THE PUBLIC LAW PROJECT RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION:

THE PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES

THE PUBLIC LAW PROJECT

The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies, such as judicial review, for those whose access to justice is restricted by poverty or some other form of disadvantage.

Within this broad remit PLP has three main objectives:

- increasing the accountability of public decision makers;
- enhancing the quality of public decision making;
- improving access to justice.

PLP aims to fulfil these objectives by undertaking research, casework, policy work and training across the range of public law remedies.

PLP'S response is informed by its expertise in public law, including judicial review and other public law remedies, including complaints and ombudsmen schemes. While PLP's focus is on public law and the accountability of public bodies, access to justice for those disadvantaged by poverty is central to PLP's objectives. The availability of legal aid, and particularly legal advice at an early stage, helps to ensure that those of limited means have access to the courts and to other effective ways of resolving legal disputes, particularly with public bodies.

The consultation proposes significant cuts to legal aid. The rationale for the cuts is described as being both economic, and ideological. It is stated that the main policy objectives and intended effects of the proposals are to reduce expenditure on legal aid but in addition the consultation paper repeatedly asserts that there is a "compelling case for going back to first principles in reforming legal aid."

This 'compelling case' appears to be founded on two broad assertions, contained in paragraphs 2.7-2.8. The first is a general statement that legal aid is available for a wide range of issues including those which 'should' not require legal expertise. The second is that this availability of legal advice has led to an increase in unnecessary litigation at the taxpayer's expense.

No evidence is provided to support the suggestion that the taxpayer has funded 'unnecessary' litigation. Even if this were correct, PLP make two observations in response.

First, the majority of the proposed cuts apply to Legal Help, which does not fund litigation. The provision of early advice and assistance under the Legal Help scheme can, and often does, enable individuals to resolve their problems *without* litigation, whether by correspondence and negotiation or by the provision of advice that enables modification of an individual's own position or expectations.

Secondly, if unnecessary litigation has indeed been funded to date, it should not have been. The existing Funding Code properly contains requirements that funded cases be of sufficient importance, and have sufficiently good prospects of success, to warrant the provision of public funding.

As to first principles, the unqualified concept of access to justice for all was first enshrined in the Magna Carta (chapter 40). The same principle was reflected in the original intention of modern civil legal aid in the Legal Aid & Advice Act 1949, that: *'no one will be financially unable to prosecute a just and reasonable claim or defend a legal right.*

Legal aid expanded into areas of law such as debt, benefits and housing precisely because it was recognised that vulnerable individuals were otherwise unable to assert or defend their legal rights in those areas. The assertion that legal aid has "expanded beyond its original intentions" is quite simply wrong. Legal aid expanded in an attempt to stay true to its original intentions. And it should be noted that at the conception of the modern legal aid scheme, 80% of the population were financially eligible. That figure now stands at 30%.

We note that the government considers that it will reduce the fiscal deficit to cut the legal aid budget. The evidence suggests otherwise (we would refer to the research by the Citizens Advice Bureau (CAB) which suggests that every £1 of legal aid expenditure on housing, debt, benefits and employment advice in fact saves the state £2.34, £2.98, £8.80 and £7.13 respectively). Even if the government's projected costs savings are correct, to assert that cost-cutting also represents an ideological improvement is disingenuous. The MoJ's own impact assessments, flawed as they are, recognise that injustice is likely to result from many of these proposals, and that it will be the most vulnerable in society that will bear the brunt.

PLP supports the approach of taking the following four factors into account when deciding which cases should attract funding;

(i) the importance of the issue;
(ii) the litigant's ability to present their own case;
(iii) the availability of alternative sources of funding; and
(iv) the availability of other routes to resolution.

We have kept these factors in mind in our response.

(1) THE SCOPE PROPOSALS

We have serious concerns about most of the proposals to remove certain categories of law from scope and our detailed comments are set out below. However, the areas which cause us the greatest concern are: the removal from scope of all welfare benefits advice, all asylum support advice, all debt advice and all non-asylum immigration advice and representation.

ASYLUM/IMMIGRATION

We support the proposal that issues regarding asylum are to remain in scope.

Asylum support

We are strongly opposed to the removal from scope of advice on asylum support under s.4 and s.95 of the Immigration and Asylum Act 1999.

In relation to asylum support, we cannot see how these proposals can be justified given the four factors, set out above, which have purportedly been applied. To be entitled to asylum support a person/family must be destitute. Asylum support comprises a subsistence level of support and adequate accommodation. Where asylum support is delayed or terminated, individuals and families are unable to meet their basic needs for food, clothing and shelter. To the individuals concerned, it cannot be disputed that the issue is of crucial importance.

