****

**The Association of Prison Lawyers**

C/o Office 7,

19 Greenwood Place,

Kentish Town  
London.

NW5 1LB

**Joint Committee on Human Rights**   
Committee Office   
House of Commons   
7 Millbank   
London SW1P 3JA

27th September 2013

Dear Sirs,

**The implications for access to justice of the Government's proposed legal aid reforms**

Please find enclosed the submission by the Association of Prison Lawyers (APL).  We would be happy to provide oral evidence to the Committee.  Our nominee to give oral evidence, should the Committee wish to hear from us, will be Simon Creighton whose contact details are below.

Please note that I am the current Chair of APL but will step down at our AGM on 22 October. I will be the point of contact until then.

Please also cc our Administrator David Long ([administrator@associationofprisonlawyers.co.uk](mailto:administrator@associationofprisonlawyers.co.uk)).

**Contact details:**

* **Andrew Sperling, Consultant Solicitor-Advocate, Chair Association of Prison Lawyers, 07539 325869,** [**andrew.sperling@associationofprisonlawyers.co.uk**](mailto:andrew.sperling@associationofprisonlawyers.co.uk)
* **Laura Janes, Consultant Solicitor, The Howard League for Penal Reform, 07817 962 206,** [**Laura.Janes@howardleague.org**](mailto:Laura.Janes@howardleague.org)
* **Simon Creighton, Solicitor, Bhatt Murphy, 07931 545 675,** [**creightons@bhattmurphy.co.uk**](mailto:creightons@bhattmurphy.co.uk)

Yours sincerely

**Andrew Sperling**

**Chair - Association of Prison Lawyers**

Written evidence submitted by the Association of Prison Lawyers

Table of Contents

[1. **Executive summary** ……1](#_Toc367718069)

[2. **About Association of Prison Lawyers (APL) and relevant expertise** 1](#_Toc367718070)

[3. **Evidence** 2](#_Toc367718074)

[3.1 **Why the justifications for cuts to scope of legal aid for prison law do not stand up** ………………………………………………………………………………………….2](#_Toc367718075)

[3.2 **Cost** 2](#_Toc367718077)

[3.3 **Public confidence/credibility** 2](#_Toc367718079)

[3.4 **Complaints** 3](#_Toc367718083)

[3.5 **Continuing availability of judicial review** 4](#_Toc367718085)

[3.6 **Lack of clarity** 4](#_Toc367718088)

[3.7 **Parole Board cases where direct release is not an option** 4](#_Toc367718090)

[3.8 **Treatment Cases** 5](#_Toc367718092)

[3.9 **Adjudication cases where there is no risk of extra days/ Tarrant criteria not   
deemed met** 6](#_Toc367718094)

[3.10 **Most sentence cases** 7](#_Toc367718097)

[3.12 **Judicial review** 10](#_Toc367718105)

[3.13 **Residence** 12](#_Toc367718108)

[4. **Recommendations** 13](#_Toc367718111)

1. **Executive summary**
   1. The current proposals to change legal aid will have a devastating impact on prisoners’ access to justice. The justifications for the changes include grossly misleading characterisations as to why prisoners seek legal assistance (to get an ‘easier ride’). In reality the proposals will mean that prisoners will not be able to seek legally aided advice on issues such as segregation, access to mother and baby units and other areas which might involve serious allegations of breaches of human rights .
   2. The Justice Secretary accepts that the changes are ideologically driven rather than to save money. In any event prison law is a small part of the legal aid budget and the increases in spending have mainly been caused by a bigger prison population, including a larger proportion of those serving indeterminate sentences.
   3. It is suggested that prisoners do not need access to legal aid for the matters to be excluded because of the availability of complaints procedures. However the Justice Secretary has ignored a large body of evidence, including from the Chief Inspector of Prisons, that shows that the current complaints system is inadequate. It is also suggested that criminal legal aid for prison law can be removed because judicial review remains available. The reality is that judicial review is unlikely to be a desirable or viable option for many prisoners. The ability of prisoners to seek legal advice has been crucial to ensuring that in the closed world of prisons there is accountability for abuse of power.
   4. Even on their own terms, the proposals make little sense and it is even now unclear as to the full extent of the proposed cuts to the scope of provision for prisoners. Whilst it appears that the intention is to retain legal aid for parole and disciplinary matters where liberty is at stake, other areas which have a direct impact on liberty are excluded. As to costs, it is likely that the proposals result in more rather than less expenditure. The proposed reduction in payment rates will in any event make the work unviable for most firms.
2. **About Association of Prison Lawyers (APL) and relevant expertise**
   1. The 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 membership is made up of around 300 firms of solicitors and around 60 individual members (who include specialist counsel).
   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. Our evidence deals with the cuts to legal aid for prison law announced by  
      the Justice Secretary on 5 September 2013, following the proposals in Transforming Legal Aid (TLA). Where appropriate we also deal with the proposed changes to legal aid for judicial review, currently subject to further consultation. Drawing on our collective experience and expertise, our evidence deals with practical examples where prisoners will be at increased risk of human rights violations. We would be willing to provide oral evidence if required.
3. Evidence
   1. **Why the justifications for cuts to scope of legal aid for prison law do not stand up**

