Ministry
of Justice

Government response to the Joint Committee on Human Rights:

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

February 2014

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Presented to Parliament
by the Secretary of State for Justice
by Command of Her Majesty

February 2014

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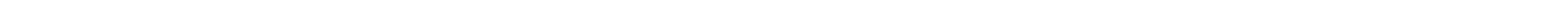

Introduction

This is the Government response to the Joint Committee on Human Rights' (JCHR's) Seventh Report of the 2013–14 Session, *The implications for access to justice of the Government's proposals to reform legal aid*. The JCHR report made recommendations on the civil legal aid residence test and the borderline merits test and on criminal legal aid prison law cases. The Government's response to each of the recommendations made is set out below. Separately, today the Government has also published its response to the 'Transforming Legal Aid: Next Steps' consultation.'

The Government is grateful to the JCHR for their diligent work in scrutinising our proposals, and for the opportunity to provide both written and oral evidence. As the JCHR is aware, the overarching purpose of each of the three proposals which were the subject of the JCHR's inquiry is to target limited public resources at cases that most justify it, ensuring that the public can have confidence in the legal aid scheme.

Legal aid is a vital part of our justice system. It goes to the heart of a civilised society. The Government is clear that nothing it proposes undermines this, or is contrary to the principles on which the legal aid scheme was founded. Legal aid will continue to be, available (subject to means and merits tests) in cases where:

- people's life or liberty is at stake;
- they are at risk of serious physical harm;
- their children may be taken into care; and
- failure to fund would amount to a breach of the individual's right to legal aid under the European Convention on Human Rights or European Union law (or, in the light of the risk of such a breach, it is appropriate to provide legal aid).

This will not change. The legal aid scheme will continue to help thousands of people a year. Even after these latest proposals England and Wales will still have one of the most generous legal aid systems in the world, costing around £1.5bn a year.

The Government's proposals are fully compatible with its legal obligations. The Government accepts that there is a common law right of access to the court (albeit one which Parliament has the power to abrogate: see *R v Lord Chancellor ex parte Witham* [1998] QB 575 at 581 per Laws LJ). However, this is not the same as a common law right to legal aid, as was recognised by Laws LJ in Witham itself:

> *"Mr. Richards submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not. As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyers' fees to conduct litigation is a subsidy by the state which in general is well within the power of the executive, subject to the relevant main legislation, to regulate…"* (at p. 586).

The Government does not consider that there is any basis at common law that a litigant is in general entitled to a state subsidy in respect of lawyers' fees. That is in line with the constitutional position in relation to other areas of policy, where it is entirely correct for Parliament and the Executive to determine how limited public funds are available. The proposed legal aid reforms do not undermine any fundamental right of access to the

courts, but considers the question of whether a person should receive legal aid funding. Even if this were wrong, the limits on legal aid agreed by Parliament through legislation would be effective to limit the extent of any such common law right.

The Government maintains that its reforms are compatible with all relevant human rights standards, including, for example, the United Nations Convention on the Rights of the Child.

Access to justice is a fundamental part of a properly functioning democracy and a very important element in the constitutional balance. The Government's proposals are designed to ensure that these principles are preserved, a commitment that will not be waivered from.

As set out in *Transforming Legal Aid: Next Steps*[1] *(Next Steps)*, the Government continues to believe that individuals should, in principle, have a strong connection to the UK in order to benefit from the civil legal aid scheme. The Government believes that a requirement to be lawfully resident at the time of applying for civil legal aid and to have been lawfully resident for 12 months in the past is a fair and appropriate way to demonstrate such a strong connection. The proposed residence test for civil legal aid will comprise two limbs: (i) individuals will need to have been lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time the application for civil legal aid was made; and (ii) have resided there lawfully for a continuous period of at least 12 months at any point in the past (short breaks of up to 30 days, whether taken as a single break or several shorter breaks, would not breach this requirement).

Next Steps also set out exceptions to the test for serving members of Her Majesty's Armed Forces and their immediate families and for asylum seekers. Children under 12 months old will not be required to have at least 12 months of previous lawful residence. In addition, the Government also took the view that there were limited circumstances where applicants for civil legal aid on certain matters of law set out in Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) would not be required to meet the residence test. These broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.

In response to the JCHR's report, the Government has set out its view below on the Committee's recommendations in respect of the proposed residence test, prison law changes and removal of funding from borderline cases.

In particular, the Government agrees that some further modifications to the proposed residence test are justified in order to achieve the essential policy aim of targeting legal aid at those with a strong connection to the UK, whilst providing protection for those who are particularly vulnerable. The Government therefore intends to make the following further changes to the proposal:

- An asylum seeker who is successful in their asylum claim[2] will not be required to satisfy the residence test until 12 months after their claim for asylum was made, or until their claim for asylum was determined (whichever occurs later). The effect will

[1] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps

[2] That is, an individual who is granted leave to enter, or to remain in, the UK based on rights described in paragraph 30(1) of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

be to ensure that an asylum seeker who is successful in their asylum claim would be either exempt from the residence test, or be able to accrue sufficient previous lawful residence to satisfy the second limb of the test for any civil legal aid applications.

