Office of the Children's Commissioner:

Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales

February 2011

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Championing Children and Young People in England

Contents

Office of the Children's Commissioner **3**

1. General introduction **4**

2. Education law proceedings **5**

3. Immigration and asylum proceedings **15**

4. Private law proceedings (Children Act 1989) **31**

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Office of the Children's Commissioner

The Office of the Children's Commissioner is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. Section 2(11) of the Act places a requirement that "*in considering for the purpose of his function under this section what constitutes the interests of children (generally or so far as relating to a particular matter) the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child (UNCRC)*."

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. This duty is extended to young people up to the age of 21 where they have been in care or have learning difficulties. The Children's Commissioner also has a duty to speak on behalf of all children in the UK on non-devolved issues which include immigration, for the whole of the UK, and youth justice, for England and Wales. One of the Children's Commissioner's key functions is encouraging organisations that provide services for children always to operate from the child's perspective.

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1. General introduction

We note that paragraph 4.4 of the consultation states: *"The starting point for our consideration has been to examine, from first principles, which issues should attract public funding in light of the financial constraints. In reaching our proposals, we have taken into account our domestic, European and international legal obligations."*

The UK is a signatory to the United Nations Convention on the Rights of the Child (UNCRC), an international legal instrument which the Government has a clear obligation to uphold. A number of rights held by children and expressed in the UNCRC are engaged by the proposed changes to legal aid, particularly Article 12:

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose,* ***the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child****, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*[1]

In addition to the UNCRC, the Children's Commissioner wishes to draw to the attention of the Ministry of Justice the guidelines adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, which relate to child-friendly justice ("the guidelines").[2]

These guidelines intend to enhance children's access to justice, and help governments ensure that children are treated properly by and in the justice system. They apply to all domestic courts and tribunals, and aim to ensure that in legal proceedings, the rights of children, including the rights of information, to representation, to participation and to protection, are fully respected.

This response largely focuses on the proposed changes to the scope of legal aid, as contained in chapter four of the consultation document.

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[1] *Convention on the Rights of the Child*, Office of the United Nations High Commissioner for Human Rights, September 1990, available at: http://www2.ohchr.org/english/law/crc.htm [accessed 1 February 2011].

[2] *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies, available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 [Accessed on 12 February 2011].

2. Education law proceedings

Question 3 - Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148-4.245 from the scope of the civil and family legal aid scheme? Please give reasons.

2.1 As noted in the general introduction, the Children's Commissioner is required to have regard to the United Nations Convention on the Rights of the Child (UNCRC) in exercising her duties.

- Article 23 of the Convention states that children with any kind of disability have the right to special care and support so that they can live full and independent lives.

- Article 28 gives all children the right to education. The Convention places a high value on education. It says that young people should be encouraged to reach the highest level of education of which they are capable.

2.2 The Committee of Europe's child-friendly justice guidelines ("the guidelines") note that specific protection and assistance may need to be given to more vulnerable children, such as those with disabilities.

2.3 More specifically, in relation to access to court and to judicial processes, the guidelines note that children should be allowed to effectively exercise their rights or act upon violations of their rights. The guidelines are clear that, where appropriate, domestic law should facilitate access to court for children who have sufficient understanding of both their rights and of the use of remedies to protect these rights, based on adequate legal advice. They state that any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.

2.4 If parents are unable to access legal aid to bring education cases on their child's behalf, and/or children capable of exercising those rights are prevented from doing so, it appears that the proposed restrictions engage the rights of children under the UNCRC, as well as breaching the guidelines.

2.5 In deciding what should remain in, or what should be taken out of scope, the Ministry of Justice has applied certain filters across the board; these are:

- the importance of the issue (paras 4.13-4.21)
- the litigant's ability to present their own case (paras 4.22-4.24)
- the availability of alternative sources of funding (para 4.25) and
- the availability of other routes of resolution (paras 4.26 & 4.27).

2.6 The same filters have been applied to all types of cases within all types of law, and therefore to all types of education case. Thus, a case involving an exclusion from school has been considered in the same way as a case involving a child who is not getting the appropriate support at school for their special educational needs (SEN). These types of cases are very different, as are their consequences. It is not appropriate, or fair to the children involved, for all education cases to be subject to the same approach when considering whether legal aid may be justified.

2.7 It is accepted that educational damages cases which are primarily about monetary compensation may fall within a lower objective importance for funding, but, if that is the case, they should not be grouped together with other cases which directly engage the rights of the child.

2.8 The Office of the Children's Commissioner notes that the proposal to take education cases 'out of scope' appears to have been made without the benefit of consulting with the Special Educational Needs and Disability Tribunal (SENDIST), the Special Educational Needs Tribunal for Wales (SENTW),or with the Department for Education.

Is the anticipated saving justified?

2.9 The current spend from the legal aid budget on education cases is £4 million per annum, which accounts for a small proportion of the total legal aid budget. The saving estimated to result from the proposed restrictions is thought to be in the region of, or below, £1 million per annum. This response sets out to demonstrate that the level of injustice and disruption that the proposed restrictions to legal aid will cause to children and their families, as well as to schools and local education authorities, outweighs the small financial savings that may be made, and may not have been properly considered or understood. We submit that the answer to the question, "Will these actions save the public purse money?" is: "not enough". In our view the degree of saving does not justify the actions proposed.

2.10 According to Legal Services Commission statistics, at least 92% of education cases are successful. The majority of these are SEN cases. This represents extremely good value for money. There are only 27 providers (including law centres) that offer education legal advice under the Legal Help Scheme in England and Wales. We understand that the high volume of work being handled by all 27 of these providers means that currently many cases are turned away. Solicitors are restricted by the Legal Services Commission as to the number of cases they can take on in any one year – meaning that currently only 1,944 education cases can be taken on annually.

2.11 It is estimated that one in five children in England may have SEN, amounting to approximately 1.7 million children. These children are disproportionately from disadvantaged backgrounds and are more likely than their peers to be excluded from school. We would hope that it would be a priority of the Government to ensure that these children are provided with an education suitable to their needs. In doing so, we would argue that money is likely to be saved in the long term, given that statistics indicate that those who are imprisoned, either as young people or as adults, tend to have had a disrupted school experience. Many struggle with literacy, numeracy, spoken communication and other basic skills, which a school experience appropriate to their needs would have helped them to develop.

Level of importance

2.12 The consultation paper says that education cases cannot be accorded the same level of importance as those concerning an immediate threat to life or safety, liberty or protection against homelessness. Yet education is recognised as a basic human right, and is one of the key children's rights in the UNCRC. Without access to an appropriate education, children from poor backgrounds or with SEN are more likely than their peers to end up in the youth justice system, resulting in a significantly greater financial as well as social burden to the state. It is well documented that a high proportion of prison inmates have learning difficulties, and come from lower socio-economic groups.

2.13 To most parents the education of their child, and perhaps even more so a child with SEN, is vital. An appropriate school place for a child with SEN may mean the difference between that child learning how to communicate, or remaining unable to do so, for life. In some cases children already dealing with considerable barriers to their success have been shown to become 'school-phobic', to suffer a decline in their mental and emotional wellbeing, and in extreme cases to become suicidal, if difficulties at school are not resolved through a more appropriate placement, or provision of the right support.

2.14 The consultation paper states that the issues at stake in community care cases are very important because they can substantially affect the individual's ability to lead an independent and fulfilled life. The same thing can be said for SEN cases, and those which concern a child whose access to education is at stake. The impact of an appropriate education on a child's ability to develop skills to carry them into independent adulthood is enormous. We do not agree that education cases never involve a threat to life or safety. The right education can directly affect an

individual's ability to live an independent and fulfilled life, to maintain good health and to avoid harm.