3.1.1 The original consultation justified proposals to cut prison law on grounds of cost and public confidence and credibility in the scheme (TLA, para 3.15, Response para 11, page 66). The response appears to justify the decision to proceed with the scope cuts on the basis that (a) the complaints system is adequate (Response, paras 11, 19, 21, 27 and 28) and (b) judicial review will remain available to prisoners, subject to means and merits (Response, para 14, 21, 24, 28, 36). These grounds are not justified.

* 1. **Cost**

3.2.1 Although in his recent evidence to the Justice Select Committee, the Justice Secretary candidly admitted that his proposals for reform in legal aid funding for prisoners was ideologically driven, the consultation documents have focussed on the need to save costs. The projected savings from prison law cuts will be £4m. The Ministry of Justice impact assessments provide no figures as to the cost of the decision. Alternative projected costs consequences are extensive, ranging from £10m on a conservative estimate[[1]](#footnote-1) to £480m[[2]](#footnote-2). Current prison law spend is comparatively modest and has been declining year on year, despite parallel increases in the prison population – a factor noted by the Legal Aid Agency (LAA) in its analysis of prison law cost[[3]](#footnote-3). The largest increase in the prison law budget in recent years coincided with the implementation of the sentence for Indeterminate Public Protection (IPP) and the consequent increase in numbers of indeterminate sentenced prisoners. All prison law cases are paid for under a fixed fee scheme. Fixed fees that can be claimed without routine scrutiny range from £220 to £1,593.91[[4]](#footnote-4). The cases that will be cut from scope, classed as ‘sentence’ and ‘treatment’ cases, cover a broad range of work and are remunerated at the lower fixed fee of £220 other than in exceptional cases, where each item of work is scrutinized on assessment. There has been no assessment as to whether it will be viable for prison law experts to function with the combination of scope cuts and a cut of 17.5 per cent of the remaining work. There is a very high risk that as fixed fees penalize high quality and specialist providers: such specialists will no longer be able to provide this service.

* 1. **Public confidence/credibility**

3.3.1 Despite the Ministry of Justice view that prison law legal aid is used to assist prisoners to ‘simply’ get an ‘easier ride’ in another prison[[5]](#footnote-5), the grant of prison law legal aid is subject to rigorous tests. There is no provision in the current scheme to assist prisoners to simply change cells or get to a more comfortable prison. We have not seen any evidence to support the assertion that the provision of criminal legal aid for prison law cases suffers from a lack of public confidence or credibility.

3.3.2 All prison law cases, other than treatment cases, are at present authorised by the provider. All providers of legal aid prison law must meet rigorous supervisor standards requiring a certain volume and spread of prison law work each year. When authorising a case for legal aid the lawyer must be satisfied and provide evidence on file that:

* + - 1. the prisoner meets the financial eligibility criteria and seek evidence of means (a very time consuming task);
      2. the matter raises a significant legal or human rights issue;
      3. there is sufficient benefit to the Client, having regard to the circumstances of the matter, including the personal circumstances of the Client, to justify work or further work being carried out. In addition, there should be a realistic prospect of a positive outcome that would be of real benefit to the Client; and
      4. the cost benefit test – namely, whether a notional reasonable private paying client of moderate means would pay for the legal assistance – is met.