We note that the justification for retaining homelessness in scope is the 'severity of the potential impact on the livelihood, health, safety and well-being of the litigant and their family'. And, in relation to substantive asylum issues, the "particular vulnerability of this group". That being so, it is incomprehensible to propose to remove from scope advice on asylum support. In contrast to the non-asylum seeker facing homelessness, the asylum seeker is in a much worse position: they are prohibited from working and excluded from mainstream benefits – if asylum support is wrongly terminated, they face inevitable homelessness and destitution.

In relation to the litigant's ability to present their own case, the asylum seeker's vulnerability is recognised. In addition to the trauma they may have suffered, most clients will not have English as a first language which will further hinder their ability to present their own case. Furthermore, the destitution suffered by asylum seekers whose support is terminated or refused may prevent them from participating in an appeal; they will not have the means to travel to the hearing, to photocopy important documents or to post or fax such documents to the tribunal.

PLP would expect to see a dramatic increase in destitution which will affect disabled adults and families with children. This, in turn is likely to lead to increased pressure on publicly funded services, such as social services and health services and increased public spending.

Immigration where the individual is not detained

At paragraph 4.202 the consultation document makes the claim that:

> *"As the tribunal is designed to be user-accessible, and interpreters are provided free of charge for hearings, we do not consider that the class of individuals in these immigration cases will be incapable of navigating their way through the tribunal system. We do not consider that individuals in theses immigration cases are likely, in general, to be particularly vulnerable. They will not face the same potential traumatisation issues as those seeking asylum, and are more likely to be able to represent themselves, given that these cases do not generally involve complex legal issues".*

With respect to the drafter(s) of the consultation document, anyone with a basic knowledge of the relevant case law and some experience of how the immigration and appellate systems operate will appreciate that this paragraph contains a number of false assumptions.

These cases "do not generally involve complex legal issues"

As the consultation document appears to accept (at paragraph 4.201), it is not uncommon for issues of family and private life to be raised in a non-asylum immigration case brought by a claimant who is not detained. These cases are highly likely to depend on the outcome of an assessment of Article 8 of the European Convention on Human Rights, first by the Home Office decision-maker, then on appeal by the First Tier Tribunal, and then – if an arguable error of law can be identified – by the Upper Tribunal and the higher appellate courts. Other cases will depend on the assessment of the rights of applicants and their families under European Union Law, and others will depend on an assessment of whether the applicant made out a claim (a) under the Immigration Rules, or (b) for discretion to be exercised outside the Immigration Rules.

The proper approach to Article 8 ECHR in immigration cases has repeatedly come before the Supreme Court (and, before the creation of the Supreme Court, the House of Lords) and the Court of Appeal in England and Wales, over recent years. We have seen a document dated 4 February 2011 produced by barristers at Mitre House Chambers entitled "Compendium of Higher Court Article 8 cases between January 2006 and December 2010", comprising of summaries of 77 cases heard during this period. Of those 77 cases, 64 do not appear to have involved issues of detention. Of these 64, 52 were heard by the Court of Appeal, 9 by the House of Lords, 2 by the Supreme Court and one by the European Court of Justice. The frequent need for the guidance of the higher courts on Article 8 reflects the complexity of the law.

As for European Union Law, and applications under the Immigration Rules and outside of the Immigration Rules, these matters have also generated significant volumes of litigation in the European Court of Justice and the higher domestic courts, and cannot reasonably be said to be generally straightforward.

The complexity of immigration law has been acknowledged by the senior judiciary. For example, in a short concurring judgment following the lead judgment of Rix LJ in *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773, Longmore LJ stated:

> *"It is unfortunate that this court has now construed Rule 322(1A) to mean the opposite of what, at least on one view, it appears, on its face, to say. But one must remember that, as pointed out in MO (Nigeria,) [2009] 1 WLR 1230, the immigration rules are statements of policy not the law of the land. In these circumstances formal statements in Parliament or in correspondence with interested parties cannot be gainsaid by the Secretary of State when it comes to interpreting the Rules.*
>
> *I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules*

themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done." [86-87]

In PLP's view, the assertion in the consultation paper that this area of law does not involve complex legal issues does not withstand scrutiny, and smacks of complacency and/or wishful thinking on the part of the Government.

Evidence preparation

In all immigration cases, the evidence submitted by the applicant in support of the claim and/or on appeal is liable to be determinative of the outcome. The types of documentary evidence typically required in an immigration matter include witness statement evidence, expert evidence, documents originating from the applicant's country of origin translated into English, and DNA tests. In appeals, such evidence together with a paginated bundle, a skeleton argument and a chronology of events will typically be required to be filed and served not later than 5 working days before the full hearing, or 10 days in the case of an out-of-country appeal, (see Practice Direction 7.5 of the Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal).

