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# INTRODUCTION

Amnesty International submits this briefing in advance of the examination of the United Kingdom by the Committee on Economic, Social and Cultural Rights during its 58<sup>th</sup> session in June 2016.<sup>1</sup>

In this document, Amnesty International sets out its concerns about the implementation of the International Covenant on Social Economic and Cultural Rights (ICESCR) by the United Kingdom (UK), focusing on plans by the government to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights; the criminalization of abortion and lack of access to abortion in Northern Ireland and the impact of cuts to civil legal aid on access to justice and the right to an effective remedy.

## I. REPEAL OF THE HUMAN RIGHTS ACT AND THE FAILURE TO INCORPORATE ICESCR INTO DOMESTIC LAW (LIST OF ISSUES PARA. I.1<sup>2</sup>)

Following the General Election on 7 May 2015, the Conservative party obtained the majority vote and formed a new government. The Conservative party 2015 manifesto contained not only the commitment to “scrap the Human Rights Act”, but as part of that, to “curtail the role of the European Court of Human Rights”.<sup>3</sup> The Queen’s Speech on 27 May 2015 did not contain any concrete legislative plans, but confirmed that the new government will “bring forward proposals for a British Bill of Rights”.<sup>4</sup> These proposals have yet to be published by the government. Notably, following a recent speech from the Home Secretary advocating withdrawal from the European Convention on Human Rights (ECHR), the Attorney General informed Parliament that the government wished to “restore some common sense” to the ECHR system and focus on the “expansionist approach to human rights” from the Strasbourg Court, noting they would “rule out absolutely nothing in getting that done”.<sup>5</sup>

The Human Rights Act 1998 allows people in the UK to exercise their rights as enshrined in the ECHR under UK law and in UK courts. The Act is simple, effective and has undoubtedly contributed to the respect and protection of human rights in the UK. Proposals to replace the Human Rights Act with what appears to be a significantly different ‘British Bill of Rights’, are of significant concern to Amnesty International. There is absolutely no suggestion or indication from the government that a British Bill of Rights would build on the rights enshrined in the Human Rights Act by providing greater protection to economic, social and cultural rights. Quite the reverse. The UK government remains implacably opposed to recognising the justiciability of economic, social and cultural rights and give full legal effect in domestic law to the Covenant, despite the Committee’s 2009 concluding observations to the contrary.<sup>6</sup> Rather the proposals seen to date threaten seriously to constrict fundamental

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<sup>1</sup> See also Amnesty International submission to the UN Human Rights Committee, AI Index: EUR 45/1793/2015, 29 June, 2015, <https://www.amnesty.org/en/documents/eur45/1793/2015/en/>

<sup>2</sup> E/C.12/GBR/Q/6, 3 November 2015.

<sup>3</sup> The Conservative Party manifesto 2015, page 60.

<sup>4</sup> Queen’s Speech, 27 May 2015 can be accessed here: <https://www.gov.uk/government/speeches/queens-speech-2015>

<sup>5</sup> <https://hansard.parliament.uk/Commons/2016-04-26/debates/16042638000003/EuropeanConventionOnHumanRightsUKMembership>

<sup>6</sup> See the Concluding Observations of the Committee on Economic, Social and Cultural Rights on the UK, E/C.12/GBR/CO/5, 12 June 2009, paragraph 13, “The Committee urges the State party to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights.”

safeguards for human rights that currently exist.<sup>7</sup> Amnesty International is strongly of the view that this reform project is a dangerous and unnecessary one, which appears to be focussed upon allowing the government to provide less protection for human rights in the UK than the core protections currently offered by the ECHR and the Strasbourg Court. It risks a general downgrading of rights protections in the UK where economic, social and cultural rights are already under protected. In that respect Amnesty International is also deeply disappointed by the continued failure of the UK government to sign or ratify the Optional Protocol to the Covenant or the Additional Protocol to the European Social Charter which provides for a system of collective complaints.

Amnesty International is also disappointed by the ongoing failure of the UK to introduce a Bill of Rights for Northern Ireland that is tailored to its particular circumstances and history. This process is distinct from and should not be conflated with the wider discussions noted above around repeal of the Human Rights Act and the introduction of a UK Bill of Rights. In its 2009 Concluding Observations the Committee called for the enactment of a Bill of Rights for Northern Ireland which included social, economic and cultural rights that are justiciable.<sup>8</sup> However, in the intervening seven years no significant progress has been made.<sup>9</sup>

#### **Amnesty International calls on the UK authorities to:**

- Abandon plans to repeal the Human Rights Act and replace it with a British Bill of Rights;
- Ensure the legal protection of all economic, social and cultural rights, including access to appropriate means of redress for the violation of these rights;
- Establish a specific Bill of Rights or other human rights legislation for Northern Ireland which builds upon the rights enshrined in the Human Rights Act and takes into account the particular circumstances of Northern Ireland;
- Sign and ratify the Optional Protocol to the Covenant.