3.3.3 If the criteria above are not met, the Legal Aid Agency will penalise the provider on audit.

* 1. **Complaints**

3.4.1 The Response provides a detailed consideration of the adequacy of the complaints system and concludes that the complaints system is adequate and will in any event be strengthened. The adequacy of the current complaints system is disputed by Her Majesty’s Inspectorate of Prisons (HMIP), the Children’s Commissioner, APIL and others. APL research with over 200 prisoners shows that 55 per cent consider the internal prison complaints process to be ‘very poor’ with 45 per cent considering the PPO to be ‘very poor’. Even if the complaints system were to be more effective, it is not an adequate substitute for legal representation. This is because:

* + - 1. The complaints system looks backward, not forward, looking whereas legal work that meets the rigorous legal aid sufficient benefit test must be of a practical benefit to the client;
      2. The complaints system is limited in ambit – not all the matters currently covered by legal aid will come within the scope of the internal complaints system. For instance, representations to the Justice Secretary about the period between reviews are not a matter for a complaint to the prison; nor are concerns about local authority duties to house children on release from prison; and
      3. The Justice Secretary’s plans to improve the complaints system to justify the removal of legal aid implies the system is not adequate; any such changes should take place before removing legal aid is contemplated, and those changes should be subject to monitoring and assessment to determine whether they meet the widespread concerns about the efficacy of the system.

3.4.2 As Lord Justice Sedley highlights in his recent article, the Ministry of Justice appears "seemingly unaware of the way prisoners’ claims are already handled, [and] proposes to take away access to justice for prisoners (including, for instance, children and expectant and new mothers in the prison system), in the belief, which three decades of judicial review have shown to be mistaken, that the prison complaints system and the prisons ombudsman are sufficient for the redress of illegality and unfairness." [[6]](#footnote-6)

* 1. **Continuing availability of judicial review**

3.5.1 The cuts to prison law are, in part, justified by reference to the continuing availability of judicial review. This justification is fundamentally flawed for two reasons: (i) it does not take into account the restrictions that apply to the number of public law cases that can be initiated or the firms able to bring such cases and (ii) it does not take into account the proposed further changes to the funding arrangements for judicial review.

3.5.2 It is wholly undesirable to force prisoners to attempt to turn to judicial review to deal with problems that are currently dealt with for fixed fees of £220.

* 1. **Lack of clarity**

3.6.1 At present the precise detail of the proposed cuts in scope is unclear, and in parole board cases, goes further than the original proposal. There is no doubt that the vast majority of prison law cases[[7]](#footnote-7) will no longer be funded.

3.6.2 The Response is also silent on how the work that remains in scope will be quality assured in light of the extent to which the current quality assurance through supervisor standards is based on the spread of work that practitioners undertake.

3.6.3 A close reading of both the consultation and the response would suggest that the following areas of prison law that may currently attract legal aid will no longer be funded:

* + - 1. Cases before the parole board where direct release is not an option;
      2. Treatment cases;
      3. Adjudication cases where there is no risk of additional days or the Tarrant criteria is not deemed to be met by the prison; and
      4. Most sentence cases.

These submissions deal with each category in turn, highlighting the implications for prisoners and aspects of the proposals that remain unclear.

* 1. **Parole Board cases where direct release is not an option**

3.7.1 The Ministry of Justice has announced that cases before the parole board where direct release is not an option will no longer be covered by legal aid (Response, para 22, page 68 and para 25, page 69)[[8]](#footnote-8). This would necessarily include:

* + - 1. cases where the review clearly has a direct impact on liberty such as pre-tariff reviews where lifers are considered for a move to open conditions before their minimum term ends thereby allowing a realistic prospect of release at the end of their tariff[[9]](#footnote-9); and
      2. reviews by the parole board where a prisoner has been transferred from open conditions to closed conditions by the Secretary of State and the Secretary of State has sought advice from the parole board on whether the prisoner should be returned to open conditions.

|  |
| --- |
| **Case Study 1**  Case of A - a pre tariff mandatory prisoner with a life sentence whose case was referred to the parole board to consider progression to open conditions before the expiry of her tariff/minimum term. It is the parole board's policy that lifers need to spend time in open conditions before release. There were disagreements between the report writers and disputes regarding suitability for open. Evidence needed to be gathered and her case needed to be competently presented to the Parole Board. A was successfully represented at her hearing and moved to open conditions. A can now be released on tariff expiry. Otherwise she would have spent another 3 years in closed conditions and her chances of being released at the end of her tariff would have been remote.  **Under the new scope criteria…**this case would not be in scope as it does not directly relate to release and A would have had to represent herself.  **Why not complain or judicially review?** JR not relevant – case concerns representation before the board. |

