



House of Commons
House of Lords

Joint Committee on
Human Rights

Enforcing human rights

Tenth Report of Session 2017–19

*Report, together with formal minutes
relating to the report*

*Ordered by the House of Commons
to be printed 11 July 2018*

*Ordered by the House of Lords
to be printed 11 July 2018*

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

House of Commons

[Ms Harriet Harman QC MP](#) (*Labour, Camberwell and Peckham*) (Chair)

[Fiona Bruce MP](#) (*Conservative, Congleton*)

[Ms Karen Buck MP](#) (*Labour, Westminster North*)

[Alex Burghart MP](#) (*Conservative, Brentwood and Ongar*)

[Joanna Cherry QC MP](#) (*Scottish National Party, Edinburgh South West*)

[Jeremy Lefroy MP](#) (*Conservative, Stafford*)

House of Lords

[Baroness Hamwee](#) (*Liberal Democrat*)

[Baroness Lawrence of Clarendon](#) (*Labour*)

[Baroness Nicholson of Winterbourne](#) (*Conservative*)

[Baroness Prosser](#) (*Labour*)

[Lord Trimble](#) (*Conservative*)

[Lord Woolf](#) (*Crossbench*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/jchr by Order of the two Houses.

Evidence relating to this report is published on the relevant [inquiry page](#) of the Committee's website.

Committee staff

The current staff of the Committee are Eve Samson (Commons Clerk), Simon Cran-McGreehin (Lords Clerk), Eleanor Hourigan (Counsel), Samantha Godec (Deputy Counsel), Katherine Hill (Committee Specialist), Penny McLean (Committee Specialist), Shabana Gulma (Specialist Assistant), Miguel Boo Fraga (Senior Committee Assistant) and Heather Fuller (Lords Committee Assistant).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 2467; the Committee's email address is jchr@parliament.uk

Contents

Summary	3
1 Introduction	5
Background	5
Our inquiry	6
2 Access to justice and the rule of law	8
The preconditions necessary for enforcement of human rights	8
The need for a strategic approach to securing access to justice to enforce human rights	9
3 The damaging effects of legal aid reforms	11
Legal aid reform in England and Wales	11
Criminal Legal Aid	11
Civil Legal Aid	12
Financial eligibility for legal aid	13
Exceptional Case Funding	15
Difficulties arising from the increase of Litigants in Person	16
Mandatory Telephone Gateway	17
Damaging impact of LASPO on human rights	17
Article 8 - the right to a private and family life	17
Article 2 - the right to life	20
Judicial Review	23
‘Legal aid deserts’ and the threat to the future of legal aid provision	24
4 The importance of a robustly independent judiciary	26
Role of the independent judiciary in enforcing human rights	26
The ECHR as a ‘living instrument’	27
The danger of Government criticism of human rights judgments	29
Government’s central role in supporting and defending the independence of the judiciary	30
5 The importance of a robustly independent legal profession	32
Potential threats to legal professionals’ independence	32
Legal Aid decision making	32
Proposal for an ‘embarrassment clause’ in the contract for criminal legal aid	33
Interference in professional disciplinary processes	33
Conclusions	34

6	The crucial role of the Equality and Human Rights Commission and other UK National Human Rights Institutions	35
	The need for sufficient powers and a stronger approach to enforcement	35
	The Equality and Human Rights Commission (EHRC)	35
	The Northern Ireland Human Rights Commission (NIHRC)	37
	The Scottish Human Rights Commission (SHRC)	37
	The need for adequate resources	37
7	The need for a culture of human rights	39
	Public attitudes towards human rights, and differences across the UK	39
	Media reporting of human rights	40
	A hierarchy of rights?	42
	Human rights culture in public authorities	44
	The role of human rights education and public legal education	44
	Conclusion	45
	Conclusions and recommendations	46
	Annex 1: Human Rights powers of the UK's National Human Rights Commissions	50
	Declaration of Lords' Interests	53
	Formal minutes	54
	Witnesses	55
	Published written evidence	57
	List of Reports from the Committee during the current Parliament	59

Summary

Human rights have been central to the UK constitution and its legal system throughout its history. The following section of Magna Carta remains in force today, and can be found on the Government's legislation website.

“We will sell to no man, we will not deny or defer to any man either Justice or Right.”¹

For rights to be effective they have to be capable of being enforced. For that enforcement, it is essential to have:

- adequate access to legal information, advice and assistance for everyone at all income levels and in all areas of the country;
- a robustly independent judiciary;
- a robustly independent legal profession;
- a strong Equality and Human Rights Commission, held accountable for its work, and strong National Human Rights Institutions in the devolved administrations, similarly held accountable; and
- a culture which understands the concept of the rule of law, respects human rights and accepts that they will be enforced and which is supported by the Government.

Access to justice is fundamental to the rule of law. We are concerned that the reforms to legal aid introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) have made access to justice more difficult for many, for whom it is simply unaffordable. Moreover, there are large areas of the country which are “legal aid deserts”, as practitioners withdraw from providing legal aid services since they can no longer afford to do this work following reductions in legal aid funding by successive governments over the past three decades. The Government is currently reviewing LASPO and we make recommendations for that review. There also needs to be a broader review into access to justice and the provision of advice and assistance, going beyond matters which might be seen as purely legal, to ensure that people can get the help needed to enforce their rights before matters escalate into expensive adversarial court proceedings. The remit of the Equality and Human Rights Commission should be extended so that it can take human rights cases on the same basis as it supports equality cases. It should use those powers assertively and be given adequate resources to allow it to do so. Its work should be more closely scrutinised by Parliament accordingly.

There is a need for better general understanding of the role of the courts in enforcing human rights, and in balancing the rights of one group against another. Ill-informed media criticism can undermine support for the legal system which protects everybody's rights—even those of groups who are unpopular. There is also a need for better education about the legal system in general, and the way in which it protects people's human rights, and the Government should do more to support and encourage this.

1 [Magna Carta](#)

In its strategy for countering terrorism, the Government sets out its definition of British values:

“We believe it is essential to protect the values of our society—the rule of law, individual liberty, democracy, mutual respect, tolerance and understanding of different faiths and beliefs [...]”²

Respect for the rule of law and the independence of the judiciary are values that the Government itself must demonstrate. The UK is fortunate in having a robustly independent judiciary. There have been occasions when Ministerial reactions to individual judgments have been inappropriate. We note that the requirement to uphold judicial independence is binding on all Ministers, in addition to the Lord Chancellor’s duty to defend such judicial independence.³ The Government should consider whether those requirements should also be written into the Ministerial Code.

A legal profession which fears adverse consequences from taking up unpopular causes will not be effective in defending rights: the Government must be careful not to use its voice and influence improperly.

The Government needs to make sure it appropriately prioritises due respect for rights, so that administrative decisions are taken with proper consideration of people’s rights.

Individuals should be protected from abuse by the State, and public bodies should respect the law. The UK’s legal framework allows individuals to protect their rights and gives the courts the task of deciding that balance in individual cases, within the parameters set by Parliament, which includes the Human Rights Act. There is legitimate debate over how best to protect rights and where the balance should be struck if rights compete. But no-one should lose sight of the fact that human rights, and the ability to enforce them, are amongst the hallmarks of a civilised country. Government, Parliament, the media and the legal profession all have a responsibility to consider the importance of the rule of law, and the role that rights which can be enforced through an independent court system plays in that.

2 HM Government, *CONTEST, The United Kingdom’s Strategy for Countering Terrorism*, Cm 9608, June 2018

3 Under Section 3(1) of the Constitutional Reform Act 2005, the Lord Chancellor and other Ministers of the Crown have an existing duty to “uphold the continuance of the independence of the Judiciary”

1 Introduction

Background

1. The United Kingdom has a proud tradition of respect for human rights. Such rights have long been an integral part of common law, as well as being enshrined in statute by the Human Rights Act 1998. They are supported by United Kingdom political parties.

2. For rights to be effective they have to be capable of being enforced. It is therefore profoundly concerning that the recently retired President of the Supreme Court, Lord Neuberger of Abbotsbury, told us that “we have pretty good rights but quite a yawning gap as far as enabling people to enforce those rights is concerned.”⁴ This view was echoed by many who had experience of trying to enforce their rights; their evidence reflected a widespread feeling of exclusion from the system of protections and rights afforded to others in society.⁵ A member of the Glasgow Disability Alliance told us: “justice is something other people get”.⁶

3. One of the reasons we undertook this inquiry was because the difficulty of enforcing human rights kept coming up in the course of other inquiries. Many of the Committee’s recent reports have examined situations in which people have rights that are enshrined in law but which, for many, are unenforceable in practice:

- In our 2017 report on Human Rights and Business we identified a range of obstacles that frustrate access to remedies for victims of human rights abuses by companies. These included changes to limit legal aid provision, limits on the recovery of legal costs in these types of case, increases in court and tribunal fees, and the otherwise high costs of civil action, especially if the abuse has occurred overseas.
- In the oral evidence sessions held as part of the Committee’s inquiry on Mental Health and Deaths in Prison, which was interrupted by the 2017 General Election, we heard from bereaved families who had struggled to afford legal representation at the inquests of those who had died whilst in the care or custody of the state.⁷
- Our most recent report on reform of the Deprivation of Liberty Safeguards concluded that inequitable access to legal aid has left some disabled people unable to challenge their unlawful detention in court.⁸

4. This clear pattern in our conclusions prompted us to look at the issue in more depth. Our contention at the outset was that the conditions necessary to ensure that human rights can be enforced are:

- adequate access to legal information, advice and assistance for everyone at all income levels and in all areas of the country;

4 [Q49](#) [Lord Neuberger of Abbotsbury]

5 See for example, Christian Concern ([DRA0006](#))

6 Glasgow Disability Alliance ([AET0029](#))

7 Joint Committee on Human Rights [Session 2016–17] [Publications](#); Oral evidence taken on 8 March 2017, HC (2016–17) HC 893, [Q67](#) [Saunders family]

8 Joint Committee on Human Rights, Seventh Report of Session 2017–19, [The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards](#), HC 890 / HL 161

- a robustly independent judiciary;
- a robustly independent legal profession;
- a strong Equality and Human Rights Commission, held accountable for its work, and strong National Human Rights Institutions in the devolved administrations, similarly held accountable; and
- a culture which understands the concept of the rule of law, respects human rights and accepts that they will be enforced and which is supported by the Government.

5. Our ongoing investigation into the wrongful detention of members of the Windrush generation has highlighted that many decisions that profoundly impact on individuals' human rights are administrative in nature, such as the decision to take someone into immigration detention; which deprives them of their liberty. It is essential that these processes are transparent and open to scrutiny so that individuals are able to challenge decision-making where their human rights are engaged.

6. Access to a court is an essential backstop for human rights; without legal jeopardy there is impunity for those who might abuse another's human rights. However, in most cases this should be the last resort not the first. The most effective and efficient way to enforce human rights is to design and implement systems and laws that uphold human rights at the outset. A culture which understands and respects human rights is a necessary pre-condition for this.

7. We recognise that much of this report deals with complex and difficult issues, such as the fundamental conditions necessary to secure the rule of law and a functioning justice system; how to build a legal advice and assistance system that is sustainable over the long-term or how to develop a stronger human rights culture in which individuals have greater levels of awareness of their rights. These are necessarily long-term issues but we offer some initial thoughts about how these should be taken forward. But some of the issues we consider need to be addressed urgently, such as the failure of the Exceptional Case Funding scheme to provide legal aid where human rights are at risk and the restrictions on the Equality and Human Rights Commission's powers to take human rights cases.

Our inquiry

8. Our inquiry has focused in the main on the situation in relation to enforcing human rights in England and Wales, which was the focus of the majority of the evidence and submissions received. However, we have also looked to the experiences of Scotland and Northern Ireland, which has been useful for the purpose of comparison and learning. We were very grateful to representatives of the Scottish Human Rights Commission and Northern Ireland Human Rights Commission for coming to give evidence to us.

9. The Committee published an open call for evidence on 4 December 2017 along with a detailed set of questions, which served as the terms of reference for the inquiry. We conducted seven oral evidence sessions with 25 witnesses and received 46 written submissions. All the evidence, both written and oral, can be viewed on our website.⁹ We are grateful to everyone who gave evidence.

9 Joint Committee on Human Rights; [Publications](#)

10. This has been a wide-ranging inquiry, and we have heard from stakeholders representing not only legal practitioners but also groups representing individuals seeking to uphold their rights, including disabled people, women, children, religious groups prisoners and Gypsy and Traveller communities. It has been particularly important to hear in oral evidence from individuals who had first-hand experience of seeking to enforce their rights. We wish to single out for special mention bereaved family members: Richard Huggins, Sara Ryan and Louise and Simon Rowland, who shared with us their experiences of seeking justice for their loved ones through the inquest process - we are deeply indebted to them.

2 Access to justice and the rule of law

The preconditions necessary for enforcement of human rights

11. The right to an effective remedy is enshrined in all major human rights treaties. Most notably, Article 13 of the European Convention on Human Rights (ECHR)¹⁰ provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. Article 13 is not explicitly listed in Schedule 1 of the Human Rights Act 1998 as one of the Articles given effect to by that Act, because the Act itself is deemed to give effect to this right.¹¹

12. The fundamental importance of the right of access to justice is recognised in Article 6(1) ECHR, and the European Court of Human Rights (ECtHR) has said that it is essential to ensure that rights are ‘practical and effective, not theoretical and illusory’¹² The Court has interpreted this to include a right of access to a court which may in certain circumstances require publicly funded access to legal advice to be available for the right of access to a court to be practical and effective.

13. In deciding whether free legal assistance is necessary the ECtHR has stated it will consider the particular facts and circumstances of each case, taking into account:

- i) the importance of what is at stake for the applicant;
- ii) the complexity of the case or the procedure, particularly when legal representation is mandatory by law; and
- iii) the capacity of the applicant to effectively exercise his or her right of access to court.¹³

14. Access to justice is an essential component of the rule of law. In his seminal text, Lord Bingham listed it as one of his eight principles of the rule of law in these terms:

“Means must be provided for resolving without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve.”¹⁴

15. Lord Reed JSC, commenting in the *Unison* case, warned that the intrinsic link between access to justice and the rule of law is not always fully appreciated by policy makers:

10 See also the following, all of which have been ratified by the UK, Article 8, Universal Declaration of Human Rights; Article 2 (3), International Covenant on Civil and Political Rights; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 47, Charter of Fundamental Rights of the European Union

11 Human Rights Act 1998, [Schedule 1](#)

12 *Airey v. Ireland*, Series A No. 32, 2 EHRR (1979–1980) 305

13 See such cases as *Airey v. Ireland*, ECHR 9 October 1979 (Application No. 6289/73), *Benham v. the United Kingdom*, ECHR 10 June 1996, (Application No. 19380/92), *P., C. and S. v. the United Kingdom*, ECHR, 16 July 2002 (Application No. 56547/00) and *R (Gudanaviciene & ors) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622

14 *The Rule of Law*, Tom Bingham (London, 2010)

“The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other.”