Personal choice

2.15 The consultation paper indicates that some education cases arise from personal choice, and therefore legal aid is less likely to be justified. If this is the case, it is a further reason why all education cases should not be considered together. Cases which do not include an element of special needs differ entirely from cases involving children with SEN, who have a right to be provided for at school, and therefore should remain within the scope of legal aid.

2.16 It is important to be specific about which cases have an element of personal choice. In the consultation document, the conduct of a child who has been excluded from school is cited as an example of 'personal choice'. This assumes that in all exclusion cases the child has behaved in the way that has been alleged by the school authorities. Such an assumption could be damaging to the child's ability to access legal support. To accept the school's view as being the only perspective on the issue would contravene Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), which upholds the child's right to have their views heard in all matters that affect them.

2.17 Personal choice can also be cited as a factor in some school admissions cases. However, this is not always the case. The proposed changes to scope should take into account those cases where children have moved to a new area out of necessity - for example, to escape domestic violence, because the family are travellers or refugees, or because the child has been seriously bullied and needs to escape a particular area. Access to legal aid makes a great deal of difference for families in such circumstances, and they should not be excluded from scope on the basis of a generalisation about the nature of admissions cases.

Litigants' ability to present their own case

Vulnerable clients

2.18 Some of the clients of education lawyers come from the most vulnerable and deprived groups in our society. We understand that many are in receipt of income support, and many are single parents caring for more than one child with special needs. Where children have special needs, often their parents share these or similar personal needs.

2.19 It is proposed that community care remains within scope of legal aid. This is because those in receipt of community care require support due to their age, illness or disability. We submit that children with special needs could be described in the same way; indeed, there is a fine line between SEN and disability. It seems to be anomalous that disability discrimination cases are to remain in scope, yet SEN appeals, which may revolve around the same fundamental issues, and which aim to improve the position for the future rather than compensating for past or present problems, are not.

2.20 The rationale for keeping community care within scope is that those who need help are likely to be vulnerable, and therefore less able to present their own cases without legal assistance. We submit that the 'typical' education client is similarly vulnerable, and may be equally unable to present his/her own case. SEN cases often involve disabled children with very complex needs. In the same way that community care cases are taken against the state, education cases are likewise; the procedures for bringing cases against the state in the stressful and emotional circumstances that surround many education cases are complex, daunting, and far beyond the capabilities of the typical client.

2.21 In relation to community care, the consultation puts forward a belief in a continuing role for legal aid to enable the elderly to be cared for adequately and with dignity. Many cases coming before the SEN Tribunal involve children with similarly highly complex and specialised needs. Without an appeal to the SENDIST (or SENTW in Wales),[3] they might otherwise receive either inadequate or no education. This appears to us to be inequitable.

Are education cases fact-driven?

2.22 The consultation document states that legal advice to the SENDIST - First Tier Tribunal is not justified, because the tribunal system is designed to be accessible to individuals without legal assistance and parents can generally present their case without specialist knowledge or representation. We disagree with this view. The law surrounding special educational needs is complex, and parents often find it impossible to present their case appropriately, or in the best possible light, without knowledge of the law. They therefore need recourse to specialists who have the appropriate knowledge.

[3] Please note that references to SENDIST in the rest of this document can be taken to refer to SENTW in Wales as well unless otherwise specified.

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Championing Children and Young People in England

2.23 One such complex area is that of calculating and weighing up the cost of a parental preferred placement against that of the placement put forward by a local authority. This is a common scenario in SENDIST appeals. In-depth knowledge of recent case law is essential in preparing for such a case. In the last few years there have been several conflicting judgments in the High Court and it is an area lawyers often have difficulty in arguing. It would be beyond any lay person to find their way through these matters, let alone one with vulnerabilities such as those described as characterising many parents of children with SEN.

2.24 The current SEN tribunal procedure is designed to resolve as many points in dispute as possible prior to the hearing. This involves case management and directions hearings throughout the period leading up to the formal tribunal hearing. These hearings in themselves would cause many clients difficulty, putting them at a disadvantage against a local authority with experience of dealing with such matters. Directions can sometimes involve each party putting forward written submissions on points in dispute. This again would be something far beyond the capabilities of vulnerable clients.

2.25 Working documents are now commonplace. In every case going through the SEN tribunal procedure, a working document needs to be drafted. In most cases this document goes back and forth many times between the parties before it is finalised. We argue that a parent without prior experience of statements of SEN would struggle to understand the best way of wording a particular section, or indeed what can, or ought not to be included in each section. Most parents require careful guidance to understand such a document. Caring for a severely disabled child is often a 24-hour job in itself, meaning that parents cannot in addition devote the necessary time and energy to preparing for a SENDIST appeal. In addition, parents and children alike often find dealing with the preparation for a tribunal stressful.

2.26 Equality is also an issue. Local authorities employ solicitors or barristers to represent them at SENDIST appeals, particularly in complex cases. If parents did not receive representation and assistance, this could reduce the chance of the disabled child in question receiving their entitlements.

2.27 The Lamb Inquiry ‘Special Education Needs and Parental Confidence’ published in December 2009 made numerous recommendations about children with SEN. In particular, it recommended that legal aid should be extended to cover representation at a SENDIST appeal. Currently, legal help covers preparation of a case, but not representation at a hearing.

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2.28 Paragraph 5.80 of the Lamb Inquiry report states: *"It is better for everyone if provision is made for children without recourse to the Tribunal. However, the cases going to a hearing are becoming more complex and issues under contention are more likely to be matters of law to be decided, rather than matters of fact to be established. Despite changes in the Tribunal System, many parents are finding appeals too difficult and complex and feel unable to pursue their claim without legal support. This leaves only those with considerable personal and financial resources able to afford representation."*

2.29 Paragraph 5.81 goes on to state: *"With increasing complexity in the interest of equity, Legal Aid should be available for parents attending a Tribunal hearing."*

2.30 It is worth noting that appeals to the Upper Tribunal, which used to be appeals to the High Court, are not generally accessible as described in the paper and are not entirely fact-driven. They are extremely complex legal cases for which, in the vast majority of instances, a barrister would need to be employed by both sides. It is not realistic to assume that parents who are not legally qualified could deal independently with an appeal on a point of law to the Upper Tribunal.

2.31 These often vulnerable clients would similarly be unable to prepare for and face admissions or exclusions appeal panels. These situations can be emotional and daunting to even the most educated and eloquent client, for whom, for example, English is their first language. Without knowledge of the law, or guidance on the relevant legal principles, it is highly unlikely a lay person could include all the relevant factual information, or indeed know whether the institution in question had acted reasonably and in accordance with the law, in matters of admissions or exclusions.

2.32 Having a parent represent themselves can also cause significant delay in dealing with cases, meaning that tribunals may handle the matter less efficiently than they would if the parents had received legal assistance. Reducing the legal aid budget will inevitably result in an increase to litigants in person. We consider the effect of this on the efficient running of tribunals has been underestimated. In SENDIST cases, for example, at every hearing there would be more points remaining in dispute than would otherwise have been necessary. This could result in longer hearings and cost more to the tribunal and local authorities. Good legal advice can in such cases be seen to save the system money.

The use of experts

2.33 The use of experts is crucial to SENDIST appeals. The panel in an appeal hearing will usually base their decision on the expert evidence presented to it. The value of such evidence is therefore high. Currently, the legal help scheme will cover the assessment of a child by an expert, and the preparation of a report to support the child's case. It will not cover attendance of an expert witness at the tribunal.

2.34 It is often difficult, and in complex cases can be impossible, to ascertain what a child needs without the input of an educational psychologist, speech and language therapist or occupational therapist. Without access to funds to cover such expert evidence, parents appealing to tribunals would stand little chance of success. Access to expert evidence is arguably even more important than access to legal assistance. In the majority of cases, as well as parents requiring assistance to identify the evidence required, they are also unable, of their own volition, to provide all the relevant factual evidence without the assistance of an independent expert.

