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Dear Madam

Re: "Transforming legal aid: delivering a more credible and efficient system"

This is the response by the Association of Prison Lawyers ("APL") to the Ministry of Justice consultation paper, "*Transforming legal aid: delivering a more credible and efficient system*"[1] ("the consultation document").

Executive Summary

About The Association of Prison Lawyers(APL)

The Association of Prison Lawyers (APL) represents the interests of around 360 members who specialize in representing prisoners. APL opposes the proposals set out in the Consultation document.

The relevant proposals

There are three proposals that in combination are almost certain to destroy the provision of good quality legal aid prison law work. They are:

(i) Prison law will be removed for everything other than parole reviews and disciplinary hearings before a magistrate

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

(ii) Prison law will only be delivered by those who 'win' a crime contract

(iii) Prisoners will find it extremely difficult to find a lawyer bring judicial reviews on their behalf in meritorious cases

The anticipated savings from these changes are minimal and the consequences irreversible.

APL believes these proposals are unworkable, unfair and counterproductive

APL believes the proposal to effectively remove legal aid for all prison law issues other than parole hearings and disciplinary hearings dealt with by magistrates is not justified. The rationale behind the proposal is that the internal prison complaints system is capable of dealing with all matters without the need for any legal involvement. There is no evidence to support the use of the complaints system as a viable alternative to legal advice and representation and there is significant evidence to suggest that it is not.

Legal aid is already restricted to matters that meet a stringent sufficient benefit test and applications for fixed fee cases about prisoners' treatment are so carefully scrutinised that only 11 such cases have been granted since July 2010. However, the changes will mean that funding will no longer be available for such important matters as the separation of mothers and babies, prisoners being held in solitary confinement and access to rehabilitative programmes. No exception is to be made for children or vulnerable groups. APL believes that the changes to scope will result in unsafe prisons and unsafe communities where prisoners are released without having done the courses they need to do or with a suitable home to go to.

It is also proposed that all prison law cases will have to be dealt with by firms awarded a new criminal contract under the new PCT 'mega-firm' proposals. APL believes this will end years of specialism and expertise amongst providers, and will prevent charitable organisations such as the Prisoners' Advice Service and the Howard League from being able to take on cases.

APL is concerned that proposed changes to judicial review arrangements will mean that it will become virtually impossible for prisoners to access the Courts when they are the victims of serious abuse by the State and all other attempts to deal with the problem have failed.

The Government's figures on the costs of prison legal aid are wholly misleading. In the last 2 years, the cost of legal aid in this area has actually fallen[2], and the overall increase in the budget in the last 10 years is entirely attributable to the massive increase in the prison population and the explosion of people serving sentences of imprisonment for public protection (IPPs).[3] The proposed savings are minimal, if not negligible when compared to the cost of further detention as prisoners are warehoused because the state is failing to progress them.

APL is concerned that the proposals will actually increase the overall cost to the public purse and will lead to a decrease in public safety. Many more complaints will be directed to the Prisons Ombudsman, where each investigation costs 5 times the fixed legal aid fee[4] and many prisoners will remain in custody for longer than is necessary at enormous expense. Important rehabilitative steps that protect the public and reduce reoffending will no longer be taken.

APL is also concerned that the lack of effective redress for prisoners may well lead to increased problems of order and discipline in prisons.

The following response is lengthy and detailed and includes two Appendices. APL believes that these proposals are so ill-conceived and will be so damaging that they require such an extensive response.

The Association of Prison Lawyers(APL)

1. APL was formed by a group of specialist prison lawyers in 2008 to represent the interests and views of practitioners in prison law. It currently represents the interests of around 360 members who specialize in representing prisoners. The current membership is made up of representatives of 110 firms of solicitors and over 250 individual practitioners who include specialist counsel.

[2] The prison legal aid spend fell by £3m (11.5%) in 2011/2012

[3] Over the period 2001-2011, the prison population increased by 25% and the number of people serving indeterminate or life sentences increased by 300%. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/163144/story-prison-population.pdf.pdf

[4] The legal aid fixed fee is £220, the average cost of an investigation by the Ombudsman is approximately £1,000.

2. APL members have extensive experience of representing prisoners in the Administrative Court, County Court, Parole Board, adjudication hearings, and making representations to prisons and other agencies working with prisoners where required. APL members have played a central part in the development of public law in the prison context over the past three decades. Some of our members have been representing prisoners for well over twenty years.

3. In responding to this consultation document, the starting point for APL is to stress two fundamental aspects of our organisation. Firstly, APL exists to enable some of the most vulnerable members of our society to be represented. Representing prisoners fairly and fearlessly not only ensures that vulnerable prisoners are not treated unfairly and unlawfully, but it also leads to the development of better protection for all members of society. Secondly, APL has worked closely with the Legal Services Commission (now the Legal Aid Agency) and other stake-holders in the area of prison law and penal policy to reduce the costs of legal aid in prison law and develop good working practices.

Introduction: the importance of prison law and the work of APL to reduce costs and improve practice

The Importance of Prison Law

4. It is of the utmost concern that the consultation document does not contain any recognition, let alone analysis or consideration, of the importance of prison law. As explained further below, prison law practitioners have served to (a) protect an often marginalised and misrepresented group of people, (b) provide an important level of protection in very serious cases, such as those involving discriminatory treatment, and (c) set important precedents in the common law more widely.

5. All relevant expert authorities agree that prisoners are particularly vulnerable and require particular protection. Within prisons, there are disproportionately high numbers of ethnic minorities and of individuals with mental health problems.[5] As the United Nations special rapporteur on torture, Mr Manfred Nowak has commented, "*persons*

[5]More than 70% of the prison population has two or more mental health disorders. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998).

deprived of liberty are among the most vulnerable and forgotten human beings in our society".[6] The European Court of Human Rights held in *Campbell and Fell v. United Kingdom* [1984] 7 E.H.H.R. 165 that "*justice cannot stop at the prison gates"*.

6. These principled positions are consistent with the views of the domestic judiciary:

   a. In his report entitled Prison Disturbances: April 1990 (Cm 1456, 1991), Lord Woolf recognized, at paragraph 14.293 that, "*a prisoner, as a result of being in prison, is particularly vulnerable to arbitrary and unlawful action*".

   b. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Bingham held, at paragraph 5, that it was important that a prisoner retained the right of access to the law.

   c. As Sir David Latham, the former Court of Appeal judge and chair of the Parole Board, commented in an APL lecture at Matrix Chambers on 23rd October 2012, prisoners form "*one of those communities that is disadvantaged and misrepresented often."*

7. Legal aid provides a key mechanism for prisoners to assert their rights against unlawful action on the part of the state. We are very concerned that the proposed new measures will have a negative impact on prisoners' right of access to justice.

8. Our members have also brought judicial review claims to help protect the rights of families of those who have lost their lives in custody. It follows that, in our experience, the fair provision of legal aid to prisoners is of key importance in clarifying issues of the utmost seriousness. The importance of prison law was recognised by the House of Lords. As Lord Bridge stated:

> "*I believe this confirms the view that the availability of judicial review as a means of questioning the legality of action purportedly taken in pursuance of the prison rules is a beneficial and necessary jurisdiction which cannot properly be circumscribed by considerations of policy or expediency in relation to prison administration.*"[7]

[6] http://www.ohchr.org/EN/NewsEvents/Pages/ConditionsInDetention.aspx
[7] *R v Deputy Governor of Parkhurst Prison ex parte Hague* [1992] 1 AC 58, per Lord Bridge, at 155.

9. This finding is consistent with the subject matter of a number of successful judicial review claims in recent years. As analysed in detail below, these cases demonstrate that issues relating to a prisoner's ability to access legal advice in disciplinary hearings, treatment, and sentence progression, can have extremely serious consequences for prisoners. By way of example only:

   a. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 concerned a failure by the Prison Service to respect the confidentiality of prisoners' legal correspondence. This undermined their ability to access justice.

   b. In *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002, the Prison Service was found to have unlawfully separated mothers from their babies.

   c. The Prison Service breached of Article 3 of the European Convention of Human Rights (the protection against inhuman and degrading treatment) by handcuffing a prisoner during medical treatment (*R (Graham) v Secretary of State for the Home Department* [2007] EWHC 2950 (Admin)).

10. These examples illustrate how the present arrangements have functioned to safeguard against serious continuing injustice and prompt improvements in the system. However, it is highly unlikely that these important issues would be aired if the proposals in the consultation document come into force.

11. Prison law proceedings serve not only to protect prisoners, but they have also put in place key safeguards for the wider community. Prison law has also made an important contribution to the common law, often reflecting the seriousness of the issues raised by the cases. For example, a case involving the administration of the life sentence remains a key authority on fairness in decision-making[8] and the case that established that domestic courts would apply proportionality under the Human Rights Act 1998 related to unlawful cell searches.[9]

[8] *R. v Secretary of State for the Home Department Ex p. Doody*[1994] 1 AC 531.
[9] *R. (Daly) v Secretary of State for the Home Department*[2001] 2 A.C. 532.

12. APL is therefore concerned at the apparent suggestion in the consultation document, that prison law cases are "*frivolous"* or not deserving of legal aid. In the prison law context, one example is the work of the Howard League for Penal Reform and the Prisoners Advice Servicewhich havetheir own legal departments that have issued many important judicial reviews. For example, a Howard League case in 2003[10] established that the Children Act 1989 applied equally to children in prison and resulted in child protection procedures being developed across the secure estate. This is an extremely important decision that introduced an entire new framework to safeguard vulnerable children in prison. The charity also took a case about the rights of children to suitable support and accommodation on release from prison to the House of Lords.[11] This case was critical in establishing the nature of local authorities' duties to children leaving prison and has made a major contribution to the ability of young people to engage in the rehabilitation revolution that the Ministry of Justice considers critical to public safety. The Prisoners Advice Service successfully challenged the way in which child care resettlement leave operated for prisoners who are sole carers of children under 16. The High Court ruled in February last year (*R(on the application of MP) v the Secretary of State for Justice [2012] EWHC 214*) that the prison authorities had acted unlawfully in restricting childcare resettlement leave to prisoners who were within two years of their release date and had been allocated to "open" conditions.This is an important contribution to the resettlement and rehabilitation prospects of prisoners who care for their children and the interests of those children. The proposals in the paper would make it virtually impossible for such not for profit organisations to provide legal aid services.

13. In order to illustrate the breadth and significance of the types of assistance which will be excluded if the proposals in the paper are implemented, we have included a range of Case Studies in Appendix A of this Response.