16. The evidence we received, summarised in Chapter 3, suggests that the Government’s approach to achieving its legitimate aim of reducing the legal aid budget has fallen into the trap highlighted by Lord Reed. Legal advice and assistance is available for those who have the means to pay for it but is out of many people’s reach. A fundamental rethink about how legal information, advice, assistance and representation is delivered in this country is needed to solve this problem. Improved access to legal aid, while necessary and urgent, may not be the whole answer.

The need for a strategic approach to securing access to justice to enforce human rights

17. In a world of finite resources, it is vital that access to justice is viewed in its widest sense. Strategic investment in advice services, education and regulation can prevent breaches of people’s human rights and reduce the need for expensive court processes after the event. Moreover, improved training for public officials can help to ensure that human rights breaches do not occur from the outset (before needing any recourse to the Courts).

18. Better provision of easily accessible advice services was a recurrent theme in our inquiry. For example, help to address debt problems or welfare benefits at an early stage could prevent relatively minor problems escalating into major ones which could threaten an individual’s human rights. Lord Thomas of Cwmgiedd told us:

“There is a case for looking again at better integration of the advice given by lawyers, the third sector and lawyers employed by the local authority. For the foreseeable future, in the light of fiscal conditions in this country, I wonder whether it is realistic to expect solicitors, who want to earn a reasonable living, to be paid out of legal aid funds. I may be completely wrong; there may be money for it. I am rather sceptical as to whether that would ever happen. There is an urgent need, particularly in respect of post-industrial and rural areas where there is a lot of poverty of different kinds, to look for the proper provision of advice that is not necessarily through the traditional mechanisms.”¹⁵

19. Improved public legal education (PLE) and human rights education (HRE) have an important role to play in helping individuals to know their rights, to identify for themselves when they have experienced a potential breach of their human rights and therefore have a case to take. These issues are discussed in more detail in Chapter 6.

20. The experience in Scotland is instructive here. An independent review of legal aid was published in Scotland in February 2018. The review highlighted that Scotland’s legal aid spend per head is among the highest in the European Union and has both the widest scope and eligibility. In the report, the Chair, Martyn Evans, Chief Executive of the Carnegie Trust, said:

“I found, rather to my surprise, that the Scottish legal aid service compares very well internationally. That finding should not lead to any complacency. The vision I suggest seeks to move Scotland towards having one of the very best services in the world.”¹⁶

21. Despite this positive assessment, he also concluded that a fundamentally new approach was needed to further secure access to justice:

“We need to rethink legal aid and in doing so, widen it to encompass the whole range of what I have called ‘publicly-funded legal assistance’ [...].

In my review, the term ‘publicly-funded legal assistance’ will be used to describe the wider services that include information and advice about the law and alternative means of resolving legal problems, help in preventing or resolving disputes, and help in enforcing decisions. It includes advice that is often not described as legal, for example welfare rights advice, housing advice, money and debt advice and consumer advice. This wider definition allows for a strategic approach that is rooted in the current pattern of complex service provision and user need.”¹⁷

22. The ability to know about and enforce human rights is vital for the rule of law to be a reality. As well as the current review of the impact of legal aid reform in England and Wales, there is a pressing need for a much wider evaluation of the broader landscape of advice, support and means of resolution for legal problems to assess how they can collectively better serve individuals faced with a breach of their human rights. Such a process must also consider the economic viability of the whole system.

16 Martyn Evans, [Rethinking Legal Aid, An Independent Strategic Review](#), February 2018, p 1

17 Martyn Evans, [Rethinking Legal Aid, An Independent Strategic Review](#), February 2018, p 1

3 The damaging effects of legal aid reforms

Legal aid reform in England and Wales¹⁸

23. In 2010 the Coalition Government announced its intention to reduce the legal aid budget in England and Wales. It wished to discourage cases from coming to court when they might better be resolved by other means, such as mediation. The reform package had four key objectives:

- To discourage unnecessary and adversarial litigation at public expense;
- To target legal aid to those who need it most;
- To make significant savings to the cost of the scheme; and
- To deliver better overall value for money for the taxpayer.¹⁹

24. To these ends, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) made significant changes to civil legal aid. The legislation amended the financial eligibility criteria and took many areas of civil and family law out of scope. Previously, any type of case would be within scope for legal aid unless it was part of a (relatively short) list of exclusions.

25. The LASPO reforms left criminal legal aid largely untouched, although the subsequent “Transforming Legal Aid” programme went on to make significant changes to criminal defence policy.

Criminal Legal Aid

26. While the focus of our evidence has largely been on the impact of civil legal aid reforms, it must be noted that the situation facing law firms doing criminal legal aid work is now severe, as is currently very well publicised.²⁰ While criminal legal aid has not been restricted in the same way as civil legal aid, reform of criminal legal aid contracts and significant fee reductions have meant that many law firms providing criminal legal aid have gone out of business or are at risk of doing so, or law firms have closed their department undertaking this work. Young Legal Aid Lawyers told us: ‘It is vital to the legitimacy of the criminal justice system that there is a sufficient number of lawyers with expertise and experience in criminal law to advise and represent defendants.’²¹ The Justice Select Committee has recently taken oral evidence on criminal legal aid from The Bar Council, the Criminal Bar Association, the Law Society and the Criminal Law Solicitors’ Association.²²

18 Legal aid is a devolved matter in Scotland and Northern Ireland and hence we have not focused on it in this chapter.

19 Ministry of Justice, Reform of Legal Aid in England and Wales: the Government Response, [CM8072](#), June 2011

20 For example: [Criminal defence solicitors may be extinct in five years, says Law Society](#), The Guardian, 17 April 2018

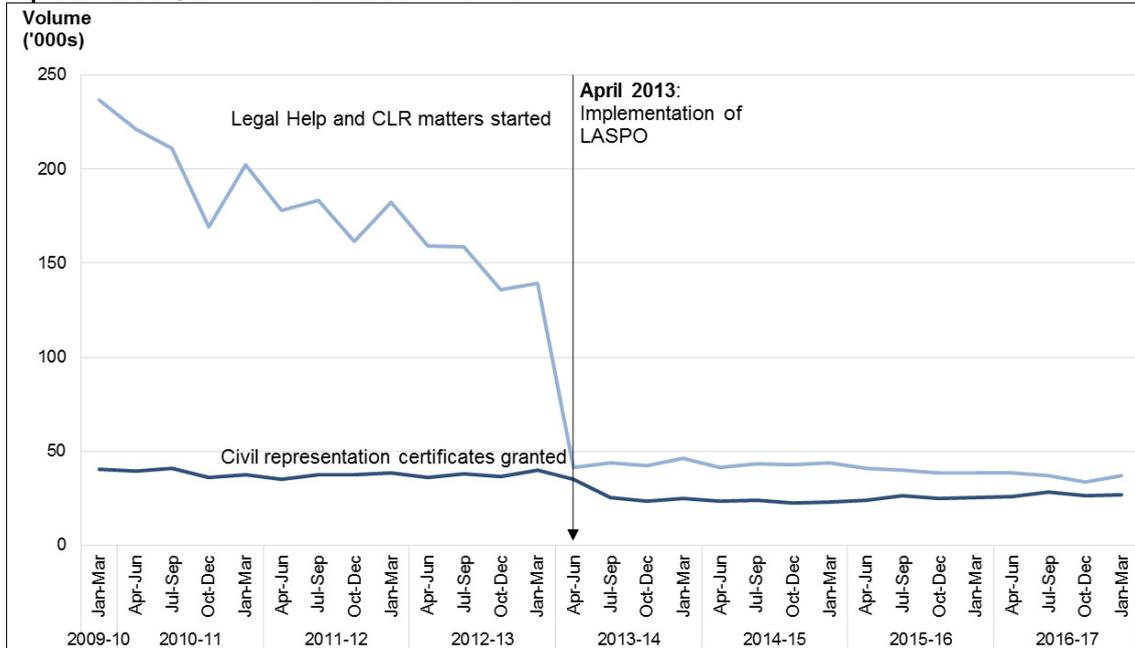
21 Young Legal Aid Lawyers ([AET0024](#))

22 Oral evidence taken before the Justice Select Committee evidence session on 1 May 2018, [HC \(2017–19\) 859](#)

Civil Legal Aid

27. The impact of LASPO on access to civil legal aid has been dramatic. It has resulted in large reductions in the number of legal help (initial advice and assistance) cases being funded, with the overall trend having then levelled out at around one-third of pre-LASPO levels.²³ The number of civil representation certificates fell by a smaller proportion than legal help, before levelling out at around two-thirds of pre-LASPO levels, (see Graph 1).

Graph 1: Longer term trends in civil legal, legal help/controlled legal representation and civil representation, Jan–Mar 2010 to Jan–Mar 2017.²⁴



Source: Legal Aid Agency - Ministry of Justice

28. The effects of LASPO on the ability of individuals to enforce their wider human rights have been widely commented upon by a range of select committees, regulatory bodies, trade unions, professional bodies and NGOs.²⁵ In its 2016 'Cuts that Hurt' report, Amnesty International UK concluded that access to justice has been significantly damaged, which, it argued, amounted to a regressive measure in human rights terms.²⁶

23 Civil legal aid can be broadly categorised into legal help and civil representation. The first point of contact for a client of civil legal aid is usually legal help, which covers help via telephone, face-to-face with a solicitor or at Not-for-Profit centres. Many of these matters will then extend into civil representation with full investigations undertaken or in-court representation given.

24 Ministry of Justice, [Legal Aid Agency, Legal Aid Statistics in England and Wales, January to March 2017](#), 29 June 2017

25 Final Report of the Bach Commission, The Fabian Society (September 2017); The Law Society Access Denied? LASPO four years on: a Law Society review (June 2017); LAG – Justice in Free Fall : A report on the decline in civil legal aid in England and Wales (December 2016); Amnesty International UK: Cuts that hurt: The impact of legal aid cuts in England on access to justice (October 2016); TUC Justice denied - impacts of the government's reforms to legal aid and court services on access to justice (October 2016); Equality and Human Rights Commission published, Equality, human rights and access to civil law justice: a literature review. (October 2015); Justice Select Committee Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15 (March 2015); National Audit Office, Implementing reforms to civil legal aid (November 2014) and The Bar Council The Legal Aid, Sentencing and Punishment of Offenders Act (2012): One Year On (September 2014)

26 Amnesty International UK ([AET0034](#))

29. LASPO has had deleterious and discriminatory effects on particular groups.²⁷ For example, the revisions to the financial eligibility criteria for legal aid have had a disproportionate impact on various groups, including disabled people, women, children and migrants. These experiences are explored in more detail below.

30. The reforms have also made obtaining legal representation in order to access justice more difficult for many without the financial means to pay for it.²⁸ This is acknowledged by senior judicial figures. In his 2015 annual report to Parliament, the then Lord Chief Justice, Lord Thomas of Cwmgiedd wrote that “our justice system has become unaffordable to most.”²⁹

Financial eligibility for legal aid

31. Under LASPO, the financial eligibility criteria for civil legal aid are more restrictive than previously. The levels of income-based contributions have been increased to a maximum of approximately 30% of monthly disposable income and all applicants are now subject to means testing regarding their capital. This means that those on benefits, such as income support or universal credit, are now only passported in respect of the income part of the means test. Nicola Mackintosh QC (Hon), Sole Principal at Mackintosh Law; told us:

“In the welfare benefits system, when the state means tests people it ignores the value of their dwelling house, recognising that they have to live somewhere, but the legal aid system takes that into account and presupposes that they can raise money on the value of that property to pay privately for their legal advice. That is not realistic. It is not living in the real world.”³⁰

32. Rights of Women cited this quotation from a woman responding to a survey about legal aid they carried out in 2014/15:

“I earn a low income, yet I’ve been assessed as having too much disposable income [...] and when you aren’t eligible you’re expected to pay full solicitors costs - there’s no help anywhere in between. I’ve had to face my violent ex-partner in court twice now, and will have to continue to do so as I simply cannot afford costs”³¹

33. The revised financial eligibility criteria have impacted disproportionately on disabled people. For many disabled people, moving house to release equity to pay for legal costs is not an option due to the chronic shortage of accessible housing, and in any event not within the three-month timeframe for taking a judicial review. Inclusion London told us that they are aware of numerous cases where Deaf and Disabled people have not been able to obtain representation to take legal action to enforce their human rights due to being ineligible for legal aid following these changes.³²

27 See for example, Amnesty International UK ([AET0034](#))

28 See for example, Young Legal Aid Lawyers ([AET0024](#))

29 Judiciary of England and Wales, [The Lord Chief Justice’s Report 2015](#), 2016, p 5

30 [Q30](#) [Nicola Mackintosh QC (Hon)]

31 Rights of Women ([AET0023](#))

32 Inclusion London ([AET0025](#))

34. The Supreme Court ruling in the *Unison* case is instructive. In the judgment their Lordships held that in order for employment tribunal fees to be lawful, they would have had to be set at a level that everyone can afford, taking into account the availability of full or partial remission. They also specified that fees must be affordable in the sense that they can *reasonably* be afforded and that this meant individuals should be able to afford them without foregoing an acceptable standard of living. Nimrod Ben-Cnaan, Head of Policy and Profile at Law Centres Network told us that the case had “reasserted not just the principle but the practice of assessing affordability of access to justice as a practical test of whether people, on legal aid or not, can assert their rights.”³³

35. The Ministry of Justice (MoJ) does not routinely estimate the percentage of the population eligible for civil legal aid. However, they did attempt to do so for a single year, 2015; estimating that around 25% of the population were eligible for free or contributory legal aid.³⁴ Previous estimates suggest this figure has dropped from 52% in 1998, and 29% in 2007.³⁵ By comparison, in Scotland 70% of the population are eligible for civil legal aid.³⁶

36. Many of those who contributed written submissions to the inquiry asserted that this reduction in the coverage of legal aid in England and Wales over a long period of time has left a large proportion of the population unable to afford to access justice. Young Legal Aid Lawyers said:

“The means test for civil legal aid does not bear a direct relationship to applicants’ actual ability to meet the costs of privately obtaining legal advice and representation. In reality, the result of the current financial eligibility criteria is that almost anyone who is not in receipt of means-tested state benefits will be financially ineligible for civil legal aid. In our view this represents a widespread denial of justice to the people of this country.”³⁷

37. When we put it to the Lord Chancellor that the majority of the population could neither afford to access legal assistance nor obtain legal aid in the event they needed to enforce their human rights, he responded that the review of LASPO that his Ministry is currently undertaking will look at the availability of legal aid and the impact it is having on individuals. He also noted that the Government still spends £1.6 billion a year on legal aid.

38. *The ongoing Government review of the legal aid reforms must look again at the financial eligibility criteria with a view to widening access to a larger proportion of the population. At the least, it should consider extending the passporting of those on welfare benefits so that the part of the means test focussing on capital is aligned with welfare benefits criteria, thus making it fairer and more administratively expedient.*

33 [Q5](#) [Nimrod Ben-Cnaan]

34 This is based on outputs from DWP, informed by the Family Resources Survey (FRS) and DWP’s Policy Simulation Model (PSM), which attempts to take into account the impact of various earnings / tax / welfare policy decisions. The modelling involves a number of assumptions, which bring uncertainty to the estimate.