Alternative sources of funding

2.35 The consultation paper envisages the existence of alternative funding for education cases in the form of Conditional Fee Agreements (CFAs). CFAs are not appropriate for anything other than damages actions. In relation to education cases, we understand that due to the nature of the issues, the expense and the complexity of the law, it has been impossible to use CFAs successfully. There is therefore no alternative source of funding for such cases, contrary to what the consultation document indicates.

Availability of other routes to resolution

2.36 The consultation paper puts significant weight on the availability of alternative sources of help to resolve education issues. In particular, the charities Advisory Centre for Education (ACE) and Independent Parental Special Educational Needs Advice (IPSEA) have been mentioned. We understand that neither of these charities was approached during the drafting of the consultation paper. We further understand that they have already confirmed that they will be able to give no more help, and support no more families, than they do at present. It is a matter of fact that whilst ACE provides wider educational advice, they do not undertake case-specific work, and they do not offer detailed special educational needs advice. IPSEA provides representation at tribunal hearings through their volunteers, but often relies on solicitors acting under the Legal Help Scheme to prepare the case. Neither of these organisations, therefore, seem open to becoming sources of

alternative help towards resolution. We submit that this fact needs to be taken into consideration as the Legal Aid Scheme is reviewed.

Judicial review

2.37 Finally, the importance of being able to challenge public authorities' decisions by way of judicial review (JR) is recognised. This is to be applauded. However, without legal assistance being funded and made available for education matters, it will be very hard for any individual to get to the point where a judicial review is applicable. Judicial review is and has always been a remedy of last resort. This means that other routes of achieving the desired outcome must have been tried and failed before judicial review proceedings can be brought. Under the proposed reforms, clients who might bring actions will be unable to pursue any other earlier means to challenge decisions because they will not be entitled to legal assistance. This means they will be unable to reach the stage where a judicial review challenge is valid.

2.38 Because it is proposed that judicial review is the only stage within education law where legal aid will be available, there is some concern that this may encourage people to bring such claims where previously they may have had an alternative, less expensive and certainly less high profile remedy. The bringing of more judicial reviews, especially where the chances of their success are slim but previously available legal remedies have been withdrawn and a JR is the only recourse available, could waste court time. For example, if exclusions were removed from scope as the consultation suggests, parents and excluded children would not receive appropriate legal advice before the appeal panel, but they could still bring judicial review proceedings against the panel's decision. This could lead to an increase in High Court litigation and associated costs. If parents were to continue to receive advice before the Independent Exclusion Appeal Panel, this would often put right any errors which have been made in the initial exclusion, and thus both reinstate a child's right to an education, and avoid stressful, lengthy and protracted High Court proceedings.

Conclusions

2.39 Many education clients achieve what they do for their children only with the help of legal aid. Whether it be support and therapies for their child's special educational needs, admission to a particular school, transport to and from school, or a reinstated education after a period without it, legal aid-funded advice has often made an invaluable difference to their children's life chances.

2.40 The net result of these proposals would, in our view, remove the rights of access to justice by vulnerable and marginalised members of our society where no other alternative source of funding or route to resolution can be secured, and in circumstances where litigants' ability to represent their own case has not properly been considered.

2.41 The proposed redefinition of scope for legal aid appears to show a serious disregard for the rights of the child under both the UNCRC, and the recent guidelines adopted by the Council of Europe on child-friendly justice.

3. Immigration and asylum proceedings

Question 1 - Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the Civil and Family Legal Aid scheme? Please give reasons.

3.1 The Office of the Children's Commissioner welcomes the decision to retain legal aid for asylum cases. We also welcome the clarification provided to the Immigration Law Practitioners Association (ILPA) that: "*claims made under Article 3 of the ECHR only would remain in scope for legal aid, as well as claims under both Article 3 and the 1951 Convention*."

3.2 Similarly, the Commissioner is pleased to note the decision to retain legal aid for immigration detention cases. Nevertheless, we are concerned that those in detention will only be able to seek assistance regarding their liberty, not in relation to their underlying immigration issues. If a family or parent is detained under Immigration Act powers it will be difficult, if not impossible, for a lawyer to secure their release without addressing their substantive immigration position. There is therefore a risk that parents and families will be detained for longer periods of time or that they will be released only to be re-detained at a later date. This could have an extremely traumatising impact on the children concerned.

Question 3 - Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148-4.245 from the scope of the civil and family legal aid scheme? Please give reasons.

3.3 The Office of the Children's Commissioner does not agree with the Ministry of Justice's proposal that all immigration legal aid should be removed from scope unless the person is detained.

3.4 The Ministry of Justice states at paragraph 4.146 of the consultation:

"In making these proposals, we have applied the factors we set out in paragraphs 4.13 to 4.29 to determine whether funding is justified:

- *the objective importance of the issue, taking into account the matters at stake;*
- *the litigant's ability to present their own case;*
- *the availability of alternative sources of funding; and*
- *the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves."*

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Championing Children and Young People in England

3.5 The Ministry of Justice accepts that "*some of these cases may be of importance, in that they raise issues of family or private life*" but states that "*these cases do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death. In contrast to those cases, an individual involved in non-detention immigration cases will usually have made a free and personal choice to come to or remain in the United Kingdom*."

3.6 The Ministry of Justice then notes at paragraph 4.203: "*individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate.*"

3.7 We believe that the Ministry of Justice has failed to have adequate regard to the detrimental impact of these proposals on child applicants. Children rarely make a "*free and personal choice"* to come to or remain in the UK and they do not have the ability to present their own cases without assistance. Nevertheless, immigration decisions can have a significant bearing on their lives and it is important that their views are obtained and their best interests protected. We would remind the Ministry of Justice of Article 3 of the United Nations Convention on the Rights of the Child (UNCRC), which states:

"1. ***In all actions concerning children****, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,* ***the best interests of the child shall be a primary consideration."*** *(Emphasis added.)*

3.8 This is a binding obligation in international law and is reflected in domestic legislation by section 11 of Children Act 2004, which places a duty on public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The United Kingdom initially entered into a reservation to the UNCRC regarding immigration matters, but this was withdrawn in late 2008. Section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that the Secretary of State must discharge her functions having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

3.9 The Council of Europe recently adopted guidelines on child friendly justice[4] ("the guidelines"), which aim to ensure that the rights of children are fully respected in legal proceedings. These guidelines note that specific protection and assistance may need to be given to more vulnerable children such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children and children in residential institutions. In respect of legal representation, the guidelines note:

"37. *Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.*

38. Children should have access to free legal aid, under the same or more lenient conditions as adults."

3.10 Taking account of these guidelines, the Office of the Children's Commissioner considers that, as a starting point, all unaccompanied children should have access to legal aid to assist with their asylum and immigration cases, regardless of whether these areas remain in scope for adults. Furthermore, it is believed that where a conflict of interest arises between a child and their parent or guardian, the child should also be able to access legal aid to assist them in making their views known. A child often has separate and discrete interests to a parent, whether it is the child or the parent, or both, who are subject to immigration control. Legal representatives must satisfy themselves that there is no conflict between their principle client and other family members, including children.

3.11 This is not to say that we agree with immigration advice being taken out of scope for adults. There are many cases involving families where there are no conflicts of interest and the parent or guardian is the main applicant. As noted by Baroness Hale in the case *ZH (Tanzania) v SSHD* [2011] UKSC 4, it is not always necessary for children to be separately represented as their views can often be obtained through their parent or guardian's representative:

"35. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between

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[4] *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies. See: https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 [Accessed 12 February 2011].

parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways."[5]

3.12 In paragraph 37, Baroness Hale goes on to note that the immigration authorities must be prepared to consider hearing directly from a child who wishes to express a view and is old enough to do so, referring to the remarks of the UN Committee on the Rights of the Child, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

"If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."[6]

3.13 We therefore consider that all cases involving children, including those who are dependent on adults, should remain within the scope of legal aid, so that the wishes of children can be obtained and their best interests actively considered.