- Similarly, other categories of refugee who never make a claim for asylum in the UK, but are resettled or transferred here would not be required to satisfy the residence test until 12 months after they arrive in the country (after which point they would have been able to accrue sufficient lawful residence to satisfy the test).
- Alongside other exceptions for protection of children cases previously set out in *Next Steps* there will be a further exception for sections 17 and 20 Children Act 1989 cases falling within paragraph 6 of Part 1 of Schedule 1.
- The Government will not be taking forward the recommendation of the JCHR to provide a general exception for those who lack mental capacity and are unable to litigate under the rules of the court. However, the Government is minded to introduce flexibility in the requirements to provide evidence of residence for individuals whose personal circumstances (e.g. age, mental disability or homelessness) may make it impracticable for evidence to be supplied.

As set out in *Next Steps*, the Government intends the residence test to be objective and not overly onerous to administer for providers or the LAA. The Government is considering carefully the precise evidential requirements for the proposed test. It intends to set out the details of the intended evidential requirements in a policy statement to be annexed to the Explanatory Memorandum which will be laid alongside the draft affirmative SI introducing the residence test. However, it is worth emphasising at this stage that those carrying out document checks will not be expected to be experts on immigration law. Such document checks are already a feature in other areas. For example, employers are under a legal duty[3] to prevent illegal working by carrying out document checks to confirm if a person has a right to work in the UK or face a civil penalty or imprisonment.

The Government is currently in the process of drafting the statutory instruments which will introduce the residence test. As part of that process it will consider how best to provide for the changes to the policy outlined above.

The changes to the scope of criminal legal aid for prison law were implemented on 2 December 2013 and the removal of civil legal aid for borderline cases came into force on 27 January 2014. Both reforms were the subject of extensive consultation with the public. The Government's response to the issues raised was set out in *Next Steps*' published on 5 September 2013. In addition the House of Lords has debated the changes to the scope of criminal legal aid for prison law, which highlighted a number of queries and concerns. Lord Faulks QC, Minister of State at the Ministry of Justice, responded to these issues.

The Government would like to thank the JCHR for their deliberations.

[3] Sections 15-25 of the Immigration, Asylum and Nationality Act 2006

Residence Test

Can a residence test be introduced by secondary legislation?

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

The Government believes that the power exists under LASPO to implement the residence test for civil legal aid in secondary legislation. Section 9(2) of LASPO provides the Lord Chancellor with power to add to, vary or omit services in Part 1 of Schedule 1 by secondary legislation. Further, section 41 of LASPO makes clear that this can be exercised by reference to different classes of persons. The Government therefore does not accept the argument that has been made by the Committee.

Asylum seekers

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

The Committee sought clarification on matters relating to asylum seekers. Under the proposal set out in *Next Steps*, the Government set out the terms under which the residence test would affect asylum seekers.

The Government made clear that individuals claiming asylum[4] would be exempt from the test for all civil proceedings. Although asylum seekers do not have a strong connection to this jurisdiction, they are seeking refuge from their country of origin, and by virtue of their circumstances this groups tends to be amongst the most vulnerable in society.

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[4] As set out in the response paper, *Next Steps,* an asylum seeker means a person claiming rights described in paragraph 30(1) of Part 1, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The Government have also proposed that individuals who were successful in their asylum claim and who had been granted legal aid for any case under LASPO prior to determination of their asylum claim would continue to receive legal aid for that case. This is important to avoid the individual who was an asylum seeker (and who has been successful in their claim) from having to wait a further 12 months to comply with the second limb of the test and disrupt ongoing proceedings.

As made clear in *Next Steps,* in light of concerns raised by respondents about requiring an asylum seeker who is successful in their asylum claim to have to wait for 12 months to comply with the residence test for any new application for civil legal aid, the Government decided that the continuous 12 month period of lawful residence required under the second limb of the test should, in the case of an asylum seeker who is successful in their asylum claim, begin from the date they submitted their asylum claim, rather than the date when that asylum claim is accepted.

Where an asylum seeker is not successful in their asylum claim and has exhausted all their appeal rights, they would cease to qualify for legal aid under the asylum seeker exception. However, civil legal aid would continue to be available for preparing and submitting further submissions, which may result in a grant of asylum or amount to a fresh claim.

To clarify, the individual would not benefit from the wider exception to the residence test for asylum seekers unless and until the Home Office had accepted that their further submissions amounted to a fresh claim.

Where the Home Office decides that the further submissions should result in a grant of asylum then the individual would be treated in the same manner for the purposes of the residence test as any other asylum seeker who is successful in their asylum claim.

The Home Office may decide not to grant the individual's asylum claim but decide that the individual's further submissions do amount to a fresh claim for asylum under paragraph 353 of the Immigration Rules. In such circumstances, the individual would be entitled to appeal against that decision in line with the appeal rights available to all asylum seekers, and would be regarded as an asylum seeker for the purposes of the residence test exception until their appeal rights were exhausted.

As set out above, where the Home Office decides that an individual's further submissions do not amount to a fresh claim, the individual would not benefit from the wider asylum seeker exception. However, legal aid would be available in respect of a judicial review of that decision (subject to means and merits), as required by the EU Procedures Directive.

The Government notes the Committee's specific query regarding when the 12 month period of lawful residence will commence for asylum seekers who have submitted fresh claims for asylum which are then accepted. To clarify, the 12 month period of lawful residence for a person who has put in further submissions which have been accepted as a fresh claim for asylum by the Home Office commences on the date the further submissions (which the Home Office subsequently accept as a fresh claim) are submitted. If the Home Office decides that the fresh claim should be granted asylum, then the individual's period of 12 months of lawful residence would start on the date the further submissions were submitted.