Without public funding for expenses of this sort, an impecunious applicant whose English may be poor is unlikely to be able to properly prepare a claim or an appeal. In our adversarial system, that will lead to injustice as meritorious claims and appeals are rejected.

The consultation document places emphasis on the availability free of charge of court interpreters. But this has no relevance to the preparation of evidence in support of a claim or of an appeal. In particular, a court interpreter provided free of charge on the day of the hearing, will not be able to ensure a claim or appeal is properly prepared.

Accordingly, by the time many meritorious claims get before the First Tier Tribunal, it will simply be too late to ensure a just outcome. In our adversarial system, the onus is on the appellant to make good an appeal. Inadequacies in the evidence filed in support of an appeal to the First Tier Tribunal will not generally constitute a point of law sufficient to found an appeal to the Upper Tribunal.

Appeals to the Upper Tribunal and beyond

Appeals to the Upper Tribunal are with leave on points of law. Although the consultation document asserts that an unrepresented appellant should be able to "navigate" the system, it does not appear to go so far as to claim that a point of law sufficient to ground an appeal to the Upper Tribunal can be identified without legal advice. That being the case, it follows that the absence of legal advice effectively bars access to the Upper Tribunal and the higher courts. This clearly discriminates against impecunious appellants.

The unfairness is aggravated where an appeal to the Upper Tribunal is brought by the Secretary of State (or Entry Clearance Officer). If permission is granted, the impecunious

immigrant or sponsor will be expected to make submissions on points of law against the Secretary of State (or Entry Clearance Officer) who is very likely to be represented. The availability of a court interpreter free of charge is manifestly inadequate to ensure even the semblance of equality of arms.

The situation becomes worse if permission to appeal is granted to enable the appeal to proceed in the Court of Appeal. The same issues of identification of grounds of Appeal and equality of arms arise in cases before the Court of Appeal, but in addition, an impecunious immigrant or sponsor will now be exposed to a costs risk if the appeal is unsuccessful and an order for costs is made in favour of the Secretary of State or Entry Clearance Officer.

In summary, therefore, the complexity of the law, and the need to provide supporting evidence for a claim or an appeal will have clearly foreseeable consequences for impecunious immigrants or sponsors who are eligible on means for public funded advice but cannot access legal advice because of the removal of non-detained non-asylum immigration law from scope:

(1) immigration applications by such people are liable to be inadequately drafted and evidenced;

(2) appeals to the First Tier Tribunal are liable to be pursued on misconceived grounds, with inadequately drafted evidence;

(3) access to the Upper Tribunal will effectively be barred for immigrants and sponsors unless an arguable point of law can be identified without legal advice (which due to the complexity of the law, will very rarely happen);

(4) exposure to the risk of being ordered to pay the costs of the Secretary of State or Entry Clearance Officer will have a chilling effect on the pursuit of onward appeals, even if arguable points of law can be identified.

CLAIMS AGAINST PUBLIC AUTHORITIES

We support the proposal to retain in scope such claims where they concern (i) serious wrong-doing [deliberate harm or behaviour going well beyond simple negligence or breach of contract] (ii) abuse of process (iii) significant breach of human rights, or (iv) where they are of Significant Wider Public Interest (and where part of a MPA where likely damages exceed £5,000.

Damages claims against public authorities

We oppose the proposal that claims for damages should not be viewed as being of sufficiently high importance to warrant intervention and support in the form of legal aid. Where a public authority has been guilty of serious wrong-doing, abuse of process or significant breach of human rights, the principal remedy is a claim for damages. Such

claims play a crucial role in holding public bodies to account and ensuring that those who have suffered as a result of wrong-doing have a remedy.

Further, if the proposal of a SLAS is to be feasible, a proportion of damages claims must be funded by the legal aid scheme.

Wider public interest

Paragraph 4.238 of the consultation document states:

> *"We propose that, in future, public interest will be a relevant feature in the civil legal aid merits criteria … but it will no longer be a basis for bringing back into scope otherwise excluded cases"*

It is submitted that it would be a mistake to remove "exceptional" funding for public interest cases in areas to be brought out of scope solely on the basis that:

> *"cases that genuinely have the potential to yield significant wider benefits to the public are most likely to arise in categories of law which we intend should be retained in scope (for example, judicial review or claims against public authorities)" (paragraph 4.254 of the consultation document).*

While such a case may be "most likely" to arise in a category of law that is to be kept in scope, it seems to be accepted by the Government that such a case may also arise in a category to be removed from scope. Whether or not such cases would "most likely" arise in cases to be kept within scope, there appears to be insufficient justification for the removal of the Lord Chancellor's power to grant funding exceptionally.