Level of importance

3.14 Children are normally impacted by immigration issues in three ways: they are either in the UK as unaccompanied minors, they are applying to enter the UK to join a family member or they are in the UK and dependent on an adult's case. Whatever the case, most of their immigration cases will involve human rights issues, primarily although not exclusively under Article 8. In many cases, the child will be facing removal to an unfamiliar country, having been born or brought up in the UK, or they will be facing potential separation from a parent or guardian. Others may be outside of the UK and facing continued separation from a parent. The withdrawal of legal aid for these matters means that children will not be able to access the rights guaranteed to them and this would put the UK in breach of our international treaty obligations.

3.15 The Office of the Children's Commissioner considers that these issues are of extreme importance to children and their families. In saying that a case does not involve "life and death", the Ministry of Justice fails to give sufficient weight to the importance of the family unit. A child facing imminent and possibly permanent separation from a parent will feel significant pain and grief. In addition, younger

[5] See the judgment on *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent), p18*, available at: http://www.supremecourt.gov.uk/docs/UKSC_2010_0002_Judgment.pdf, p18 [accessed 12 January 2011].
[6] See: *General Comment No. 12 (2009): The Right of the Child to be Heard*, Committee on the Rights of the Child, 2009, available at: http://www2.ohchr.org/english/bodies/crc/comments.htm [accessed 12 January 2011].

children will struggle to understand the reasons behind the separation and will instead blame their parent or guardian for "abandoning" them or wrenching them away from their life in the UK.

The examples set out below detail the types of cases that are of particular concern to us.

Article 8 cases

3.16 Article 8 of the European Convention on Human Rights provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3.17 Article 8 immigration applications can be relevant to children in two main ways. Firstly, there are many children who are dependent on parents who have overstayed or resided in the UK for a substantial period of time and are seeking to remain on the basis that they have developed a significant family and private life in the UK. Secondly, we frequently come across cases involving children who have been brought into the country by a parent or guardian and then either abandoned, left with another relative, orphaned or taken into care. It is only when they become older and wish to go on a school trip or apply for a part time job that they discover that they are overstayers with no entitlement to remain in the UK.

3.18 It is evident that in both scenarios, the children cannot be held responsible for their poor immigration history as they did not make a "personal choice" to remain here illegally. In addition, the children concerned have often formed close bonds with their parents or guardians, are settled in the education system and have developed extensive private lives. They are often under the impression that they are British citizens and are extremely shocked and distraught to discover that they are in fact at risk of removal.

3.19 Article 8 cases are legally complex and involve the application of the following five stage test laid down by Lord Bingham in *Razgar V SSHD* [2004] UKHL 27:

"Whether the removal of an applicant from the UK would amount to interference with the exercise of an applicant's right to respect for his private or family life; Whether such interference has such gravity to engage the operation of Article 8; Whether the proposed interference will be in accordance with the law; Whether the interference complies with the legitimate aim of a democratic society; and Whether such interference would be proportionate to the legitimate public end sought to be achieved by the public authority."

3.20 In preparing Article 8 cases, representatives must gather together as much evidence as possible of the family and/or child's life and networks in the UK and then go through the principles established in the domestic and European jurisprudence to demonstrate why removal would be disproportionate. This is no easy task as Article 8 is one of the most complex, litigated areas in the higher courts. The evidence must also be presented in the correct form, such as formal witness statements. The Secretary of State will not assist applicants by interviewing them and investigating their claim, so unless the applicant pro-actively puts their case forward, there will not be any papers before the Tribunal to help the judge identify the relevant issues.

3.21 We consider it would be entirely unreasonable to expect a child applicant to present such a case themselves, and that it would also be virtually impossible for a parent or guardian to do so. We therefore request that the Ministry of Justice retains such cases within scope.

Extension applications for unaccompanied asylum-seeking minors

3.22 When unaccompanied children apply for asylum and have their claims rejected, they are normally granted Discretionary Leave to Remain until they are 17½ years old. This is on the basis that many countries do not have adequate care and reception arrangements for returned minors. By the time these children reach 17½ years old, they have often developed significant private lives and support networks and may wish to apply for further leave to remain on Article 8 grounds. These are complex applications, both legally and evidentially, and would be difficult for an unrepresented child to pursue. Nevertheless, they are of extreme importance to the child concerned. It is not unusual for a child to have lost all contact with their family and to have fully integrated into UK society. The trauma of removal to a now unfamiliar country cannot be underestimated, particularly as many children will maintain a subjective fear of return, notwithstanding the rejection of their asylum claims. Furthermore, children who fail to submit an extension application in time face serious consequences. In being rendered 'unlawfully in the UK' they will be at

risk of losing their leaving care support from Social Services, may also face homelessness and will not be able to access benefits or be entitled to work.

3.23 Many unaccompanied minors will also wish to submit fresh asylum claims when they turn 17½ years old. This is particularly true of those minors who were granted less than a year of discretionary leave to remain due to their age, and were thus prevented from appealing the refusal of their asylum claims by virtue of Section 83 of the Nationality, Immigration and Asylum Act 2002. We would welcome clarification as to whether providers will be permitted to prepare detailed Article 8 representations alongside fresh asylum representations or whether, due to the proposed removal of immigration from scope, they will be restricted to the asylum aspect only.

Deportation/removal

3.24 Children are often dependents on the claims of parents or guardians facing criminal deportation or administrative removal. Children also face the prospect of remaining in the UK with one parent while their other parent is deported or removed. In this regard, we consider that the Government should have regard to Article 9 of the UNCRC, which states:

"1. States Parties shall ensure that a ***child shall not be separated from his or her parents against their will****, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that* ***such separation is necessary for the best interests of the child****. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. [Emphasis added.]*

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known."

3.25 It is noted that the Ministry of Justice has proposed to retain legal aid for cases involving care proceedings on the basis it is accepted that *"families must have a practical means of taking part in proceedings",* yet the same logic has not been applied to immigration deportation cases. In deportation cases, the proposed separation could be even more permanent and the justification will not be focused on the child's best interests, as in care proceedings, but on the parent's immigration history.

3.26 The Office of the Children's Commissioner considers it self-evident that permanent separation from a parent will have an extremely detrimental impact on the welfare of a child, particularly if the separation is not driven by concern for the child's well being. In the case of *Bekou-Betts v Secretary of State for the Home Department* [2008] UKHL 39, the House of Lords held that the Home Office must take account of the impact of the principal applicant's proposed removal upon all those sharing family life with him. It is therefore considered that where a child is facing a possible separation from a parent, either the parent should be granted legal aid so that the child's views can be fully considered and expressed by the parent's representative, or if there is a conflict of interest, the child should be afforded separate representation under the legal aid system.

Domestic violence

3.27 The consultation proposes to retain family cases involving domestic violence within scope, however immigration cases do not benefit from the same concession. The Immigration Rules allow victims of domestic violence to remain in the UK so as to prevent individuals, usually women, staying in abusive relationships because they fear removal. Fear of removal is frequently used by abusive partners as a means of control, with the effect that victims remain in violent relationships for far longer than they would otherwise. This exposes them and their children to significant risks of harm.