Individuals who fall within the asylum seeker exception will need to provide evidence that they fall within that exception when they apply for civil legal aid. Final evidence requirements will be confirmed in due course. However, the Government does not expect the evidential requirements for asylum seekers to be onerous and anticipate that this will

be satisfied by an individual providing an Application Registration Card, which represents that an application for asylum has been made.

The Government notes the specific concern raised by the Committee that those asylum seekers whose claims are processed in under 12 months and who are successful in their asylum claim, would face a wait before accruing sufficient lawful residence to satisfy the second limb of the test, during which time they would be unable to access civil legal aid on any new matter, at a point where they could still be regarded as particularly vulnerable.

Having listened to the concerns raised the Government agrees that the exception for asylum seekers should be modified further as follows:

> ***An asylum seeker who is granted leave to enter, or to remain in, the UK based on rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO will not be required to satisfy the residence test until 12 months after their claim for asylum was made, or until their claim for asylum was determined (whichever occurs later)***.

The effect of this will be to ensure that all asylum seekers who are successful in their asylum claims will not be required to satisfy the residence test for a period of at least 12 months from the point at which they make their claim for asylum. After 12 months, such individuals would be able to satisfy the residence test for any civil legal aid application (provided that they had not been out of the country for more than 30 days during that 12 month period). The individual will still need to be lawfully resident at the time of applying for civil legal aid.

Other refugees (including Gateway Protection Programme)

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

As set out above, individuals seeking asylum will not be required to satisfy the residence test. For the purposes of the residence test, an 'asylum seeker' is any individual claiming rights described in paragraph 30(1) of Part 1, Schedule 1 to LASPO, that is rights to enter, and to remain in the UK arising from:

(a) The Refugee Convention 1951;

(b) Article 2 or Article 3 ECHR;

(c) The Temporary Protection Directive[5];

(d) The Qualification Directive[6].

[5] Council Directive 2001/55/EC on minimum standards for temporary protection in the event of a mass influx of displaced persons.

[6] Council Directive 2004/83/EC on minimum standards for qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection.

As indicated above all those seeking asylum in the UK would be exempt from the residence test. All those refugees who are successfully granted leave to enter, or to remain in the UK based on rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO would also be exempt from the residence test for at least 12 months from the date of their asylum claim (and therefore would have had the opportunity to accrue 12 months of lawful residence before they are subject to the residence test).

However, having listened further to the comments raised by the JCHR about resettled refugees, that is individuals who are never initially regarded by the UK as an 'asylum seeker' but are accepted as refugees, the Government intends to modify the proposal as follows:

> ***Refugees who never make a claim for 'asylum' in the UK, but are resettled or transferred here will not be required to satisfy the residence test until 12 months after they arrive in the UK.***

The effect will be to ensure that all refugees who do not seek asylum in the UK will not be required to satisfy the residence test for a period of at least 12 months from the point at which they arrive in the UK. After 12 months, such individuals would be able to satisfy the residence test (provided that they had not been out of the country for more than 30 days during that 12 month period). The individual will still need to be lawfully resident at the time of applying for civil legal aid.

This modification will affect individuals who arrive in the UK under the following programmes:

(i) the Gateway Protection Programme;

(ii) the Mandate Resettlement Scheme; and

(iii) those who transfer their refugee status to the UK under the European Agreement on the Transfer of Responsibility for Refugees (EATRR).

An equivalent exception will be made for individuals under the proposed Syrian Vulnerable Person Relocation Scheme.

Children

JCHR: We welcome the Government's modifications to the residence test which exempts children under 12 months of age (who are lawfully resident at the point of application) as this group could clearly not have met the 12 month requirement of the residence test. However, we do not agree that the Government has considered all groups of children who could be adversely affected by this test, and we note that no Child Impact Assessment has been produced. Such groups of children include children unable to provide documentation of residence and those who need help to gain access to accommodation and services. There is a particular problem in terms of the complexity and urgency of EU and international agreement cases, acknowledged during the passage of the LASPO Bill, but which have not been made an exception to the residence test. We are concerned that the Government has not given full consideration to its obligations under the second article of the UNCRC. For reasons we explain below, we do not consider that the Government's argument that cases can always apply for exceptional funding is sufficient to meet UNCRC obligations or the Government's access to justice obligations. We are sure that the Government does not intend vulnerable children to be left without legal

representation. The proposals give little consideration to the access to justice problems that the proposal specifically creates in relation to children, such as the potential complexity and urgency of the cases for which children would need advice and representation, or in some cases, the need to find a litigation friend to assist the child with their proceedings because they have become separated from their families. The Lord Chancellor's justification for the policy, namely contribution, in particular through the payment of tax, cannot apply in relation to children. Nor can it be said that children have chosen to make their home in the United Kingdom. We do not consider that the removal of legal aid from vulnerable children can be justified and therefore we recommend that the Government extend the exceptions further by excluding all children from having to satisfy the residence test. (paragraph 91 to 95)

In *Next Steps* the Government set out an exception to the residence test for cases involving protection of children issues. Specifically, this means that the residence test would not apply to applicants for civil legal aid on matters listed in paragraphs 1, 3[7], 9[8], 10, 15 and 23 of Part 1, Schedule 1, of LASPO. This is in addition to the other exceptions proposed for specific types of cases, which may also be relevant for children. This includes exceptions for domestic violence cases (under paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO), for victims of human trafficking in relation to certain damages, compensation and immigration claims (under paragraph 32 of Part 1 of Schedule 1) as well as detention cases (under paragraph 5, 9[9], 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to LASPO).