## **II. CRIMINALIZATION OF ABORTION AND LACK OF ACCESS TO SAFE ABORTION IN NORTHERN IRELAND (ARTICLE 12, LIST OF ISSUES PARA. III. 28)**

The law governing abortion in Northern Ireland is one of the most restrictive in Europe both in law and in practice.<sup>10</sup> It also carries the harshest criminal penalty in abortion regulation in Europe—life imprisonment for the woman undergoing the abortion and for anyone assisting her. Abortions are only lawful in extremely restricted circumstances, namely where there is a risk to a woman's or girl's life or a real and serious long-term or permanent damage to the physical or mental health of the pregnant woman. Abortions procured for other reasons carry a risk and threat of life imprisonment, including abortions sought because the pregnancy is a result of a sexual crime, such as rape and incest, and in cases of severe or fatal foetal impairment.<sup>11</sup> Although the sanction of life imprisonment has not been applied in practice in

<sup>7</sup> See "Protecting Human Rights in the UK: the Conservatives' Proposals for Changing Britain's Human Rights Laws" published by the Conservative Party at the end of 2014, a few months prior to the Manifesto Pledge, available [https://www.conservatives.com/-/media/files/downloadable%20files/human\\_rights.pdf](https://www.conservatives.com/-/media/files/downloadable%20files/human_rights.pdf)

<sup>8</sup> Concluding Observations to the UK 5th periodic state party review, 2009, paragraph 10. 1

<sup>9</sup> For further information see the ICESCR Shadow Report Submission from the Human Rights Consortium, a not for profit coalition of civil society organisations in Northern Ireland of which Amnesty International is a member.

[http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/GBR/INT\\_CESCR\\_NHS\\_GBR\\_23724\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/GBR/INT_CESCR_NHS_GBR_23724_E.pdf)

<sup>10</sup> The abortion regulation in Northern Ireland is underpinned by 19th century legislation, the Offences against the Person Act 1861, which predates all the relevant international human rights treaties by a century. The Abortion Act 1967 and subsequent legislative developments which regulate abortion in Great Britain do not extend to Northern Ireland. Responsibility for healthcare and criminal justice matters has been devolved, since 1999 and 2010 respectively, to regional authorities in Northern Ireland.

<sup>11</sup> Notably, in 2013, the CEDAW Committee issue concluding observations to the UK calling for the government to expedite reform of

recent memory, the risk and threat of possible severe criminal sanction continue to exert a chilling effect on women and healthcare providers alike.<sup>12</sup> The threat and use of criminal sanction has been particularly notable over the last year in relation to the prosecutions of women procuring World Health Organization (WHO) approved drugs – mifepristone and misoprostol – by mail order for medication abortion.<sup>13</sup>

Amnesty International has documented in a recent research publication that, in practice, the law is even more restrictive.<sup>14</sup> For many women, demonstrating a long-term risk to health, particularly mental health, and overcoming barriers to access to abortion in Northern Ireland is often an insurmountable challenge. Women's access to and experience with health services also varies depending on the attitude of service providers and availability of services within each of Northern Ireland's National Health Service (NHS) health trusts (i.e. the regional administrative units of the UK public health system), which leads to further inequity.

Abortion remains an issue that continues to be highly stigmatized in society. The effects of that stigma extend to women and girls, medical practitioners, health care service providers, and across society generally. Moreover, legal abortions are very rarely carried out in Northern Ireland because of the extremely limited legal circumstances in which women are entitled to abortions, and possibly owing the underlying social stigma: official statistics indicate that 23 lawful terminations took place in Northern Ireland between 2013-2014. Most women and girls living in Northern Ireland who need to access abortion services have to take a plane or ferry to access such care in another jurisdiction; the majority travel to Great Britain, with some also travelling to other European countries, including the Netherlands and Belgium. Women and girls attending clinics and centres that provide reproductive health care and advice are regularly intimidated by anti-choice activists outside the clinics and nearby pavements. Service providers and others who work in the area of sexual and reproductive health, including family planning and abortion, are also regularly harassed in public.