<u>The Work of APL to Reduce Costs</u>

14. APL is recognised as the representative body for prison lawyers and meets regularly with the Parole Board, Legal Aid Agency and officials from NOMS/Ministry of Justice. APL has, since its inception, actively pursued a policy of engagement with

[10] *R. (Howard League) v Secretary of State for the Home Department and the Department of Health* [2003] 1 FLR 484
[11] *R (M)* v *Hammersmith and Fulham* [2008] 1 WLR 535

stakeholders within the penal system and with the Legal Aid Agency. Three examples of the APL's work underline this approach:

a. APL has worked closely with the Parole Board, Public Protection Casework Section and Probation Service to improve good practice within parole proceedings and to reduce the number of avoidable deferrals of hearings which are extremely costly and disruptive and impact adversely on everyone involved in the process.
b. APL has collaborated with the Parole Board, Public Protection Casework Section, Probation Service and expert witnesses in a number of training events.

c. APL has met regularly with the Legal Services Commission and latterly the Legal Aid Agency to discuss funding issues and to seek to develop good practice.

15. The APL's response to the Ministry of Justice's 2009 Consultation, 'Legal Aid: Refocusing on Priority Cases' advocated the following:

"The introduction of a supervisor standard, clarification of the sufficient benefit test and the development of a good practice guide would be sufficient to contain volume increases and root out inappropriate cases. These are further discussed below.

"Auditing and consideration of applications for costs extensions should provide the Commission with the means of monitoring how work is being carried out by practitioners. This suggestion is made on the basis that auditors will have a specific knowledge of prison law issues rather than general crime where the current principles often do not tally with the day to day workings of a file under the prison law area of work.

"We believe that a well-drafted Practice Guide (which the Association is happy to assist in drafting) which sets out what the Commission expects practitioners to do and not to do when carrying out prison law work will be more useful in this regard. If the Commission is concerned about particular practices (e.g. excessive or unjustified travel) if they can state this clearly in the Guidance, and ensure that

LSC staff enforce that Guidance when considering applications for costs extensions or carrying out audits.

"It would also assist if such guidance were made widely available to prisoners. Prisoners must be made aware of what they are entitled to and not entitled to expect when it comes to legal assistance. This is particularly important for less experienced practitioners. They need to be able to refer to something authoritative which explains what they can and cannot do for prisoners. This may be useful in saving public funds as it should avoid such practitioners responding to pressure from their clients to do something which the Commission feel they should not be doing.

"If the LSC is able to develop better guidance as to good practice and is able to distinguish experienced prison law practitioners with those who dabble in this area by introducing a supervisor standard then there will be more control over the budget.

"No such review has been carried out of this area of work and we are concerned that the Commission are contemplating a wholesale overhaul of the funding system without the kind of detailed analysis and understanding of prison law work that should come first. There are marked differences between, for example, the way in which crime work has traditionally been carried out and the structure of provision of prison law work. Prisoners are not usually located near to their home towns, prisons (particularly those holding life-sentenced and IPP prisoners) are not situated in major cities and there is a high degree of movement of prisoners between establishments. There is also nothing like the supply of prison lawyers (particularly those with appropriate levels of expertise) as there is for crime work.

"The Commission must take care not to presume that the practitioners who currently carry out this difficult area of work will be able to continue to do so whatever the funding system that is in operation."

16. The arrangements for prison law which were developed following that consultation formed the bedrock of the 2010 contract and constituted the first concerted effort to recognise prison law as a distinct area of specialism. Between 2010 and 2013, the APL has sought to work in partnership with the LSC to develop guidance for

practitioners to supplement the 2010 contract. Such guidance was finally published by the LAA as a separate section of the Crime Bills Assessment Manual in April 2013.

17. The purpose of this guidance is obvious. It will ensure that prison law is provided by expert solicitors and counsel, who work together to ensure the efficiency of the prison law system. The primary focus for legal representatives is to work effectively with prisoners and the agencies of the state towards rehabilitation so that prisoners can be released into their communities without risking the protection of the public. This, in turn, reduces public expenditure on the costs of detention.

18. Within a matter of days of the publication of this funding guidance, the Ministry of Justice issued the consultation document. This effectively proposes that prison law should return to being an adjunct of the crime contract, that specialism should be discarded and that over four years' work of engagement should be tossed away. Regrettably, the consultation document has been produced without any analysis of the likely savings to the public purse brought about by (a) the introduction of this funding guidance, (b) the reforms following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (c) the policy of engagement between the APL and other stake-holders.

Preliminary Concerns about the consultation

19. Before addressing the detail of each of the proposals, the APL has a number of preliminary concerns in relation to the consultation exercise itself.

Timeframe for response

20. Firstly, the time for responding to the consultation is unacceptably brief. The consultation document aims at the wholesale "*reform"* of the legal aid system, with a concomitant impact on access to justice for the most poor and vulnerable members of our society. It is difficult to imagine an issue of higher public interest.[12] The consultation document also raises detailed and technical issues in relation to a number of different areas of law and expertise. The detail as to how the proposals will work has been provided in a piecemeal manner, with additional amendments to the document itself and further information being provided during the consultation period. Despite this, the timetable for responses to the consultation document has been set at

[12] The "*rule of law"* is recognised in law as a "*constitutional principle"*: s.1 Constitutional Reform Act 2005.

eight weeks, during a period including two bank holidays. This timing does not appear to comply with the principles of consultation, as published by the Cabinet Office in July 2012,[13] which provide:

> "*Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks."*

21. The unacceptably short timeframe for consultation responses, in a consultation of the utmost importance and the widest scale, cannot be sensibly described as "*proportionate and realistic"*.

Flawed rationale for proposals

22. Secondly, the APL is concerned at the purported premise of the consultation document. The premise for the consultation document is set out in the "*Ministerial Foreword"*, at p.3. It appears to be asserted that the proposals in the consultation document are necessary because the system of legal aid has "*lost much of its credibility with the public"*, because "*[t]axpayers' money has been used to pay for frivolous claims"*, and because the "*cost of the system [has] spiraled out of control"*.

23. These assertions are unacceptably vague and not evidenced. Although evidence in support these claims has been sought repeatedly,[14] the Ministry of Justice has failed to provide any. This absence of evidence is material. Firstly, it undermines the credibility of the consultation document as a whole. Secondly, it undermines the ability of consultees to engage with the proposals in the consultation document. It is settled law that, in order for a consultation to be meaningful, "*sufficient reasons for particular proposals"* must be provided, *"to allow those consulted to give intelligent consideration and an intelligent response*" (*R v North and East Devon Health*

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf

[14] Including at the Ministry of Justice "*roadshows"* (see press coverage of the comments of Dr Elizabeth Gibby here: http://www.guardian.co.uk/law/2013/may/08/legal-aid-tendering-moj) and by the Public Law Project, by way of a letter dated 22nd May 2013 (http://www.publiclawproject.org.uk/documents/PLP_Letter_to_MoJ_22_May_2013.pdf).

Authority, ex p. Coughlan [2001] QB 213, per Lord Woolf MR, as he then was, at paragraph 108).

24. These assertions do not stand up to scrutiny. When considered carefully, the basis for these assertions is entirely unclear, as an individual analysis demonstrates:

The cost of legal aid

25. The Ministerial Foreword to the consultation paper states that, under the previous Government, "*the costs of the system spiralled out of control*". This is an unsustainable assertion presented without analysis.

26. The total cost of legal aid in 1997, when the Labour administration came to power, was about £1.5 billion.[15] Taking into account inflation, this figure represented in real terms in 2010, when the current coalition came to power, a figure of approximately £2.13 billion.

27. The Legal Services Commission annual report for 2009/10 confirmed that the cost of legal aid in that year was about £2.23 billion, which represents an increase of under 5% in real terms over the life of the last administration.

28. The Legal Aid Agency Business Plan 2013/4 confirms that the budget for legal aid in this year (i.e. before any of the proposed cuts in this consultation take effect) is about £1.83 billion. As the 1997 legal aid spend would represent in real terms £2.31 billion in 2012, there has, in effect, already been a cut in real terms of over 20% in legal aid spending since 1997.

The cost of prison law

29. Paragraph 3.12 of the consultation document notes that spending on prison law has "*increased markedly over time"*; from £1m (0.06% of the total legal aid budget) in 2001/2 to £23m (1.12% of the total) in 2011/12. The increase in costs over this period is not, however, put into context.

[15] http://www.official-documents.gov.uk/document/cm65/6591/6591.pdf - para 2.12

30. Firstly, the figures already show a reduction of £3m in prison law spend in 2011/12 from the previous year, a reduction of some 11.5%. This reduction shows that the changes brought into effect by the introduction of the 2010 Standard Crime Contract have resulted in a significant reduction.

31. Secondly the increase in the spend on prison law between 2001 – 2012 has primarily been driven by external factors:

    a. The average prison population in 2001 was 66,300.[16] In December 2012 the prison population was 83,205,[17] an increase over the period of more than 25%.

    b. This increase of the prison population was largely caused by the introduction of indeterminate sentences for public protection ("IPPs") by section 225 of the Criminal Justice Act 2003. As the courts have recognized, the introduction of IPPs was not resource-neutral.[18] As regards legal aid expenditure, the introduction of IPPs was accompanied by a massive increase in numbers of oral hearings in parole and disciplinary cases, which are precisely the cases that will remain in scope even were the proposals in the consultation document to come into effect.

    c. In 2001/2 the Parole Board held 466 oral hearings.[19] In 2011/12 the Board held 4,216 oral hearings,[20] a nine-fold increase over the period. The rise in the number of oral hearings has been brought about judgments of domestic and the Strasbourg courts confirming the applicability of article 5(4) of the European Convention of Human Rights when the Parole Board is considering whether to release indeterminate sentence prisoners,[21] and when the recall of determinate sentence prisoners is being considered.[22]

    d. Prior to the judgment in *Ezeh and Connors v United Kingdom* (2002) 35 E.H.R.R. 28 and the subsequent changes to the Prison Rules that gave prisoners an

[16] http://www.mywf.org.uk/uploads/projects/borderlines/Archive/2007/r195.pdf
[17] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/163219/prison-population-monthly-dec2012.doc.doc
[18] See, amongst other authorities, *R (James, Lee, and Wells) v Secretary of State for Justice* [2010] 1 AC 553, at paragraph 3, and *R (Faulkner and Sturnham) v Parole Board* [2013] 2 WLR 1157, per Lord Reed, at paragraphs 2 and 4.
[19] http://www.insidetime.org/articleview.asp?a=566
[20] http://www.justice.gov.uk/downloads/publications/corporate-reports/parole-board/parole-board-annual-report-2011-12.pdf
[21] See, for example, *Stafford v UK* (2002) 35 EHRR 32.
[22] *R (Smith and West) v Parole Board* [2005] 1 W.L.R. 350.

entitlement to legal representation at disciplinary hearings where additional days might be imposed as punishment (by application of article 6 of the European Convention of Human Rights) there were very few disciplinary hearings where Governors allowed representation under the criteria set out in *R. v Secretary of State for the Home Department Ex p. Tarrant*[1985] Q.B. 251 ("the *Tarrant* criteria"). The judgment of the European Court of Human Rights in *Ezeh and Connors* suggests, at paragraph 51, that, between 1994 and 1998, requests for legal representation in disciplinary hearings were granted in only around 160 cases (a rate of around 40 per year). The Chief Magistrate has confirmed that there were over 16,000 disciplinary hearings before independent adjudicators in the year to 31st March 2013.