Having listened to the concerns raised by the Committee, the Government is however minded to make a further exception for certain other types of case involving protection of children issues, namely section 17 and 20 Children Act 1989 cases (under paragraph 6 of Part 1 of Schedule 1). Section 17 cases relate to the provision of services for children in need, for example additional care needs of a disabled child and section 20 cases provide for accommodation for children.

In response to the Committee's concern relating to child abduction cases under the Hague Convention 1980, the Government would like to clarify that these cases would not be subject to the residence test. As set out in *Next Steps,* legal aid would continue to be available where necessary to comply with the UK's obligations under EU or international law as set out in Schedule 1 to LASPO. Hague Convention 1980 cases are one such international obligation listed in Schedule 1 to LASPO (at paragraph 17 of Part 1) and applicants for civil legal aid in such cases would therefore be exempt from the residence test.

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[7] Exceptions to the residence test for cases under paragraph 3 would only apply for cases where the abuse took place at a time when the individual was a child.

[8] This exception to the residence test for cases under paragraph 9 would only apply to cases under the inherent jurisdiction of the High Court in relation to children.

[9] As described below, in line with the exception for detention cases in Schedule 1, the Government also intends to make an exception for deprivation of liberty cases falling under paragraph 9 of Part 1 of Schedule 1.

Detainees

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

Paragraph 21 of Part 1 of Schedule 1 of LASPO provides for civil legal services in relation to an abuse by a public authority of its position or powers. The Government notes that the JCHR suggest that individuals who have suffered abuse whilst being detained by the State, so as to breach article 3, should be eligible for legal aid in order to pursue compensation. As set out in *Next Steps* the Government has made exceptions for categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children. This includes exceptions for certain detention cases where an individual's liberty is at stake; in particular under paragraphs 5, 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1, to LASPO. In line with the exception for other detention cases, the Government also intends to make an exception for deprivation of liberty cases falling under paragraph 9 of Part 1 of Schedule 1, to LASPO. These exceptions are focussed on challenging detention rather than damages claims relating to the conditions of previous detention. For other cases, the Government believes that individuals should in principle have a strong connection to the UK in order to benefit from the civil legal aid scheme. The Government therefore does not accept that further exemptions are required.

Victims of domestic violence

JCHR: We accept as a general matter of common sense the Lord Chancellor's answer that individuals who lack documentation should seek to rectify this with the Home Office. However, we are clear that there have been and will continue to be cases where individuals cannot produce the required documentation to prove their residence in the time necessary to allow the legal process to be of use to them. We are also concerned by the different examples we were provided with by our witnesses where documents have been lost by the Home Office, or indeed, for individuals who entered the country prior to the Immigration Act 1971, where such records have been destroyed by the Home Office. We ask the Government in its response to this Report to set out what the practice has been in the Home Office with regards to such records. We believe that the Government has not given sufficient thought to the difficulties some individuals may have in proving lawful residence, nor made a wide enough exemption to the test to ensure that some citizens are not prevented from accessing civil legal aid funding and we recommend that the Government look at this again. We welcome the Government's exemptions in certain cases for victims of domestic violence, although we remain concerned about the impact of these proposals on victims of domestic abuse and their ability to access legal aid funding in order to gain practical and effective access to justice for themselves, and in many cases, for their families. This group of people is likely to experience practical problems in proving residence, and in any event may need to satisfy a further test to show evidence of domestic abuse in

order to gain access to certain forms of civil legal aid funding in family cases, and we would ask the Government to review whether the exemptions should be extended to meet these concerns. (paragraph 111 to 112)

In *Next Steps* the Government made clear that there were limited circumstances where applicants for civil legal aid on certain matters of law would not be required to meet the residence test. These included victims of domestic violence in relation to applications for civil legal aid under paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO. This covers matters such as legal aid for cases where a person is seeking protection from domestic violence or to protect a child from abuse, for private family law matters arising out of the abusive family relationship, forced marriage and specific immigration applications for victims of domestic violence. This recognises that there are certain specific circumstances where individuals are particularly vulnerable and in need of legal aid, and in such circumstances, it would not be appropriate to require applicants for civil legal aid to be able to demonstrate a strong connection to the UK. However, the Government does not accept that this needs to extend more widely than to the specific circumstances where domestic violence is relevant and where, as a result, a person is in particular need of legal aid.

The Committee have sought clarification on the practice the Home Office adopts for individuals who have entered the country prior to the Immigration Act 1971 and whose records have been destroyed by the Home Office. The policy adopted by the Home Office is to retain data in line with the requirements set out in the Data Protection Act 1998.