35 It is estimated that this figure increased to 36% in 2009 before decreasing again. HC Deb, 20 February 2008, [cols 779-780W](#) [Commons written answer], and Review of Civil Litigation Costs, [Review of Civil Litigation Costs: Final Report](#), 2009, p 68, para 3.1 and footnote 8

36 Rethinking Legal Aid, [An Independent Strategic Review](#), February 2018

37 Young Legal Aid Lawyers ([AET0024](#))

Exceptional Case Funding

39. Section 10 of LASPO provides for funding when the Director of Legal Aid casework makes a determination that it is an exceptional case. Exceptional Case Funding (ECF) should be available in cases engaging human rights where a failure to provide funding would mean that an individual's human rights are not enforced and there is no effective remedy. This is a vital safety net for an individual's ability to enforce their rights.

40. During the passage of the LASPO Bill through Parliament, the Government originally projected that 5,000–7,000 such exceptional cases would be funded per year.³⁸ In reality, only 954 people benefited from the scheme in 2017.³⁹ Initially, applications and grant rates were even lower, but they rose following amendments to the Lord Chancellor's Guidance on Exceptional Funding (Non-Inquests) following a decision in the Court of Appeal that found the previous guidance to be incompatible with Articles 6(1) and 8 ECHR.⁴⁰

41. Numerous submissions to this inquiry contend that despite these improvements ECF remains inaccessible in practice for those who need it, particularly those who are trying to apply without the assistance of a legal aid provider. This leaves them unable to secure their fundamental rights.⁴¹

42. One of the main problems is the complexity of the system. The Legal Aid Agency claims that individuals can apply directly for ECF without the assistance of a solicitor, but those submitting evidence to the inquiry, such as the Public Law Project, told us that the forms are extremely complex and almost impossible for most individuals to complete themselves:

“None of these forms is designed for completion by a person who is not familiar with the legal aid scheme. They are all designed to be completed by legal aid providers who have detailed knowledge of the legal aid contract and relevant Regulations.”⁴²

43. A further barrier to take-up is that legal aid providers are not paid for compiling, completing and submitting applications on behalf of potential clients. Richard Miller from the Law Society told us:

“Lawyers say that it takes a good three to four hours minimum to complete the application forms here. That is work for which they are not entitled to be paid. Most lawyers feel that they cannot do this work. They cannot afford to do those many hours of unpaid work.”⁴³

44. *The Exceptional Case Funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Urgent reform is needed to ensure that human rights cases are properly supported and therefore to ensure meaningful and effective access to justice. The LASPO review should consider how to*

38 National Audit Office, Ministry of Justice and Legal Aid Agency, *Implementing reforms to civil legal aid*, [HC 784](#), November 2014

39 Ministry of Justice, Legal Aid Agency, [Legal Aid Statistics in England and Wales, January to March 2017](#), 29 June 2017

40 In the case of R (Gudanaviciene & ors) v The Director of Legal Aid Casework and The Lord Chancellor [2014] EWCA Civ 1622

41 Rights of Women ([AET0023](#)), LawWorks ([AET0027](#)), The Howard League ([AET0031](#))

42 Public Law Project ([AET0022](#))

43 [Q30](#) [Richard Miller]

remove barriers to accessing Exceptional Case Funding where this is needed to secure effective enforcement of human rights. This should include ensuring simplification of the application process, and access to legal advice and assistance (legally aid funded where necessary) to navigate complex legal process forms.

Difficulties arising from the increase of Litigants in Person

45. Since LASPO, there has been a significant increase in the number of litigants in person (LiPs), individuals representing themselves in courts and tribunals.⁴⁴ There have always been some people who have chosen to represent themselves, but since LASPO, many people have had no choice because they have found themselves ineligible for legal aid and unable to afford a lawyer. Those representing themselves face a complex legal system which they do not have the expertise to navigate effectively. These challenges are particularly acute if an individual is seeking to assert their human rights in a case where the State, with full legal representation, is their opponent. Given that human rights protect the individual from abuses of state power, this could pose a significant problem.⁴⁵

46. Evidence suggested that the increase in LiPS has led to increased costs elsewhere in the system. For example, the Law Society told us that judges have estimated cases involving LiPs take 50% longer on average.⁴⁶ This entails increased costs to the Court system. When we asked the Secretary of State for Justice, Rt Hon David Gauke MP, about this, he pointed to measures the Government has sought to put in place to support LiPs, but also acknowledged that the effects of the increase in LiP numbers should be considered by the LASPO review:

“One of the points that is often made is that there are costs that occur somewhere else in the system. Our challenge in engaging in the LASPO review is to look at the evidence on that and so on. It is perfectly fair to ask whether a false economy is being made here. That should be led by the evidence.”⁴⁷

47. We welcome the fact that the Government is considering the impact of the increased number of Litigants in Person in the LASPO review and the impact that this is having on access to justice in those individual cases, but also the burdens on the justice system more generally. We recommend that the review looks specifically at what options might exist to ensure that the Courts are properly supported so that justice may be served in such cases, including whether better use could be made of an amicus curiae system to assist the court or tribunal and unrepresented individuals.

48. There are specific concerns about litigants in person in domestic abuse cases, where victims may be cross-examined by their abusers. In the first three quarters of 2017, 27% of applicants in domestic violence cases were unrepresented, compared with 16% in 2012.⁴⁸

44 Law Centres Network ([AET0035](#))

45 Amnesty International UK ([AET0034](#))

46 The Law Society ([AET0020](#))

47 [Q72](#) [Rt Hon David Gauke MP]

48 Ministry of Justice (2017), Family court statistics quarterly, July to September 2017, table 11: legal representation status of applicants and respondents in cases with at least one hearing [accessed: 16 January 2018]. Note that the total number of domestic violence cases in family courts increased significantly over this period, from 8,009 in the first three quarters of 2012 to 12,040 for the same period in 2017.

Before the 2017 General Election, the Government committed to ban this practice, and legislative measures to prevent it are currently subject to consultation.⁴⁹ We will monitor progress on this issue.

Mandatory Telephone Gateway

49. LASPO introduced a telephone gateway for initial advice on debt, discrimination and education law. For those seeking advice in these areas, it is mandatory to go through this service to access legal aid. There is concern that this has created barriers for people for whom telephone advice is not appropriate, including those with physical and mental health conditions and those whose first language is not English.⁵⁰ There are also broader concerns about whether the gateway is delivering adequate access to legal advice. Since it was introduced, both the total number of cases received and the number of clients referred for face-to-face advice have declined. In 2016/17, no discrimination cases were referred for face-to-face advice.⁵¹

50. In February 2018, the Government announced that it had cancelled the procurement process for the delivery of gateway services for discrimination and education law from September 2018, due to a lack of tenders.⁵² In light of this, it is unclear how legal aid will continue to be made available in discrimination and education cases. In evidence, the Lord Chancellor told us that the Ministry is engaging with the Department for Education on this particular point.⁵³

51. *The Government must urgently resolve the question of how legal aid for discrimination and education matters will be made available from September 2018. We are concerned by the fall in numbers of those using the Mandatory Telephone Gateway, and those who are referred for face-to-face advice. The LASPO review must consider whether the Gateway is effective, and whether it is sufficiently accessible and readily navigable by all.*

Damaging impact of LASPO on human rights

Article 8 - the right to a private and family life

Immigration Law

52. Migrants were frequently singled out in written submissions as a group which had had their ability to enforce their human rights restricted by LASPO.⁵⁴ Non-asylum immigration cases were taken out of scope of legal aid, subject to narrow exceptions for some applications by victims of domestic violence, and of trafficking and modern slavery.

49 HM Government, [Transforming the Response to Domestic Abuse](#)

50 Law Centres Network ([AET0035](#)), Legal Aid Practitioners Group (LAPG) ([AET0021](#)), Equality and Human Rights Commission ([AET0037](#)), Inclusion London ([AET0025](#))

51 HC Deb, 7 November 2017, [c 111873W](#) [Commons written answer] [accessed: 2 February 2018]. The total number of cases received by the gateway service fell from 53,479 in 2013/14 to 30,370 in 2016/17; the total number of clients referred for face-to-face advice fell from 182 to 56 over the same period.

52 Gov.UK, [Civil news: cancellation of Civil Legal Advice procurement](#), 5 February 2018

53 [Q69](#) [Rt Hon David Gauke MP]

54 Public Law Project ([AET0022](#)), Migrants' Rights Network ([AET0026](#)), Coram Children's Legal Centre ([AET0019](#))

Applications for leave to enter or remain based on an individual's right to private and family life under Article 8 of the ECHR were amongst those areas taken out of scope, even though these too are human rights issues.

53. We received striking examples of how migrant children are affected. Kamena Dorling from Coram Children's Legal Centre told us that without access to legal aid to regularise their status when they have a right to stay in the UK, these children and their families are at risk of breaches of their human rights in other areas of their lives:

“In the current legal framework, which we have in part because of the hostile environment, if you do not have papers, in short, you can find yourself destitute, homeless, unable to access healthcare and not allowed to work. A whole range of other human rights implications stem from the immigration side of things.”⁵⁵

54. Evidence from the Public Law Project (PLP) highlights statistics which show that in the majority (over 70%) of cases where ECF applications are made for immigration matters, the application is granted. These will mainly be cases based on private and family life rights. PLP believes that these figures:

“[...] reveal a strong case for reinstating legal aid for Article 8 immigration cases to ensure effective participation in proceedings which determine individuals' rights to live with their family or remain in their communities. This case for reinstating legal aid is even stronger for unaccompanied and separated children making immigration applications.”⁵⁶

55. We recommend that the Government consider whether immigration cases engaging the Article 8 right to private and family life be brought within the scope of civil legal aid, where they would be available on the means and merits test basis.

Family Law

56. LASPO largely removed private family law from the scope of legal aid provision, although it was retained in some limited circumstances, for example for children in family proceedings, for cases involving allegations of child abuse and for victims of domestic violence who could meet the evidence threshold set in regulations.

57. The removal of private family law from the scope of legal aid has had a very significant impact on children and their families. Article 12 of the UN Convention on the Rights of the Child (UNCRC) provides that children should have ‘*the opportunity to be heard in any judicial and administrative proceedings affecting [them], either directly or through a representative*’. The UNCRC also states that the best interests of children should be the primary consideration in all decisions affecting them (Article 3 (1)). Without access to legal advice and assistance these rights cannot be enforced effectively. Kamena Dorling from Coram Children's Legal Centre told us that a lack of legal advice was limiting the ability to protect children's rights:

“In private family law, in an acrimonious divorce case for example, [...] [t]he issues can be where [a child is] going to live, what support they are

55 [Q3](#) [Kamena Dorling]

56 Public Law Project ([AET0022](#))

going to get and what contact they are going to have with other members of their family. At the moment, there is very limited legal advice and support for families going through that process in order to ensure that the best interests of the child are considered all the way through so that the case does not end up in court where what a judge can do is very limited; they cannot create evidence if it has not been put in front of them. That is a clear example in the family law space [...] where children's rights are not being sufficiently considered."⁵⁷

58. Whilst domestic violence remains in scope following LASPO, there has nevertheless been a reduction in applications for legal aid in this area. Between 2011–12 and 2015–16, applications relating to domestic violence decreased by 16%, and applications granted fell by 17%.⁵⁸

59. One probable reason for this drop is the evidential requirements introduced under LASPO to establish domestic violence in order to access legal aid. Following a legal challenge,⁵⁹ the Government made various amendments to these evidential requirements for access to legal aid funding, expanding the list of acceptable evidence of domestic violence and removing time limits on such evidence.⁶⁰ However, in its submission to this inquiry, Rights of Women raised concerns about the effectiveness of these changes. They drew attention to the situation of migrant women survivors of domestic violence and feared that some categories of women could face reduced access to justice under the amended regulations.⁶¹

60. ***The LASPO review must consider whether further amendments are necessary to evidential requirements for access to legal aid funding to ensure that women who have experienced domestic violence are able to access legal aid.***

61. The number of applications being made for ECF in private family cases⁶² remains troublingly low despite the very serious human rights issues which are often at stake, such as contact between parents and children or where a child should live, and the obvious impact on families' human rights. ***The Ministry of Justice's review of LASPO must examine the reasons for the low uptake of ECF in private family law cases, the impact of this on families' abilities to secure effective access to justice, and whether the Courts are able to act consistently in the best interest of children, when individuals are not represented.***

57 [Q4](#) [Kamena Dorling]

58 LawWorks ([AET0027](#))

59 *R (on the application of Rights of Women) v Lord Chancellor and another* [2016] All ER (D) 177 (Feb)

60 [Civil Legal Aid \(Procedure\)\(Amendment\) \(No 2\) Regulations 2017](#)

61 Rights of Women ([AET0023](#)). The 2017 regulations enable a victim to provide a letter from the Home Office confirming that they have been granted leave to remain in the UK as a victim of domestic violence. However, the leave to remain must have been granted under paragraph 289B of the Immigration Rules a provision that only applied to applications prior to July 2012, so women whose leave was granted after that date would be denied legal aid for family cases simply because their leave to remain fell under a different provision.

62 Private family law cases are those brought by private individuals, generally in connection with divorce or the parents' separation.

Article 2 - the right to life

Inquests

62. During our inquiry, we were privileged to hear at first-hand, moving evidence from bereaved families about the difficulties they faced in enforcing their human rights in the inquest process. One of the chief causes of these difficulties was the lack of equal access to legal advice and assistance.

63. Article 2 of the ECHR (the right to life) contains a ‘procedural obligation’ which requires the State to initiate an effective public investigation by an independent official body into any death the circumstances of which give ground for suspicion that the State may have breached a substantive obligation imposed by Article 2.⁶³ In England and Wales, the coroner’s inquest is how the state discharges its procedural obligation. An Article 2 inquest has certain minimum requirements for the investigation, one of which is that the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.⁶⁴

64. In limited circumstances, legal help is still available to bereaved family members in the run-up to an inquest but save in “exceptional” cases, the availability of publicly funded legal services does not extend to cover advocacy at the inquest or at pre-inquest review hearings.

65. The witnesses were unanimous in expressing the view that the way inquests are run puts families at a serious disadvantage as compared with interested persons from the commercial sector or other business interests and most notably from state bodies who have legal representation, the last at public expense.

66. The Ministry of Justice’s position was that funding for representation at an inquest is not generally available for families because an inquest is an inquisitorial process, rather than an adversarial one. It was clear from our evidence that bereaved families do not experience them in this way. Our witnesses had been subject to aggressive questioning from barristers representing public bodies (such as the NHS), often facing multiple lawyers from many public bodies on the other side, or left out of significant steps in the process due to their lack of legal representation, where the other side’s lawyers took part in key coronial decisions as to the way the inquest would be run and what it would focus on. Richard Huggins and Sara Ryan, Connor Sparrowhawk’s parents, described their experiences:

Richard Huggins: “Without [support from INQUEST and lawyers acting pro-bono] we would have been totally ill equipped and unprepared. We would have taken at face value the statement that we did not need legal representation. They had seven barristers in the court for two weeks.”⁶⁵

63 *McCann v United Kingdom* (1995) 21 EHRR 97, para 161

64 See *Jordan v United Kingdom* (2001) 37 EHRR 52, para 102, *R (Amin) v. Home Secretary* (2004) 1 AC 653 and *Paul and Audrey Edwards v. the United Kingdom* 14 March.2002 (Application No. [46477/99](#))

65 [Q14](#) [Richard Huggins and Sara Ryan]

[...]