* 1. **Treatment Cases**

3.8.1 These are cases where a prisoner alleges that he or she has been treated unfairly and meets the rigorous criteria to obtain legal assistance from a lawyer to make representations. At present, these cases which result in a fixed fee of £220 are subject to approval by the Legal Aid Agency which must be satisfied that the matter cannot be dealt with by an alternative mechanism and that the applicant cannot progress this matter himself. Since July 2010, 11 such cases have been approved. Although the small number of cases might suggest that this will not make a big practical difference, this is not the case because there will be no flexibility at all to allow assistance in the most serious cases of abuse, including in cases where the prisoner will be unable to obtain legal aid to bring a judicial review (see below).

|  |
| --- |
| **Case Study 2**  B, a foreign national with no previous convictions was sentenced to a year in prison when her son was 9 months old. B was his sole carer, had never left him and was still breastfeeding. On admission to prison, she was immediately separated from him. B could not speak or write English very well, was isolated and had no experience of how the prison system works. B was traumatised by being separated from her baby and on her first few nights in custody she screamed for him. B was placed on report for threatening behaviour and placed in segregation for the night.  B was not aware that she could make an application to be transferred to a mother and baby unit (she was unaware of mother and baby units), so that she could be reunited with her baby. Her son was being looked after by an elderly aunt who was finding it difficult to cope with such a young child.  B’s lawyers advised that she was entitled to apply for transfer to a mother and baby unit and assisted her with the application, liaising with the prison, the local Council and expert social workers. Despite unequivocal medical evidence warning of the detrimental impact on their well-being that continued separation would have on both her and her baby, her application for a mother and baby unit was rejected on the basis of her record of "poor behaviour in custody". B's lawyers successfully appealed and she was transferred to a mother and baby unit, where she was reunited with her baby. B was reported as being a calming and positive presence within the unit.  **Under the new scope criteria…**B would be expected to have achieved this by herself.  **Why not complain or judicially review?** It is unlikely that B would have been able to navigate the complaints system alone. It is likely that her lawyers would have struggled to obtain affirmative proof of 12 months of lawful residence. Even if this could be achieved, the inevitable delay in this process and the expectation that the complaints/appeals processes would have been exhausted already could mean that by the time the matter was determined mother and child would have encountered too long a period of separation to support the claim. With her limited knowledge of both the prison system and the English language, a complaint or judicial review were both unfeasible for B. |

* 1. **Adjudication cases where there is no risk of extra days/ *Tarrant* criteria not deemed met**

3.9.1 Adjudications (prison disciplinary hearings) where there is no risk of additional days or where the prison does not deem the prisoner vulnerable under the *Tarrant* criteria. This includes written advice for prisoners facing an adjudication where the finding or punishment could have a grave knock on effect (including an adverse impact on a parole case).

* + 1. Written representations requesting representation under the Tarrant criteria appear to be out of scope.
    2. Written appeals made by prisoners, including children, who were not presented at first instance also appear to be out of scope.

|  |
| --- |
| **Case Study 3**  C was a life sentence prisoner in a closed prison awaiting the Parole Board’s review of his suitability to progress to Category D open conditions. C was charged with a number of adjudication offences arising from one incident. They were the only misconduct allegations on his record for several years. C denied the charges. They raised a number of complex legal and evidential issues. Under the legal aid scheme C’s lawyers investigated the facts and drafted representations to the governor. The governor ignored the representations. His lawyers appealed the decision to the Briefing and Casework Unit. All convictions were quashed. Subsequently the Parole Board made a positive recommendation for open conditions which the Secretary of State accepted. C was moved to an open prison and he was released on licence at his next parole review.  **Under the new scope criteria…**Assistance with the adjudication would no longer be possible. It is highly unlikely C would have been able to conduct this work himself. Had the findings of guilt remained the Parole Board would be unlikely to have progressed him to open conditions and his release would be delayed by several years with the consequent cost to the public purse of additional years in prison at around £40,000 each year.  **Why not complain or judicially review?**  This was an appeal based on legal principles and not suitable for a complaints system navigable by a lay person. Nor would it have been desirable to have had to issue judicial review proceedings to deal with this injustice. It is unlikely that the legal aid agency would have granted funding or the Court permission unless all the work that was in fact undertaken was undertaken for free as both the financial and legal tests for judicial review require all other avenues to be exhausted. Even if these hurdles could be crossed, a judicial review would have caused considerable delay. |

* 1. **Most sentence cases**

3.10.1 The majority of sentence cases are now out of scope (Response, para 46, page 73). This appears to include (TLA, 3.18 and Response page 73):