32. The increase in the cost of prison law, which in any event remains a very small proportion of the total cost of criminal legal aid, can be explained by these developments. The consultation document entirely fails to set out the chronological context of the rise in legal aid expenditure and inaccurately infers that the rise in legal aid expenditure in prison law is, in some way, linked to "*frivolous claims"* (*Ministerial Foreword*, at p.3). The rise in prison legal aid expenditure has resulted from government policy, not frivolous claims.

33. The consultation document suggests that the savings generated by the changes to scope in prison law will save £4m per year by funding approximately 11,000 fewer prison law cases a year. No basis for this calculation has been provided. As noted above, the requirement to obtain prior authority in treatment cases has already been brought in by the 2010 contract. The vast majority of prison law costs arise from the cases that will remain in scope due to the application of certain rights under the European Convention of Human Rights. However, for the reasons set out in the response, the changes risk further damaging the ability of prisoners to access the means to challenge both unlawful decision-making, and abuses of power.

34. The proposals also ignore the risks that, overall, there is a reasonable prospect of an *increase* in costs if these proposals are introduced. For example the involvement of lawyers in sentence planning issues can often result in parole processes working effectively, reducing the need for adjournments or deferrals. The proposals on contracting will prevent experienced and specialist firms and organisations from being able to undertake publicly funded prison law as they will not be in a position to apply

for a criminal contract. Experienced and specialist practitioners filter out poor cases and their advice is far more likely to be followed by their clients. They tend to pursue cases in a more cost-effective, focused manner. The loss of this expertise and the diversion of prison law services into other less specialist models is very likely to be counter-productive in terms of reducing costs.

Public confidence in the legal aid scheme

35. This is repeatedly given as a justification for the proposed changes in the consultation. No real explanation or evidence is given to support the assertion that public confidence in legal aid has reduced in recent years. Indeed, available evidence appears to demonstrate the contrary. In the recent Bar Council survey more than two-thirds of the public agreed that at its current levels legal aid spending "*is a worthwhile investment in our basic freedoms*."[23]

36. The proposals in this consultation will disproportionately impact on the most vulnerable of prisoners, including young prisoners, older prisoners, those with disabilities, and those of ethnic minorities. No attempt has been made to assess whether seeking to prevent such vulnerable prisoners from accessing legal aid will improve the overall credibility of the legal aid system.

37. In an interview with the Law Society Gazette on 20th May 2013,[24] the Secretary of State for Justice suggested that he had received "*lots of letters and emails"* raising concerns about entitlement to legal aid. If this is the best evidence for the assertion that there is lack of public confidence then it is clearly unsustainable. It seems clear that the Ministry of Justice has not made any attempt, whether qualitative or quantitative, to assess the current credibility of the legal aid system and, in particular, whether any lack of credibility (which has not been demonstrated) is, in any way, linked to the current levels of legal aid expenditure in prison law cases. As the *Law Society Gazette* interview recognised, there is no empirical evidence to justify the proposed changes.

[23] http://www.guardian.co.uk/law/2013/may/21/public-legal-aid-cuts-poll
[24] http://www.lawgazette.co.uk/features/interview-chris-grayling

Matters which are better resolved through other non-legal channels

38. Bizarrely, the consultation asserts that, "*we assume individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues. They may choose to represent themselves in court or pay for private representation", and "prisoners are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution*." The central premise of the proposals in prison law therefore appears to be that prisoners are able to resolve issues through "*non-legal channels"*, such as the internal prison complaints system and the Prisons and Probation Ombudsman or through legal channels but without the benefit of representation. The consultation document expressly asserts, at paragraph 3.10, that the internal prison complains system is "*a robust set of procedures"*.

39. No evidence is provided in relation to the effectiveness or confidence in the internal complaints procedures. When an APL member asked a Ministry of Justice representative for evidence that the internal complaints procedures were sufficiently robust to deal with serious legal issues (at a "*roadshow"* event on 16th May 2013), the Ministry of Justice representative simply replied that the complaints system exists. This is a very concerning response and is indicative of a lack of adequate analysis of the current procedures.

40. The internal prison complaints procedures are flawed and do not provide adequate redress for many prisoners. If they did always work, then there would be no successful judicial reviews in prison law cases. This is because it is a requirement of judicial review that all available alternative remedies are first exhausted. In prison law cases, this generally means that a prisoner must first exhaust the internal prison complaints procedure. It is only when and if this procedure has failed that a judicial review will be justified. However, each year there are a number of successful judicial review claims in the area of prison law.

41. Further, the internal complaints procedure is not independent. The staff who investigate these complaints are not legal experts, and are routinely being asked to investigate legal issues or complaints about either themselves or their close colleagues. They do not have the experience or expertise to adequately address disputed questions of law or fact.

42. These concerns are supported by evidence. Recent inspection reports by Her Majesty's Chief Inspectorate of Prisons suggests that the internal prison complaints system in many prisons is inadequate and flawed. Relevant extracts from a number of different inspection reports are appended to this Response in Annex B.

43. It is of the utmost concern that the Ministry of Justice has failed to carry out any analysis of the quality of the redress provided by prison complaints procedures. Principle and practice suggests that there are obvious systemic problems with the prison complaints procedures. They are not robust. They fail to investigate thematic complaints (particularly complaints about staff and complaints about discrimination). They are looked upon with understandable scepticism by prisoners. They are not routinely available to prisoners who do not speak English or those with learning difficulties or low IQs. It is very difficult to understand how it can be sensibly asserted that the prison complaints procedure offers an adequate substitute for legal redress.

44. The systemic problems with the prison complaints system are not rectified by the Prisons and Probation Ombudsman ("the Ombudsman"). The APL is not aware of a single authority at any level of the Courts that has conclusively found that the Ombudsman represents a valid alternative remedy for serious legal complaints.[25] Nor is there any qualitative analysis of the effectiveness of the Ombudsman in the consultation document. In the experience of APL members, investigations before the Ombudsman take some time, often requiring many months. The Ombudsman is reluctant to rule on questions of disputed law or policy[26] (issues which are the typical preserve of the Courts). The Ombudsman has no power to make binding decisions, but rather can only make "*recommendations"*.[27] In addition, the average cost of an investigation by the Ombudsman is approximately £1000[28]. Finally, the UN Committee Against Torture expressed concern in their 5th period review of the UK that the National Preventative Mechanisms are not sufficiently independent as too many

[25] Rather, one fully reasoned permission decision suggests that the Ombudsman is not an effective remedy in allegations relating to fairness (*R (Akbar) v Secretary of State for Justice* [2011] EWHC 3439 (Admin), per Wilkie J. at paragraph 11). This decision is consistent with prior authority (*Leech v Deputy Governor of Parkhurst Prison* [1988] A.C. 533).

[26] Paragraph 1.4 of PSO 2520 makes it clear that the Ombudsman's "*terms of reference do not cover … policy decisions*".

[27] Paragraph 4.21 of PSO 2520 provides, "*On completion of an investigation, the Ombudsman may make a recommendation for action to be taken by the Prison Service*." Such a recommendation is not binding. The only responsibility that falls on the prison service on receipt of such a recommendation is a "*target"* to respond to the recommendation within 4 weeks.

[28] PPO, 2011-2012 annual report (pages 46 and 47)

staff are seconded from the prison service.[29] This continues to be a major issue for the Ombudsman and his staff.

45. One of the key themes of the Woolf Report[30]following the Strangeways riots was the importance of effective forms of redress for prisoner grievances. In a 'ten years on' Commons Debate review of the Woolf report, Mr Paul Stinchcombe MP noted[31](emphasis added):

> *"Likewise, there has been some, but not enough, progress in respect of the recommendation for an improved standard of justice in prisons. At the time of the Strangeways riot, justice stopped at the prison door. Lord Woolf thought that to be one of the worst aspects of the prison system 11 years ago. As he said in his lecture last week,* ***for the justice system to send somebody to prison, only to treat him unjustly when he is there is simply intolerable****.*
>
> *There have been significant improvements since then. We now have a prisons ombudsman and a grievance procedure has been established. However, there remains room for real improvement. The delays in the grievance procedure are excessive--justice delayed is often justice denied. Last week, Lord Woolf said that* ***an ineffective grievance procedure is probably as bad as no grievance procedure at all****. Unless more is done to speed up the system, it risks falling into disrepute."*

46. The availability of legal assistance for prisoners to pursue significant concerns which have a legal framework provides an important function within prisons. If prisoners do not feel that there is adequate opportunity for redress for serious grievances, there is a real risk that this will engender more serious and anti-social forms of protest and prisons will become unsafe places

[29] http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.GBR.CO.R.5-%20AUV_en.doc at para 14
[30] Cmn 1647, page 15
[31] 7 Feb 2001 : Column 294WH
http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010207/halltext/10207h05.htm

Responses to the consultation questions

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

47. The APL does not agree with the proposed restrictions of legal aid in prison law matters. The proposals are obviously flawed.

Treatment

48. The consultation proposes to remove treatment cases from scope entirely. These are cases that are currently within scope but subject to an application for prior approval following concerns raised by the Ministry of Justice in its 2009 consultation[32]. They are referred to in the Ministerial Foreword to the current consultation with an announcement that "Prisoners who wish to challenge their treatment in custody will have recourse to the prisoner complaints procedures rather than accessing a lawyer through legal aid". However, that statement needs to be seen in the context of the present arrangements for treatment cases as outlined in Annex K to the consultation which states that only eleven cases have been granted to very vulnerable clients:

> *"The LAA has indicated that of the 11 treatment cases to receive prior approval since July 2010 a significant proportion have involved prisoners with learning difficulties and/or mental health issues. The proposal could therefore potentially have an impact on this group of prisoners."*

49. It is the experience of APL members that the use of the £220 fixed fee legal aid authorisation for these cases is strictly administered. There is already a requirement to robustly justify why a prisoner might not be able to use the complaints system without assistance, if this is the proposed course of action.

50. The proposal to exclude treatment completely is inappropriate because:

[32]The Ministry's carefully considered response accepted the importance of retaining the possibility for legal aid for treatment cases within criminal legal aid. It is available at http://webarchive.nationalarchives.gov.uk/20100208135405/http://www.justice.gov.uk/consultations/docs/legal-aid-refocusing-on-priority-cases.pdf

- The restriction is inflexible and removes the core safety net altogether for those subject to serious wrong-doing and abuse: for instance, a women requiring medical assistance with an unborn child who has a serious condition or a child being subjected to restraint in prison. The complete removal of this type of work from the scope of criminal legal aid would mean that a foreign national prisoner not deemed 'lawfully resident' for over 12 months would have no recourse to legal assistance at all (see Question 4 below) even for cases of very serious abuse.
- Savings will be minimal as only 11 such cases have been approved since 2010 and these cases are low fixed fee cases worth just £220 unless they are exceptional. Even where they are exceptional, the lawyer is only paid above the fixed fee following detailed scrutiny of the file by the LAA.
- Removing treatment from scope entirely from criminal legal aid will restrict access to justice to the higher courts beyond intended measure. It will mean that providers who only hold a criminal contract will not be able to judicially review unlawful action unless they also have a public law contract as 'associated CLS' cases will no longer be available for treatment cases as they will not be within scope. This does not mean that these challenges cannot be brought. They can and will be brought if prisoners are desperate enough. However, they may well be brought by the prisoner as a litigant in person or by a public law lawyer who does not practice in prison law matters and who will have to get up to speed with the issues in the case and the system, as well as additional visits to the prison, thereby driving up cost. In essence, the removal of stand alone contracts and the requirement for all criminal lawyers to do prison law work may lead to a dichotomy of expertise whereby criminal lawyers do standard prison law work and public law lawyers do not have the day to day expertise of the penal system to inform their judgement in conducting prison law judicial reviews.