So for example, if the Government's proposals as to scope were to be implemented, it would mean that no appeal could be funded in the Upper Tribunal:

(1) in a welfare benefits matter, even where the outcome might, for example, affect benefit entitlement for many thousands of people; or

(2) in an immigration matter, even where the outcome might, for example, clarify the rights of thousands of foreign workers in the UK.

As stated above, onward appeals from the Upper Tribunal in such cases would have to be brought or defended by litigants in person, who would be exposed to a risk of being ordered to pay the other side's costs. This would inevitably have a chilling effect on potential litigants considering whether to litigate partly in the public interest.

Furthermore, granting public funding for a case that has significant wider public interest is likely to result in costs savings as the case can be properly argued ensuring that the legal point is established and avoiding multiple cases involving the same point being pursued by litigants in person.

Insofar as the Government is concerned that the power to grant exceptional funding might be exercised in cases which attract insufficient wider public interest, guidance could and should be given as to what wider public interest is considered sufficiently “significant” to attract funding.

CLAIMS ARISING FROM ALLEGATIONS OF ABUSE AND SEXUAL ASSAULT

We support the retention in scope of such claims.

CLINICAL NEGLIGENCE

We oppose the proposal to remove from scope all advice and representation. If the only way to fund such claims is by way of a CFA we would anticipate that many providers will cease to undertake such cases, leaving the victims of clinical negligence without a remedy.

COMMUNITY CARE CASES

We support the proposal to Legal Help and Legal Aid for judicial reviews and for civil injunctions against non-state care institutions.

If it is the case that the proposal will mean that complaints will no longer be within scope we would oppose this. Complaints are one of the main ways of obtaining redress in community care cases and many clients with community care issues will be vulnerable and unable to pursue complaints without help.

GENERAL CONSUMER AND CONTRACT

We do not have the expertise to comment.

CICA APPLICATIONS

We do not have the expertise to comment.

DEBT

We note that the foreword to LSC Strategic Plan 2009-2012 states:

> *“The current extraordinary economic climate has created an even greater urgency for us to deliver services that meet the needs of our clients, particularly in the areas of debt, housing and employment. We have already taken action to increase availability of services and funding in these priority areas.”*

More recently, on 1 Feb 2011, Hansard records the following [Column 774W]:

> *Mr Hoban (Financial Secretary to the Treasury): "The Government remain committed to helping poorer households to access appropriate financial services, to improve their financial resilience and to avoid falling into unsustainable levels of debt."*

As indicated in the LSC's strategic plan, the need for debt advice is all the greater in the current economic climate.

We note that the consultation paper acknowledges that debt and welfare benefits problems may lead to the home being at risk if not dealt with expeditiously [para 4.79]. It is irrational to nevertheless withdraw advice from these areas only to make an exception where there is an immediate risk of loss of the home.

We strongly oppose the proposal to remove debt advice from scope. It is well established that to be effective debt advice is needed at an early stage. To provide debt advice only where the client's home is at immediate risk of repossession is a false economy as it is unlikely at this stage to be possible to prevent repossession and the additional costs to the state, not to mention the social cost, of homelessness is likely to outweigh any possible saving.

If the government's aim is to reduce public spending, this is short-sighted. A person/family facing an eviction will be entitled to public funding in respect of a possession claim but, if substantial arrears have accrued, it will be unlikely that eviction can be prevented. Following eviction he/she will be entitled to Legal Help/representation in relation to a homeless application, review and appeal. Further, local authority resources will be applied dealing with the homeless application and in providing temporary accommodation. The financial cost to the public purse in dealing with a homeless family will outweigh any savings, not to mention the social costs, e.g. disrupted education, impact on physical and mental health.

DISCRIMINATION PROCEEDINGS

We support the proposal to retain all legal aid as it is now.

DOMESTIC VIOLENCE AND FORCED MARRIAGE/INTERNATIONAL CHILD ABDUCTION/ANCILLARY RELIEF AND CONTACT CASES

PLP are not family practitioners and cannot comment on the proposal to remove from scope ancillary relief proceedings and private law family and children proceedings. However, we note that it is accepted that an exception should be made for those who are the victims of domestic violence.

In our view the criteria set out to determine who is a victim of domestic violence are so restrictive that it is clear that many people who have been subject to domestic violence and are in fear of their opponent will be excluded from public funding.

EDUCATION

We oppose the proposal to remove all advice and representation for education cases.