* + - 1. categorisation, (including from high security prisons, applications for a referral to the parole board for a pre-tariff review or to the Secretary of State under the *Guittard* Arrangements or following a return from open conditions)
      2. segregation,
      3. close supervision centre and dangerous and severe personality disorder referrals and assessments,
      4. resettlement issues and planning and
      5. licence conditions
    1. These cases include a broad range of work allowing prison lawyers to use their expertise to resolve important issues quickly and effectively.
    2. Assisting a prisoner to move through the security categories can be essential to his or her eventual safe release; in some cases, prisoners may be entitled to a pre-tariff review by the parole board to recommend open conditions. These cases affect lifers who generally have two to three years left before their tariff expires. Pre-tariff reviews are subject to a ‘sift’ by the prison service. A prisoner who does not get through the sift process is entitled to challenge that decision through the complaints system. These are complex cases.

|  |  |
| --- | --- |
| **Case Study 4**  D is serving a mandatory life sentence for murder. Most of his minimum term has been served in mental health detention. D was recently transferred back to prison having completed treatment.  He was completely oblivious to the fact he was entitled to, at the very least, initial assessment for a pre-tariff sift review.  It was clear to his lawyers that the prison had not realised he could be considered for a pre-tariff review by the Parole Board or a transfer to open conditions under the Guittard arrangements.  **Under the new scope criteria** it is likely that D would not be considered for a progressive move, leaving him languishing in closed conditions, at unnecessary public expense.  **Why not complain or judicially review**  It is unlikely that without access to a lawyer D would even be aware of the cause for complaint or challenge. Even if he were aware of this, the complaints system, administered by ordinary prison staff, is not geared up to challenges to serious decisions about the progression of life sentenced prisoners concerning public protection. Judicial reviews of decisions by professionals about risk are notoriously complex and deferential to the expert decision makers on the ground. | |
| **Case Study 5**  E was in open conditions when it was alleged he was using substances in addition to his methadone prescription. It was considered that this would be hazardous and he was returned to closed conditions for his wellbeing. However, E had produced numerous Mandatory Drug Tests (MDTs) and Voluntary Drug Tests (VDTs) to demonstrate that he was not using any illicit substances. Upon his arrival into the closed estate, another MDT was given showing there were no illicit substances in his system. Also E was accused of this on a Saturday, yet on a Monday evening he was granted Release on Temporary Licence (ROTL) to attend an NA meeting in the community, he travelled unaccompanied and returned to the prison at 11pm as per the licence. If there were genuine concerns regarding his health, a ROTL surely would not have been granted in his case. As a result of the representations highlighting the discrepancies in his removal from open conditions, Mr B’s case was concluded on the papers and he was allowed to his return.  **Under the new scope criteria** E would not be allowed legal representation in respect of his application to return to open conditions, leaving him in closed conditions, at unnecessary public expense.  **Why not complain or judicially review?** JR not relevant – case concerns representation before the board. |

3.10.4 Making representations for statutory authorities to provide accommodation for a vulnerable prisoner to take up discretionary early release or challenging licence conditions are all issues that engage important personal, human rights issues (usually under Art 8 ECHR) and are often a pre-requisite to allowing a prisoner to enjoy human rights that the courts have recognised must attract funding (ie Art 6 and 5 ECHR).

|  |
| --- |
| **Case Study 6**  F was a 17 year old who was convicted of violent disorder in the context of a demonstration against Government plans to introduce student tuition fees. He had been studying for his A levels at college at the time of the offence. He was sentenced to three years in custody. F asked his lawyers to assist him in minimizing the disruption to his education.  F was offered a place at college to continue his A levels starting at the beginning of the next school year, if he was able to attend part time from prison. F had been an excellent pupil and in their view, his offence was isolated and entirely out of character and would not be repeated.  F's lawyers calculated that a combination of ROTL followed by release on Home Detention Curfew (‘HDC’) would enable him to attend college and keep the option of going to university alive. It was necessary for F’s lawyers to do considerable work to achieve this, including investigating the facts and making representations as to why this course should be followed. This enabled him to leave prison at the earliest opportunity and get his life and education back on track, saving money for the tax payer and securing his rehabilitation on licence.  **Under the new scope criteria…**  None of this work would be possible, F would have to have prepared his own representations  **Why not complain or judicially review?**  The complaints system would not have been equipped to deal with this issue which involved the application of prison service policy to children and rights under Article 8 ECHR. The complaints system would be more focused on whether the failure to progress ROTL was wrong rather than the legal reasons for rectifying it. Prior to issuing a judicial review, all the work undertaken by the lawyers in this case would need to be undertaken in any event. A judicial review would have delayed matters and could have meant F missing the beginning of term. |