Individuals who lack specific mental capacity

JCHR: We are concerned about access to legal aid for the small group of individuals who are protected parties pursuant to the Mental Capacity Act 2005. This group, while small, has an obvious need for legal representation; given that its members are prohibited from litigating in person, any right of access to justice cannot be practically and effectively exercised if (subject to means and merits) they are denied legal aid. We do not think that the residence test can be justified in its application to this group. We do not accept the Lord Chancellor's response on this issue. The response does not take sufficient account of the obstacles already faced by litigants lacking mental capacity, as explained by the Official Solicitor in his evidence. If protected parties fail the residence test, they are prohibited from appearing before the Court as a litigant in person. To refuse funding to a protected party would mean that they could not litigate, there would be no need to assess whether their access was practical or effective, as they would have no access to the court whatsoever. We do not consider that the exceptional funding scheme, even if it were operating correctly (a question we consider below), could appropriately satisfy the needs of those who are protected parties pursuant to the Mental Capacity Act 2005 because, as the Official Solicitor made clear in his evidence to us, the discretionary nature of the scheme is not a sufficient safeguard to meet the concern about the position of those with impaired mental capacity, who cannot gain access to justice in any other way. (paragraph 122 to 124)

In *Next Steps* the Government made clear that there were limited circumstances where applicants for civil legal aid on certain matters of law would not be required to meet the residence test. As part of this the Government made exceptions for cases relating to an

individual's liberty, including under the Mental Health Act 1983 and Mental Capacity Act 2005[10]. In line with the exception for other detention cases, the Government also intends to make an exception for deprivation of liberty cases falling under paragraph 9 of Part 1 of Schedule 1, to LASPO.

The Government does not agree that a further exception should be made for those individuals who lack capacity to litigate in person. As a matter of principle the Government requires clients to provide evidence of financial means in order to access civil legal aid, including those who could be regarded as vulnerable, and considers that the same principle applies in respect of evidence of residence. However, the Government also recognises that in practice a flexible approach to evidence of means for such individuals is afforded under the civil legal aid contract with providers and accompanying guidance.

The Government is therefore minded to introduce a similar element of flexibility in the requirements to provide evidence of residence for individuals whose personal circumstances (e.g. age, mental disability or homelessness) may make it impracticable for evidence to be supplied.

The Government is considering carefully the precise evidential requirements for the proposed test. It intends to set out the details of the evidential requirements in a policy statement to be annexed to the Explanatory Memorandum which will be laid alongside the draft affirmative SI introducing the residence test.

As set out below, the Government continues to believe that the exceptional funding scheme is working effectively. The Lord Chancellor's Guidance to caseworkers on exceptional funding contains some factors that will be specifically relevant to applications from individuals lacking capacity. These include the role of the Official Solicitor in the case, and whether a suitable litigation friend will be available. Caseworkers will also consider whether the subject matter of proceedings have a special importance to an applicant who lacks capacity.

Trafficking victims

JCHR: We are concerned that the Government may not meet its current international obligations, given the narrow list of cases for which victims of trafficking will be eligible to receive civil legal aid funding under this proposal. It is not always practical for a victim of trafficking to return to their country of origin, although we acknowledge that these individuals may apply for asylum and would then be exempt from the residence test. We seek assurances from the Government that assistance and advice would be given to victims in this situation about this course of action. (paragraph 129 to 131)

In *Next Steps,* the Government recognised the particular vulnerability of victims of trafficking and provided for them to be exempt from the residence test in relation to applications for legal aid under paragraph 32 of Part 1 of Schedule 1 to LASPO. This paragraph allows legal aid for applications for leave to enter, or to remain in the UK, by a victim of trafficking, and for employment or damages claims arising in connection with the trafficking or exploitation of an individual who is a victim of trafficking. As set out in *Next Steps*, the Government will ensure that legal aid will continue to be available where

[10] Mental health detention cases under paragraph 5, Part 1, Schedule 1, LASPO.

necessary to comply with our international and EU obligations and that exceptional funding and anyone excluded from civil legal aid because of the residence test can make an application for exceptional funding where the failure to provide legal aid would amount to a breach of their ECHR or enforceable EU law rights. The Government therefore does not accept the Committee's recommendation.

Exceptional funding

JCHR: We do not have sufficient evidence to draw conclusions as to whether the lack of funding to complete what is a detailed and lengthy application process is creating a chilling effect on the numbers of applications, and we invite the Government to investigate this as a matter of urgency. The evidence we have received, when taken together with the lack of a procedure to grant emergency funding, failure to exempt children and those who lack capacity, and lack of training provided to LAA employees who are assessing these cases, strongly suggests that the scheme is not working as intended. In our opinion this is borne out by the number of grants of exceptional funding. We therefore conclude that the Government cannot rely upon the scheme as it currently operates in order to avoid breaches of access to justice rights. We also recommend that the Government review the potential problems regarding the independence of decision-making at the Legal Aid Agency that may be created by the introduction of a residence test, and respond with detailed suggestions as to how it intends to prevent any appearance of a conflict of interest arising in residence test cases, where the LAA refuses to grant exception funding given that refusal can be challenged by way of judicial review, which itself requires exceptional funding, requiring the LAA to review its own funding decision. For these reasons, we do not consider that the exceptional funding scheme is operating in such a way as to guarantee that legal aid funding will always be available whenever Article 6 ECHR requires it, and we therefore conclude that the Government cannot rely upon the scheme to ensure that the residence test is ECHR compliant. (paragraphs 141 to 144)

The Government continues to believe that the exceptional funding scheme is working effectively but accepts that the number of applications and grants are much lower than originally estimated. In spite of the initial numbers emerging the Government is not aware of any evidence that shows the scheme is not working effectively. However if any such evidence is presented, the Lord Chancellor will, of course, consider it very carefully.