51. Removing a prisoner's ability to challenge unfair treatment also impacts directly on their progress and rehabilitation. It is well accepted that fair treatment is an important part of the rehabilitative process.[33] This legal pronouncement is consistent with the relevant academic studies, which have found that:

[33] *SP v Secretary of State* [2004] EWCA Civ 1750, *Times*, 21 January 2005, per Hooper LJ, at paragraph 63.

"… *disregard for procedural fairness may decrease offender's levels of mental well-being, engagement in their management, motivation to forge new lives, and respect for authorities and the civic values they represent. It may inhibit the maintenance of an effective probation/client relationship and increase resistance*."[34]

52. It follows that removing legal aid from prisoners will not only prevent particularly vulnerable members of society from obtaining fundamentally important safeguards, but it will also hamper their rehabilitation, thus adding further to the cost of detaining them.

Disciplinary proceedings

53. The proposed removal from the scope of prison law of advice and assistance in prison disciplinary matters unless the case is referred to an independent adjudicator or allowed legal representation under the Tarrant criteria is flawed.

54. It ignores the obvious fact that even where representation is not granted the outcome of prison disciplinary charges can have a serious impact on a prisoner, including on prospects of release. As has been recognised by the Ombudsman in his recent thematic review into governors' adjudications (the hearings that it is proposed will be removed from scope):

"In addition to the punishment, adjudications remain on a prisoner's record and may be noted by the Parole Board and during consideration for Release on Temporary Licence and Home Detention Curfews. For this reason, it is crucial that the system is fair, proportionate and follows due process."[35]

55. This is especially true for those serving indeterminate sentences, who cannot have additional days imposed as punishment. Proven disciplinary charges can result in delays in progress through the sentence, removal from open conditions, adjournments in the parole process and negative parole decisions.

[34] Digard, L. (2010), "When legitimacy is denied: Offender perceptions of the prison recall system" 57 Probation Journal 43-61, as cited in Nicola Padfield; *Understanding Recall 2011* (University of Cambridge Faculty of Law Research Paper No. 2/2013), at p.10.
[35] Learning from PPO investigations: Adjudication Complaints – PPO March 2013 p.10

56. The Prison Service's own policy recognises that, even in cases where legal representation is not mandated or granted, that procedural fairness requires governors to grant prisoners an adjournment of the hearing of a disciplinary charge to obtain legal advice where requested.[36] This is of course especially important for prisoners who may, due to mental health issues, language problems or other vulnerabilities have serious difficulties in understanding both the process, and how to prepare a defence. In the Ombudsman's thematic report one of the key areas of concern was the failure by governors to make allow adjournments for legal advice:

> *"In order to facilitate a fair and lawful system, prisoners should be allowed a sufficient amount of time to adequately provide a defence against the charge. This should include time to obtain legal support if necessary."*[37]

57. The Courts have recognised, that even where there is an entitlement to representation, that fairness may require the prison authorities to take pro-active steps to ensure that young and vulnerable prisoners should be provided with legal assistance.[38]

58. If prisoners, including vulnerable prisoners who do not understand the process they are facing, are not able to access publicly funded legal advice – then the right to seek an adjournment in governors' adjudicators – recognised by the Prison Service's own policy, the Ombudsman, and the Courts as an important procedural safeguard to ensure a fair process – becomes an empty right.

59. Although governors' adjudications do not involve the risk of additional days being imposed, as noted by the Ombudsman, the outcomes can impact on other processes that impact on the prisoner's right to liberty. For instance, prisoners may be returned from open to closed conditions on the strength of proven adjudications and may spend months if not years in closed conditions as a result – a scenario that would also be excluded from the scope of legal assistance under the proposals (see below). Governors can also impose punishments that have an immediate and serious impact on the prisoner, such as periods of cellular confinement – which again impact

[36] PSI 47/2011 para 2.16
[37] PPO Thematic Report para 3.3.2
[38] See *R (M) v The Chief Magistrate* [2010] EWHC 433 (Admin).

disproportionately on vulnerable prisoners.[39] Such punishments are imposed to be served immediately, and so will usually be completed before the operation of the complaints process can provide any redress.

60. Prisoners who experience unfairly conducted governor's adjudications will also, if these proposals are introduced, not be eligible for funded assistance with any appeal to the Secretary of State under the Prison Rules, or in relation to a complaint to the Ombudsman, regardless of the complexity of the legal issues raised.

61. The proposal also ignores the fact that in relation to cases where representation under the *Tarrant* criteria is granted, that this is in practice only after legal representations have been made to the governor on the prisoner's behalf.[40] APL members confirm that it is extremely rare for governors to grant legal representation of their own motion – they have obvious managerial reasons for being reluctant to do so. If prisoners cannot access their right to legal advice, it becomes almost impossible for advisors to know when a prisoner should be advised to seek representation under the Tarrant criteria.

62. If the right to obtain funded assistance in making written representations to governors about legal representation is removed, then there is an obvious risk that many prisoners will unfairly be denied such representation. The change will also impede the development of the law. For example, the recent change in the Prison Rules to allow the referral of charges to an independent adjudicator even where additional days cannot be imposed was the result of a case brought by a life sentence prisoner, where the court recognised that some prison disciplinary charges are so serious as to engage Article 6 even without the possible sanction of further loss of liberty.[41] The prisoner had been refused representation under the *Tarrant* criteria.

63. This aspect of the proposals will disproportionally affect young and vulnerable prisoners who tend to struggle to be assertive about accessing legal advice. Moreover, young people are more likely to have serious matters heard by internal

[39]The inappropriate imposition of cellular confinement as punishment by a governor on a young man suffering from mental illness contributed to a finding that he was subjected to treatment that breached Article 3 of the European Convention of Human Rights in *Keenan v UK* (2001) EHRR 242
[40]The *Tarrant* criteria themselves were of course only established by legally assisted prisoners challenging the refusal to allow representation at their hearings
[41]*R (Smith) v Governor of HMP Belmarsh* [2009] EWHC 109 (Admin).

adjudicators because they tend to be on sentences where additional days cannot be added[42].

Sentence Cases

64. The consultation document envisages, at paragraph 3.18, that matters relating to "*categorisation, segregation, close supervision centre and dangerous and severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions would not be funded*".

65. There is a fundamental flaw at the heart of this assertion as each these matters impact directly on a prisoner's early release.

66. It is now well-established that matters relating to a prisoner's security categorization impact directly on their release. In respect of decisions relating to Category D status, as Mr Justice Irwin held in *R (Hill) v Secretary of State for the Home Department* [2007] EWHC 2164 (Admin), at paragraph 7, "*the transfer to open conditions for the vast majority of life sentence prisoners … represents in effect a precondition for eventual release. It follows that if the system withholds or prevents transfer to open prison, that prevents progress towards release*". This finding is consistent with the judgment of Mr Justice Keith in *R (Yusuf) v Parole Board* [2011] 1 WLR 63, at paragraph 7, and the judgment of Mrs Justice Lang DBE in *R (Haney) v Secretary of State for Justice* [2013] EWHC 803 (Admin), at paragraph 46. In respect of decisions relating to Category A status, the Courts have repeatedly held that an indeterminate sentence prisoner who is held in Category A conditions will not be released by the Parole Board.[43] As Rose LJ held in *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277, at288B-D,

> *"So long as a prisoner remains in category A, his prospects for release on parole are, in practice, nil. The inescapable conclusion is that which I have indicated, namely, a decision to classify or continue the classification of a prisoner as category A has a direct impact on the liberty of the subject."*

[42]This is notwithstanding the decision in Smith (ibid) as the prison disciplinary manual states that such referrals should only be made in exceptional circumstances.
[43]See, amongst other authorities, *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277.

67. Decisions in relation to security category are not only of the utmost importance in terms of a prisoner's early release, but they are also important to their overall standard of life and levels of residual liberties, as the Courts have repeatedly recognized.In *Payne v Home Office* (Unreported, 2nd May 1977), Cantley J listed six disadvantages to a prisoner flowing from allocation to Category A:

a. There are only a relatively small number of prisons suitable for his safe accommodation; this may result in his being detained in a prison which is more distant from persons from whom he wishes to have visits than some less secure prison would be;

b. He can have visits only from a solicitor; a probation officer; a prison visitor or a person who has been passed as suitable by the Home Office;

c. His cell is a specially secure one and it is liable to be searched more frequently than other cells; he is also under constant surveillance, and this may sometimes result in his sleep being disturbed when the officer who is looking into his cell cannot be sure in a dim light that there is more than a carefully arranged heap of bedclothes on his bed;

d. He cannot attend general vocational training classes or concerns, nor can he attend the ordinary church services, although he has regular visits from the chaplain and can take communion in his cell if he wishes;

e. He can attend only educational classes of not more than two students, and so he has less frequent opportunity to attend educational classes;

f. He is not likely, to say the least, to be put on parole whilst he is a category A prisoner.

68. These severe restrictions are not only of the utmost importance to a prisoner, but they also cost the Ministry of Justice significant amounts of money. Figures published by the Ministry of Justice on 25th October 2012 indicate that the cost per prisoner, in a Category A prison, is approximately £61,500 whereas the cost per prisoner in a male Category B location is £33,500. It appears that a Category C prisoner costs £30,600 and that a Category D prisoner costs less still. It follows that an efficient system of

security category reviews saves the public purse. A prisoner who enjoys the benefit of expert legal representation is significantly more likely to obtain a direction for release from the Parole Board and progressive re-categorisation by the Prison Service. This means that proper provision of legal aid in sentence planning cases saves money.

69. The same logic applies to legal advice in relation to "*resettlement issues"* and licence conditions. These are issues of the most obvious importance in Parole Board reviews. Indeed, when considering recall cases[44] and the release of lifer prisoners,[45] the Parole Board is required to consider the availability of risk management plans in the community and the sufficiency of licence conditions. By providing legal aid to prisoners to obtain expert legal representation and to therefore enable resettlement issues and licence conditions to be arranged and tested well in advance of a Parole Board hearing, the Ministry of Justice therefore improves a prisoner's prospects of release. This, in turn, saves the public money.