3.10.5 There is burgeoning jurisprudence on HDC, especially as it affects foreign nationals. On the face of it this is a release mechanism which is fairly straightforward.  But the case law demonstrates otherwise.  Rushing straight to judicial review is a wholly inadequate as a means of redress. Decisions are usually made close to the potential release date so any challenge needs to be dealt with urgently to be meaningful. Emergency funding is difficult to justify given (a) the margin of appreciation afforded to prisons, and (b) the fact that release will be inevitable at the halfway point. Additional representations from solicitors appealing initial decisions is a much more efficient and constructive way to proceed than the two extremes of allowing prisons to remain in prison unnecessarily at public expense or rushing to judicially review decisions.

3.10.6At present limited funding is available to challenge findings that prisoners should be placed in Dangerous and Severe Personality Disorder projects (DSPD). These projects involve very long periods (often up to 7 years) of intensive treatment. It is critical that the initial decision for prisoners to be placed on such projects is correct.

* + 1. Funding is also currently available to make representations for prisoners in relation to segregation and selection for the Close Supervision Centres (CSCs) but this will be removed completely. The use of segregation is the most severe punishment available to prisoners, involving the loss of their residual liberty. In a report transmitted to the UN General Assembly on 5 August 2011, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, defined ‘solitary confinement’ as the; “*Physical and social isolation of individuals who are confined to their cells for 22-24 hours a day*”. The UN Rapporteur’s report reinforced the opinion of his predecessors that:

“prolonged solitary confinement [defined as longer than 15 days] may itself amount to prohibited ill treatment or torture” and this is “because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible”.

* + 1. As a consequence the UN Rapporteur recommended that: indefinite solitary confinement should be abolished and that prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition. The 2006 report by HM Inspector of Prisons entitled *Extreme Custody*, contained similar warnings about the operation of the CSC system:

“We considered that there were dangers associated with the use of designated cells as a control mechanism for open ended periods, without any apparent consultation with clinical staff, little local ownership of the their management, and limited independent oversight. In practice this aspect of their use replicated the merry-go-round system which was now otherwise discontinued in the segregation system, and did not fit well into a system of holistic management and care.”

* + 1. Although the Response states that the ‘Government has decided to proceed with the proposal to limit the scope of criminal legal aid for prison law cases as proposed in the consultation document’ (para 48, page 73), it is unclear whether the final decision has gone further than the original proposal. For instance, TLA 3.18 stated that ‘some’ of the cases currently included under the ‘sentence’ category ‘would continue to be within the proposed scope of criminal legal aid advice and assistance’ noting that ‘matters related to sentence planning and minimum term review applications would continue to be funded, subject to merits and means, as they relate to a review of ongoing detention’. However, the Response at Para 46, page 73 states that ‘the amendment to the scope criteria outlined above would have the effect of removing both sentence planning…from scope as it is not a matter ‘for the Parole Board’. This is despite that fact that disciplinary matters are not for the Parole Board and not all parole board matters appear to remain in scope in any event. The Response adds ‘The consultation paper stated that sentence planning matters would continue to be funded but the modified scope criteria[[10]](#footnote-10) will mean they are not in future.’ It is therefore unclear whether minimum term reviews which deal with whether a person convicted of murder as a child should have the minimum term reduced by a High Court judge on account of exceptional progress and sentence planning matters including the provision of offending behaviour courses deemed critical to progress and safe release remain in scope.
  1. Judicial review

3.11.1 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.

3.11.2 As has been said by many before, Sir Winston Churchill included, the way a nation treats its prisoners is a mark and measure of its stored up strength and “the sign and proof of the living virtue in it”. Access to the courts and the protection of the rule of law should be available to all in equal measure.

3.11.3 The APL agrees with Stephen Sedley's assertion that the current proposals "undermine judicial review by starving claimants of legal aid on several fronts"[[11]](#footnote-11).

3.11.4 On a practical level, judicial review is simply not an adequate safety net to justify the removal of 80 per cent of prison law work.