In relation to the potential "chilling effect", the JCHR agrees that there is a lack of evidence to this effect. There is a bespoke application form to fill in which is designed to help providers present the relevant information. In addition, clients can also ask for a preliminary view from the LAA concerning their case, if they wish to.

In relation to the point about timeliness – the LAA ask that if providers wish the case to be treated as urgent they should provide details as to the urgency of the case. For example an imminent date for a hearing or the imminent expiry of a limitation date, or reasons why delay would cause risk of harm or prejudice to the client's case. The LAA will consider the information that is provided and if they agree that the case is urgent, will deal with it ahead of non urgent applications. The LAA aim to determine all cases within 20 working days from the date of receipt of the fully completed application. It is also worth noting that exceptional funding can be backdated.

In terms of specific exemptions for children and those who lack capacity: where legal aid is not routinely available, children, or those who lack capacity can receive exceptional funding, where the failure to provide legal aid would amount to a breach of their ECHR or enforceable EU law rights. Applications for exceptional funding will be considered by the Director on a case by case basis.

However, the Lord Chancellor's Guidance to caseworkers on exceptional funding contains some factors that will be specifically relevant to applications from or on behalf of children. These include the role that Children and Family Court Advisory and Support Service (CAFCASS) might have in the case; and whether a suitable litigation friend will be available.

The Guidance also contains some factors that will be specifically relevant to applications from individuals lacking capacity, these include the role of the Official Solicitor in the case. Caseworkers will also consider whether the subject matter of proceedings have a special importance to an applicant who lacks capacity.

LAA caseworkers, dealing with exceptional funding applications, are subject to extensive training (which is ongoing). Each application is also subject to strict quality control - and each application will be seen by a senior member of the team, who is a trained and experienced solicitor or barrister (save for some non complex family cases which are seen by an experienced legal caseworker). The Government are not aware of the specific nature of the Committee's concern on this issue.

The Government does not accept that the introduction of the residence test raises any issues concerning the independence of decision making or a potential conflict of interest. The Director of Legal Aid Casework already makes decisions on legal aid applications for judicial review of exceptional funding applications that have been refused. These, and all other individual funding decisions under LASPO, are taken independently of Ministers. This independence is statutorily underpinned by section 4(4) of LASPO, which expressly prohibits Ministers from giving guidance or directions to the Director in relation to an individual case.

The exceptional funding system enables funding to be granted where the statutory tests set out in section 10 of LASPO are met. The scheme ensures the protection of an individual's rights to legal aid under the European Convention on Human Rights or EU law. As a result the Government does not accept that the residence test would be non-ECHR compliant. The exceptional funding system exists to ensure ECHR compliance.

Associated Community Legal Service Funding

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

The Standard Crime Contract Specification 2010 provides that there may be instances in which associated civil proceedings may be brought with criminal proceedings. The

associated Community Legal Service no longer exists. It is now known as Associated Civil Work and covers judicial review, habeas corpus and proceeds of crime work. As indicated in *Next Steps* an exception has been made to the residence test for habeas corpus cases but for all other cases which fall under the Associated Civil Work the residence test would apply and be subject to means and merits test in the usual way.

Prison Law

Availability of judicial review

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

The Government does not accept that there is any breach of Article 6 ECHR or that the proposal is inconsistent with the common law right of access to the court.

Judicial reviews for prison law matters removed from the scope of criminal legal aid for prison law can be carried out by a legal aid provider with a Public Law contract. The Government considers the current number of matter starts in this area to be appropriate. There is no limit to the number of certificates for Investigative Representation or Full Representation that can be granted to an individual provider. If, in the future, there is evidence of unmet need in a particular geographical area, providers are able to apply to the LAA for a limited number of supplementary matters starts under the terms of their contract.

The Government expects that the majority of cases being removed from scope will be able to be resolved via the prisoner complaints system, prisoner discipline procedures or the probation complaints system, or by reference to the Independent Monitoring Board or the Prison and Probation Ombudsman. Therefore the Government does not expect to see the number of new judicial reviews rise significantly enough to exceed the number of matter starts.

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

The residence test has not yet been laid before Parliament, but will be subject to Parliamentary approval and debate.

The residence test, if approved by Parliament, will affect the availability of civil legal aid to all individuals, including prisoners. In those cases where the residence test applies, a prisoner will need to satisfy it. Anybody excluded from civil legal aid as a result of the residence test would be entitled to apply for exceptional funding under section 10 of LASPO if failure to provide civil legal aid would breach the applicant's rights to legal aid under the ECHR or EU law (or, in the light of the risk of such a breach, it is appropriate to provide legal aid).

It is not possible to say whether a foreign national prisoner excluded from civil legal aid as a result of the residence test would be able to get legal aid under the exceptional case funding scheme for a matter removed from the scope of criminal legal as this will depend on whether the individual circumstances of the case engage a Convention right or right under EU law which requires the provision of legal aid.