70. The availability of legal assistance for resettlement issues and licence conditions also meets an important public protection function which applies to determinate as well as indeterminate sentenced prisoners. The assistance of lawyers to ensure that problems with resettlement arrangements and licence conditions are resolved in a timely fashion prior to release, improves the prospects of rehabilitation and reduces the likelihood of reoffending and recalls to prison.

71. The same logic applies with obvious force to issues relating to close supervision centre and dangerous and severe personality disorder referrals and assessments. For prisoners posing particular risks and for prisoners with mental health problems, accessing the correct rehabilitation opportunities (including specialist treatment) is central to their ultimate release. However, each of these programmes is expensive (by way of example, assessment alone for the dangerous and severe personality disorder unit takes something in the region of one year and the involvement of multiple medical experts). By providing legal aid to prisoners to properly test these issues, the Ministry of Justice thus ensures that each of these rehabilitation programmes is properly targeted at the right prisoner. This saves money and is critical for the protection of the public.

[44] *Secretary of State`s Directions to the Parole Board: December 2009*.
[45] *Secretary of State`s Directions to the Parole Board: August 2004.*

72. Finally, it is well recognized that the segregation of prisoners has an impact on their mental health.[46] It can also engage Articles 3 and 8 of the European Convention of Human Rights. Providing legal aid to prisoners to challenge the unnecessary use of segregation is therefore a prerequisite of avoiding abuse within the Prison Service.

73. The impact assessment does not take account of other drivers which make the proper funding of these cases more necessary than ever. For example, changes to the funding of local authorities, the probation and prison services have reduced the level of resources available to prisoners. This means that expert legal representation is a necessity so as to ensure that prisoners access the care and attention that they need.

74. For the avoidance of doubt, the APL does not accept that any of these fundamentally important matters will be able to be resolved satisfactorily via the prisoner complaints system or probation complaints system. As demonstrated above, the internal prison complaints procedure is systemically flawed, inconsistently applied, and unfit for purpose. In particular, access to the prisoner complaint system is significantly hampered for younger prisoners, prisoners with disabilities (including mental health problems), prisoners who do not speak English, and prisoners who cannot read or write. It flies in the face of logic to suggest that a prisoner who has been segregated, due to their own mental health problems, and faces a real risk of suicide or serious self-harm, should be expected to complete a complaint form and then go through the lengthy Ombudsman investigation, rather than being able to immediately access a lawyer who can apply the legal protections afforded by statute and caselaw to his situation and put it to the prison in the hope of resolving the problem quickly and cheaply.

Conclusion on scope cuts

75. Overall, the impact of this proposed change of scope on prisoners is severeand disproportionate. In contrast, the overall level of the proposed saving is small, £4 million (as set out in footnote 17, page 21 of the consultation document). The APL is concerned, not only that no breakdown or explanation has been provided in relation to the size of the proposed saving, but also that the detrimental impact of this proposed

[46] As set out in the introduction to the relevant HM Prison Service policy, PSO 1700. This impact is particularly significant in the prison estate, given that more than 70% of the prison population has two or more mental health disorders. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998).

reform in terms of the impact on specialist practitioners and on vulnerable prisoners far out-weighs the relative size of the proposed saving.

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

76. No. We are concerned about the impact of these proposals on access to justice.

Q3. Do you agree that the proposed threshold is set an appropriate level? Please give reasons.

77. No. We are concerned about the impact of these proposals on access to justice.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection to the UK? Please give reasons.

78. No. The APL does not agree with this proposal.

<u>The case for reform</u>

79. The case for reform and the proposed approach appears to be based on three issues: (i) making legal aid available to those without a strong connection to the UK "*undermines public confidence in the scheme"*; (ii) the availability of legal aid may encourage people to bring disputes in the UK, and (iii) it is unfair to the UK taxpayer to support legal aid for those who have never paid taxes or who have never set foot in the UK before. The consultation paper provides no evidence to support (i) and (ii). It is based upon pure speculation.

80. The APL believes that, if the case for and against were put properly to the public, there would be overwhelming support against introducing a residency test. Indeed we note that in the recent 'ComRes' Bar Council poll two-thirds (67%) of those surveyed said that: '*legal aid is a price worth paying to ensure we have a fair society, regardless of its cost*.' This proposal will have the converse effect.

<u>Current Practice</u>

81. Although there are no nationality restrictions or residence restrictions on accessing civil legal aid, it is important to note as a starting point that the vast majority of non-asylum immigration legal work has been excluded very recently from 1st April 2013.

82. There has been little time to assess the impact of this on service users or the Tribunal system. There is considerable anecdotal evidence to suggest a dramatic increase in litigants in person with the associated increase in judicial time, with overall increased costs on the public purse. It is simply too soon to introduce this additional exclusion.

Anticipated Impact of Proposal

83. The impact assessment appended to the consultation states that '*[i]ndividuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all*'. The impact assessment also proceeds on the assumption that '*[c]ivil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution*'.

84. As argued below, including by reference to various reported cases that have been brought in relation to foreign national prisoners (FNPs), that latter assumption in particular is absurd. It is nonsensical to suggest that claimants acting as litigants in person – the most likely option for individuals who would otherwise qualify for legal aid – should be able on their own to address complex issues of law, face a defendant government department represented by a solicitor and counsel, **and** achieve the same outcome that would have been achieved if they had been legally represented. This assumption fundamentally misunderstands the reason why individuals are legally represented in Court in the first place.

85. It is the view of the APL that, rather than saving taxpayers' money, the residence test is in fact far more likely to increase the burden on taxpayers. Courts (as well as legal representatives acting for government departments) will be required to spend far more time on cases brought by litigants in person, e.g. in order to be able to discern and understand the case issues, without any legal assistance from the claimant and so without, for example, a set of pleadings that sets out the specific issues that arise and the law that appertains thereto. This significant additional time will plainly be required

in order that any claimant is afforded a fair hearing, under common law and/or Article 6 of the European Convention of Human Rights. Further, it is to be borne in mind that foreign national prisoners may not speak English as their first language. Thus court interpreters will be required for every hearing, which will be even longer as a consequence, where that would not have been the case previously, e.g. in a judicial review hearing a claimant typically does not speak.

86. In a recent case Sir Alan Ward said (*Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234 at para 2): '*saving expenditure in one public department in this instance simply increases it in the courts'*. That of course belies the suggestion in the impact assessment that '*[t]his may lead to savings to HMCTS expenditure*'.

87. The list of assumptions demonstrates no attempt to understand the true impact of the proposed residence test, which will make those without 12 months lawful residence in the UK ineligible for civil legal aid. The fact that the consultation cannot identify the proposed savings to the legal aid fund from this proposal is telling.

Foreign National Prisoners

88. In relation to the prison context, this proposed change will have a serious impact on prisoners who do not meet the residence test in bringing judicial reviews and other civil claims to address misuse of power by the state. As recognised by Her Majesty's Chief Inspector of Prisons, foreign national prisoners (FNPs) have very particular needs and in a thematic review found that '*residency outside the UK was the most significant predictor of problems*'.[47] Neither the consultation document nor the impact assessment recognise this. Indeed, the APL is concerned that there has been no consideration of the true impact that these changes will have on those who will fall foul of the residence test.

89. The APL objects to the introduction of the residence test for prisoners for the reasons set out below.

90. First, in enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) the Government recognised the importance of certain categories of

[47] Foreign National Prisoners: A Thematic Review HMCIP July 2006

case by keeping them in scope: inquest proceedings and associated civil actions; civil actions involving abuse or power or significant human rights breaches; and those concerning discrimination under the Equality Act 2010. The consultation prior to LASPO recognised that '*these cases are an important means to hold public authorities to account and to ensure that state power is not misused…we believe that the determining factor [in keeping the cases in scope] is the role of such cases in ensuring that the power of public authorities is not misused*.'

91. The APL does not see how the Government can now seek to depart from that position. Further, we do not see, in particular, how the change can be achieved lawfully through *secondary* legislation, in light of the APL's understanding of LASPO 2012.

92. For the current consultation to now introduce immigration status into consideration in relation to eligibility for funding, when those not meeting the residence test are likely to be more vulnerable and less able to pursue cases without representation, is discriminatory, unlawful and wrong in principle. A prisoner who has been assaulted by prison officers, or the family of an FNP who has died in prison, clearly should not have the ability to pursue their case decided on this basis. Insofar as it is suggested that exceptional applications for funding might be made, the consultation provides no proper basis for the difference in treatment as against those who meet the residence test, given the overwhelming importance of the issues these cases raise (as previously recognised by the Government). We also note and share the concern that the Immigration Law Practitioners' Association has raisedthat LASPO 2012, as presently drafted, will not allow for exceptional funding to be made available to those who fall foul of the residence test.

93. Claims and judicial reviews for challenging detention under immigration powers were also kept in scope by LASPO 2012 due to the importance of the issues at stake. The courts have on a very large number of occasions found that FNPs who have served their sentence have been detained unlawfully, and clearly the ability to challenge the lawfulness of detention should not depend on immigration status. There is no justification for removing such claims from scope now. The Supreme Court found that the Home Office has operated an unlawful and secret detention policy for FNPs[48].The proposed changes risk increasing the chance that such abuses, on both an individual

[48]R (Lumba) v SSHD [2012] 1 AC 245

and systemic level, will go unchecked. APL does not accept that this is something that the British public would wish to happen. On the contrary, and as we note above, the recent 'ComRes' Bar Council poll suggests a very different position.

94. Second, the practical impact of the proposal will be to deny prisoners' access to justice. Prisoners are in the total control of the state and to suggest that that when they are the victims of abuse of power they should be in a position to pay privately for representation, represent themselves or not tackle the issue at all is absurd, and like other proposals in this consultation risks undermining the rule of law. FNPs otherwise eligible for public funding simply will not be able to pay privately.

95. Third, in practical terms the proposal seems unworkable and inconsistent. The requirement that providers of legal services will be required to assess lawful residence will be unworkable. This often involves complicated questions of immigration and nationality law. It is over-simplistic to suggest that the provider will be able to make a straightforward judgement based upon a passport (as asserted at paragraph 3.51 of the consultation document). The Home Office holds passports when an application is under consideration and communicating with the Home Office is very difficult indeed. Further, prisoners simply do not have easy access to such documents, if they even have them. Moreover, a stamp on a passport does not provide an easy answer in this field. This is a highly specialised area of law that is subject to increasingly frequent changes. There is an inevitable risk that many will be excluded under the residence test simply because of a failure to understand the technicalities of the subject or by expecting an easy answer in a passport. Indeed BME persons who would in fact be eligible under the new residence test may still be adversely affected by it, due to representatives needing to ensure that they have carried out necessary checks. The APL has seen the Immigration Law Practitioners' Association response on this question and fully supports the other points that it makes on behalf of that organisation.

