal with serious issues of concern for prisoners or those released on licence. Only those cases that cannot be satisfactorily resolved via these processes, which we expect to be a small number, will be referred to the ombudsman. Prisoners may also refer their case to the independent monitoring board.

Lord Beecham: I am sorry to interrupt the Minister, but at paragraph 175 of its report the committee says specifically:

> "the Prisons and Probation Ombudsman … 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".

How does the Minister square that with the assurance that he has just given?

Lord Faulks: The assurance that I have just given is that the Government take the view that it will be rare that there will be any need to refer to the Prisons and Probation Ombudsman. However, the Ministry of Justice intends to put the PPO on a statutory footing as soon as legislative time permits. I note that the Joint Committee on Human Rights noted—and this must be in the same section to which the noble Lord referred—that the PPO has himself "acknowledged that his recommendations", while not binding, are in fact "always accepted".

There was understandable anxiety about mental health issues and learning difficulties for young offenders. The Government are of course extremely concerned with young offenders and their rehabilitation. I could give a detailed response, but that would be outside the scope of this debate, which is concerned with legal aid. That issue is a matter of continuing concern to the House, and indeed to the Government, just as the position with mental health issues is also a concern. I accept that many prisoners have a background with mental health issues.

Noble Lords may ask what is done to screen prisoners for mental health problems. As part of the early days in custody process, all prisoners are risk-assessed for

potential harm to themselves and to others and from others. All incoming prisoners are given a medical examination to identify any short-term or long-term physical or mental health needs, including disability, drug or alcohol issues, and to ensure that follow-up action is taken.

9.15 pm

Questions were raised as to how vulnerable prisoners, such as those with mental health issues or learning disabilities or those who cannot read or write, can be expected to represent themselves even in relation to an internal complaint. We believe that prisoners with mental health issues and/or learning disabilities and those whose first language is not English will be able effectively to resolve those issues. Prison service instruction PSI 32/2011, at paragraph 1.8, gives the following mandatory action:

"Disability: prisoners encouraged to disclose disabilities. Reasonable adjustments made and recorded".

Those involved are experienced at helping prisoners present their arguments appropriately and such adjustments will continue to be made. To give just one example, prisoners are allowed,

> "to make a formal complaint orally to a member of staff where the prisoner has difficulty doing so in writing",

and members of staff are required to ensure prisoners understand the response given to their complaint. The need for compliance with these aspects of the complaints system process, which is set out in PSI 02/2012, has been reinforced in the communications to prisons.

Time is running out on me, but there are a series of steps made to ensure that in secure establishments for young people there are comprehensive internal complaints systems. As noble Lords will know, advocacy services are also provided in youth establishments to help young people navigate the processes, including the process of resettlement that was referred to. There are other issues which I have not been able to cover in the time that I have thought appropriate to deal with a debate of this magnitude, but I hope that I can deal with some of those in writing.

One central theme in the very fierce criticism made of my right honourable friend the Lord Chancellor is that there is an ideological basis for his approach to these issues. I do not know what was meant by the term "ideological", but the position of the Ministry of Justice is certainly not that prisoners do not deserve proper consideration as members of society who have temporarily lost their liberty. It is simply that they should have legal aid, and legal aid should still remain in those circumstances where their liberty is in fact affected, or might be affected, by the lack of representation.

However, in these straitened times, there has to be some modification of legal aid to circumstances where, in the Government's view, it is not necessary for the complaints—and there may be a number of complaints made by prisoners—to have the benefit of lawyers, provided that the systems, which we believe are there and can continue to develop, will allow them to make complaints in a way that does not leave them especially vulnerable but allows them to make complaints in a proper way without imposing on the Government the

unnecessary expense of lawyers. We have targeted legal aid where we think it is most appropriate. If that is an ideological matter, then I accept that it is ideological. Certainly we

have no wish to persecute prisoners for populist reasons. It is an attempt to deal with a difficult problem in these straitened times.

That is the Government's response to the Motion of Regret. I am extremely grateful to all noble Lords who have illuminated this debate with their many and widespread concerns for prisoners, but I respectfully ask the noble Lord to withdraw his Motion.

Lord Beecham: Before the Minister sits down, can he tell the House if and when the Government will be publishing their response to the Joint Committee report of 13 December?

Lord Faulks (Con): I cannot I am afraid give an exact date for that, but I shall take back the noble Lord's concern and I will write to him when I have information. Of course, it is a matter that will be taken very seriously at the Ministry of Justice.

Lord Pannick: My Lords, I am grateful to the Minister for doing his best to defend this sorry set of regulations. The Government are very fortunate indeed to have his services on the Front Bench. I am grateful to all noble Lords who have spoken in this debate and who have explained with clarity and force why the regulations are wrong in principle and damaging in their consequences.

The Minister may have noticed the embarrassing lack of support for these regulations on the Benches behind him, and indeed anywhere in this House tonight. Before the Minister's speech, your Lordships heard 15 speeches—I have been counting—all of them regretting these regulations and all highly critical of them and of the purported justifications for them. Noble Lords who have spoken tonight have reflected the widespread concern about the regulations that exists outside this House.

The Minister's main argument, that the internal complaints system and the ombudsman system are an effective substitute for legal assistance and advice, is simply contrary to the advice of the Parole Board, the inspector of prisons and the ombudsman. It is contrary to court judgments over the years. It is contrary to the experience of all those who have spoken tonight, apart from the Minister. Indeed, it is irrational, given the lack of literacy, the youth, the immaturity and the mental health difficulties of so many prisoners, let alone their obvious inability to identify and present the issues that arise in their cases.

I ask the Minister to send a copy of today's *Hansard* to the Secretary of State tomorrow morning, to ask the Secretary of State to reflect on the nature and strength of the concerns that have been expressed tonight from the broad experience and expertise that so characterise this place, to draw the Secretary of State's attention to the absence of any support for these regulations outside his own ministry and to ask the Secretary of State to think again about this important matter. I beg leave to withdraw the Motion in my name.

Motion withdrawn.

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