Education appeals to the Upper Tribunal are appeals on points of law in an area where there is a complex statutory scheme and a substantial body of case law.

These are difficult cases for any lay person to bring but the parents of children with Special Educational Needs (SEN) are disproportionately likely themselves to have SEN and come from a background of disadvantage. Further, children from BME communities are disproportionately excluded from education so this is likely to impact on the BME community. Applying the government's criteria, particularly in relation to the importance of the issue (the child's right to education), the litigants' ability to present their own case and the availability of alternative funding, we can see no justification for excluding from scope SEN cases, permanent exclusion cases and failure to make educational provision cases.

As with many of the proposals, to remove advice and representation will impact dramatically on the cost and efficiency of the Court and Tribunal Services.

The work is currently carried out by a small number of expert providers which ensures efficiency and the proposed savings (around £0.5 million) are relatively small. We do not think that the costs saving justifies the proposal.

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EMPLOYMENT

We would oppose the removal of all employment advice from scope.

Again, we refer to the LSC's Strategic Plan 2009-2012 which states:

> *"The current extraordinary economic climate has created an even greater urgency for us to deliver services that meet the needs of our clients, particularly in the areas of debt, housing and employment. We have already taken action to increase availability of services and funding in these priority areas."*

ENVIRONMENTAL MATTERS

We support the proposal to retain in scope

EUROPEAN UNION CROSS BORDER DISPUTES

We support the proposal to retain in scope

FAMILY MEDIATION IN PRIVATE LAW CASES

We do not have the expertise to comment.

HIGHER COURTS – Court of Appeal, Supreme Court, European Court of Justice

We strongly oppose the removal of legal aid for all categories no longer in scope.

First, it is self-evident that where permission to appeal is given, there is likely to be an issue of some complexity to resolve. A litigant in person will be at a severe disadvantage, whether as appellant or respondent. If the unrepresented litigant is the appellant, s/he will be responsible for the compliance with the relevant Practice Directions in relation to the preparation of bundles and skeleton argument. It is unlikely s/he will be able to follow the relevant practice directions and the time of the court staff and judiciary will be taken up trying to ensure that the preparation for appeals is adequate.

Secondly, the unrepresented litigant will be at risk of an adverse costs order if unsuccessful. In relation to an unrepresented respondent, this will have a particularly unjust effect: a person who brings a claim in a tribunal, which is a 'no costs jurisdiction', could find themselves responding to an appeal and at risk of an adverse costs order.

We note that the government recognises that the proposals to reduce the scope of legal aid will lead to an increase in the number of litigants representing themselves in court in civil and family proceedings which may lead to delays in proceedings and poorer outcomes for litigants [4.266]. It is claimed:

> *There is, however, little substantive evidence on the impact that a litigant-in-person has on the conduct and outcome of proceedings. Research conducted by the former Department for Constitutional Affairs in 2005 did not find a significant difference between cases conducted by a litigant-in-person and those in which clients were represented by lawyers, in terms of court time. [4.268]*

The research referred to was conducted by Richard Moorhead and Mark Sefton in 2005 and uses a sample of data on unrepresented litigants from four courts in first instance civil and family cases, excluding small claims.[1] The research, although based on a fairly small sample found that there was at best only modest evidence that cases involving unrepresented litigants took longer. So in terms of court *time* there may be little difference but what is not addressed is whether litigants in person have more or less *success* than litigants with representation.

The executive summary of Moorhead and Sefton's research points out:

> *Participation by unrepresented litigants is not the same as active defence. Levels of activity suggested cases involving unrepresented litigants may have involved more court-based activity than those cases where all parties were represented. Within*

[1] http://www.familieslink.co.uk/download/july07/DCA%20view%20of%20LIPs.pdf

cases involving unrepresented parties, participation by unrepresented litigants was generally of a lower intensity than participation by represented parties.

… Unrepresented litigants participated at a lower intensity but made more mistakes. Problems faced by unrepresented litigants demonstrated struggles with substantive law and procedure. There was other evidence of prejudice to their interests.

Richard Moorhead has responded to the use of his research in the legal aid consultation paper.

What the research essentially shows is not that litigants in person gum up the courts with vexatious cases and applications (though some do) but that most struggle to participate in their cases if they participate at all. Where they do participate, the evidence suggests they do so sporadically; they sometimes damage their own interests as a result; and they probably create more work for their opponents and the courts themselves.[2]

Richard Moorhead also recognises that where unrepresented litigants do participate fully they are probably often more time consuming, which is what the judges see.

There is a real risk that litigants in person, particularly in the appellate courts, will either be unable to fully participate in the proceedings or, if they do, will greatly increase the amount of court/judicial time spent on each appeal.