Sara Ryan: “As for the uneven playing field, we were not even on a field. There was no field for us. They were already on it scoring goals before we got there.”⁶⁶

67. This powerful evidence suggests that the justification that legal aid-funded representation is not generally required because inquests are an inquisitorial process is invalid. In March 2018, we wrote to the Lord Chancellor putting this to him and in his response, he told us:

“An inquest should be an inquisitorial process but, as you note, this is not always the case. We are therefore also considering how we can make inquests less adversarial and reduce the number of lawyers who attend without compromising fairness alongside other measures to make inquests more sympathetic to the needs of bereaved people [...]”⁶⁷

68. Exceptional Case Funding is available to fund advocacy at an inquest:

- a) Where representation is necessary for an effective investigation into the death, as required by Article 2 of the European Convention on Human Rights (ECHR)—although often this is determined too late to give meaningful access to legal advice at the crucial stages of an inquest;⁶⁸
- b) Where the Director of Legal Aid Casework has made a wider public interest determination in relation to the individual applicant and the inquest.⁶⁹

69. In its written evidence to this inquiry, INQUEST notes that in its experience:

“Exceptional Case Funding [...] is onerous, intrusive and can take many months. In most cases it is not only the only individual legal aid applicant who has their financial means assessed, but also all other close family members and often their partners. This can create significant family tensions as well as making the relationship with the lawyer difficult or requiring pro bono work in the interim period before the awarding of any funding which is not backdated.

This can be a very stressful period for the family who are left in limbo not knowing whether they will be granted legal aid or will have to try to raise the funds themselves, or what steps can or cannot be taken on their behalf.”⁷⁰

70. It is important to note that during this initial period, when bereaved families are struggling to understand the process or access support, crucial decisions can be taken affecting the running of the entire coronial process. Therefore, if families are unrepresented during this period, because ECF funding is still being assessed, this means that the

66 [Q18](#) [Richard Huggins and Sara Ryan]

67 Letter from Rt Hon David Gauke MP, Secretary of State and Lord Chancellor, to Rt Hon Harriet Harman MP, Chair of the Joint Committee on Human Rights, regarding [JCHR inquiry into Enforcement Rights](#), dated 26 March 2018

68 Legal Aid, Sentencing and Punishment of Offenders Act 2012, [section 10 \(2\) and \(3\)](#)

69 Legal Aid, Sentencing and Punishment of Offenders Act 2012, [section 10 \(4\)](#)

70 INQUEST ([AET0038](#))

family is excluded from decision-making during that period and therefore there can be no meaningful equality of arms. This significantly questions whether the procedural requirements of Article 2 ECHR are being met in such instances.

71. A number of high profile reports published in 2017 have all concluded that bereaved families should be given non-means tested funding for legal representation at inquests.⁷¹ Louise and Simon Rowland put the case in these words in their written submission to the inquiry:

“Non-means tested legal aid is an absolute necessity to ensure a fair system. All families want is answers when something like this happens and at a very basic level, the state needs there to be proper justice. This simply cannot be done without the family being properly represented. Coronial law is very specialised, there is no way we can expect a family, even a legally trained family member, to represent themselves at an inquest.”⁷²

72. On 13 June 2018, Lucy Frazer QC MP, Parliamentary Under-Secretary of State for Justice, wrote to inform us that the Government had made changes to the Exceptional Funding Guidance for Inquests to ensure a clear starting presumption that legal aid should be awarded for representation of the bereaved at an inquest following the non-natural death or suicide of a person detained.⁷³ We welcome this as a positive step forward.

73. This letter also goes on to note that the Ministry of Justice is currently reviewing the provision of legal aid for inquests as part of the wider review of legal aid reforms and that a report is expected later this year. In a previous letter of 26 March, the Lord Chancellor assured us that the provision of publicly funded representation in cases where the state is represented will be considered as part of this.⁷⁴

74. While inquests are theoretically inquisitorial, in practice they often have a more adversarial nature. It is extremely difficult for families of the deceased to participate effectively without legal representation, leading to inequality of arms and consequent concerns about fairness, access to justice and compliance with the procedural requirements of Article 2 ECHR. *If inquests are to remain inquisitorial, families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons. Consideration should be given as to funding models that might be employed, such as whether there should be a requirement on public bodies to pay a proportion of their own legal costs to fund families' representation.*

71 Chief Coroner, (2017) Report of the Chief Coroner to the Lord Chancellor. Fourth Annual Report 2016–2017, Angiolini, E. (2017) Report of the independent review of deaths and serious incidents in police custody, Jones, J. (2017) ‘The patronising disposition of unaccountable power’: A report to ensure the pain and suffering of the Hillsborough families is not repeated

72 Simon and Louise Rowland ([AET0046](#))

73 Letter from Rt Hon Lucy Frazer QC MP, Parliamentary Under Secretary of State for Justice, to Chair, regarding [changes to the Lord Chancellor's exceptional funding guidance for inquests](#), dated 13 June 2018

74 Letter from Rt Hon David Gauke MP, to Chair, regarding [JCHR inquiry into Enforcement Rights](#), dated 26 March 2018

Judicial Review

75. Judicial review is the primary means by which individuals may challenge the lawfulness of public decision making. In Liberty’s assessment, it has “time and time again shown itself to be a vital component to [sic] ensuring respect for human rights.”⁷⁵

76. In its 2013 consultation paper, ‘Transforming legal aid: delivering a more credible and efficient system’ the Government set out figures for 2011–12 which showed that there were 4,074 cases where legal aid was granted for an actual or prospective judicial review. Of these, over 500 cases funded by legal aid did not settle and were not granted permission, so ended without benefit to the client but with public money expended on the case. The consultation paper contended that this demonstrated that there were a “substantial number of cases which benefit from legal aid, but are found by the Court to be “unarguable”.”⁷⁶

77. Those submitting written evidence to the inquiry voiced concern that the reforms introduced to reduce the number of unmeritorious cases have reduced access to judicial review.⁷⁷ Judicial review legal aid work has halved from 6,294 grants in the year before the cuts (2012–13) to 3,018 grants in the last full year (2016–17). These cuts therefore have an impact vastly beyond the small number of cases that did not receive permission. So very clearly these changes are cutting into cases where there is a valid human rights concern and where access to justice is required. Liberty told us:

“Further changes mean legal aid has been refused for cases where the chances of success are assessed as borderline. This means that cases that might break new legal ground are less likely to be brought through legal aid. This risks insulating the state from legitimate challenges, including to measures which threaten basic rights and freedoms.”⁷⁸

78. Given the link between judicial review and human rights arguments, this trend and these changes are all the more concerning from the perspective of enforcing human rights.

75 Liberty ([DRA0007](#))

76 Ministry of Justice, Transforming legal aid: delivering a more credible and efficient system, Consultation Paper [CP14/2013](#)

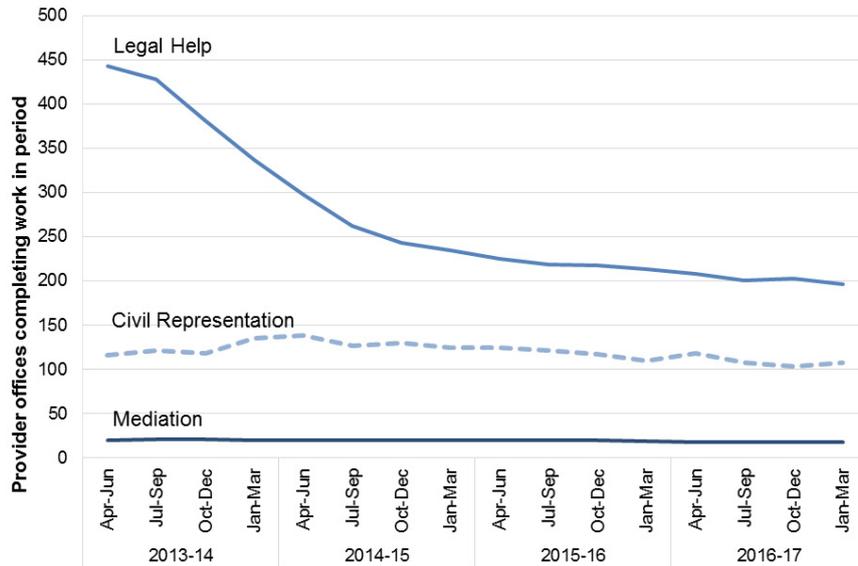
77 See for example, No Mad Laws Campaign ([DRA0004](#))

78 Liberty ([DRA0007](#))

'Legal aid deserts' and the threat to the future of legal aid provision

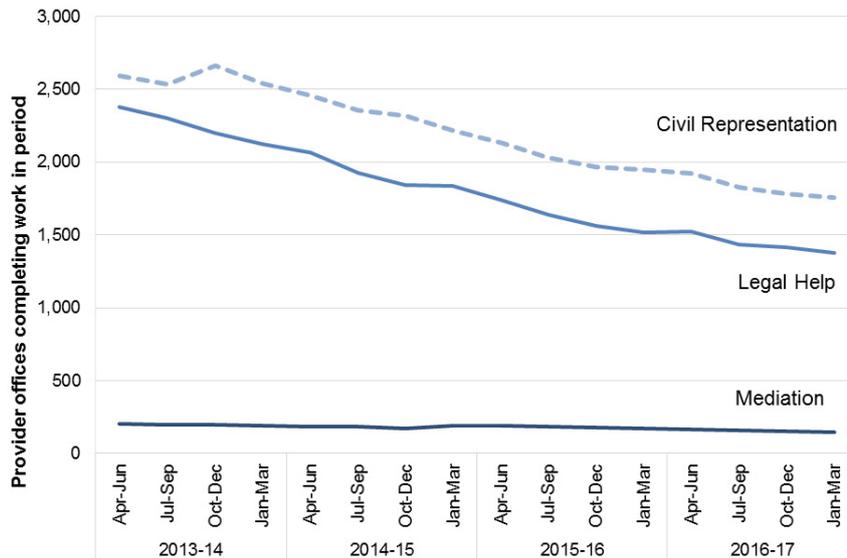
79. Since LASPO came into force, there has been a very significant reduction in legal aid providers.⁷⁹

Graph 2: Number of Solicitor firm provider offices by category of civil legal aid work, Apr-Jun 2013 to Jan-Mar 2017.⁸⁰



Source: Legal Aid Agency - Ministry of Justice

Graph 3: Number of Not-for-Profit provider offices by category of civil legal aid work, Apr-Jun 2013 to Jan-Mar 2017.⁸¹



Source: Legal Aid Agency - Ministry of Justice

79 Ministry of Justice, Legal Aid Agency, [Legal Aid Statistics in England and Wales, January to March 2017](#), 29 June 2017

80 Ministry of Justice, Legal Aid Agency, [Legal Aid Statistics in England and Wales, January to March 2017](#), 29 June 2017

81 Ministry of Justice, Legal Aid Agency, [Legal Aid Statistics in England and Wales, January to March 2017](#), 29 June 2017

80. The fall in legal aid supply over the past three decades has led to the phenomenon of so-called ‘legal aid deserts’- geographical areas where legal aid advice is now unavailable in certain areas of law. In her oral evidence, Rachel Logan from Amnesty International UK gave these examples:

“[...] Take Devon and Cornwall. There is one small legal aid provider in Plymouth, as far as I understand it, for immigration law. It therefore deals with anyone in the entire region who has problems arising within that sphere, and it is an area of dispersal; it is an area where people are sent specifically who are trying to regularise their status or who have immigration questions. Similarly, in Oxford, as far as I understand it, there is only one firm, providing private family law.”⁸²

81. The direct effects of the LASPO reforms have been compounded by the fact that they coincided with a significant reduction in civil legal aid fees. The National Audit Office calculated in 2014 that this has amounted to a 34% real-terms reduction over a 13-year period between 1998–99 and 2011.⁸³ There are many examples of solicitors’ firms ceasing (generally with reluctance) to undertake legal aid work in order to keep the firm in business. The Law Centres Network told us that legal aid work is barely viable for non-commercial providers (who cannot subsidise it).⁸⁴ And for many small or medium sized firms the level of subsidy now required is unaffordable.

82. In addition to the financial pressures, Steve Hynes from the Legal Action Group highlighted excessive bureaucracy as a further reason for providers withdrawing from legal aid work:

“CCMS—the client and cost management system—is an absolute disaster from the lawyer’s point of view; [...] This is the system that is used to administer legal aid. It is designed from the Legal Aid Agency’s point of view. In no way is it an effective system, and unfortunately a lot of lawyers are just walking away from legal aid because they do not want to be bothered with the bureaucracy; they will go off and do private work.”⁸⁵

83. We share the concerns of many of our witnesses that the pressures caused by the reforms to legal aid are having a severe impact on legal aid professionals, damaging morale and undermining the legal profession’s ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK.

82 [Q9](#) [Rachel Logan]

83 National Audit Office, [Implementing Reforms to Civil Legal Aid](#), November 2014, p 33

84 Law Centres Network ([AET0035](#))

85 [Q8](#) [Steve Hynes]

4 The importance of a robustly independent judiciary

Role of the independent judiciary in enforcing human rights

84. Judicial independence is a central feature of the UK's constitutional arrangements. The judiciary is one of the three pillars of our constitution, alongside Parliament and the executive. Each has its role and function, and together they complement each other to create the constitutional balance needed to support democracy, rule of law and the stable government necessary for peace and security. It is essential that the judiciary is impartial and independent of all external pressures so that those who appear before it, and the wider public, can have confidence that cases will be decided fairly and in accordance with the law. As the Courts and Tribunals Judiciary website puts it:

“Only in this way can judges discharge their constitutional responsibility to provide fair and impartial justice; to do justice as Lord Brougham, a 19th Century Lord Chancellor, put it ‘between man and man’ or as Lord Clarke, former Master of the Rolls put it more recently in 2005, ‘between citizen and citizen or between citizen and the state.’”⁸⁶

85. Lord Thomas set out why judicial independence is especially important to the enforcement of human rights:

“It seems to me that no system that truly enforces human rights can operate without a judiciary that is completely independent, and with that independence supported by Parliament and the Executive.”⁸⁷

Lord Neuberger concurred:

“The essence of the way our system works is that Parliament makes laws in a general sense, and the laws are applied in individual cases by the judges. There are few areas where the facts are more sensitive and more determinative, and where rights are more acute, than the area of human rights. That is where the judges, with their decision-making powers in relation to individual cases, applying the law that Parliament has made, come into their own. Unless Parliament is independent of the judiciary and the judiciary is independent of Parliament, it does not work.”⁸⁸

86. In passing the Human Rights Act in 1998, Parliament increased UK judges' involvement in public policy matters, human rights cases having previously been determined by judges in Strasbourg. Where a decision interferes with human rights, the court needs to consider whether that decision was proportionate, with reference to the reasons for making it and the extent of the interference with the human right in question. In doing this, the Courts show a degree of deference to the proper role for Government in decision-making, and so will be reluctant to simply replace a decision-making role, but will highlight where a result is not proportionate. Furthermore, the HRA tasked the

86 Courts and Tribunals Judiciary, [Independence](#)

87 [Q43](#) [Lord Neuberger]

88 [Q43](#) [Lord Neuberger]

Courts under sections 3 and 4 with interpreting the law in a way that is compatible with human rights, so far as it is possible to do so, and if it is not possible to do so, to make declarations of incompatibility. After a declaration of incompatibility, Parliament may then consider whether it wishes to amend the law.