3.28 The importance of this issue was acknowledged by the Government in a press release on 25 November 2010 when it pledged to ensure that *"women who are in the country on spousal visas and who are forced to flee their relationship as a direct result of domestic violence are supported".*[7] This promise is meaningless if free legal representation is withdrawn. Women who have experienced or are enduring domestic violence often feel anxious, helpless and traumatised and this can impact on their ability to care for their children. The children themselves can also be subjected to violence and abuse. We therefore ask the Ministry of Justice to reconsider its position on this issue and to retain immigration cases involving domestic violence within scope.

Refugee family reunion

3.29 Individuals who have obtained refugee status may apply for their family members, usually their spouses and children, to join them in the UK. In many cases, the

[7] See: http://www.homeoffice.gov.uk/crime/violence-against-women-girls/strategic-vision/

children concerned are living in fear of their lives and without a parent figure to care for them. They may also have been left alone for a significant period of time because asylum applications can take many years for the Home Office to process.

3.30 Once the parent is recognised as a refugee, they often find that their applications for their children to join them are refused on the basis that their child has "joined" another family unit or there is no satisfactory evidence that the child is related to them as claimed. This sometimes necessitates DNA testing, which is both logistically difficult and expensive.

3.31 We consider that all parents have the right to be involved in the upbringing of their child and that the Government should not stand in the way of a family being reunited, particularly when persecution was the reason for the separation. We would refer to Article 18 of the UNCRC, which states:

"1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

3.32 Unfortunately, while parent sponsors are normally desperate to be reunited with their children and to be involved in their upbringing, due to their status as refugees, they are often vulnerable and traumatized and therefore particularly ill-equipped to deal with the application and appeal process. In this regard, we would refer to research conducted by the Scottish Refugee Council on family reunion cases, released in a report in April 2010:[8]

"*While many refugee respondents emphasised the importance of having formal support and advice, they were also asked if they felt that they could have undertaken the family reunion process without such support. Respondents generally felt that they and other refugee applicants could not undertake the family reunion process by themselves as it was too difficult and detailed. When asked why they felt this, eight main reasons were given: to provide them with detailed information about the family reunion process, the application itself and what documentation and related information was required; to clarify and explain the language and terms used in family reunion documents and to clarify the rules and regulations that had to be adhered to; to translate information and conversations;*

[8] *One day we will be United: Experiences of Refugee Family Reunion in the UK,* Scottish Refugee Council, April 2010. See: http://www.scottishrefugeecouncil.org.uk/assets/0000/0099/Family_reunion_research_someday_we_will_be_reunited.pdf [Accessed 12 February 2011].

to send information and pay to send that information; to make contact with other relevant professionals and organisations in the UK and other countries such as embassies, Visa Application Centres and Entry Clearance Officers; to pay for their family members travel to the UK; and to overcome any general difficulties experienced in the application process."

3.33 We would ask that refugee family reunion cases be treated as asylum cases and thus retained within scope.

Trafficking

3.34 Article 35 of the Convention on the Rights of the Child states:

"States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."

It is noted that the consultation does not mention trafficking where an asylum issue is not raised. As the Ministry of Justice should be aware, not all trafficking cases involve an application for asylum; some simply deal with the National Referral Mechanism process or involve European rights (individuals from A8 and A2 countries in particular).

3.35 Victims of trafficking are often children or young adults and are normally extremely vulnerable; failing to provide legal advice and assistance to this group arguably conflicts with the UK's international obligations under the Convention on Action against Trafficking. We would ask the Ministry of Justice to reconsider its position on this issue and to make specific provision for legal aid to be provided to potential victims of trafficking.

Parents exercising rights of access to a child

3.36 The consultation also fails to mention parents exercising rights of access to a child. The Court of Appeal in *MS (Ivory Coast) v SSHD* [2007] EWCA Civ 133 found that there was a potential breach of Article 8 if a party to a family case was removed prior to the conclusion of proceedings. The Court further held that it was not appropriate to leave an appellant in this country *"in limbo with temporary admission and the promise not to remove her until her contact application has been concluded*", indicating that such individuals should be granted a period of leave to remain to allow them to participate in proceedings in a meaningful way. If legal aid is withdrawn for these cases there is a risk that parents will be removed prior to the

conclusion of their family case and will lose all contact rights with their child. This will necessarily have a negative impact on their child's well being.

Judicial review work

3.37 Paragraph 4.97 of the consultation states:

> *"In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly."*

We fully agree that such cases should remain in scope, but we are unclear as to why the same rationale has not been applied to immigration appeal cases. According to Government figures,[9], there is a 37% success rate in the Tribunal. This demonstrates that the Home Office's decision-making is frequently flawed. We consider it is just as important that the Home Office is held to account at the appeal stage as in judicial review proceedings.

3.38 We would also appreciate clarification regarding work undertaken in accordance with the pre action protocol. Judicial review is to be used as a last resort and representatives are required to demonstrate that they have exhausted all other remedies before pursuing a claim. While it is clear that judicial review work itself remains in scope, it is less clear whether providers will be able to open a legal help file to undertake pre action work on an issue which is related to an immigration matter and therefore technically out of scope.

Litigants' ability to present their own case

3.39 The consultation paper states:

> *"4.202 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 these 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."*

[9] *Home Office Statistical Bulletin: Control of Immigration: Statistics, United Kingdom, 2009* , available at: http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf [accessed 14 February 2011].

We respectfully disagree with these assumptions and consider that the particular vulnerabilities of immigration clients in general, and children in particular, have not been adequately considered.

3.40 In our experience, many immigrants have gone through traumatic experiences and some have mental health problems. Immigration clients often struggle to disclose key details of their cases until they have built up a relationship with their representative. It is highly unlikely they would feel safe disclosing traumatic details in a setting in which they felt threatened, such as a Home Office interview or an appeal hearing.

3.41 In addition, many immigration applicants have issues with literacy and/or English. It is not as simple as referring them to websites and guidance notes. Many applicants will have limited, if any, support networks. In the absence of a legal aid representative, they will have no choice but to turn to unscrupulous privately paid representatives (who are not regulated by the immigration accreditation scheme) or rely on third parties to assist them. This may be detrimental to their cases.

3.42 We do not agree that immigration cases are simple. Immigration is a vast, complex and continually changing area of law. Policy documents are often unclear and difficult to locate and the case law is rapidly evolving, particularly in relation to Article 8. We strongly believe that the majority of applicants could not adequately conduct their own cases and this applies with particular force to children.

3.43 The complexity of the law also affects the efficient administration of justice. Immigration tribunals are highly formal and require appellants to comply with copious directions, often involving strict timescales. Judges frequently rely on representatives to produce skeleton arguments and to guide them through the relevant case law. Representatives assist both the client and the Tribunal and ensure there is procedural and substantive fairness. Without qualified representatives, judges would spend a greater amount of time explaining the law and procedure to lay appellants.

3.44 We also note that the consultation proposes to exclude all immigration appeals from scope, even when they are in the Upper Tribunal, Court of Appeal or Supreme Court. The Home Office frequently appeals decisions to the Upper Tribunal on points of law and we consider it clear that an unrepresented appellant would require legal representation to respond to such an appeal or to access the Court of Appeal or Supreme Court.

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3.45 In summary, we believe that the majority of applicants will be unable to adequately conduct their cases without assistance and we consider it extremely undesirable for unaccompanied children to be expected to do so. Our position is confirmed by the Tribunal's guidance note on unaccompanied children, which clearly states:

"An unaccompanied child should be legally represented. The child's legal representative must attend the first hearing. If the child is not legally represented, take steps to inform the Refugee Council's Panel of Advisers, and the Refugee Legal Centre or Immigration Advisory Service and adjourn the case for legal representation to be arranged."

Although this note refers specifically to asylum cases, we consider the principle remains equally applicable to children participating in immigration proceedings.

Alternative sources of funding

3.46 As far as we are aware, there are no alternatives to legal aid funding for immigration advice and representation. The vast majority of these cases are not related to damages and therefore Conditional Fee Agreements are not an option.