96. In addition, a prisoner who does not meet the residence test would, subject to means, be eligible for representation for a parole or disciplinary matter, but not for the civil funding for a judicial review to challenge an unlawful outcome (as the scope of Associated CLS work is tied to the scope of the civil contract). For example, a prisoner

who is not lawfully resident and has been subject to an unlawful parole hearing would not be able to challenge that decision.[49]

97. Fourth, the proposal ignores the particular problems experienced by FNPs in the prison system, as their treatment often gives rise to unlawful conduct by the prison authorities arising from the complicated interplay between prison and immigration law. This necessitates the assistance of specialised legal representation. For example, the original proposals introduced to concentrate FNPs in 'spoke and hub' prisons included no flexibility to take into account individual circumstances. The Ministry of Justice only agreed to amend the policy after a number of judicial reviews were brought by FNPs.[50] Another example is the situation, which arises frequently in the experience of APL lawyers, of prisons failing to properly take into account the individual circumstances of FNPs, including family ties, when determining security category.[51] It is not uncommon for those working in prisons and offender management to unlawfully take into account immigration status when assessing the viability of a transfer to open conditions or release. This often means FNPs staying in closed prisons/ custodial settings for longer, when they can be safely transferred or released, at a far lesser cost to the public.

98. The APL notesthat such claims for judicial review are regularly contested by the Ministry of Justice. Detailed and complex legal arguments have to be deployed by the claimants' lawyers, in seeking to meet the defensive position adopted by the Ministry. We simply do not see how it can reasonably be said that litigants in person should be able to do this on their own **and** achieve the same outcome.

99. Fifth, the requirement that an applicant should have 12 months lawful residence before being eligible to apply for civil legal aid ignores the significant delays experienced by those seeking to regularise their status in UK, and who are subsequently granted such status. It is extremely common for applications with very strong cases based upon EEA or Article 8 grounds to be kept waiting for years for a favourable outcome.

[49] See for example *R (Clift) v Secretary of State for the Home Department* [2007] 1 A.C. 484, in which the statutory scheme for parole was found to be unlawfully discriminatory against foreign nationals.
[50] R (EHRC) v SSJ and SSHD [2010] EWHC 147 (Admin) paras 19-22
[51] See R (Manhire) v SSJ [2009] EWHC 1788 (Admin)

100. This will lead to entirely arbitrary distinctions between applicants depending on how quickly their cases may have been dealt with by the Home Office, which will in fact have no bearing on that person's strength of connection to the UK.

101. Sixth, the proposal will increase the numbers of litigants in person, which is highly likely to result in further burdens on the court system and an overall increase in public costs.

102. Seventh, the assumption that those FNPs in prison have not paid taxes or spent very little time in the UK is not evidenced. Many have spent long periods in the UK and would have been entitled to indefinite leave to remain had they applied or are still entitled to leave but their application is still under consideration by the Home Office.

103. In the circumstances, the APL not only objects to the proposals in principle, but also has real concerns as to the legality of such a discriminatory proposal.

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

104. No. The APL disagrees with this proposal, except to the extent that reasonable disbursements should be payable in any event.

105. The consultation document is premised on the basis that there is a low number of judicial review cases that a '*substantive benefit to the client'* is achieved. This premise is flawed, as has been demonstrated by the Public Law Project (PLP) research into outcomes in judicial review.[52] The PLP research shows that a substantive benefit to the client was achieved in over 40% of the non-immigration judicial reviews based on the statistics available in 2011.

[52] http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

106. This shows that it is by proper application of merits criteria that it is appropriate to determine funding for judicial review.

107. In these circumstances it is unworkable to place the costs risk of seeking permission on claimant' solicitors, when there has already been substantial cuts made to the rates of payment for civil work including an across the board cut of 10% in civil matters. The proposals will make it less likely that even in meritorious cases claimants will be able to find competent specialist solicitors who are able to take the on the financial risks in bringing judicial reviews.

108. The Summary: Analysis and Evidence Sheet for this option recognises that '*There is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may in the future rest with them. However, these are likely to be cases that would not be considered by the Court to be arguable in any case*.' It is an unusual judicial review claim where the prospects of success can reliably be put in a high bracket. This circular argument shows that the proposals are likely to make it unworkable for firms to take the risk of issuing proceedings in cases with a 50 – 60% merits assessment, if there is to be no payment in those cases where permission is not granted.

109. The assumption that the pre-action work will be funded, for example by Legal Help, ignores the fact that in recent civil contract rounds there has been a massive reduction in the number of public law matter starts – for example in London each provider has been provided with a limited number of matter starts. This limiting of matter starts, together with the risk of non-payment at the permission stage will mean that meritorious claims will not be brought.

110. As with other sections of the consultation the assumptions behind the proposal are misconceived. The consultation states '[*i]ndividuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all'*. The evidence base also proceeds on the assumption that '*[c]ivil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution'*.

111. It is misleading to suggest that claimants, and in particular prisoners, bring judicial reviews as a matter of choice. They will in any event be expected by the Court to have exhausted appropriate alternative remedies, such as the prisoner complaints system. It is not acceptable for the Ministry to accept that some claimants will choose not to '*tackle the issue at all'* where this could mean that unlawful conduct by the State goes unchecked. This approach has profound implications for the rule of law and the adherence by the State to its own rules.

112. The consultation in any event provides no proper basis for asserting that this proposal will save £1m annually. The proposal also ignores the obvious costs risks of the proposals. The evidence base appended to the summary sheets states that this has been worked out by multiplying the 800 cases where permission was not granted in 2011-12 by the standard costs limitation at this stage. This of course conflicts with paragraph 3.67 of the consultation document which recognises that, in 330 of these cases, there was a substantive benefit for the client.

113. The proposals, by providing a serious financial disincentive to providing representation, will result in more cases being brought by litigants in person at the permission stage. This will place a burden on the Courts and increase costs on defendant government departments, who will have to ensure that relevant material is before the Court in accordance with their duty of candour. Cases brought by litigants in person are likely to take up more court time. It is not made clear how prisoners or detainees will be able to represent themselves.

114. There may also be a perverse incentive for defendants to not settle cases at the pre-permission stage, precisely to see if represented claimants are willing to take the risks of issuing proceedings. Where claims before permission have been considered there will be an increase in applications to the Court for costs orders, as defendants often dispute liability to pay costs at this stage, as the extent to which the settlement has been effected by the litigation is often unreasonably contested.

115. All of these factors are capable of imposing far more costs on other parts of the system than the anticipated savings to legal aid of this proposal.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

116. No. APL does not agree with this proposal.

117. As paragraph 3.87 of the consultation document recognises, "*the cases to which the "borderline" exception applies are high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing*".

118. Despite this recognition, the consultation document proposes the removal of legal aid for such "*high priority cases"*, which are of high "*public interest"*. This proposal is illogical and unjustified.

119. The overall level of expenditure on such cases appears to be small, in the region of approximately £1 million (paragraphs 49-50 of Annex K). This small saving is far out-balanced by the risk of injustice that flows from this proposal.

120. The "*borderline"* provisions form part of the Legal Aid Agency's carefully drafted merits criteria. Advisers can only place a case in this category if it is impossible to assert that the prospects of success are less than 50%, because of uncertainty over the law, fact or expert evidence. The funding of such cases will then only be justified if the Legal Aid Agency is persuaded that the case justifies funding, by reason of its fundamental importance to the lay client or the wider public interest of the case. This careful assessment ensures that only the most important cases are funded. There is no evidence or justification for reforming these careful assessment criteria. These cases include precisely the kinds of cases that need to come before our courts so that we know what the law says.

121. Moreover, these criteria were originally laid before Parliament as secondary legislation and approved. There has been no meaningful change of circumstances since these regulations were approved. It is not suggested that "*borderline"* cases have become less important or that the public is in any way concerned that important test cases have damaged the credibility of the overall legal aid system.

122. There is no meaningful analysis of the importance of the "*borderline"* cases that have been funded. There is no evidence that any individual "*borderline"* case has been an improper investment of public funds. There is no reason to believe that any

individual "*borderline"* case has damaged public confidence in the legal aid system. As a result of this wholesale lack of analysis, the proposed change is not justified and is obviously unnecessary.

Q7. Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

123. No.

124. The proposed model of competition for all areas of criminal legal aid is not viable and will result in negative outcomes for clients in terms of access to justice and quality;

125. It is understood, although it is not clear from the face of the consultation paper, that only firms and organisations who have 'won' a criminal contract will be able to provide prison law work and that they will in fact be required to provide it to any eligible client who seeks it. APL does not believe this is viable.

126. APL believes that prison law work is out of kilter with the model for all other criminal work under the proposals. This is because under the proposals prison law providers will increase as all successful bidders will be required to provide a service to any eligible client[53]. There are currently 353 prison law contracts and these will increase to 400. Prisoners will retain client choice in contrast to criminal clients. Prisoners will be able to instruct on a national basis in contrast to criminal clients (see below).

127. APL has worked intensively and collaboratively with the LAA over a number of years to ensure that prison law has rigorous supervisor standards in contrast to criminal work which is quality assured in a different way. As noted above, these supervisor standards were introduced to ensure quality and they work well. It is not viable for this low volume and differently assured work to be meshed in with high volume work which is subject to an entirely different quality regime.

[53]This was not immediately clear from the Consultation but has been confirmed by the MOJ in meetings with APL and at legal aid roadshows.

128. The removal of standalone contracts for prison law will see the end of specialist providers, including not for profit organisations providing prison law services. It will also lead to the prison law matters which remain in scope being largely conducted by criminal lawyers. This is of particular concern for parole board matters which follow in inquisitorial model in contrast to adversarial criminal practice. Parole board work is likely to suffer, especially in the absence of any quality assurance requirements as is the case for Mental Health Review Tribunals upon which the Parole Board is modelled. The individual lawyers that work in organisations and firms that will not be in a position to bid are unlikely to transfer their expertise and act as agents. It is not realistic to expect the market to rearrange itself and retain prison law experts as agents with the proposed cut of 17.5 per cent.

129. Criminal appeals and reviews work is also out of kilter with the model for all other criminal work under the proposals as all successful bidders will be required to provide a service to any eligible client[54].

130. APL notes that there are several aspects of work that are excluded from the contract – it would be perfectly possible to exclude prison law and criminal appeals and review work from the competitive contract, leaving all firms free to apply for stand alone contracts for this work should they wish to and should they have the appropriate expertise.

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

131. No. APL strongly objects to this proposal. Spend on criminal legal aid is declining generally and the cut is not viable.

132. In relation to prison law, the figures provided in Table 1 show that prison law expenditure has declined significantly following changes to legal aid in 2010: it is anticipated that these figure will decline even further as pre-July 2010 cases filter out of the system. If anything, costs will rise if the proposals go ahead as changes to

[54]This was not immediately clear from the Consultation but has been confirmed by the MOJ in meetings with APL and at legal aid roadshows.

probation, licences and prisons may well result in an increase in prisoners, recalls and adjudications – all of which will remain in scope.