87. Some have questioned whether this augmented role shifts the balance of power too far towards the judiciary and undermines the rule of law.⁸⁹ In their evidence to us, senior retired judges rebutted the argument that these developments had substantially altered the relationship between the judiciary and the executive. Lord Neuberger reminded us that the new powers given to judges under sections 3 and 4 of the HRA were not part of a power grab initiated by the judges themselves, but rather were granted to them by Parliament. He also said:

“I like to believe—I do believe—that the relationship between the judiciary and the Executive, and the judiciary and Parliament, has remained one of serious mutual respect. While inevitably there have been more opportunities for disagreement, I do not think that either relationship has been harmed in any significant way.”⁹⁰

The ECHR as a ‘living instrument’

88. The living instrument principle exists to enable the application of the ECHR to adapt to modern times and technologies. For example, “correspondence” has been taken to include emails, even though internet and email were not envisaged at the time of the drafting of the Convention as those technological developments had not yet occurred. Such an interpretative approach allows the Convention to remain relevant through modern technological and societal developments.

89. This principle, is, according to some, including the Policy Exchange’s Judicial Power Project, being used to extend the Convention into new areas and in effect make new rights.⁹¹ The majority of those who submitted evidence to us did not share this viewpoint. They rather asserted the ‘living instrument’ principle to be an important one, without which the framework would risk becoming irrelevant and ineffective. For example, Liberty gave these illustrations of how the living instrument principle has been used in practice:

“The importance of the ‘living instrument’ approach can be seen in *Rantsev v Cyprus and Russia*. The ECtHR held that trafficking fell within the prohibition on slavery in Article 4 of the Convention, commenting that “the absence of an express reference to trafficking in the Convention is unsurprising” since it was a relatively new phenomenon. Again, in *S and Marper v United Kingdom* the ECtHR held that retaining DNA samples of individuals who had been arrested but later acquitted violated the Article 8 right to respect for private life. A strictly literal approach of the Convention would deny protection to victims and future victims of human rights violations.”⁹²

89 Policy Exchange’s Judicial Power Project ([AET0036](#))

90 [Q44](#) [Lord Neuberger]

91 Policy Exchange’s Judicial Power Project ([AET0036](#))

92 Liberty ([DRA0007](#))

90. The living instrument doctrine allows core protections to adapt to technological and societal developments to prevent the Convention from becoming unintentionally obsolete. As such, this is indeed a crucial and vital tool. However, the living instrument doctrine is not a tool of rights creation. It should be used to apply agreed Convention rights to new technological and societal realities. It does not, and should not, be misused to seek to develop radically new rights where none existed before. Indeed, were it to do so, the ECtHR would be acting unlawfully.

91. The ECHR was agreed by the member States of the Council of Europe and the ECtHR was created to apply those agreed Convention rights. This is a necessary and useful function and one that should remain a necessary and useful function. However, were the Court to move beyond this function and to seek to apply new rights that went beyond those Convention rights, it would be acting outside of those powers conferred on it and therefore the Court would be acting unlawfully as a matter of international law and the law of international organisations. For this reason, the living instrument doctrine cannot lawfully be used to create new rights in areas beyond the scope of the Convention and the rights envisaged by the High Contracting Parties. The member States did not confer such rights upon the Convention system and therefore were it to act beyond the scope of those powers it would be acting unlawfully and beyond its powers. We consider this gives a good deal of comfort that the Court, as a body giving effect to the rule of law, would not - and indeed would not wish to be seen to - go down this route. In this light, we welcome the renewed focus on this topic by the Court and Convention bodies in recent years to ensure that it continues its useful role of applying the Convention as part of the rules-based international system.

92. When we asked senior retired judges about their experiences of the ‘living instrument principle’, they agreed that interpreting legislation in light of modern circumstances was a necessity which did not cause any serious problems in practice. Lord Hope of Craighead told us:

“I have not experienced a case where it has really been open to the argument that we are being too modernist and that we should go back and look at the convention in the light of the situation when its framers were there. That argument has never been presented to a court in which I have been sitting. On the contrary, the argument is always accepted that we are looking at modern conditions and making sense of the provision in the light of the circumstances as they are today.”⁹³

93. Lord Neuberger agreed with him but did advise that the principle should be operated with caution: “If you give undemocratically accountable judges that sort of power, they have to exercise the power with great caution and great diffidence—but they should exercise it.”⁹⁴

94. There may be controversy over human rights judgments, but it seems to us the issue is not whether the Convention should be treated as a living instrument: law has to be interpreted in the light of contemporary circumstances. Rather it is whether the courts are exercising their powers with the “caution and great diffidence” urged by Lord Neuberger.

93 [Q44](#) [Lord Hope of Craighead]

94 [Q44](#) [Lord Neuberger]

On this, there is a role for debate, but how to exercise those powers must be a judgement for the judges sitting on each individual case, subject to always showing the appropriate degree of deference to the proper role for Parliament and Government in decision-making.

The danger of Government criticism of human rights judgments

95. In the terms of reference for this inquiry, we sought views on the question of whether the Government has been too ready to criticise human rights judgments, in a way that undermines judicial independence. Amnesty International UK responded in these terms:

“Ready criticism has been a feature of successive administrations. It has been particularly prevalent in relation to asylum, deportation of people whose presence is deemed not conducive to the public good and consideration of private and family life in immigration decision-making.”⁹⁵

96. Speaking in 2013 in a debate on the Immigration Bill, Theresa May MP, then Home Secretary, asserted that: “some judges have [...] chosen to ignore the will of Parliament and go on putting the law on the side of foreign criminals instead of the public.”⁹⁶

97. Others disagree that this is a major issue. For example, the Policy Exchange’s Judicial Power Project believes that there have been few recent examples.⁹⁷ The same submission also questions the assumption that ministerial criticism of judicial decisions should be presumed to be illegitimate. Instead, it asserted that ministers have a responsibility to articulate their concerns about judicial decisions, particularly in human rights cases. In the first place, this is because they require the assessment and balancing of various individual, social and national interests, which is the fundamental responsibility of Parliament and Government to undertake and secondly, because the structure of the HRA recognises the scope for reasonable disagreement between politicians and judges on questions of rights.

98. The Ministry of Justice in its written submission takes a different view:

“A judgment is not an invitation for dialogue. The judiciary are not in position to respond. It is an absolute consequence of the process of the rule of law and must be respected as such. Ministers might comment on a judgment but they must do so with restraint and it is right that judicial decisions are accountable solely through appeal to a higher court”.⁹⁸

99. *In our view, Government Ministers should be restrained in their reaction to court judgments, bearing in mind that in cases where they are a party, they can exercise appeal rights and that they can seek to change the law. They must respect this self-denying ordinance and comment with restraint.*

95 Amnesty International UK ([AET0034](#))

96 HC Deb, 22 October 2013, [col 156](#) [Commons Chamber]

97 Examples include criticism of the Strasbourg Court’s decision in *Hirst v UK (No 2)* [2006] 42 EHRR 41; Theresa May’s criticism of Article 8 case law in a speech at the Conservative Party Conference in 2011; criticism of the Strasbourg Court’s decision on whole life sentences in *Vinter v UK* [2013] 55 EHRR 34; and criticism before, during and after the EU referendum campaign of the Court of Justice of the EU’s case law under the EU Charter of Fundamental Rights.

98 Ministry of Justice ([DRA0008](#))

Government’s central role in supporting and defending the independence of the judiciary

100. As set out in Chapter 2, the independence of the judiciary plays a central role in fundamental UK constitutional values and in upholding the rule of law and enforcing human rights in the UK. It is therefore critical that all constitutional actors operate with respect to British values such as the independence of the judiciary. In the wake of the High Court judgement in the Article 50 case last year, the judges involved, who included Lord Thomas, attracted significant criticism in the media, most notably in the Daily Mail, which branded them ‘Enemies of the people.’⁹⁹ Following this, the then Lord Chancellor, the Rt. Honourable Liz Truss MP, was also criticised for failing to adequately defend the judges and their independence.¹⁰⁰ Lord Thomas and Lord Neuberger both echoed these criticisms.¹⁰¹

101. In written evidence to this inquiry Amnesty International UK gave its assessment:

“Successive UK Governments have failed to defend the rule of law in word as well as deed, both by failing to implement judgements in a timely fashion and by failing to defend an independent judiciary. The Lord Chancellor when appointed vows to uphold the independence of our judicial system and the rule of law. As such, the slow and lukewarm response to media attacks on judges following the Article 50 Brexit decision was worrying and disappointing.”¹⁰²

102. Although direct criticism of the judiciary by Ministers may not be commonplace, the “Article 50” example is not unique. In 2013, the then Home Secretary, Rt Hon Theresa May MP, made comments in the Mail on Sunday in an article headlined: “It’s MY job to deport foreigners who commit crime—and I’ll fight any judge who stands in my way”.¹⁰³

103. When he gave evidence to us, Lord Hope made the point that in his opinion criticising judges is serious because it undermines the rule of law: “The press is one thing, but, as far as the Government are concerned, one of their responsibilities is indeed to maintain the rule of law. That is why great caution is required when criticising judges.”¹⁰⁴ While senior judges we heard from assured us that they are not intimidated by such criticism,¹⁰⁵ it should not be necessary for judges to have to withstand political censure, especially in a heated climate, such as the aftermath of a terrorist attack or a particularly dreadful crime.

104. Section 3(1) of the Constitutional Reform Act (“CRA”) 2005 places all Ministers under a duty to uphold the continued independence of the judiciary, but the specific duty to have regard to the need to defend that independence rests with the Lord Chancellor and is set out in the oath she or he is required to take (s.17 CRA 2005). In oral evidence, the Lord Chancellor told us he believed he had striven to uphold this duty to date and would do so in the future:

99 *‘Out of touch judges’*, Daily Mail, 3 November 2016

100 For example: *‘Liz Truss defends judiciary after Brexit ruling criticism’*, The Guardian, 5 November 2016

101 For example: *‘Liz Truss defends judiciary after Brexit ruling criticism’*, The Guardian, 5 November 2016 and *‘Neuberger attacks ‘enemies of the people’ criticism’*, Financial Times

102 Amnesty International UK ([AET0034](#))

103 *‘It’s MY job to deport foreigners who commit serious crime - and I’ll fight any judge who stands in my way, says Home Secretary’*, Daily Mail, 17 February 2013

104 [Q46](#) [Lord Hope of Craighead]

105 [Q45](#) [Lord Hope of Craighead]

“I have repeatedly made the case for the rule of law and the independence of the judiciary. It is also a point that I have not hesitated to raise in Cabinet meetings.

There may well be other circumstances in which I would be prepared to step in, such as if I considered that the independence of the judiciary was under threat or a level of abuse was being directed at the judiciary. I have repeatedly made the case that I would be prepared to step in to make the argument for it. That is the central point: to be that defender and that advocate.”¹⁰⁶

105. While we welcome these strong assurances from the current Lord Chancellor, we are concerned to ensure that these standards must be met regardless of who the post-holder is at any particular time. In oral evidence Lord Thomas posed the question of whether stronger legislative duties are required:

“It is important to review whether imposing the duty on the Lord Chancellor is enough and whether a more specific duty ought to be imposed on other ministers as well.”¹⁰⁷

106. Lord Neuberger expressed some doubt as to whether this would be a good course of action, saying that he felt it might devalue the existing duty in some way. The Lord Chancellor when he appeared before us agreed, arguing that it creates a risk that ‘no-one feels that it is their specific responsibility to make the case’¹⁰⁸

107. We are sympathetic to the argument that extending the duties within the Constitutional Reform Act 2005 to cover all Ministers may have the effect of diluting those duties. Nonetheless, we consider that the Government as whole needs to be more proactive in its defence of the independence of the judiciary. The Lord Chancellor has a duty to have regard to the need to defend the independence of the judiciary. We recommend that the Government consider amending the Ministerial Code to reinforce the duties on Ministers to uphold the independence of the judiciary, whilst retaining the specific role for the Lord Chancellor in defending the judiciary.

106 [Q76](#) [Rt Hon David Gauke MP]

107 [Q48](#) [Lord Thomas]

108 [Q48](#) [Lord Thomas]

5 The importance of a robustly independent legal profession

108. Ensuring that individuals have recourse to the courts in order to enforce their rights depends on the existence of a robustly independent legal profession who feel able to pursue human rights cases without fear or favour.

109. By their very nature, human rights claims are likely to arise against the State. Lawyers have a duty to uphold the rule of law, the proper administration of justice and are officers of the court. In cases where the Government is a defendant, it is axiomatic that Ministers should not use their position to criticise the lawyers taking the cases.

110. In light of this we were disappointed to read these comments from the Law Society in its written evidence to this inquiry:

“We have been very concerned by the rhetoric directed towards the legal profession. The language of blame, division and fear used by some powerful voices towards solicitors and the judiciary was damaging. It potentially undermines the separation of powers and the independence of the legal profession. We publicly challenged these comments and made representations to Government and in the press stating that we will continue to pursue access to justice for those who are weak, vulnerable, or marginalised, even if these are regarded as “unpopular” cases.”¹⁰⁹

111. In their written submission, the Committee on the Administration of Justice (Northern Ireland) drew our attention to the situation of lawyers in Northern Ireland working on so called ‘legacy cases’ engaging the actions of the security forces during the Northern Ireland conflict. They highlight statements by UK politicians and articles in the media, which can be interpreted as equating individual lawyers with the case or interests of the clients they represent.¹¹⁰ These are potentially contraventions of the UN Basic Principles on the Role of Lawyers (1990) which state that “[l]awyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.”¹¹¹

Potential threats to legal professionals’ independence

Legal Aid decision making

112. A number of witnesses raised concerns about the potential for political interference in the Legal Aid Agency’s decision-making processes created by the ‘high-profile case referral system’ that it operates.¹¹² Under this policy, cases that meet the criteria set out in the standard operating procedure are referred to the “Central Legal Team and the Principal Legal Advisor to advise on funding decisions in order to minimise legal and reputational risk associated with High Profile cases.”¹¹³

109 The Law Society ([AET0020](#))

110 Committee on the Administration of Justice ([AET0014](#))

111 [UN Basic Principles on the Role of Lawyers \(1990\)](#)

112 [Q38](#) [Richard Miller; Nicola Mackintosh QC (Hon); Gareth Peirce]

113 https://www.lapq.co.uk/wp-content/uploads/2013/09/FOIA_LAA_26_Feb_16.pdf

113. The Legal Aid Practitioners Group (LAPG) was concerned about the system:

“We are also deeply concerned about the policy of the Legal Aid Agency to refer certain sensitive or political cases through a special process where legal advice appears to be given by the Government Legal Service about the grant or refusal of legal aid, and the merits of the case. The risk of interference in decision making about access to the Courts is obvious, and lends further support to our view that the legal aid system should be administered by an independent body without political interference.”¹¹⁴

Proposal for an ‘embarrassment clause’ in the contract for criminal legal aid

114. In our third oral evidence session, Nicola Mackintosh, Sole Principal at Mackintosh Law, drew attention to the fact that when the ‘2017 Standard Crime Contract Standard Terms’ were published in July 2016, they contained a so-called ‘embarrassment clause’ which some lawyers feared was intended to stifle criticism by lawyers of the Government. The draft as published read:

“2.2 You shall ensure that neither you nor any of your Affiliates embarrasses us or otherwise brings us into disrepute by engaging in any act or omission which is reasonably likely to diminish the trust that the public places in us, regardless of whether or not such act or omission is related to your obligations under this Contract. Any operation of this Clause is subject to our obligation to act as a responsible public body and any sanction must be proportionate.”¹¹⁵

115. The Public Law Project issued a letter before claim¹¹⁶ announcing its intention to judicially review the decision to introduce the clause. In its response, the Legal Aid Agency agreed to amend it to give greater clarity regarding its ambit, including that the Legal Aid Agency would not seek to rely on the clause to stifle criticism of, or challenges to, the Legal Aid Agency, the Lord Chancellor or wider government.¹¹⁷

116. While the clarification is welcome, we note stakeholders were concerned that the original wording is indicative of the Government’s broader desire to restrict the activities of legal aid lawyers in a way that is potentially detrimental to their independence.