3.47 The Immigration Advisory Service, previously funded by the Home Office to provide free advice, no longer does so and only advises those who qualify for legal aid or can afford a modest fee. The services provided by law centres and other not-for-profit agencies are both limited and under threat due to local authority funding cuts.

3.48 We believe it will be extremely difficult for other NGOs and charitable organisations to assist applicants because it is a criminal offence under the Immigration and Asylum Act 1999 for anyone to advise on immigration matters unless they are suitably qualified. In addition, legal aid advisers must undertake regular Law Society accreditation exams. This scheme was introduced for quality assurance purposes and we believe the expertise of such providers cannot be matched by NGOs or the voluntary sector.

3.49 If legal aid is unavailable, we fear that applicants will be put at risk of exploitation. They are likely to rely on any adviser that can be found, running up large debts. Applicants may then resort to working illegally in situations where they are vulnerable to abuse and mistreatment.

Availability of other routes to resolution

3.50 Immigration is different from the other areas facing removal from scope because there is no option of mediation. Immigration cases concern either an application to the Home Office or action initiated by the Home Office, such as deportation or removal. The applicant does not have the option of entering into alternative dispute resolution.

3.51 At paragraph 4.84 of the consultation, the Ministry of Justice acknowledges the absence of other forums to resolve disputes in immigration detention cases and this is one justification for keeping such work in scope. We consider the same consideration should be applied to non detained immigration cases.

Conclusion

3.52 We do not agree with the areas that are proposed to be removed from scope. The result of these proposals would remove the rights of access to justice by vulnerable and marginalised members of our society. There are no other alternative sources of funding or routes to resolution that can be secured and we consider that the litigants' ability to represent their own case, given the complexity of the law, has not properly been considered.

Community Legal Advice Helpline

Question 7 - Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons; and

Question 8 - Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons

3.53 We consider that a telephone gateway system is inappropriate for asylum and immigration cases and that such a system will be both expensive and unworkable. For the same reasons, we also believe that specialist advice should not be offered through the Community Legal Advice helpline.

3.54 Firstly, language difficulties make telephone access impractical. Although it is possible to secure a telephone translation service, these services are often significantly more expensive than normal interpreters. In addition, without a face-to-face meeting, it would be difficult for a client to indicate to their representative if they had any concerns about the interpreter. It is not unusual for an immigration client to withhold information if they feel uncomfortable with the interpreter, for example if they recognise the interpreter from their community or if they feel the interpreter is judging them or misinterpreting. It would be impossible for a representative to pick up on the non-verbal indications that a client is unhappy about an interpreter over the telephone. The representative would also be unsure about whether the client had fully understood their advice as such information is often gained from facial expressions and body language.

3.55 Immigration and asylum clients, particularly children, have often experienced abuse or trauma and they can be reluctant to disclose information about their cases until they have built up a trusting relationship with their advisor. Unaccompanied children frequently need reassurance and this is best provided face-to-face, where they can see the advisor's body language.

3.56 Even if the client is happy to explain their case over the phone, it is often necessary for representatives to see the documentation that an asylum or immigration client has in their possession in order to provide the appropriate advice. Such documents include interview transcripts, reasons for refusal letters, witness statements and appeal determinations. Clients may lack the ability to search through English language documents to establish which ones are relevant

or may struggle to understand and summarise the legalistic terminology used. It is often hard, for example, for a client to understand the difference between a finding of fact and an error of law.

3.57 We are also concerned about the possibility of abuse. It is not unusual for a friend, family member or social worker to make the initial call to a representative to set up an appointment, however problems could arise if full instructions are taken during that call. It will be difficult to establish who the actual client is, whether they are alone, whether they are being coerced and whether they feel safe disclosing all the relevant information about their case. In face to face meetings, third parties can be asked to leave the room if it is felt that they are inhibiting the client or coaching them.

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4. Private law proceedings (Children Act 1989)

4.1 This section of our response focuses on the proposals insofar as they relate to children, whether the representation of children and/or of their parents/carers within the arena of Private Law work (as determined in the Children Act 1989).

4.2 In addition to the United Nations Convention on the Rights of the Child (UNCRC), the Committee of Ministers of the Council of Europe has recently adopted Council of Europe guidelines on child friendly justice, the purpose being to achieve greater unity between member states by promoting and adopting common rules in legal matters. In relation to access to court and to judicial processes, the guidelines note that children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights and that any obstacles to access to court such as the cost of the proceedings or the lack of legal counsel should be removed.

4.3 Children are at the heart of their family. Whether their parents are single or part of a couple, stability and consistency are key requirements for children to thrive. There are many times when parents need somebody to turn to for good advice about how to achieve these requirements.

4.4 One of the immediate effects of the proposals upon the practice of recourse to the court to resolve family problems is that there will be a dramatic increase in relation to litigants in person (who will be the children's parents or carers). There has been insufficient assessment made of the impact that this will have in turn upon the courts system (judiciary and staff) other agencies and government departments and the families themselves.

4.5 Any impact of the changes to legal aid in private law cases should be seen in the context of the function and duties of the Office of the Children's Commissioner. These proposals impact upon the right of a child to freely express their views and to be provided with the opportunity to be heard in any proceedings affecting them under Article 12 of the UNCRC.

4.6 Furthermore, a fundamental review of the family justice system is underway. It is understood that an interim report will be produced around March 2011 with a final report due in August of this year. This is a major and fundamental review involving the most thorough examination of the family justice system since the work which lead to the enactment of the Children Act 1989 more than 20 years ago. We therefore submit that it is entirely inappropriate for the proposals within the green paper to be made at this stage before sight of the conclusions of the Family Justice Review. The proposals as they stand will fundamentally affect entitlement to public

funding in family law cases. We ask that the Family Justice Review takes a child's rights approach, to ensure that children within private law proceedings do have a voice.

4.7 Families who are going through a separation process need advice. The areas of law largely but not exclusively concern ancillary relief, private law Children Act 1989 (CA 1989) applications and domestic abuse work, public law CA 1989 cases, child abduction and adoption.

Question 1 - Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the Civil and Family Legal Aid scheme? Please give reasons.

4.8 We agree that domestic violence and forced marriage cases should be retained within scope (4.64). We agree with the retention within scope of applications brought under the Protection from Harassment Act 1997 (4.123-4.125). We agree international child abduction (4.86-4.88), international family maintenance (4.89-4.91), public law children (4.100- 4.101) and registration or enforcement of judgments under European Union legislation (4.102-4.104) should remain in scope. As regards family mediation in private law cases, we agree with the retention of funding. However, we do not agree the basis of retention of funding as set out in the consultation document (4.69-4.73). The question above presupposes an acceptance of the whole proposed scheme – including categories it proposes to remove from scope. Agreement here with those mentioned as remaining in scope does not imply acceptance of those categories which have been removed.

4.9 The issues to be addressed below include: children and private law; domestic violence – definition and application; ancillary relief/private law and children where there is no domestic violence.

Private law and children

4.10 We agree that children should continue to be afforded representation within private law proceedings, where the court has determined it to be necessary. In those cases young people can, depending on age and level of understanding and competence, instruct the solicitor who has been appointed to represent them. Our concerns about what is not included are set out below at our response to Question 3.