133. Further cuts will make it impossible to provide a good enough service that will enable prisoners to rehabilitate and resettle effectively into the community. Prison cases are invariably complex and time consuming if a positive outcome is to be achieved for the client and so they are not suited to a reduced fixed fee payment for good quality lawyers.

134. There are extensive hidden costs in prison law work which make it inherently expensive due to the bureaucracy of the prison system and the fact that it is time consuming to get instructions from detained clients.

135. The model of delivery for prison law services is different from other criminal work and will make it hard to quantify work flow and business plan.

136. Similar considerations apply to criminal appeals and review work.

Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons.

137. No. APL does not believe that the model is viable.

138. However, if it were to proceed, three year contracts are too short and create too much uncertainty for firms to obtain adequate financial investment and business plan.

Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset /Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

139. No. APL believes that the proposal is not viable. However, procurement areas based on current criminal justice system areas fail to take into account crucial information, such as the distribution of custody suites, prisons and courts in each area;

140. Further, APL believes that the impact of prison locations and changes to this under the Government's plans to rely on larger prisons is unknown in light of the absence of any geographical restrictions on prison law in contrast to general criminal work.

Q11. Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

141. No. APL believes that firms in these areas need to be specifically consulted on this aspect of the proposals

Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

142. No. APL considers that three procurement areas for London will not reflect the reality of clients' patterns of arrest and detention and is likely to lead to absurd outcomes.

Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

143. No. APL is concerned that this section of the consultation is unclear and illustrates the extent to which there may be hidden consequences for prison law and criminal appeal work; there is no justification for prohibiting specialists from applying for stand alone contracts for these areas of work.

Q14. Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

144. No. APL believes the timetable is wholly insufficient to allow the necessary market adaptations.

Q15. Do you agree with the factors that we propose to take into consideration and are there any other factors that should to be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

145. It is unclear how the government has determined the contract numbers: this information is required to respond to this question on an informed basis.

146. While the factors listed should be taken into consideration, it is of concern that agreed necessities, such as market agility, are unrealistic within the proposed timeframe.

Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

147. No. If these proposals go ahead, the market will need to restructure significantly and the share of the work required is likely to be different for different providers in each area to provide the best opportunity for viability.

Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

148. No. Client choice is critical in criminal work because:

- It enables a client to choose a solicitor that they trust which is important for access to justice and confidence in the system: this is especially the case for young and vulnerable clients who may need to have developed a trusting relationship to ensure effective representation;

- It allows clients to return to good quality solicitors and avoid poor quality solicitors, allowing market forces to contribute to quality assurance;
- It saves costs as solicitors that have a good knowledge of existing clients do not need to gather new information or spend time getting to understand their client's needs/background and avoids unnecessary duplication of work;
- While client choice will remain for prison law and criminal appeals and review work, the lack of client choice at trial could result in additional work in these areas.

Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

· Option 1(a) – cases allocated on a case by case basis

· Option 1(b) – cases allocated based on the client's day of month of birth

· Option 1(c) – cases allocated based on the client's surname initial

· Option 2 – cases allocated to the provider on duty

· Other

149. Not applicable. APL does not agree with the model. We do not consider that any of the proposals as they stand will be viable for the reasons stated above.

Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

150. Not applicable. We do not agree with the model. We do not consider that any of the proposals as they stand will be viable for the reasons stated above. In relation to this specific point, it would be hard for businesses to plan to factor in the additional travel costs in advance.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

151. No. This does not accord with the critical need for client choice (see above).

Q21. Do you agree with the following proposed remuneration mechanism under the competition model? Please give reasons.

· Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price

· Fixed fee per provider per procurement area based on their bid price for magistrates' court representation

· Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)

· Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area.

152. Not applicable. The model is not viable. There are valid concerns that the fee structure is designed to encourage guilty pleas as many of the fees are the same for guilty pleas and not guilty pleas. This could have serious consequences for prison law work and sentence progression/offending behaviour work in the future.

Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

153. No. It is not appropriate for providers to be expected to absorb unknown travel disbursements and subsistence costs in general criminal work.

154. Unremunerated additional costs are likely to hinder practitioners' ability to properly prepare for cases.

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

155. Yes to the extent that this proposal proceeds notwithstanding the concerns raised above.

156. The proposals in the consultation are too vague and unclear to constitute a proper consultation process as to what factors should be considered at this stage.However, an ability to comply with quality standards for prison law should be required from the outset.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

157. Yes to the extent that this proposal proceeds notwithstanding the concerns raised above. The proposals in the consultation are too vague and unclear to constitute a proper consultation process as to what factors should be considered at this stage.However, an ability to comply with quality standards for prison law should be required from the outset.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

158. No as the model is not viable. However, if the proposals do proceed then this will have a negative effect on quality.

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

· introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;

· reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and

· taper rates so that a decreased fee would be payable for every additional day of trial?

Please give reasons.

159. No.This proposal is concerning because:

- It will encourage guilty pleas and provide a perverse incentive to plead guilty.
- This in turn could lead to miscarriages of justice and appeals/difficulties for sentence planning and progression.

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

160. No. Very High Cost Cases are expensive but are also by nature amongst the most complex and time-consuming. There are a number of factors that need to be considered including the way in which such cases are prosecuted.It is far from clear that a fee slash of the magnitude proposed in the consultation is the right approach.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

161. No. See response to question 27 above.

Q29. Do you agree with the proposals:

- **to tighten the current criteria which inform the decision on allowing the use of multiple advocates;**
- **to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and**
- **to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?**

Please give reasons.

162. No. There is a real risk that these proposals will undermine the principle of equality of arms and result in providers being obliged to do additional work without appropriate remuneration.

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

163. No.Reducing public law family fees could result in this sector becoming unsustainable and impede access to justice for vulnerable children. Such children are over represented in the prison system.

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

164. APL does not agree with this proposal.

165. APL is concerned at the suggestion that junior barristers' hourly rates should be cut by around 40%. This will render it very difficult for junior barristers to continue to provide an effective service to their clients. The proposals are ill-thought-through and do not demonstrate any consideration of the realities of life at the junior bar.

166. It is immediately apparent that this proposal does not even purport to be related to the primary aims of the consultation itself. Indeed, there is no suggestion in the consultation document itself (let alone any evidence) that the current rates of pay to the junior bar have, in any way, led to an undermining of the credibility of the legal aid system in the eyes of the public or that this proposal is necessary in order to deliver real savings or to bring about greater efficiency in the legal aid system. There is therefore no obvious justification for this proposal, which will have a genuinely disruptive impact on life at the junior bar.

167. APL includes a number of junior barristers who provide a specialist service to prisoners across the country. Prison law is a technical and rapidly developing area of law, which requires specialist expertise. Prisoners and their families depend on

junior barristers for specialist advice on public law challenges, representation in Parole Board and independent adjudication hearings, in civil actions against the Ministry of Justice and prison governors, and in inquests arising out of deaths in custody. The involvement of counsel in these cases provides an important costs reduction in terms of the expenses of the wider court system and ensuring quality by allowing solicitors and counsel to work as a team. Given the pressures of legal practice today, the involvement of specialist counsel helps to ensure that where there is a complicated or novel point of law, solicitors and barristers work together to provide an efficient service to the public.

168. The use of barristers is already tightly constrained by the Legal Aid Agency, which has provided detailed guidance as to the circumstances in which it is appropriate to instruct counsel.[55] The instruction of counsel is primarily only justifiable where a case is novel and complex. It follows that, in prison law, solicitors and barristers do not provide an identical service. Barristers are briefed in civil certificated matters only where necessary and often only when the Legal Aid Agency has expressly permitted such instructions. As far as the APL is aware, there has not yet been any analysis of the impact of this guidance or of the reforms brought in as part of the Legal Aid and Sentencing of Offenders Act 2012 on the overall cost of instructing counsel. Without such analysis, it is difficult to see how this additional proposal is necessary and proportionate.

169. APL is also concerned that this proposal does not appear to reflect the reality of life at the junior bar. In particular, the proposal also fails to recognize a fundamental difference between members of the self-employed bar and employed solicitor-advocates. Barristers have high individual over-heads. They each pay rent to their chambers (usually at a rate of around 20-25% of their monthly earnings in legal aid chambers), the costs of travel, textbooks and practitioners' texts, professional indemnity insurance, and fees to the Information Commissioner, subscription fees to legal updating services (such as Westlaw, LexisNexis, Lawtel, Casetrack, and others), and membership fees of professional bodies. Employed solicitor-advocates do not have to pay for these expenses. Were hourly rates for junior counsel to be reduced to the proposed levels, it is difficult to see how it would be possible for junior barristers to continue to practice in legal aid work.

[55] http://www.justice.gov.uk/downloads/legal-aid/vhccs/prison-law-judicial-review.pdf

170. There is a strong public interest in ensuring that legal aid practitioners are properly funded. As Lord Hope held in *Re appeals by Governing Body of JFS* [2009] 1 WLR 2353, at paragraph 25, in which Lord Hope underlined that, "*the system of public funding …depends on there being a pool of reputable solicitors who are willing to under take this work"*. Lord Hope's words apply with equal force to the legally aided bar. Undertaking work at public funding rates is difficult. It involves substantial overheads. Without a proper system of funding, this reputable pool of practitioners will not be able to sustain their practices.

171. The suggestion, at paragraph 6.25 of the consultation document, that the very damaging results of this proposal on the junior bar will be mitigated by the possibility of enhancements, is inadequate. Firstly, the services provided by the junior bar in prison law cases is not the same as those provided by majority of solicitor-advocates incriminal work (as above). Secondly, there is no guarantee that these enhancements will be routinely paid to junior barristers undertaking specialist work in the Administrative Court, High Court, and County Courts. The threshold tests for payment of enhancements, as set out at Annex I of the consultation document, provide that enhancements will only be justified in "*exceptional"* circumstances. This threshold is too high and may not cover all work currently undertaken by counsel in prison law cases. In order for the enhancements to represent an adequate mitigation for the effects of this proposal, the threshold test for the payment of enhancements would need to be re-drafted so as to specify that enhancements will be paid where advocacy services are "*novel and complex, such as proceedings in the Administrative Court or specialist cases in the County Court and High Court."*

172. Whilst the consultation appears to seek to reduce the rate of pay for junior counsel who act for claimants in legally aided cases, there is no corresponding proposed reduction to the rates of pay to barristers who act for the government. It is understood that rates of pay for Treasury panel counsel or for special advocates will continue to receive their current hourly rates of pay, regardless of which court they appear in. This reflects an important principle, which is that specialist counsel provide an important service to their clients. If the Government did not consider that specialist counsel provide an important service, the current rates of pay for members of the Treasury panels or for special advocates would not be justified. There is no explanation at all in the consultation document, let alone any evidence, as to why it is justified to reduce the rates of pay for claimant counsel but not for government

counsel. The result of this proposal would be that barristers appearing for claimants in judicial review claims, civil actions or inquests against barristers acting for the state, would receive radically different rates of pay. Such a proposal is not only unjustified, it is unfair. It would lead to an inequality of arms. There is no analysis of this differential treatment (between claimant and government counsel) in the consultation document.