Interference in professional disciplinary processes

117. There has been controversy about Government comments concerning the case of a solicitors’ firm that brought cases against the Government relating to actions of British soldiers in Iraq and Afghanistan. This case is currently being appealed (hence the sub judice rule applies), so it is not discussed in any detail in this report. However, we are more generally concerned to stress the vital importance of Government Ministers being

114 Legal Aid Practitioners Group (LAPG) ([AET0021](#))

115 Letter to Principal Legal Adviser, Legal Aid Agency, from David Oldfield, Solicitor, Public Law Project, regarding [2017 Standard Crime Contract Standard Terms](#), dated 29 September 2016 http://www.publiclawproject.org.uk/data/files/News/160929_LBC_2.pdf

116 Letter to Principal Legal Adviser, Legal Aid Agency, from David Oldfield, Solicitor, Public Law Project, regarding [2017 Standard Crime Contract Standard Terms](#), dated 29 September 2016

117 Email from Anthony Lawrence, Lawyer, Legal Aid Agency, to David Oldfield, Solicitor, regarding [London Criminal Courts Solicitors’ Association and Tuckers Solicitors LLP](#), dated 13 October 2016

scrupulous in avoiding interference in disciplinary cases involving the legal profession. It is not appropriate for Ministers, and especially not the Prime Minister, to criticise solicitors who are the subject of ongoing professional disciplinary proceedings in a way which would identify them, for representing claimants against the Government of whom the Government disapproves. Everyone is entitled to representation in court, and it is for the courts to decide on the merits of a given case.

118. In its evidence the MoJ denied any attempts to seek to use its influence in such cases:

“We are not aware of the Government attempting to influence, intimidate or interfere with opposing counsel in human rights law cases or any other cases. There has been controversy about alleged malpractice on the part of some lawyers involved in litigation against the Government arising out of military action in Afghanistan and Iraq, but this is being resolved, as it should be, by the relevant professional regulatory bodies.”¹¹⁸

119. Richard Miller from the Law Society set out the framework for addressing complaints against solicitors and stated his position that this was the correct way for such matters to be handled:

“Where a lawyer is believed to have overstepped the bounds, there are processes for dealing with that. We have a regulatory authority. We have the disciplinary tribunal. There are appropriate channels there, where any legitimate concerns about the role of the lawyer can be dealt with. In our view, that is the way that those issues should always be addressed.”¹¹⁹

Conclusions

120. The Government must create a positive environment in which lawyers are not impeded from bringing human rights cases against the Government. Lawyers should not be criticised because they represent ‘unpopular’ clients in human rights claims. Where there are concerns about lawyers’ conduct, the proper disciplinary channels should be used, and the Government should not seek to abuse their position to influence, intimidate or interfere in that process.

118 Ministry of Justice ([DRA0008](#))

119 [Q37](#) [Richard Miller]

6 The crucial role of the Equality and Human Rights Commission and other UK National Human Rights Institutions

121. There are three National Human Rights Institutions (NHRIs) operating across the UK; the Equality and Human Rights Commission (Great Britain) (EHRC), the Scottish Human Rights Commission (SHRC) and the Northern Ireland Human Rights Commission (NIHRC). They are publicly funded bodies with a legislative mandate to protect and promote human rights and they have a central role to play in their enforcement.¹²⁰ This can take a number of forms including; educating people about their rights, funding individual human rights cases, conducting strategic litigation, undertaking formal investigations and partnership working to encourage public authorities to adopt a human rights-based approach to their work. The exact functions that each of the Commissions operating within the UK can undertake is in part determined by the legislation that governs them, summarised in the table in Annex 1.

122. It is vital that the UK's NHRIs have the powers necessary to do their jobs, in accordance with the different roles assigned to them. Much value can be added through NHRIs undertaking work—including litigation. This can ensure that human rights violations, and in particular systemic violations, are raised and addressed - and where necessary, litigated. The involvement of NHRIs in bringing—or assisting in—cases helps to ensure that streamlined and well-argued cases are brought before the Courts, thereby addressing human rights concerns in a timely manner, while avoiding lengthy, disparate and confused litigation.

The need for sufficient powers and a stronger approach to enforcement

The Equality and Human Rights Commission (EHRC)

123. In 2003, when the JCHR examined the case for the establishment of the EHRC, it noted that “there was an unmet need for citizens to be assisted in understanding what their rights are, how these rights must be balanced with those of others, and how to assert their rights without necessarily having recourse to litigation.”¹²¹

124. Since its establishment in 2008, the question of how successful the EHRC has been in fulfilling its human rights mandate has been posed repeatedly, by this Committee and others. In a report published in 2010, the then JCHR Committee concluded:

120 National Human Rights Institutions (NHRIs) are accredited by the Global Alliance of National Human Rights Institutions (GANHRI) based on their adherence to the [United Nations Paris Principles](#).

121 Joint Committee on Human Rights, Sixth Report of Session 2002–03, [The Case for a Human Rights Commission](#), HL 67-I / HC 489-I

‘The publication of a human rights strategy is evidence that the EHRC is seeking to approach its responsibilities for human rights matters on a more systematic basis than hitherto; but, in our view, the Commission is not yet fulfilling the human rights mandate set out in the Equality Act.’¹²²

125. We regret to report once again that the EHRC is still not operating as the visible and respected champion of human rights that the country needs. We heard criticism that the Commission had, at least until recently, not used its enforcement powers to their fullest extent:

“In effect, it is a regulator and while it has some relatively muscular powers, although not as muscular as those of some other regulators, I think that in the past it has been slow to use them. Again, it would be good for the public and for the people who use and abuse human rights to have a sense that the EHRC is a body to be afraid of. If you step out of line, the commission should be something that you do not want to be confronted with. I am not sure that people feel afraid enough of the EHRC.”¹²³

126. David Isaac, Chair of the EHRC, expressed frustration that the Commission’s enforcement powers in relation to human rights were not as robust as they were in the context of equality. The consequence is that the Commission cannot provide legal assistance to individuals in a human rights case unless there is also an equality element in the case. Similarly, the Commission has the power to undertake investigations into named bodies in relation to possible breaches of the Equality Act 2010, but this does not extend to human rights breaches.

Box 1: Cases the EHRC has not been able to pursue due to its limited powers¹²⁴

- A case concerning provision of social care to enable a young man with learning disabilities to live independently, based on human rights arguments. The case did not engage the Equality Act 2010 so the EHRC was unable to provide assistance; and the claimants were unable to secure legal aid or alternative funding, so it did not proceed.
- A case where a father of four was unable to return home from hospital because his continuing healthcare funding was insufficient to pay for his support at home. Counsel advised that grounds under the Equality Act 2010, including the Public Sector Equality Duty, were likely to fail in this case. The EHRC did not have the power to fund the case on human rights grounds only (only if there was an equality angle).

127. It is difficult to understand why the EHRC should have weaker enforcement powers as concerns human rights violations than equality matters. The EHRC’s inability to bring cases on purely human rights grounds severely restricts its effectiveness. We therefore recommend that the Government harmonise the Commission’s enforcement

122 Human Rights Joint Committee, Thirteenth Report of Session [Equality and Human Rights Commission](#) March 2010

123 [Q65](#) [Martha Spurrier]

124 [Equality and Human Rights Commission \(AET0051\)](#)

powers in line with its powers in relation to equality, so that it can undertake investigations into named bodies for possible breaches of the Human Rights Act and provide legal assistance to individuals in Human Rights Act cases.

The Northern Ireland Human Rights Commission (NIHRC)

128. The NIHRC is the most well-established of the UK's NHRIs, and historically it has exercised the most comprehensive human rights powers of the three UK Commissions.

The Scottish Human Rights Commission (SHRC)

129. The Scottish Human Rights Commission (SHRC) was set up using devolved powers. It has fewer formal powers than its counterparts in other areas of the UK. While it has powers to intervene in civil cases and make inquiry into public authorities in Scotland about human rights issues, it does not have the power to give any kind of legal assistance to an individual and indeed is expressly disallowed from doing so by its governing legislation.

130. As Judith Robertson, Chair of the SHRC, explained to us, this means they focus on working in partnership with communities to support the advancement of human rights rather than using judicial routes. She gave the example of a housing project in Leith in which the Commission worked with residents to realise their right to adequate housing by using human rights arguments to persuade the local authority to invest in the property to bring it up to standard. This, she argued, demonstrates a different, but nonetheless effective, model of rights enforcement:

“For me, that is human rights being transformational, but it does not require a judicial route to achieve that [...]. We have other examples of similar kinds of processes, using non-judicial routes, but still successfully holding duty bearers to account when they have not delivered effectively for people.”¹²⁵

The need for adequate resources

131. The extent to which the Commissions are able to utilise the powers they have is inevitably constrained by their resources. All three Commissions have experienced significant budget cuts over recent years. The EHRC's expenditure reduced by 68% between its first full year in operation in 2008–09 to £20.3 million in 2015–16, the NIHRC's grant-in-aid from the Northern Ireland Office has been reduced to £1,099,000, which amounts to an approximate 37% decrease in real terms since 2011¹²⁶ and the SHRC has experienced budget cuts in recent years leaving its current budget standing at just short of £1 million.¹²⁷

132. The Commissions have the potential to play a more significant role in the enforcement of human rights. If they are given the necessary powers and use them assertively, then there is a case for their budgets to be increased to at least partially reverse the impact of the funding reductions they have experienced. This additional cost would be off-set

125 [Q52](#) [Judith Robertson]

126 Northern Ireland Human Rights Commission, [Business Plan 2018–19](#), April 2018

127 Scottish Human Rights Commission, [Annual Report 2016–17](#), October 2017

to some extent by a reduction in legal costs as fewer individual cases would reach the Courts. At the same time, if they are to play a more significant role then greater scrutiny of their work by their respective Parliament or Administrations would be appropriate.

7 The need for a culture of human rights

133. Effective enforcement of human rights requires:

- access to legal advice and assistance,
- a robustly independent judiciary,
- a robustly independent legal profession and
- muscular human rights institutions.

134. But as Professor Vernon Bogdanor put it: “In the last resort, the preservation of our rights depends on popular support, not on institutional mechanisms.”¹²⁸ This chapter looks at the support for human rights and the extent to which there is a “human rights culture” in the United Kingdom.

135. Martha Spurrier, Director of Liberty told us why she felt a human rights culture is integral to the enforcement of human rights:

“[...] while rights need not be popular, a sense of legitimacy and democratic buy-in is important. If there is a sense that such rights are in some way illegitimate or not credible, we will run into all kinds of obvious problems around how to enforce them and make sure that within communities the rights of others are respected.”¹²⁹

136. We asked our witnesses whether such a culture currently exists in the UK. In response, they tended to draw a distinction between support for the values that underpin human rights, such as fairness, equality and protecting vulnerable people; and support for the legal frameworks that seek to protect and promote them. While there was consensus that the values underpinning human rights are deeply embedded in our national psyche, there was less confidence that there is a culture of human rights that cherishes the legal protections intended to ensure those values are translated into enforceable rights. Adam Wagner, Barrister and Founder/Chair of RightsInfo told us: “I do not think that the Human Rights Act and the European Convention are part of our national culture yet, and that is what we should be aiming towards.”¹³⁰ In the sections below, we examine some of the possible reasons for this and how a stronger culture of human rights can be established.

Public attitudes towards human rights, and differences across the UK

137. A number of our witnesses cited research carried out by the Equality and Diversity Forum in 2012 on public attitudes towards human rights across the UK. This research found that while there are some (26%) who hold ‘strong hostile attitudes’ to human rights and human rights laws, and a similar number (22%) who hold ‘strong positive attitudes’, by far the largest proportion of those polled (over 50%) hold conflicting or neutral attitudes

128 Bogdanor, V. 2006. Parliament and the Judiciary: The Problem of Accountability. Third Sunningdale Accountability Lecture. Available at <https://ukpac.wordpress.com/bogdanor-speech/>

129 [Q61](#) [Martha Spurrier]

130 [Q60](#) [Adam Wagner]

to human rights. This group are unsure whether human rights are relevant to their lives, but when this relevance is made clear their attitudes become more positive.¹³¹ There is also a widespread lack of understanding about how the HRA works; for example, about the fact that the Act does not permit courts to strike down primary legislation.¹³²

138. In Scotland and Northern Ireland there are generally higher levels of support for human rights. In Scotland, a similar study to that described above, commissioned by the Scottish Human Rights Commission, found that 42% of those polled agree with positive statements about human rights and disagree with negative statements, while only 13% agree with negative statements and disagree with positive.¹³³ In Northern Ireland the Human Rights Act enjoys high levels of support with 84% of the population believing it is good for Northern Ireland.¹³⁴

139. We agree with the conclusion Dr. Alice Donald draws from this data that, “[i]t is therefore not true to say that there is a large core of people who are implacably opposed to rights.”¹³⁵ However, the data also shows that at least in some parts of the country, there is work to be done to educate and persuade people that human rights are relevant to their lives and important enough for them to want to actively preserve them as a central feature of our democracy. Adam Wagner set out what he thinks needs to be communicated to achieve this:

“What you want to get to is a position where certain basic tenets, possibly just a couple, are popular enough to sustain the political architecture that protects human rights. First, human rights are universal. Secondly, they are a safety net for the most vulnerable in society. Thirdly, human rights are a bulwark against the overactive state.”¹³⁶

140. Many of those submitting evidence felt that some influencers in the media were responsible for pushing an unbalanced negative image of human rights. There is evidence that the negative framing of human rights has a demonstrable impact on public attitudes.¹³⁷ In research carried out by the Equality and Diversity Forum, focus group participants regularly cited high-profile examples of negative media stories on human rights when discussing problems with human rights and human rights laws. Their reactions to media headlines were often emotive and led quickly to vitriolic statements and positions being taken.¹³⁸

Media reporting of human rights

141. Analysis of broadsheet and tabloid newspapers, political blogs and parliamentary speeches shows that the dominant media narrative links human rights with “undeserving” groups, such as foreigners, criminals or prisoners. They are frequently portrayed as

131 Equally Ours, [Telling the story of everyone’s rights, every day](#), November 2013

132 Equally Ours, [Telling the story of everyone’s rights, every day](#), November 2013

133 Scottish Human Rights Commission, [Building a human rights culture in Scotland: insights from audience research](#), February 2018

134 Human Rights Consortium, [Attitudes to Human Rights in Northern Ireland](#), July 2017

135 [Q60](#) [Dr Alice Donald]

136 [Q61](#) [Adam Wagner]

137 Middlesex University ([AET0050](#))

138 Equality and Diversity Forum, [Public Attitudes to Human Rights: A summary of research commissioned by the Equality and Diversity Forum](#), 2012

undermining traditional freedoms and legal protections, rather than empowering and enhancing citizenship. The graphic below shows the frequency of different frames¹³⁹ being used to discuss human rights in the media broken down by country.