We refer to Richard Moorhead's own response to the consultation: "without legal aid there needs to be other mechanisms of support to encourage litigants to participate and to do so constructively. I see no real recognition of that in the green papers."

In order to ensure access to justice, it is likely that in cases in which the appellant or respondent is unrepresented, the courts will have to appoint an *amicus* or, where the unrepresented person is the respondent, may have to order that the appellant pay the costs of the respondent as a condition of appealing.

Alternatively, the MoJ may be forced in most cases to use its discretion to grant exceptional funding.

It is PLP's view that any likely saving will be outweighed by the additional costs in terms of court time and MoJ time (administering applications for exceptional funding). In addition, in terms of access to justice, it is wrong in principle in an adversarial system to expect an unrepresented litigant to pursue or respond to an appeal against a party who will usually be represented by experienced counsel.

HOUSING

[2] http://lawyerwatch.wordpress.com/2010/12/16/litigants-in-person-what-the-research-actually-says/

We support the proposal to retain in scope possession cases (including MHA eviction cases), disrepair damages counterclaims in possession cases, cases concerning homeless applications, reviews and appeals, ASBOs and ASBIs.

We note that it is recognised that debt and welfare benefits cases may lead to home being at risk if not dealt with expeditiously but priority is where home is at immediate risk [para 4.79]. As indicated above, it is, in our view, a false economy to save money on legal aid for early debt advice and welfare benefit advice when the consequence is likely to be increased homelessness. Legal aid spending on possession proceedings and homeless advice is likely to increase, not to mention, the cost to local and central government in dealing with the consequences of increased numbers of homeless families.

Disrepair

We oppose the proposal to retain in scope only cases of serious housing disrepair where the claim is not primarily for damages. While we would accept that disrepair claims that are predominantly claims for damages may be suitable for CFA funding, if a SLAS is to be funded from a percentage of legally aided damages claims, it will be necessary for legal aid to be available for damages claims. Further, given the high success rate for disrepair actions, the net cost to the legal aid fund is minimal.

Other Housing cases

We do not have the expertise to comment on the proposal to remove all advice and representation in the following types of claim:

- Enforcing RTB, right to buy freehold or extend lease;
- Set aside legal charge or transfer of property;
- Damages and injunction for change of use of premises;
- Action under HGCRA 1996;
- LTA 1954 – application for new tenancy;
- Action for re-housing (though we do not know what is meant by this phrase);
- Access to Neighbouring Land Act 1992;
- MHA action not concerning eviction.

We note that it is proposed to remove from scope the following claims:

- Wrongful breach of quiet enjoyment, and
- Trespass.

If the effect of this would be to prevent occupiers from bringing actions following unlawful eviction and/or harassment by landlords, we would oppose this. However, it is unclear how this would operate as most claims for unlawful eviction and harassment by landlords would rely on additional causes of action which remain in scope, such as under the Protection from Harassment Act and the Housing Act 1988.

IMMIGRATION DETENTION

See above.

INTERNATIONAL CHILD ABDUCTION

We support the proposal to retain current provision.

INTERNATIONAL FAMILY MAINTENANCE

We support the proposal to retain current provision.

MENTAL HEALTH

We support the proposal to retain in scope mental health and capacity detention cases

MISCELLANEOUS

We do not have the expertise to comment.

PUBLIC LAW

We support the proposal to retain current provision.

However, we note that it is proposed that legal aid for public law cases would only be available where ADR such as complaints procedures or referral to an ombudsman have not succeeded. This would be unworkable as it is impossible to pursue ADR *before* making a claim for judicial review. Claims for judicial review must be made promptly and in any event within three months. To pursue a complaint and/or ombudsman referral would take several months by which time a claim for judicial review would be out of time.

Further, judicial review is a remedy of last resort. If the claim could be resolved by way of ADR, complaint or ombudsman, permission to bring a claim for judicial review would not be granted.

While we support the retention of public law cases, we note that the rationale for this is that public law "enables individual litigants to check the exercise of executive power". This, we agree, is a fundamental right and a necessary part of a democratic society. However, issues relating to welfare benefits and asylum support are also about individuals challenging the exercise of executive power in relation to an issue of crucial importance to the individual: access to subsistence and shelter. Yet, it is proposed that legally aided assistance in relation to those issues will no longer be available.

PUBLIC LAW CHILDREN

We support the proposal to retain in scope.

REGULATION AND ENFORCEMENT OF JUDGMENTS UNDER EU LEGISLATION
And Hague Convention on Parental Responsibility and Measures for the Protection of Children

We support the proposal to retain in scope.