173. Were the low rates in this proposal to be introduced, they would make entry into the legally aided bar particularly difficult; junior barristers are also likely to be still paying back student loans and additional bank loans to attain professional qualifications and undertake unpaid work experience, mini-pupillages, internships, and additional training to strengthen their potential as a barrister. The new proposed rates of pay would therefore deter or suffocate a junior legal aid bar.

174. The impact of these lower fees would be particularly damaging to the make-up of the bar. This is because these lower fees are also likely to restrict the ability of people from poor socio-economic backgrounds to enter the legally aided bar. The suggestion, at paragraph 5.11.3 of Annex K of the consultation document, that this proposal "*… advances equality of opportunity"* is entirely unreasoned and flies in the face of the likely results of this proposal.

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

175. No. APL considers the estimated savings of £1 million per annum are minimal. The scheme mitigates against the risk shouldered by providers in appealing to the Upper Tribunal and therefore promotes access to justice for this vulnerable group.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

176. No. APL is deeply concerned about this proposal as it will create a risk that the best and most experienced and specialistexperts who can make a real difference in the outcome of a case will no longer be available, which will lead to a number of

consequences throughout the system including miscarriages of justice at first instance and an inability to remedy miscarriages on appeal.

177. In relation to prison law specifically it is likely to impede the effective representation of prisoners in a number of situations where expert evidence is critical to progress a client or deal with issues that are in dispute. Prison lawyers are already required to choose experts carefully and all experts are scrutinised by the LAA before funding is granted: applications are only made where strictly necessary. However, where it has become necessary to instruct an expert, it is crucial that funds are used wisely on the best experts who can actually deal with the issue at hand.

178. Prison lawyers may require the option of commissioning an independent report in cases where the client would otherwise be unable to progress. These cases include prisoners and detained children with complex needs, including prisoners such as IPPs, prisoners who have serious learning difficulties or mental health problems and prisoners maintaining their innocence: these clients often become 'stuck' in the system and require legal assistance.

179. The rates for experts have already been significantly reduced and there has been no assessment of the impact of these recent changes. The use of experts is something which can be controlled by effective LAA guidance, audit monitoring and training.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

180. No. APL believes the quality and reasoning of the Equalities Impact Assessment is inadequate because it is based on a number of flawed assumptions (see the introduction and preliminary concerns above).

181. The public sector equality duty, set out in s.149 Equality Act 2010, requires the Ministry of Justice to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between

persons who share a relevant protected characteristic and persons who do not share it.

182. The case law relating to s.149 Equality Act 2010, as summarized in *R (W) v Birmingham City Council* [2011] EWHC 1147 (Admin) at paragraph 151, lays out a series of relevant principles regarding this important duty. These include the following principles:

a. The equality duties impose 'significant and onerous' obligations on public bodies in the context of cuts to public services.

b. 'Due regard' means specific regard by way of conscious approach to the specified needs.

c. Due regard requires analysis of the relevant material with the specific statutory considerations in mind.

d. Due regard must be given before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question.

e. As such due regard to the duty must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision.

183. APL is concerned that "*due regard"* has not been had to the relevant duties at the correct time and that these principles have not been adhered to.

184. Firstly, whilst the consultation invites responses on the impacts of the proposals, it seems clear from the subsequent comments made by the Secretary of State for Justice that formal decisions have been taken, without waiting for a proper analysis of the possible differential impact of the proposals. In an interview with the Law Society Gazette on 20th May 2013 the Secretary of State for Justice appeared to have made up his mind in respect of key aspects of the consultation proposals, commenting:

"But, he adds, 'unless somebody's got a stunning alternative to PCT', it will go ahead in some form. The fiscal imperative remains and 'not saving the money is not an option'. Grayling acknowledges opposition to the proposals, saying 'there are clearly people in the legal profession who are very unhappy'. But he insists not everybody in the legal profession shares that view. 'We've had plenty of conversations with people who intend to bid for the contracts and who are thinking about how to re-engineer their businesses.'

"What contingency plan is there if too few firms bid? Grayling replies: 'They will bid. I have no doubt whatever. There's a lot of noise at the moment, but the smart people in the industry are already working on their plans for this, thinking through their business models. That's what's to be encouraged and supported.

185. This suggests that "*due regard"* has not been had to the required aspects of s.149 Equality Act 2010 at a formative stage of the decision-making.

186. Secondly, and in any event, it is impossible to assess how meaningful any "*due regard"* has been in this consultation document, due to the fact that it is, itself, predicated on vague assertions (such as "*the system has lost much of its credibility with the public*" and "*the cost of the system spiralled out of control*", at p.3), rather than on actual evidence. The APL has considered the letter sent by Ms Martha Spurrier of the Public Law Project to the Ministry of Justice, dated 22nd May 2013, in which Ms Spurrier comments that, "*The data is incomplete and a number of the cited statistics are misleading. Without this data, the Public Law Project cannot meaningfully engage with this consultation"*. The APL respectfully agrees, and requests that the Ministry of Justice respond to Ms Spurrier's request. The APL reserves the right to update its consultation response upon the receipt of adequate facts and information. Currently, the "*equality impact assessment"*, at Annex K of the consultation document, appears to be based on vague assertion rather than on actual analysis or proper evidence.

187. Thirdly, the overall thrust of the impact assessment is that any detrimental impact of the proposals is justified. However, this is not an adequate engagement with the relevant criteria. Each proposal does not suggest (a) the severity of any disproportionate impact, (b) what alternative, less disproportionate, means of achieving the same aim were considered, (c) why any alternative means of achieving the same aim were rejected, (d) why the asserted justification is sufficient to justify

even an extremely serious impact on minority groups. Overall, the tone of the impact assessment is that, no matter how severe the detrimental impact, the stated aims of the consultation outweigh the impact. This box-ticking approach to an equality impact assessment is contrary to the principles set out above. That is because it is obviously a rearguard action following a concluded decision.

188. Fourthly, the central premise of the impact assessment, as regards civil legal aid, is fundamentally flawed. The impact assessment asserts that:

> "*Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue).*"

189. This assertion is repeated, in respect of prisoners, on a number of occasions. The impact assessment asserts that:

> "… more prisoners might use the prisoner complaints, discipline procedures and probation complaints system route to address their grievances"
>
> "… more prisoners might have their case investigated by the Prison and Probation Ombudsman"
>
> "Individuals who no longer receive legal aid will now adopt a range of approaches to resolve issues".
>
> "Prisoners are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution".
>
> "Prisoners are assumed to be able to access private legal advice and other means for resolution for the same price as legal aid advice and representation".

190. APL has already addressed the illogicality of these assertions above. Put simply, these assertions fly in the face of logic and cannot represent an adequate engagement with the equality issues raised by the consultation proposals. The consultation document suggests, essentially, that there will be no detrimental impact, because those who currently receive legal aid for expert legal representation will either

(a) represent themselves (and thus receive no legal representation), or (b) pay themselves to obtain legal representation. If those affected by these proposals could afford to pay for legal representation, they would not need legal aid. This assertion is absurd.

191. Fifthly, the impact on prisoners is underestimated. At paragraph 5.1.1, Annex K suggests that the impact on prisoners is that "*affected prisoners will no longer receive criminal legal aid for some claims. This may be adverse in some instances, however, we consider that many such claims are capable of efficient and effective resolution through the internal prisoner complaints system and prisoner discipline procedures*." However, there is no evidence is given to suggest that the complaints system is capable of dealing efficiently and effectively with existing complaints, let alone the higher volume it will be experiencing when elements of prison law are removed from scope. There is no analysis, whatsoever, of the impacts on minority groups within the prison estate. It is well known that minorities are over-represented in the prison population and that these groups are more likely to suffer injustice and require legal assistance by way of judicial review. These groups include children, older people, young adults, disabled people and ethnic minorities. Men of a Black, Asian or Minority Ethnic group, over-represented in the prison system, will be disproportionately affected, as will those prisoners with learning difficulties (acknowledged at para 5.1.3) and/or mental health issues. The APL is particularly concerned to note that there is no separate consideration for how children and/or young people will be affected by the changes.

192. Sixthly, the impact assessment proceeds on the basis that the Prison Service has assured the Ministry of Justice that reasonable adjustments will be made so as to ensure all prisoners can access the complaints system. No information is given as to what reasonable adjustments are envisaged, or what will happen if no such adjustments are, in fact, made. This is of obvious importance, given the systemic problems with the prison complaint system, as highlighted above.

193. For these reasons, the equality impact assessment that has been carried out is obviously flawed, fails to properly identify the extent of the impacts of the proposals, and fails to consider whether less detrimental and more proportionate responses may be sufficient to achieve the same goals. Without proper analysis of

the likely detrimental impacts, APL is not in a position to speculate as to alternative forms of mitigation.

194. Finally, although discrimination under Article 14 of the European Convention of Human Rights falls outside the scope of the public sector equality duty in s.149 Equality Act 2010, APL is concerned that the proposed differential treatment of prisoners as a class of citizens in the consultation document represents unlawful discrimination. Indeed, the European Court of Human Rights has repeatedly recognized that discrimination on the basis of a "*status conferred by law rather than one which is inherent to the individual*" can be unlawful under Article 14 of the Convention.[56] The European Court of Human Rights has also held that denying a prisoner services that are enjoyed by the community at large may well violate Article 14.[57] It is therefore likely to be the case that Article 14 will be violated by the proposed changes and that the proposed changes are therefore unlawful and discriminatory.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

195. No. See our answer to question 34 above. The impact assessment appears to underestimate the impact of the proposals on the factors identified.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

196. Yes. APL firmly believes that there are other things that can and should be done if these proposals are to proceed to mitigate their impact on clients and providers.

197. Simple measures that could be taken to mitigate the impact of these proposals in relation to prison law include:

- Prison law could be dealt with outside of the competitively tendered contract

[56] *Clift v United Kingdom* (App. No. 7205/07) *The Times*, 21 July 2010, at paragraph 62 and *Bah v United Kingdom* (2011) 54 EHRR 773, at paragraphs 45 to 46.
[57] *Shelley v United Kingdom* (App No. 23800/06).

- Quality assurance requirements that guarantee at least the level of expertise and experience under the current supervisor standards would ensure that the credibility of the system is not undermined.

Conclusion

198. For the reasons set out above, APL does not agree with any of the proposals set out in the consultation document.

199. A meaningful review of costs and the ways in which effective savings within the justice system can be made should be conducted in a spirit of openness with stakeholders being properly and carefully consulted. Should you consider it helpful, APL would welcome the opportunity to further discuss these issues with you.

200. In the event that you may require further information or assistance, please do not hesitate to contact Mr Andrew Sperling, the current Chair of the APL, by post c/o Office 7, 19 Greenwood Place, London. NW5 1LB or by email: andrew.sperling@associationofprisonlawyers.co.uk

Yours faithfully,

Association of Prison Lawyers