Graph 4: Frame Frequency



Source: [Building Bridges: Connecting with values to reframe and build support for human rights](#), Equally Ours, Counterpoint and the Public Interest Research Centre (2016)

142. Free speech is protected by Article 10 of the European Convention on Human Rights (ECHR). In our recent report on Free Speech and Universities, we underlined its fundamental importance to democratic society and we strongly support the right of media organisations to express views that are negative or even hostile towards human rights. But it would clearly be problematic if reporting were deliberately inaccurate or misleading.

143. According to Professor David Mead, inaccurate reporting of human rights cases issues is a serious problem:

“I am not alone in thinking that there is a problem with the way that some sections of the media portray human rights cases. They are either false or inaccurate in that they have just got things wrong or they misrepresent the totality either of the human rights world or of a particular case so that the readers of a specific [...] case or, I would argue, over time through the drip-drip preponderance of stories about X and not about Y, get a misleading view of what human rights are about.”¹⁴⁰

144. News values do not necessarily translate into giving a full account of the big picture. This is particularly the case in relation to the UK’s relationship with the European Court of Human Rights where there has been a disconnect between media narrative and report

139 In this context a frame refers to the angle or perspective from which a news story is told.

140 [Q62](#) [David Mead]. This statement is backed up by the empirical research Professor Mead set out for us in his written evidence ([DRA0002](#)).

and reality. Official statistics show that the number of ECtHR judgments against the UK finding a violation of the Convention has declined in recent years and that the UK's 'rate of defeat' in Strasbourg is extremely low. But what is reported are the cases that the UK loses, which gives the public a dramatically different perspective.

Box 2: Example of misleading reporting

The front page of the Daily Mail on 15 December 2017 ran the headline "Another human rights fiasco!" The article claimed that an Iraqi 'caught red-handed with bomb' won £33,000 because he was kept in detention too long. In reality the claimant was awarded damages because of unlawful detention, beatings in custody, and inhuman treatment. The Court also found that the soldier's claim that the individual had a bomb was a false embellishment. Following complaints to the Independent Press Standards Organisations, the newspaper issued two separate corrections (on 20.12.17 and 18.01.18).¹⁴¹

145. We invited the editor of the Daily Mail, Paul Dacre, and the editor emeritus of Associated Newspapers, Peter Wright, to give evidence as part of our inquiry but they both declined. We had hoped that they would grasp this opportunity to engage with the Committee on the interrelation between the media and human rights.

146. The Convention recognises that not all rights are absolute, and that sometimes rights have to be balanced one against another. Under the rule of law, it is the courts who have the job of deciding the balance in individual cases. It is perfectly legitimate for editorial content to argue that in a particular case a court has got that balance wrong, and that for example, action should be taken to change the law, or to defend existing law. But reporting itself should be accurate and enable readers to understand the broader context.

147. The Editors Code of Practice places a requirement on newspaper editors to correct issues 'promptly and with due prominence.'¹⁴² It is essential that the Independent Press Standards Organisation (IPSO), as the regulator, should exercise its powers to ensure that the 'due prominence' condition is met in accordance with its own guidance.¹⁴³ We agree with Shoaib Khan that: "[i]t is not unreasonable to say that if an inaccurate article about human rights can be published on the front page, then the related correction should appear there too."¹⁴⁴

148. *Media organisations and commentators should be accurate in their reporting of human rights cases. Where reporting is inaccurate, corrections should be published with the same due prominence as the original article.*

A hierarchy of rights?

149. The Committee received submissions indicating that some rights are not given sufficient weight compared to others, which could undermine confidence in the human rights framework as some individuals feel their rights are not protected.¹⁴⁵ ADF

141 British Institute of Human Rights ([AET0013](#))

142 Independent Press Standards Organisation, [Editors' Code of Practice](#), 2017

143 Independent Press Standards Organisation, [Due prominence guidance](#), 2016

144 Mr Shoaib M Khan ([AET0028](#))

145 Barnabas Fund ([AET0048](#)); ADF International ([DRA0009](#)); Christian Concern ([DRA0006](#)); CARE ([AET0016](#))
Glasgow Disability Alliance ([AET0029](#))

International commented that: “Freedom of conscience appears in all of the major human rights treaties” and submitted that “while freedom of conscience is a fundamental human right ... the lack of a clear legal test to assess whether it has been violated in practice means that it is difficult to enforce.” and “recommends that the Government advances a legal test to evaluate claims of conscience to ensure the robust protection and enforceability of freedom of conscience in practice.”¹⁴⁶

150. The Barnabas Fund raised specific concerns that the culture within some public bodies, including the Equality and Human Rights Commission (EHRC) and the Equality Commission for Northern Ireland (ECNI), “appears to conflate the promotion of human rights and ‘equality’ with promoting the ideological agenda of particular minority groups [...]”¹⁴⁷ When asked in oral evidence about how the EHRC prioritised cases, David Isaac, Chair of the EHRC told us that:

“Where we think there are areas, particularly in relation to legal intervention, which are unclear or need to be resolved, we will support those, irrespective of which group it most impacts on, or whether it disadvantages a particular group. From our perspective, there is no hierarchy.”¹⁴⁸

151. David Russell, Chief Executive of the NIHRC echoed these sentiments and told us that: “[r]ights are for everyone. There is no hierarchy; they are universal. If non-discrimination and freedom of religious belief are in the balance, the commissions have an important role to play” and spoke of the:

“[...] commission’s important role of ensuring that the public space for human rights is opened up to everyone. [...] Often, the commissions have more in common with faith-based communities than we have differences, particularly around [...] social and economic rights, and social justice matters, such as housing and health. There is lots of room for partnership where the perception of there being a dichotomy does not stack up in practice. That has to be voiced.”¹⁴⁹

152. However, when asked to address concerns as to whether the EHRC had not got the balance right in recent years when considering freedom of belief alongside other rights, David Isaac said:

“I know that there are anxieties. The commission has various stakeholder groups and one is on faith and belief. There are all sorts of discussions, and we have frank but respectful debate on areas where people disagree. We listen, wherever we can, to those differing views, but I am sure we can do more.”¹⁵⁰

153. Government, NHRIs and human rights advocates should seek ways of engaging more effectively with the public about how different human rights are balanced, in order to address the perspectives that human rights are “for others and not for us” and that “political correctness” stifles debate. The Government should consider the

146 ADF International ([DRA0009](#))

147 Barnabas Fund ([AET0048](#))

148 [Q56](#) [David Isaac]

149 [Q56](#) [David Isaac]

150 [Q56](#) [David Isaac]

introduction of a legal test to ensure that claims of conscience and faith are reasonably accommodated within the human rights framework. The rights of minority groups will always be vulnerable, and the acid test of an effective human rights system is that it must protect these groups, while ensuring the rights of the majority are also respected.

Human rights culture in public authorities

154. Section 6 of the Human Rights Act obliges public authorities to act in conformity with Convention rights unless primary legislation requires them to do otherwise. According to written evidence received from Dr. Alice Donald, “Section 6 is—or should be—the primary driver of a human rights culture in the UK.”¹⁵¹

155. The degree to which section 6 is performing this function appears to be patchy as it depends on awareness and training of public officials, which can vary according to the public authority. Martha Spurrier gave the example of the police’s approach to policing protests, as one where a human rights-based approach is embedded in public service delivery.¹⁵² By contrast, the evidence we heard recently in our inquiry into the detention of members of the Windrush generation suggests that this culture is not yet embedded in the immigration system. The Home Office’s approach to, and handling of, Windrush immigration cases suggests a culture in the Home Office that is not aware of s 6 and not informed by a human-rights based approach.

156. Public authorities are under a duty to act compatibly with the Human Rights Act (s.6), including in administrative decision making. However, as the case of the Windrush generation detainees demonstrates, this is does not always happen. Public authorities must comply with their duty under s.6 of the Human Rights Act in order to prevent breaches of individuals’ human rights.

The role of human rights education and public legal education

157. For an individual to enforce their human rights, they firstly need to know that they have rights, and secondly need to have a basic understanding of the rule of law. This knowledge is also a pre-condition for a thriving human rights culture. The central importance of education in relation to the legal system in general, and human rights in particular, came up repeatedly in the course of the inquiry. Currently levels of knowledge and awareness are very low. As Gareth Pierce told us:

“It is imperative, through any forum or opportunity, to begin to educate. National comprehension is at a very low level. We do not have a written constitution, so in our schools we do not grow up thinking, “I have rights”, with an understanding of why.”¹⁵³

158. In schools, human rights are currently part of the national curriculum at key stages 3 and 4. However, they are covered only ‘fleetingly’ as part of citizenship education and are not integrated across the curriculum.¹⁵⁴ In academies and free schools that do not follow the national curriculum, there is no requirement to teach human rights at all.

151 Middlesex University ([AET0050](#))

152 [Q60](#) [Martha Spurrier]

153 [Q26](#) [Gareth Pierce]

154 Joint submission on behalf of 37 civil society organisations, co-ordinated by the British Institute of Human Rights ([AET0017](#))

159. *We recommend that the Government should include comprehensive coverage of human rights across the curriculum at all key stages.*

160. While human rights education in schools is essential, there is also a need to raise knowledge and awareness of human rights across the population. The Equality and Human Rights Commission has duties under section 9 of the Equality Act 2006 to promote an understanding of the importance of human rights and must do so more vigorously. The Commission publishes some very good education materials on human rights and plans to further enhance the information it provides to the public in the coming year.¹⁵⁵

161. There is a strong case for better inclusion of human rights in the initial training, qualification and professional development of those working in public services.¹⁵⁶ This could transform the way public services are developed and delivered, supporting a preventative approach to human rights enforcement.

162. Under the LASPO reforms, funding from the Ministry of Justice (MoJ) for public legal education and information (PLE), which existed to improve people's understanding of the law beyond the education system, was cut.¹⁵⁷ Lack of PLE is another barrier to the enforcement of human rights.¹⁵⁸

163. *In July 2017, the Solicitor General launched a Public Legal Education panel to support and drive forward legal education initiatives.¹⁵⁹ We welcome this development and urge the Government to prioritise this work.*

Conclusion

164. **No one would argue that individuals should not be protected from abuse by the State, that public bodies should be able to act without lawful authority or that torture, slavery and arbitrary detention are defensible. The UK's legal framework allows individuals to protect their rights and gives the courts the task of deciding that balance in individual cases, within the parameters set by Parliament, which include the Human Rights Act. There is legitimate debate over how best to protect rights and where the balance should be struck if rights compete. But no-one should lose sight of the fact that enforceable rights, and the ability to enforce them, are the hallmarks of a civilised country. Government, Parliament, the media and the legal profession all have a responsibility to consider the importance of the rule of law, and the role that rights which can be enforced through an independent court system plays in that.**

155 Equality and Human Rights Commission ([AET0037](#))

156 Joint submission on behalf of 37 civil society organisations, co-ordinated by the British Institute of Human Rights ([AET0017](#))

157 LawWorks ([AET0027](#))

158 LawWorks ([AET0027](#)); JustRights ([AET0030](#)); The Howard League ([AET0031](#))

159 Ministry of Justice ([DRA0008](#))

Conclusions and recommendations

Access to justice and the rule of law

1. *The ability to know about and enforce human rights is vital for the rule of law to be a reality. As well as the current review of the impact of legal aid reform in England and Wales, there is a pressing need for a much wider evaluation of the broader landscape of advice, support and means of resolution for legal problems to assess how they can collectively better serve individuals faced with a breach of their human rights. Such a process must also consider the economic viability of the whole system. (Paragraph 22)*

The damaging effects of legal aid reforms

2. *The ongoing Government review of the legal aid reforms must look again at the financial eligibility criteria with a view to widening access to a larger proportion of the population. At the least, it should consider extending the passporting of those on welfare benefits so that the part of the means test focussing on capital is aligned with welfare benefits criteria, thus making it fairer and more administratively expedient. (Paragraph 38)*
3. *The Exceptional Case Funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Urgent reform is needed to ensure that human rights cases are properly supported and therefore to ensure meaningful and effective access to justice. The LASPO review should consider how to remove barriers to accessing Exceptional Case Funding where this is needed to secure effective enforcement of human rights. This should include ensuring simplification of the application process, and access to legal advice and assistance (legally aid funded where necessary) to navigate complex legal process forms. (Paragraph 44)*
4. *We welcome the fact that the Government is considering the impact of the increased number of Litigants in Person in the LASPO review and the impact that this is having on access to justice in those individual cases, but also the burdens on the justice system more generally. We recommend that the review looks specifically at what options might exist to ensure that the Courts are properly supported so that justice may be served in such cases, including whether better use could be made of an amicus curiae system to assist the court or tribunal and unrepresented individuals. (Paragraph 47)*
5. *The Government must urgently resolve the question of how legal aid for discrimination and education matters will be made available from September 2018. We are concerned by the fall in numbers of those using the Mandatory Telephone Gateway, and those who are referred for face-to-face advice. The LASPO review must consider whether the Gateway is effective, and whether it is sufficiently accessible and readily navigable by all. (Paragraph 51)*
6. *We recommend that the Government consider whether immigration cases engaging the Article 8 right to private and family life be brought within the scope of civil legal aid, where they would be available on the means and merits test basis. (Paragraph 55)*