INQUESTS

We do not have the expertise to comment.

PROTECTION FROM HARASSMENT ACT 1997

We support the proposal to retain in scope.

QUASI-CRIMINAL PROCEEDINGS

We do not have the expertise to comment.

WELFARE BENEFITS

We strongly oppose the proposal to remove all advice and representation for welfare benefits.

We note that the importance of public body accountability is stated to justify the retention of judicial review/public law in scope. However, claims in respect of welfare benefits are also always claims against a public body – either the government of a local authority.

With reference to the government's stated criteria, we would comment as follows:

(i) the importance of the issue

Benefit levels are set at subsistence rates. Therefore while the amount at issue may not be high, it is of crucial importance to the recipient; it is the means of purchasing food, paying for light and heating, clothing and for accommodation.

(ii) **the litigant's ability to present their own case**

Many aspects of welfare benefit law are extremely complex, such as eligibility under the EEA regulations and medical evidence in relation to disability benefits.

(iii) the availability of alternative sources of funding

We note that amongst the agencies referred to as providing advice in this area is CPAG, which does not provide direct advice to individuals, only specialist support to other advisers, and Age UK which, by definition provides advice only to a very limited class of individual. Others identified cannot provide urgent assistance to someone without any form of subsistence or shelter (e.g. FRU, the Parliamentary Ombudsman).

PLP welcomes the fact that judicial review of decisions by the DWP and public bodies such as local authorities will remain in scope. However, for potential judicial review claims in respect of benefit decisions to be identified, those in dispute with the DWP or local authority need access to initial advice. The removal from the scope of Legal Help of welfare benefits advice will mean that unlawful policies and interpretations of legislation will go unchallenged.

PLP would expect to see an increase in destitution affecting disabled adults and families with children. This, in turn is likely to lead to increased pressure on publicly funded services, such as social services and health services and increased public spending.

As is the case for the removal of debt advice, those who are unable to resolve their welfare benefit problems are likely to face the loss of their home. An increase in homelessness and threatened homelessness will lead to increased legal aid spending both on possession proceedings and homelessness. Further, if an individual or family is made homeless there will be a cost to the local authority in relation to the provision of homeless assistance and accommodation, not to mention the social costs.

EXCEPTIONAL FUNDING SCHEME

If the government proceeds to remove the proposed areas of law from scope it is clearly essential to operate a scheme whereby funding can be granted on an exceptional basis. We would support such a scheme but would not support a scheme that is restricted to cases in which funding is necessary for the UK to meet its legal obligations.

(2) A SINGLE GATEWAY TO CIVIL LEGAL AID SERVICES

PLP would agree, as stated in paragraph 4.272, that clients should be able to access information and legally aided advice via the telephone and online. PLP would have no objection to “a simple, straightforward telephone service”. However, it is one thing to offer such a service as part of the Community Legal Service provision and quite another to propose that the CLA helpline should be established as a single gateway to civil legal aid services.

What appears to be proposed is that a caller will first speak to an operator who will decide whether the caller is eligible for legal aid, i.e. financially eligible and calling about an issue that is within the scope of legal aid. If the operator decides the caller is eligible, the caller will in most cases be transferred to the CLA specialist telephone advice service. Clients will then be referred to face to face advice services if the case is too complex to

deal with by telephone or if the client has specific needs, such as mental impairment, which means their needs would not be met by telephone advice. Presumably if the operator decides the client is not eligible, the caller will then be unable to access any form of legally aided advice, whether by telephone or face to face.

We believe that the government has not considered the implications of this proposal, has inadequate data on which to base such a proposal and that, on the limited information in the consultation paper, it is impossible to adequately respond to this proposal.

We would however make the following observations:

The CLA 'operators' (not, we understand legal advisers) would be required to assess not only financial eligibility but also to diagnose the nature of the caller's legal problem and the most appropriate remedy. Diagnosis and advice on appropriate remedy is one of the most crucial aspects of giving legal advice.

At present the CLA determine only financial eligibility which is far less complex than diagnosing whether a particular legal problem and/or remedy falls within the scope of legal aid. Nevertheless, as is made clear in the clarification note, currently where a caller is referred to face to face services, the provider is required to verify eligibility, which takes into account the need to minimise the risk of clients incorrectly being deemed eligible. Although it is not acknowledged that a client may also be incorrectly deemed ineligible, at least there is recognition that an error may be made and that a further check will be made by the face to face provider. Under the 'single gateway' proposal there will be no such check if a caller is advised by the operator that s/he is not eligible for face to face advice, whether on the grounds of financial eligibility or the nature of the legal problem.