Domestic violence

4.11 We note with concern that the indication in 4.64 is that only those domestic violence cases involving the risk of physical harm would be retained. We consider it important that domestic violence must be defined as comprehensively as possible and at least to reflect the Government's definition of domestic violence:

"Domestic violence is physical, sexual, psychological or financial violence that takes place within intimate or family type relationship and that forms a pattern of coercive controlling behaviour. Domestic violence may include a range of abusive behaviours not all of which are, in themselves, inherently violent." [10]

4.12 The understanding of what "domestic violence" means should be extended to the other recognised situations of abuse within a family or relationship, and so include emotional or financial abuses of power. To limit the provision to physical harm and injunction proceedings does not and cannot reflect the realities of the pressures that particular spouses face. The proposed change of scope in this case would therefore go completely against the equality of arms recognised in the Human Rights Act and Access to Justice generally. It does not recognise what is in any event already accepted, namely that "domestic violence" may include a range of abusive behaviours not all of which are inherently violent. (See also below.)

4.13 From a child's perspective it is clearly in their best interests for stability and security to be achieved wherever possible within their family; they should not be exposed to domestic violence and they should have regular and safe contact with any absent parent if they wish to. Not all families are able to successfully and properly self-regulate in a way that protects children.

4.14 There are families where there may be no actual physical violence/harm and no proceedings of an injunctive nature where nevertheless, one parent may have financial or emotional control over another. The weaker partner may find him/herself in a situation where they are unable to access or pay for legal representation and unable practically and emotionally to seek the necessary recourse to the court and therefore unable to bring about change.

4.15 There is well researched and documented on the emotional and other consequences for both the short and long term wellbeing of children in this situation. These include situations where for example a father or mother is refused

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[10] See: www.homeoffice.gov.uk/rds/violencewomen.html.

contact to his or her child: he or she may be inclined to walk away rather than face what is for many the terrifying prospect of seeking redress through the courts.

4.16 Mediation is not always the panacea in these cases. Mediation is already an important part of attempting resolution in some private law cases: in nearly all it must be attempted before an application for public funding can be made in any event. However, the court very often succeeds in resolution where mediation has not. Parents are not always literate, articulate or sufficiently brave; there are those with mental health and learning difficulties and those for whom English is not their first language, and it is their children who will suffer, with the loss of a child-parent relationship.

Ancillary relief/private law children without domestic violence

4.17 We do not agree with the proposal that the issues relating to law such as divorce, finance and children in private law should be removed from scope unless there is the presence of domestic violence.

4.18 We would question whether the Government will allow representation of Respondents (the alleged perpetrators) to applications for injunctive relief as this was omitted from the consultation document. In a situation where injunctive relief has been sought to address actual violence, we would say that the definition must include cases where undertakings have been given by alleged perpetrators. If undertakings are not going to be sufficient grounds to obtain public funding then alleged victims are going to have to pursue fact-finding hearings or a criminal conviction which will involve lengthier hearings, increased costs and undoubtedly impact further on the family breakdown and relationships within that family. The children themselves will be subject to lengthier and therefore more acrimonious proceedings and the risk is that their voice will be lost.

4.19 We include in the above private law proceedings where there are very serious issues at stake for a child, for example allegations of emotional, physical and sexual abuse, implacable hostility of resident parent to contact, prohibited steps or specific issue, for example, involving the immediate risk of removal of a child.

We will expand upon these areas in our response to question 3

Family mediation

4.20 There is evidence that children do not have sufficient voice in mediation processes and will need some form of representation, particularly if this is to be extended.

At 4.73 it is clearly stated that the first comprehensive independent review of the Family Justice System in over 20 years is due to take place and this is expected to further consider the role of mediation in family cases. It is our view that this review should be concluded first before the Government is able to assess the value of mediation as an *additional* solution to litigation.

Question 3** - **Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.

Private law children and family cases

4.21 We are concerned that a child who wishes to make an application in their own right or become involved as a party (subject to leave of the court) will no longer be able to access public funding to do so and so would be unrepresented. We understand that this would be the case in any private law matter that did not fall within the allowed category- namely those situations involving domestic violence.

4.22 Children are not represented as a matter of course within private law proceedings. They are dependent on their views being put to the court through the Cafcass officer and their parents. Parents are not always best placed to properly represent their children's views and may be inhibited from doing so where they are intimidated by the other parent.

4.23 A child can instruct a solicitor to make an application to the court, as long as they have first obtained leave of the court. A child will no longer be able to rely on public funding to do this and so we believe that the position of children will be further sidelined and that children may be disempowered from the system that is there to protect and look after their best interests.

4.24 There are a number of specific issues which concern looked after children. We consider that these need to be included in the scope of the scheme:

- The availability of legal aid in respect of section 34 contact orders for children who are in care is not clarified. We consider this must be available.
- While legal aid is retained for separate representation of children in private law proceedings it is not clear whether legal aid is to be available for children when making their own application for leave to apply for a Section 8 order under the Children Act 1989, whether in the context of private law or when they are accommodated under Section 20 of the Children Act 1989.

- Where looked after children are applying for Section 8 orders in order to have contact with siblings who are not looked after, they need access to legal aid.

4.25 There is a further issue relating to young people's access to recourse concerning contact between siblings where one, or more, have been adopted. Children in this situation – including cases where post-adoption contact was agreed informally but has not been sustained by the adoptive parents – need to have access to the scheme

Ancillary relief in non-domestic violence cases

4.26 We disagree that funding for ancillary relief cases (where domestic violence is not present) should be removed from scope. It is our view that the importance of such cases has been seriously underestimated in the consultation document.

The consultation document sets out the following considerations in relation to what should remain in scope:

- The importance of the issue (4.13-4.21)
- The litigant's ability to present their own case (4.22-4.24)
- The availability of alternative sources of funding (4.25)
- The availability of other routes to resolution (4.26-427)

4.27 It is very often the case that the *vast majority* of ancillary relief cases fulfill at least all of the elements of the test and the remaining cases that do not satisfy the elements of the test could be excluded by a more rigorous approach by the Legal Services Commission (or their successors) to the merits of the case.

4.28 Ancillary relief cases are complex and require special expertise. It is critical that legal aid remains available for advice and representation in disputes concerning the division of financial assets.

4.29 The consultation document considers the importance of the presence of domestic violence to secure funding in this area, but there has been no consideration given to the reality in the vast majority of cases, in which control is exerted by the wealthy party in a relationship through financial rather than overtly violent means, so that the materially disadvantaged party remains unable to escape.

4.30 We refer to the definition of domestic violence addressed in the response to the previous question. The Government's proposals ignore the reality of oppressive relationships, from which vulnerable women in particular struggle to escape. We

are aware of very many cases where vulnerable women have at last managed to find the courage to flee an oppressive partner, only to return to them when the pressure from lack of finances becomes too much for them to bear. Many spouses are able to exercise domination and control over their partners in this manner.

4.31 Whilst an extension to the domestic violence definition to include oppression through financial control would ameliorate the proposals in the consultation document, it would not go far enough. There are many vulnerable spouses who would suffer in silence and would not report any aspect of abuse that they have endured to the police. That will always represent the hidden incidence of domestic violence which the Government needs to factor into its proposals. The Government's proposals would completely exclude this group of vulnerable people.

4.32 The cost of ancillary relief cases at present is stated £19 million net of the statutory charge, which therefore recovers the vast majority of public funding expenditure in this area (4.162). This is in our view a small price to pay for the valuable service provided.

4.33 We are firmly of the view that the £19 million annual expenditure would be capable of being reduced significantly, and perhaps even on a cost neutral basis, with the implementation of the interim lump sum proposals (at 4.160) and with a consistent examination of the merits test for new applications. We accept as stated above that there are some ancillary cases that receive funding currently that do not perhaps satisfy all of the consultation document's criteria and these could be excluded by better examination at an early stage.

4.34 In any event, we would anticipate that the cost to the state of retaining ancillary relief (where domestic violence is not present) would be far lower than the cost to the state in benefit payments that the materially disadvantaged spouse would be entitled to claim.