The Government expects that the majority of cases being removed from scope of prison law will be able to be resolved via the prisoner complaints system, prisoner discipline procedures or the probation complaints system. These are robust systems designed to deal with serious issues of concern for prisoners or those released on licence. If however, they are unable to do so, prisoners can also refer the matter to the Independent Monitoring Board or the Prison and Probation Ombudsman.

Internal prison complaints systems

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

The Government intends to put the PPO on a statutory footing as soon as legislative time permits. In the meantime, the Government notes that the PPO himself, Mr Nigel Newcomen, has acknowledged that his recommendations, whilst not binding, are almost always accepted, and that this has been noted by the Committee.

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

The complaints systems in adult and youth custodial establishments are robust, and enable matters removed from the scope of criminal legal aid for prison law to be resolved without the need for a lawyer.

Changes were made to the complaints system in early 2012 with Prison Service Instruction (PSI) 02/2012 *Prisoner Complaints*, and as a result an audit of the revised

process was carried out by the National Offender Management Service (NOMS) in early 2013 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 PSI although a number of recommendations were made, and accepted in full by NOMS.

The Government has issued a series of communications for governors, staff and prisoners to reinforce compliance with the relevant Prison Service Instructions in all establishments and to ensure that staff and prisoners are fully aware of the changes being made to the scope of criminal legal aid for prison law and proposed alternative means of redress. The Youth Justice Board have also written to all Secure Training Centres, and Ministry of Justice officials have liaised with the Department for Education with the aim of ensuring Secure Children's Homes receive the same message.

NOMS will formally approach HMIP to include a 'complaints' thematic inspection towards the end of 2014/15 or early in their 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 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.

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

The changes do not interfere with prisoners' right of access to the court. As discussed above, the common law right of access to justice does not extend to a common law right to receive legal aid and, further, the circumstances in which the costs of legal advice and representation will be met by public funds are the subject of legislation, to whose effect any common law right would in any event give way.

Disability, mental illness or lack of capability

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

The Government believes prisoners with mental health issues and/or learning disabilities, will be able to effectively resolve those issues removed from scope through the alternative means of redress. In addition, PSI 32/2011 *Ensuring Equality* states that reasonable adjustment must be made, and recorded.

Prison staff involved are experienced at helping prisoners present their arguments appropriately and reasonable adjustments will continue to be made where needed to enable them to make effective use of the alternative means of redress. For example, prisoners are allowed to make their complaint orally if they not able to do 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, as set out in PSI 02/2012, has been reinforced in the communications to prisons that are referred to above.

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

Guidance which all governors must adhere to when applying the Tarrant criteria is already set out in PSI 47/2011 *Prison Discipline Procedures* at paragraph 2.10.

Mother and Baby Units

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

PSI 54/2011 sets out the procedures for Mother and Baby Units (MBUs). It includes requirements for Governors to ensure that all women who are pregnant or have a child below the age of eighteen months have the opportunity to apply for a place on a Mother and Baby Unit. Women must be provided with the booklet “All about Mother and Baby Units”. This information must be available on each residential unit, in the prison library and in reception, first night centres and induction units.

Governors/Directors of all Women’s prisons must also appoint a named MBU Liaison Officer or Deputy who will be responsible for assisting the woman in completing their 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. The board take into account the best interests of their child, the

necessity to maintain good order and discipline within the MBU, and the health and safety of other babies and mothers within the unit.

The change to the scope of criminal legal aid does not create a risk of unfairness. Any mother who is refused a place can appeal the decision of the admission board by using the internal complaints system. The Government considers the current process as outlined above and the alternative means of redress available in these cases are sufficient to ensure that criminal legal aid is not required. Civil legal aid for judicial review may also be available, subject to means and merits.

No mother and baby unit cases have been funded by criminal legal aid since July 2010. The significance of July 2010 is that since that time providers have had to gain prior approval from the LAA setting out the merits of the case before starting work.

Young Offenders

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

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

All youth secure establishments are required to have comprehensive internal complaints systems that enable young people to address issues relating to their detention. Those involved are experienced at helping young people present their arguments appropriately and making reasonable adjustments where needed. Advocacy services are also provided in youth establishments to help young people navigate these processes.

If they are dissatisfied with the outcome of their complaint, young people in Secure Training Centres can refer a complaint to the statutory Monitor and now, following an extension of their remit, the Prisons and Probation Ombudsman. Young people in Secure Children's Homes can refer a complaint to their Local Authority, while those in Young Offender Institutions can refer their complaint to both the Prison and Probation Ombudsman and the Independent Monitoring Board. Access to these organisations must be made readily available and promoted within the relevant establishments. The Monitor, PPO and IMB can all make recommendations on behalf of the young person and will work with the establishment to put these measures in place.

Regarding resettlement, Youth Offending Teams and secure estate Care Managers have responsibility for ensuring that all plans and actions taken are appropriate and support the young person, and are carried out as agreed. If needed, a process of escalation is laid out for them in 'Sentence planning and resettlement escalation guidance'. Advocacy services are provided in youth establishments to help young people navigate the complaint processes. Resettlement issues can also be raised by advocates.

There was, and continues to be, an acute need to bring down the cost of legal aid against a backdrop of continuing pressure on public finances, and to ensure public confidence in the system. The Government could therefore not afford to delay plans for reform.