We note that in the clarification note it is stated that "for emergency cases clients will not be required to first ring the helpline". Often, however a client may not realise that urgent legal action is needed or may perceive their case to be urgent when it is not. No indication is given of what will be defined as an emergency case, or, more importantly, who will be responsible for deciding whether a case is an emergency.

Before consulting on the 'single gateway' proposal it will be necessary for the MoJ to set out the following information:

- What will be the training/expertise of the telephone operators and how will this be assessed and monitored?

- What appeals process will be in place for a caller who is denied access to a face to face adviser?

- What provision will be made for cases in which negligent advice is given and a caller suffers loss?

- How will an emergency be defined and how will face to face providers be paid for advising a person who believes, wrongly, that their case is an emergency?

A paid for service

It is proposed that callers who are ineligible for legal aid can be referred by CLA operators to a 'paid-for' service and that it is expected that the providers of CLA telephone advice to non-eligible callers would pay a referral fee.

While in principle we would have no objection to an expansion of the CLA to offer paid-for advice to non-eligible callers, if the government proceeds to remove, for example debt and welfare benefits advice from scope, we would strongly oppose the proposal that callers on low incomes (currently financially eligible for legal aid) could, under this scheme, be charged for such advice.

Data relied upon

At para 2.29 it is claimed that "the introduction of the Legal Services Community Legal Advice (CLA) helpline has demonstrated that advice delivered via the telephone can be as good quality as, or better than, face to face advice, and is preferred by many vulnerable groups in society." The footnote to this statement refers to a Community Legal Advice (CLA) Satisfaction Survey which, it is claimed, "demonstrates that client satisfaction with the specialist services provided through the CLA helpline is higher than equivalent face to face service, and that the service is highly regarded among vulnerable clients. For example, 87% of disabled clients and 90% of Black, Asian and Minority Ethnic (BAME) clients said that they would recommend the service to others".

This 'survey' was disclosed to us late on Friday 11 February so it is impossible to thoroughly evaluate. However, it appears that the small survey (125 disabled callers and 121 BME callers) focuses solely on client satisfaction which is not an indicator of the quality of the advice. Moreover, none of the questions the callers were asked related to whether they 'preferred' telephone advice to face to face advice and there is no reference to any equivalent survey in relation to face to face advice. This survey and the data in the consultation paper simply do not support the assertions that telephone advice can be as good quality as, or better than face to face advice or that it is preferred by vulnerable groups. At present those people who call the CLA advice line choose to do so and have the option of making an appointment to see a face to face adviser. Most individuals with legal problems will have documents and correspondence which needs to be considered. In our experience it is impossible to give comprehensive legal advice by telephone without sight of a client's documents.

(3) LITIGANTS IN PERSON

PLP believes that the consultation paper is based on wildly overoptimistic assertions about (a) the availability of alternative sources of advice and assistance; and (b) the

ability of the vast majority of those currently eligible for Legal Help and public funding to resolve their problems without recourse to the courts and tribunals and, if necessary, to represent themselves in the courts and tribunals without a lawyer, without financial assistance with evidence preparation (e.g. in relation to the cost of expert evidence), and without costs protection for onward appeals.

We refer to our submissions at pages 3-6 and 10-12 above (with reference to immigration tribunals and appeals on matters out of scope).

The consultation paper generally proceeds on the assumption that tribunal procedures are accessible and that the law administered within the tribunals is simpler than that administered by the courts. PLP disputes this assumption and refers to the judgment of Sullivan LJ in MR (Pakistan):

> *"Immigration and asylum law is undoubtedly complex but so too is the law administered by the other Chambers of the First-tier Tribunal and the Upper Tribunal. To take one example, social security law, the area of law in issue in Cart is, at least to this non-expert in that particular field, often bafflingly complex and it not infrequently raises questions as to the manner in which the United Kingdom is, or is not, implementing the obligations imposed by various European Directives dealing with such matters as equality/discrimination. The ECHR permeates to a greater or lesser extent the work of all of the Chambers of the First-tier Tribunal and the Upper Tribunal." [52]*

PLP maintains that to remove legal aid in these important areas of law will have the following effects:

1. Many will be unable to enforce their rights and will suffer from unlawful decision making, chiefly by public bodies (welfare benefits, immigration, asylum support);

2. Those who attempt to enforce their rights will either find themselves unable to understand the legal issues and to fully participate in the process, or, if the courts are able to assist them to do so, hearings will take much longer than at present with either long delays in the litigation/tribunal process or additional cost to the court service, in relation to the recruitment of extra court staff and judicial appointments.

The Public Law Project

14 February 2011