3.11.5 At present judicial review work arising from prison law issues may be undertaken by firms with either a prison law contract under the ‘associated Community Legal Service’ (ACLS) scheme or a public law contract. ACLS work enables firms with a prison law contract to commence judicial review work on any issue arising from the criminal contract. The number of cases that can be commenced is not limited. Firms with public law contracts on the other hand are allocated a limited number of public law matter starts (usually around 15). Once the majority of prison law work is removed from scope, it will only be possible for most public law challenges to be commenced by firms with a public law contract, and even then, the number of cases will be limited to the number of matter starts. This means that access to judicial review for prison law issues other than challenges concerning the legality of parole and adjudication cases is finite: once a provider has used up its matter starts, it is not possible to open a legal help file for a new judicial review, regardless of the strength of the case. The Ministry of Justice is not proposing to increase the number of matter starts allocated to public law providers. There is therefore no scope for providers to absorb the prison law cases that will now be forced down the judicial review route as a result of the scope cuts. The effect of this will be that meritorious cases will go unheard and prisoners will be prevented from accessing judicial review. We are not aware of any impact assessment on the increased need for public law matter starts based on the removal of criminal legal aid for prison law.

3.11.5 In addition, the future of judicial review is uncertain. In September 2013 the Lord Chancellor published further proposals for the reform of judicial review[[12]](#footnote-12). If enacted, those proposals will reduce the availability of judicial review for individual prisoners and their representative groups by imposing more restrictive rules on standing, forcing providers to work at risk, increasing the use of wasted costs orders and limiting the availability of costs protection. In light of this it is impossible to rely on judicial review as protecting the right of access to the courts for prisoners going forward.

|  |
| --- |
| **Case Study 7**  H was serving a determinate sentence. H's 5 year old son was diagnosed with a brain tumour and given a very short life expectancy. The client contacted us seeking advice in relation to his position. H and the child’s mother wanted to him have as much contact with his son as possible.  H's lawyers made an application to the prison for some form of release / temporary release to facilitate contact. The prison granted an escorted visit, however, indicated no further visits would be granted.  H's lawyers were ultimately successful after a number of contested hearings and H was granted a schedule of further visits with his son prior to his release from prison. The client was released on licence with similar restrictions on contact with his son. This was despite his deteriorating health and very short life expectancy. The whole family was anxious for our client to spend as much time as possible with his son.  **Under the new scope criteria....**this issue will be out of scope.  As the issue arose from a prison law matter, H's lawyers were able to open an associated Legal Help file in order to challenge the decision not to grant any further home leave. H's lawyers sent a Letter Before Claim and subsequently issued Judicial Review Proceedings in the High Court for further escorted visits.  H's lawyers would have only been able to deal with this case if H's lawyers had enough Public Law Matter Starts left, of which H's lawyers are awarded 15 per year.  **Why not use the complaints system?**  The complaints system is currently a very time consuming process, H's son was given a very short time to live and this case had to therefore be dealt with as expeditiously as possible. The complaints system would not have dealt with the case quickly enough.  Due to the urgent nature of the case the initial hearing was granted the day after the application was lodged. This was before permission was granted and under the proposals the substantial costs of this hearing would be at risk.  Numerous urgent judicial review hearings were necessary, where the barrister pushed for them to be granted proper contact. At each hearing the authorities tried to restrict contact. Ultimately the father and son were granted the contact they wanted by the High Court: they were granted more visits and then allowed to see each other every day – they were together on the day the son passed away.  Under the proposed funding cuts this family would not have had such access to a prison law solicitor. In addition, cuts to family law funding mean they would not have had access to a family law solicitor either. They would have been powerless in the face of the unlawful interference by the authorities in their lives. The mother told everyone that she wanted her son to be able to see his father as much as possible; that she needed the father to be there to support her and the family. Nobody listened to her, and nobody would have listened to her if the family had not had access to a solicitor. The government’s proposals threaten all of this. |

* 1. **Residence** 
     1. Further, legal aid to obtain redress in any civil matter will require prisoners to meet the lawful residence condition. This will exclude many prisoners from accessing civil law. The residence requirements are likely to have a disproportionate effect on prisoners. In the week commencing 23 September 2013, there were 10,786 foreign nationals in detention in England and Wales. Prisoners who are unfairly treated and unable to prove residence will be completely insulated from access to justice unless they can pay for it once the scope cuts come into place. Further, parole reviews are only challengeable by way of judicial review (a civil cause) thus leaving any prisoner without proof of lawful residence without any remedy to address an unlawful or unfair parole decision.
     2. Even where prisoners do meet the test, they may not be able to prove it. Obtaining proof of anything on behalf of prisoners can be complex and time consuming. Most prisoners do not have time to prepare for detention and their possessions and documents are not easily accessible. Many prisoners have lived hand to mouth prior to detention and may not be able to easily provide their lawyers with documentary evidence of lawful residence.