7. *The LASPO review must consider whether further amendments are necessary to evidential requirements for access to legal aid funding to ensure that women who have experienced domestic violence are able to access legal aid. (Paragraph 60)*
8. *The Ministry of Justice's review of LASPO must examine the reasons for the low uptake of ECF in private family law cases, the impact of this on families' abilities to secure effective access to justice, and whether the Courts are able to act consistently in the best interest of children, when individuals are not represented. (Paragraph 61)*
9. While inquests are theoretically inquisitorial, in practice they often have a more adversarial nature. It is extremely difficult for families of the deceased to participate effectively without legal representation, leading to inequality of arms and consequent concerns about fairness, access to justice and compliance with the procedural requirements of Article 2 ECHR. *If inquests are to remain inquisitorial, families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons. Consideration should be given as to funding models that might be employed, such as whether there should be a requirement on public bodies to pay a proportion of their own legal costs to fund families' representation. (Paragraph 74)*
10. We share the concerns of many of our witnesses that the pressures caused by the reforms to legal aid are having a severe impact on legal aid professionals, damaging morale and undermining the legal profession's ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK. (Paragraph 83)

The importance of a robustly independent judiciary

11. *In our view, Government Ministers should be restrained in their reaction to court judgments, bearing in mind that in cases where they are a party, they can exercise appeal rights and that they can seek to change the law. (Paragraph 99)*
12. We are sympathetic to the argument that extending the duties within the Constitutional Reform Act 2005 to cover all Ministers may have the effect of diluting those duties. Nonetheless, we consider that the Government as whole needs to be more proactive in its defence of the independence of the judiciary. The Lord Chancellor has a duty to have regard to the need to defend the independence of the judiciary. *We recommend that the Government consider amending the Ministerial Code to reinforce the duties on Ministers to uphold the independence of the judiciary, whilst retaining the specific role for the Lord Chancellor in defending the judiciary. (Paragraph 107)*

The importance of a robustly independent legal profession

13. The Government must create a positive environment in which lawyers are not impeded from bringing human rights cases against the Government. Lawyers should not be criticised because they represent 'unpopular' clients in human rights claims. Where there are concerns about lawyers' conduct, the proper disciplinary channels should be used, and the Government should not seek to abuse their position to influence, intimidate or interfere in that process. (Paragraph 120)

The crucial role of the Equality and Human Rights Commission and other UK National Human Rights Institutions

14. It is difficult to understand why the EHRC should have weaker enforcement powers as concerns human rights violations than equality matters. The EHRC's inability to bring cases on purely human rights grounds severely restricts its effectiveness. *We therefore recommend that the Government harmonise the Commission's enforcement powers in line with its powers in relation to equality, so that it can undertake investigations into named bodies for possible breaches of the Human Rights Act and provide legal assistance to individuals in Human Rights Act cases.* (Paragraph 127)
15. *The Commissions have the potential to play a more significant role in the enforcement of human rights. If they are given the necessary powers and use them assertively, then there is a case for their budgets to be increased to at least partially reverse the impact of the funding reductions they have experienced. This additional cost would be offset to some extent by a reduction in legal costs as fewer individual cases would reach the Courts. At the same time, if they are to play a more significant role then greater scrutiny of their work by their respective Parliament or Administrations would be appropriate.* (Paragraph 132)

The need for a culture of human rights

16. *Media organisations and commentators should be accurate in their reporting of human rights cases. Where reporting is inaccurate, corrections should be published with the same due prominence as the original article.* (Paragraph 148)
17. Government, NHRIs and human rights advocates should seek ways of engaging more effectively with the public about how different human rights are balanced, in order to address the perspectives that human rights are "for others and not for us" and that "political correctness" stifles debate. The Government should consider the introduction of a legal test to ensure that claims of conscience and faith are reasonably accommodated within the human rights framework. The rights of minority groups will always be vulnerable, and the acid test of an effective human rights system is that it must protect these groups, while ensuring the rights of the majority are also respected. (Paragraph 153)
18. Public authorities are under a duty to act compatibly with the Human Rights Act (s.6), including in administrative decision making. However, as the case of the Windrush generation detainees demonstrates, this is does not always happen. Public authorities must comply with their duty under s.6 of the Human Rights Act in order to prevent breaches of individuals' human rights. (Paragraph 156)
19. *We recommend that the Government should include comprehensive coverage of human rights across the curriculum at all key stages.* (Paragraph 159)
20. *In July 2017, the Solicitor General launched a Public Legal Education panel to support and drive forward legal education initiatives. We welcome this development and urge the Government to prioritise this work.* (Paragraph 163)
21. No one would argue that individuals should not be protected from abuse by the State, that public bodies should be able to act without lawful authority or that

torture, slavery and arbitrary detention are defensible. The UK's legal framework allows individuals to protect their rights and gives the courts the task of deciding that balance in individual cases, within the parameters set by Parliament, which include the Human Rights Act. There is legitimate debate over how best to protect rights and where the balance should be struck if rights compete. But no-one should lose sight of the fact that enforceable rights, and the ability to enforce them, are the hallmarks of a civilised country. Government, Parliament, the media and the legal profession all have a responsibility to consider the importance of the rule of law, and the role that rights which can be enforced through an independent court system plays in that. (Paragraph 167)

Annex 1: Human Rights powers of the UK's National Human Rights Commissions

	Equality and Human Rights Commission*	Scottish Human Rights Commission†	Northern Ireland Human Rights Commission‡
General Functions and Powers (in relation to Human Rights):	<ul style="list-style-type: none"> • promote awareness, understanding and protection of human rights; • encourage public authorities to comply with section 6 of the Human Rights Act 1998; • monitor and advise on the effectiveness of human rights enactments, • monitor progress towards identified outcomes; • publish, information, undertake research and provide education or training; • give advice or guidance (but not assist in the preparation of legal proceedings); and • make grants 	<ul style="list-style-type: none"> • recommend changes to law, policy and practice; and • promote human rights through education, training and publishing research 	<ul style="list-style-type: none"> • keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights; • advise the Secretary of State and the Northern Ireland Assembly of legislative and other measures which ought to be taken to protect human rights; • advise the Northern Ireland Assembly whether proposed legislation is compatible with human rights standards; • promote understanding and awareness of the importance of human rights in Northern Ireland including by, undertaking research and educational activities, and; • provide advice to the Secretary of State on the scope for defining, in Westminster legislation, rights supplementary to those in the ECHR.

	Equality and Human Rights Commission*	Scottish Human Rights Commission†	Northern Ireland Human Rights Commission‡
<p>Legal and Enforcement Powers (in relation to Human Rights):</p>	<ul style="list-style-type: none"> • take judicial review proceedings; • intervene in human rights cases taken by others (known as a ‘third party’ interventions); and. • conduct inquiries into human rights matters. 	<ul style="list-style-type: none"> • conduct inquiries into the policies and practices of Scottish public authorities; and • intervene in civil proceedings before a court where relevant to general duty and of public interest. 	<ul style="list-style-type: none"> • give assistance to individuals in relation to proceedings concerning the protection of human rights; • bring proceedings concerning the protection of human rights; • conduct investigations, including powers to require a person to provide information and to give oral evidence and the power to enter a specified place of detention in Northern Ireland; and • institute, or intervene in, legal proceedings concerning human rights whether or not it is a victim or potential victim of the unlawful act to which the proceedings relate.

	Equality and Human Rights Commission*	Scottish Human Rights Commission†	Northern Ireland Human Rights Commission‡
Limitations:	The EHRC cannot support individual human rights cases that do not raise an equality issue nor can it undertake investigations into named bodies for possible breaches of the Human Rights Act (whereas it can do so for breaches of the Equality Act 2010). In addition, there is no straightforward mechanism to enforce recommendations resulting from inquiries.	The SHRC may not provide assistance to or in respect of any person in connection with any claim or legal proceedings to which that person is or may become a party. It may however intervene in civil proceedings and make submissions.	
Notes * The full duties and powers of the EHRC are set out in the Equality Act 2006 † The full duties and powers of the SHRC are set out in the Scottish Commission for Human Rights Act 2006 ‡ The full duties and powers of the NIHRC are set out in the Northern Ireland Act 1998 and the Justice and Security (Northern Ireland) Act 2007			

Declaration of Lords' Interests¹

Baroness Hamwee

- Solicitor (non-practising)
- Member of the Human Rights Project Advisory Board, Equality and Diversity Forum during the period of the work referred to in the report.

Baroness Lawrence of Clarendon

- No relevant interests to declare

Baroness Nicholson of Winterbourne

- No relevant interests to declare

Baroness Prosser

- No relevant interests to declare

Lord Trimble

- Lecturer in Law at Queen's University Belfast between 1968 and 1990

Lord Woolf

- Membership of bodies concerning human rights
- Written on the subject of defending rights
- President of the Prison Reform Trust since 2016 (Chairman from 2011-2016)
- Patron of the Butler Trust
- Involvement in litigation as a judge in which Leigh Day Solicitors were involved
- Office-holder in other bodies such as:
 - Prisoners in Education (PET)
 - Music in Prisons (MI)
 - Rehabilitation for Addicted Prisoners Trust (RAPT)
- Speeches in debates/questions in the House of Lords on prison reform/treatment of offenders/probation etc.
- Meetings with different Justice Secretaries since 2005
- Numerous speeches and lectures on prisons (all unpaid)
- Former Chair of Universities (unpaid)

**Please note this inquiry was previously known as Defending rights and Human rights: attitudes to enforcing rights.*

¹ A full list of Members' interests can be found in the Register of Lords' Interests: <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/>

Formal minutes

Wednesday 11 July 2018

Members present:

Ms Harriet Harman MP, in the Chair

Fiona Bruce MP	Baroness Hamwee
Ms Karen Buck MP	Baroness Lawrence of Clarendon
Jeremy Lefroy MP	Lord Woolf

Fiona Bruce MP declared an interest as a practicing solicitor.

Draft Report (*Enforcing human rights*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 164 read and agreed to.

Summary read and agreed to.

Annex 1 read and agree to.

Resolved, That the Report be the Tenth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available (House of Commons Standing Order no. 134).

[Adjourned till Wednesday 18 July at 3.00pm]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 28 February 2018

Steve Hynes, Director, Legal Action Group, **Nimrod Ben-Cnaan**, Head of Policy and Profile, Law Centres Network, **Rachel Logan**, Law and Human Rights Programme Director, Amnesty International UK, **Kamena Dorling**, Head of Policy and Programmes, Coram Children's Legal Centre.

[Q1–12](#)

Wednesday 7 March 2018

Sara Ryan, **Richard Huggins**, **Louise Rowland** and **Simon Rowland**.

[Q13–19](#)

Deborah Coles, **Katie Gollop QC** and **Merry Varney**.

[Q20–25](#)

Wednesday 14 March 2018

Richard Miller, Head of the Justice Team, The Law Society, **Nicola Mackintosh QC (Hon)**, Sole Principal, Mackintosh Law, **Gareth Peirce**, Senior Partner, Birnberg Peirce and Partners.

[Q26–42](#)

Wednesday 18 April 2018

Rt Hon Lord Thomas of Cwmgiedd, former Lord Chief Justice, **Rt Hon Lord Hope of Craighead KT**, former Deputy President of the Supreme Court, **Rt Hon Lord Neuberger of Abbotsbury**, former President of the Supreme Court.

[Q43–50](#)

Wednesday 2 May 2018

David Isaac CBE, Chair, Equality and Human Rights Commission, **David Russell**, Chief Executive, Northern Ireland Human Rights Commission, **Judith Robertson**, Chair, Scottish Human Rights Commission.

[Q51–59](#)

Wednesday 9 May 2018

Professor David Mead, University of East Anglia, Law School, **Ms Martha Spurrier**, Director, Liberty, **Dr Alice Donald**, Senior Lecturer, School of Law, Middlesex University, **Adam Wagner**, Barrister and Founder/Chair, RightsInfo.

[Q60–66](#)

Wednesday 23 May 2018

Rt Hon Mr David Gauke MP, Lord Chancellor and Secretary of State for Justice.

[Q67-83](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

AET numbers are generated by the evidence processing system and so may not be complete.

- 1 ADF International ([DRA0009](#))
- 2 Adrian Britliff ([ERA0011](#))
- 3 Amnesty International UK ([AET0034](#))
- 4 Barnabas Fund ([AET0048](#))
- 5 British Institute of Human Rights ([AET0013](#))
- 6 CARE ([AET0016](#))
- 7 Christian Concern ([DRA0006](#))
- 8 Committee on the Administration of Justice ([AET0014](#))
- 9 Coram Children's Legal Centre ([AET0019](#))
- 10 Equality and Human Rights Commission ([AET0037](#), [AET0051](#))
- 11 Glasgow Disability Alliance ([AET0029](#))
- 12 Inclusion London ([AET0025](#))
- 13 INQUEST ([AET0038](#))
- 14 Jo Wilding ([DRA0005](#))
- 15 Joint submission on behalf of 37 civil society organisations, co-ordinated by the British Institute of Human Rights ([AET0017](#))
- 16 JustRights ([AET0030](#))
- 17 Katie Gollop QC ([AET0044](#))
- 18 KRW LAW LLP ([AET0042](#))
- 19 Law Centres Network ([AET0035](#))
- 20 Law Centres Network ([AET0045](#))
- 21 LawWorks ([AET0027](#))
- 22 Legal Aid Practitioners Group (LAPG) ([AET0021](#))
- 23 Liberty ([DRA0007](#))
- 24 Lord Harris of Haringey ([AET0047](#))
- 25 Mavis Jones ([DRA0010](#))
- 26 Media & Persuasive Communication (MPC) network, Bangor University ([AET0043](#))
- 27 Middlesex University ([AET0050](#))
- 28 Migrants' Rights Network ([AET0026](#))
- 29 Ministry of Justice ([DRA0008](#))
- 30 Mr Shoaib M Khan ([AET0028](#))
- 31 National Bargee Travellers Association ([AET0049](#))
- 32 No Mad Laws Campaign ([DRA0004](#))
- 33 Policy Exchange's Judicial Power Project ([AET0036](#))

- 34 Professor Abbe Brown ([DRA0001](#))
- 35 Professor of UK Human Rights David Mead ([DRA0002](#), [DRA0003](#))
- 36 Public Law Project ([AET0022](#))
- 37 Rights of Women ([AET0023](#))
- 38 Simon and Louise Rowland ([AET0046](#))
- 39 Sinn Féin ([AET0033](#))
- 40 The Howard League ([AET0031](#))
- 41 The Law Society ([AET0020](#))
- 42 Yasmin Rehman and Gita Sahgal ([AET0040](#))
- 43 Young Legal Aid Lawyers ([AET0024](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis	HC 774 HL Paper 70
Second Report	Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018	HC 645 HL Paper 86
Third Report	Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill	HC 568 HL 87
Fourth Report	Freedom of Speech in Universities	HC 589 HL 111
Fifth Report	Proposal for a draft British Nationality Act 1981 (Remedial) Order 2018	HC 926 HL 146
Sixth Report	Windrush generation detention	HC 1034 HL 160
Seventh Report	The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards	HC 890 HL 161
Eighth Report	Freedom of Speech in Universities: Responses	HC 1279 HL 162
Ninth Report	Legislative Scrutiny: Counter-Terrorism and Border Security Bill	HC 1208 HL 167
First Special Report	Human Rights and Business 2017: Promoting responsibility and ensuring accountability: Government Response to the Committee's Sixth Report of Session 2016–17	HC 686
Second Special Report	Mental Health and Deaths in Prison: Interim Report: Government Response to the Committee's Seventh Report of Session 2016–17	HC 753