4.35 We also take issue with the figures produced at 4.157 as justification for removal from scope of this area. This is the apparent evidence that in 2008, 73% of ancillary relief orders put to the court were not contested *"indicating that the majority of individuals are able and willing to take responsibility for organising their own financial affairs following relationship breakdown".* Whilst it may well be the case that the orders were not contested, this statistic is wholly misleading. It actually supports the case to retain ancillary relief funding within scope. There is no breakdown in the figures as to how many of the 73% had had the benefit of sensible practical and prolonged legal advice in order to enable them to work

together towards agreement. We believe that many of the settlements will be agreements that would not have been achieved in mediation nor in person but were in fact negotiated through legal advice and that the financial affairs of the family were resolved in a “consent order”. The children of such families benefit from early resolution of theirs and their carers’ finances.

4.36 A further extremely vulnerable group that would be excluded would be those spouses brought into this country through arranged marriages who are entirely dependent on their UK-based spouse. Upon separation, such a class of vulnerable people could find themselves excluded from the former matrimonial home and left without financial support. In many cases such people do not have English as a first language and have to deal with the reality that often their cultures permit male dominance. Upon separation, they are totally helpless and require legal assistance to protect and assert their rights.

4.37 We accept that whilst the Government may consider the protection of many individual rights as a matter for the individual and not therefore a matter for public funding, that decision appears to be driven here by financial imperatives. However, by excluding such cases as those above from access to public funding, the state will ultimately bear the cost of supporting the materially disadvantaged spouse through the benefits system. It cannot be right for the state to bear such a burden when it can rightly and lawfully be borne by a wealthy individual.

4.38 Lastly, we contend that the complexity of the ancillary process and the process to consider and analyse large volumes of disclosure is outside the grasp of the lay person. Litigants in person embarking on ancillary relief will inevitably not be able to get to grips with the real financial picture leading to lengthy and potentially unnecessary hearings. We would be concerned with the extra demand this would place on the already precarious and underfunded court system.

Mediation

4.39 We understand that many family solicitors are members of the Resolution organisation and they subscribe to its protocols of facilitating settlement wherever possible. All sensible solicitors encourage and promote mediation and other ADR as alternatives to litigation.

4.40 Solicitor involvement is essential to ensure that any power imbalance between the parties which would otherwise make mediation a terrifying prospect for the more vulnerable party is properly redressed. It is our view that mediation on its own is not always an acceptable alternative to litigation or solicitor-led negotiation.

4.41 Furthermore, we believe that the voice of the child can become lost within any mediation process unless the child has separate representation. Although we understand that some mediation sessions will involve children, these are rare. Information about the views of the child will come from the parents.

4.42 The benefit to children of enjoying regular, safe contact with an absent parent is well established. We would suggest that the percentage of court orders made for contact is irrelevant: what is of importance to the child is that an agreement/ arrangement has been reached through the work of the parents' solicitors, barristers, mediators or the court.

4.43 We are concerned about those parents who cannot resolve matters alone and for the children in these situations. The consultation document makes no allowance for those cases where it isn't solely a question of contact. The kind of issues which arise include: what to do for a child who hasn't been returned by his or her parent at the end of a contact visit or who suddenly finds that they no longer see their other parent because the resident parent believes that the child has been physically, emotionally or sexually harmed whilst in the other parent's care. In these situations it may be the case that none of the professional bodies are inclined to investigate beyond an initial enquiry, or the allegation may be malicious.

4.44 Meanwhile, a child is deprived of that relationship and their right to family life. In these proposals they are deprived of the right (by virtue of funding) to make a direct approach to the court.

4.45 There are many variations on the theme of "private law children cases" within which children's interests are of concern. There is a fear that without the ability to seek judicial redress, through lack of adequate representation, parents might seek to obtain justice through unlawful acts, for example kidnapping and violence.

4.46 There are many clients who will be unable to present their case to court by themselves. This group includes those adults with mental health problems, drug and alcohol abuse issues in the family, learning difficulties, those coming from a country with a vastly different culture, and therefore unused to this or any judicial process and where English is neither their first language nor a language that they speak or understand.

4.47 Without specialist legal intervention and advice many parents are simply unable to prioritise their children's needs above and beyond their own feelings of animosity

toward to their ex-partner. Many cases can be settled earlier with proper legal or solicitor involvement.

Criminal injury compensation

4.48 The withdrawal of legal aid for Criminal Injury and Compensation claims will impact on looked after children where the injury results from failure of the local authority to adequately safeguard; hence there is a conflict of interest if they are expected to support the young person is submitting their claim.

Question 6 - We would welcome your views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings. (4.266-4.269)

4.49 In family cases, we are concerned as to the impact of litigants in person. We would reiterate the importance of consideration being given to the outcome of the research to be carried out for the Family Justice Review before proceeding to consider these proposals.

4.50 In our experience litigants in person understandably find it difficult to remain objective, focus on the issues and understand and apply the law. This causes proceedings to be lengthier than would be usual. A parent will often find it more difficult to place the needs of a child first, as has already been mentioned, due to increased tension and aggravation. It is entirely inappropriate for children to have their parents in person in court proceedings where there may be issues of cross-examination, and in many cases mentioned above.

4.51 The oral and written evidence of litigants in person and the cross-examination of litigants in person is very often awkwardly presented and of great emotional content, which does not help the parties to move forward at the end of proceedings. Solicitor involvement aims to ensure that once proceedings have concluded the parties are able to regulate their own affairs better. Extensive and unnecessarily emotive evidence will undermine that intention.

4.52 We remain extremely concerned as to the further strain that additional court time will place on the already over-burdened and underfunded court service. Necessary court documentation required for hearings and which is of great assistance to judges in narrowing the issues such as schedules of assets, case summaries and chronologies would not be prepared, and could not realistically be expected to be prepared, and this inevitably would lead to protracted hearings.

4.53 Further research is needed upon the impact on children of lengthier court proceedings and on their parents who are without the benefit of sensible and sound advice. It is frequently an isolating and frightening experience for a parent to represent him or herself particularly where the ex-partner may be represented. It is extremely likely that a child will be aware of and affected by all of this. The "inequality of arms" will surely have its greatest impact in the family courts. Often it is the lawyers who advocate settlement and are able to persuade by explaining through "the needs of the child" to their client. The judiciary and court staff should also be consulted as to the difficulties that they will undoubtedly face with an increase in litigants in person.

Conclusion

4.54 We believe that it is inappropriate for any changes to be made before publication and consideration of the conclusion of the Family Justice Review paper.

4.55 We do not agree with the areas that are proposed to be removed from scope. We do not agree with the current definition of "domestic violence". We believe that many children will be sidelined from the decision-making process if the proposals as they stand are implemented and we are concerned that their voices will not be heard.

Question 32 - Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

4.56 We do not propose to respond in detail to the questions regarding financial eligibility as we consider providers are best place to comment on these proposals. Nonetheless, we would like to express our concern regarding the proposed 10% cut in rates.

4.57 We are already experiencing significant difficulties in locating suitable providers to assist children with their legal matters. We have seen the closure of a number of high quality providers over recent years and following the 2010 tender, there are advice deserts for certain types of work in certain area, such as immigration work in Kent. It is not unusual for children and their support workers to have contact a number of providers before they can find someone with the capacity to assist them.

4.58 When fixed fees were introduced, the Legal Services Commission said that there would be 'swings and roundabouts' for providers, explaining that fixed fees would not cover the costs of all cases, but would more than cover the costs of others. We are concerned that removing whole areas from scope and reducing the remaining fees by 10% will mean that there will no longer be any flexibility in the system. We are aware from our conversations with providers that many firms are struggling to remain financially viable on the existing fixed fees and we are deeply concerned that any further cuts would have the impact of shrinking the market even further. We would ask the Ministry of Justice to reconsider this proposal before more quality providers are lost for good.