1. Recommendations

4.1 We recommend that the Committee:

* + 1. invites the Ministry of Justice to clarify the proposed cuts to the scope of legally aided prison law;
    2. invites the Parole Board to give evidence as to the impact of the lack of legal aid for prisoners appearing before them who cannot be released;

(c) considers the adequacy of the complaints procedure for prisoners as a substitute for legal representation, inviting evidence from HMIP and the children’s commissioner

* + 1. seek clarification from the MOJ as to:
       1. why the current ‘sufficient benefit test’ (SBT) including the requirement for prisoners to use complaints systems (where they have the skills to do so and it is appropriate) is inadequate to ensure public confidence;
       2. the logic behind authorizing funding for cases engaging Art 5(4) and 6 but not matters that are essential pre-requisites to enjoying rights under these articles;
       3. how foreign national prisoners who cannot prove they are lawfully resident are to obtain access to justice if they are treated unfairly in prison and their human rights are breached;
       4. how the decision to grant representation at *Tarrant* hearings can be reconciled with the decision to bar lawyers from making representations for Tarrant hearings;

(v) whether the Ministry of Justice has considered whether it will be viable for firms to continue to provide prison law with both fee cuts of 17.5 per cent and a cut of 80 per cent of the work; and

4.2 We would be happy to provide oral evidence if this would assist the Committee.

1. <http://legalaidchanges.files.wordpress.com/2013/06/nick-armstrong-costing-the-civil-legal-aid-proposals-1306242.pdf> [↑](#footnote-ref-1)
2. <http://www.howardleague.org/francescrookblog/> 13 September 2013 [↑](#footnote-ref-2)
3. Page 11, Legal Aid Statistics in England and Wales, Legal Services Commission 2012-2013,Ministry of Justice Statistics bulletin, Published 25 June 2013

   <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf> [↑](#footnote-ref-3)
4. <http://www.justice.gov.uk/downloads/legal-aid/crime-contract-2010/Payment_Annex_Apr_12.pdf> [↑](#footnote-ref-4)
5. <https://www.gov.uk/government/news/law-society-and-moj-agree-new-proposals-for-criminal-legal-aid>; see also p.4 Transforming Legal Aid: Next Steps [↑](#footnote-ref-5)
6. <http://www.lrb.co.uk/v35/n17/stephen-sedley/beware-kite-flyers> [↑](#footnote-ref-6)
7. Subject to clarity as to what will remain in scope, according to LAA statistics published in June 2013, only 20 per cent of prison law cases involve the parole board and adjudications (page 11). Some of these cases will now be excluded and it is still possible that a small number of the remaining 80 per cent of cases will remain in scope. However, it appears that the cuts will exclude approximately 80 per cent of cases. <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf> [↑](#footnote-ref-7)
8. This was not evident from the original consultation paper which stated that parole board cases would remain in scope as these cases were ‘about on-going detention’ (para 3.20, TLA). The APL took this to indicate that it would include cases about the nature of the detention rather than just whether detention should continue. For that reason, our response did not deal with the prospect of the withdrawal of legal aid for non-release cases. We also note that the Parole Board response did not deal with this either. In addition TLA para 3.4 said legal aid should remain for any case “which affects the individual’s ongoing detention and where liberty is at stake”…? [↑](#footnote-ref-8)
9. The Board’s own policy states that: “In the majority of cases, the Board cannot ultimately be satisfied about risk until and unless a successful period of testing has been completed. Regardless of the length of tariff, where offending behaviour has been addressed in closed conditions, the prisoner has had no opportunity to demonstrate by his behaviour in conditions similar to those existing in the community that he/she can apply lessons learned in closed conditions.” <http://www.justice.gov.uk/offenders/parole-board/open-conditions> [↑](#footnote-ref-9)
10. It is not clear what the ‘modified scope criteria’ referred to here is. [↑](#footnote-ref-10)
11. See footnote 6 above. [↑](#footnote-ref-11)
12. https://consult.justice.gov.uk/digital-communications/judicial-review-reform [↑](#footnote-ref-12)