All of the changes to criminal legal aid for prison law are in line with our international legal obligations, in particular Article 5.4 and Article 6 of the ECHR, and the Government's commitments under the UN Convention on the Rights of the Child.

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

Depending on the circumstances of the case, civil legal aid may be available for judicial review. However, judicial review is a final step, only if all other means of redress have failed but as noted above, the Government expects that the majority of cases removed from the scope of criminal legal aid will be able to be resolved via the alternative means of address.

It is important to note that advocacy services are provided in youth establishments to help young people with any matter that arises in relation to their detention. Should a matter be pursued via judicial review, subject to means and merits, the young person would also be assisted through the process by the lawyer taking forward the case.

Parole Board hearings

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

The Government has carefully considered the points raised by the Committee but remain of the view that it is both fair and practical to remove Parole Board hearings where the Board does not have the power to direct release from the scope of criminal legal aid as these matters are not of sufficient priority to justify the use of public money. A Parole Board hearing is invariably inquisitorial and the Government does not accept that it requires a legal representative to ensure fairness for the prisoner. It is the Parole Board that leads the process, and its highly skilled members, with expertise in risk assessment, are adept at eliciting and assessing the information relevant to the matter under consideration. The Government is confident that the Parole Board will continue to ensure that its procedures are fair.

If sensitive information is relevant to the case and the prisoner does not have a legal representative the panel will consider that evidence in the manner it deems most appropriate to ensure their advice to the Secretary of State, or decision regarding release, is robust. In addition, Rule 8 of the Parole Board Rules 2011 provides for representatives other than a legal practitioner to represent the prisoner.

Regarding victim impact statements, the prisoner is not excluded when the victim reads their statement which, in any event, concerns the impact of the offence rather than whether the prisoner presents a risk of harm. It is unheard of for a victim to be cross examined.

Categorisation

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

Whilst the Government acknowledges that categorisation may be an important element of prisoners' risk assessments by the Parole Board, the Government does not consider that categorisation is necessarily or directly determinative of release, even for Category A prisoners. There is no breach of Article 5 ECHR.

The Government considers that the alternative means of redress such as the prisoner complaints system are sufficient to deal with these matters satisfactorily. If, contrary to the Government view, it were to be the case that as a result of the change to criminal legal aid prisoners were being held in a higher category than necessary there would be an additional cost burden, although the Government cannot quantify the number of cases for which this is likely to happen. Although the average costs per prison place increases as the security classification of prisoners increases this will only have a marginal impact on overall costs as many prisoners are held in establishments that cater for a higher security classification than their own, therefore the direct cost will not be affected greatly. However there will be some marginal additional costs relating to different transportation or

behavioural programme requirements, but it is not possible to estimate the extent of these on indirect running costs.

Borderline cases

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

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

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

As the JCHR will be aware, this proposal was subject to extensive consultation and debate in Parliament. For the reasons given in *Next Steps*, and further articulated in Parliament in the subsequent debates, the Government decided to implement the proposal as consulted on. The changes came into force on 27 January 2014, with the affirmative SI debated and approved by both Houses.

As set out clearly during the Parliamentary debates, the Government does not accept the premise that underpins the Committee's concerns about equality of arms. The merits test is designed to ensure that only sufficiently meritorious cases are funded. Cases that are within the scope of the scheme, where the means and merits test are met, will be funded.

The Government notes the Committee's concerns regarding the impact of these proposals on the development of case law and the potential for precedents to be set. However, as set out during the Parliamentary debates, although legally aided cases may have led to the development of case law in the past, the Government does not consider this is sufficient justification in itself for granting legal aid in cases which do not have at least 50% prospects of success. Further, the Government considers that it is doubtful that our action will prevent or hinder the development of case law. In order to warrant such a development, the arguments for it are likely to be strong.

It is legitimate for the Government to focus limited resources through applying a prospects of success test. Where cases are subject to the merits criteria, limited public funding should in future only be directed at those which have at least 50% prospects of success.

The Government would like to take this opportunity to clarify the interaction between the merits criteria and the exceptional funding mechanism. For a case to qualify for exceptional funding, the relevant merits criteria must be met. So a case, which is subject to the prospects of success test (an element of the merits test), and is assessed as having 'borderline' prospects of success, cannot receive exceptional funding.

The impact assessment to the consultation paper estimated that approximately 100 fewer cases each year would be funded, saving around £1m. As made clear in the methodology, these are rounded figures. Further supporting data, consisting of a breakdown by category of law, has been included in the updated impact assessment published alongside the consultation response. Whilst the estimate is based on 2011/12 data, the estimate is consistent with more recent data, i.e. data from 2012/13. The Government would also like to make clear that the figures do not account for exceptional funding. As noted above, the Committee erred in their remarks on exceptional funding. The position is that no case assessed as borderline will qualify for exceptional funding in future.

Finally, the Government does not agree with the recommendation that the LAA should retain a discretion to fund these cases, or that the requirement should be tightened rather than the ability to fund borderline cases being removed. This would be contrary to the aim of the policy. The Government considers that the policy is proportionate and that it is a reasonable principle that, in order to warrant public funding through civil legal aid, a case should have at least a 50% prospects of success. The Government does not think that a reasonable person of average means would choose to litigate in cases which only have a borderline prospect of success and we do not think it is fair to expect taxpayers to fund such cases either.

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