The current situation in relation to access to abortion in Northern Ireland has received criticism from international human rights bodies, including most recently, the UN Human Rights Committee, which in its Concluding Observations of July 2015 called on the UK government to amend the country's legislation on abortion in Northern Ireland with a view to providing for additional exceptions to the legal ban on abortion, including in cases of "rape,

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the Northern Ireland abortion law with a view towards decriminalizing abortion and to extend the legal bases for abortion to include threats to women's health and in cases of rape, incest and "serious malformation of the foetus." (See CEDAW/C/GBR/CO/7, para. 50-51). The CEDAW committee has also raised the issue of legal access to abortion in cases of severe and fatal foetal impairment (among other grounds) here: CEDAW Committee, Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/OP.8/PHL/1 (2015); CEDAW Committee, Concluding Observations: Peru, U.N. Doc. CEDAW/C/PER/CO/7-8 (2014), para 36(a); CEDAW Concluding Observations: Chile, UN Doc. CEDAW/C/CHL/CO/5-6 (2012) para. 34; CEDAW Concluding Observations: United Kingdom (regarding Northern Ireland), UN Doc. CEDAW/C/GBR/CO/7 (2013), para. 51.

<sup>12</sup> Northern Ireland medics fear prison over abortion advice, The Guardian, 5 January 2016,

<http://www.theguardian.com/world/2016/jan/05/northern-ireland-medics-fear-prison-abortion-advice>

<sup>13</sup> Amnesty International UK Press Releases: "Protesters demand urgent law reform as Northern Ireland woman faces charges for using 'abortion pills'," 15 January 2016, <https://www.amnesty.org.uk/press-releases/protesters-demand-urgent-law-reform-northern-ireland-woman-faces-charges-using> -; "Northern Ireland: 'Never in public interest to turn women in need of healthcare into convicted criminals' – Amnesty," 5 April 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-%E2%80%98never-public-interest-turn-women-need-healthcare-convicted> ; "Northern Ireland second abortion pills case: 'Grotesque spectacle' of women before courts must end," 6 April 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-second-abortion-pills-case-grotesque-spectacle-women-courts-must-end> ; and "Criminalisation of women in Northern Ireland becoming a 'grim trend' - second abortion pills court case," 27 April 2016, <https://www.amnesty.org.uk/press-releases/criminalisation-women-northern-ireland-becoming-grim-trend-second-abortion-pills> .

<sup>14</sup> Amnesty International, Northern Ireland: Barriers to Accessing Abortion Services, AI Index: EUR 45/1057/2015), <http://amnesty.org/en/documents/eur45/1057/2015/en/>

incest and fatal foetal abnormality.”<sup>15</sup> The Committee also called for ensuring “access to information on abortion, contraception and sexual and reproductive health options.”<sup>16</sup> The UN CEDAW Committee also issue concluding observations to the UK in 2013, calling upon the government to “expedite the amendment of the anti-abortion law in Northern Ireland with a view to decriminalizing abortion.”<sup>17</sup> The Committee further called upon the government to “ensure that legal abortion [in Northern Ireland] covers not only cases of threats to the life of a pregnant woman but also other circumstances, such as threats to her health and in cases of rape, incest and serious malformation of the foetus.”<sup>18</sup>

In October 2014, the Department of Justice (DOJ) for Northern Ireland embarked on a process of legislative consultation on the possible decriminalization and legalization of abortion in cases of “lethal foetal abnormality and sexual crime.”<sup>19</sup> Following the closure of the consultation, in April 2015, the DOJ issued a summary of responses received, along with issues identified for further policy consideration and some concrete, limited legislative proposals.<sup>20</sup> “In June 2015, the Minister of Justice tabled a draft paper before the Northern Ireland Executive on reforming the law on abortion in Northern Ireland, to allow access to abortion in cases of fatal foetal impairment.

There is significant ongoing political opposition to legislative reform on abortion in Northern Ireland. In January 2016, the new First Minister, Arlene Foster, made it clear in a media interview that although she would “consider carefully” a recent decision by the High Court in Belfast that found that the Northern Ireland abortion law contravened regional human rights covenant obligations (see next paragraph), she remained opposed to ensuring access to abortion in Northern Ireland on par with England, Wales and Scotland.<sup>21</sup> In February 2016, the Northern Ireland Assembly failed to take forward a proposal for legislative reform.<sup>22</sup>

In a pair of related judgments in November and December 2015,<sup>23</sup> arising from an application for judicial review of the region’s abortion laws brought by the Northern Ireland Human Rights Commission (NIHRC), the High Court in Belfast ruled that the existing abortion law in Northern Ireland was incompatible with Article 8 ECHR (right to private and family life), as it prevents access to termination of pregnancy in cases of fatal foetal impairment, rape or incest.<sup>24</sup> The judgment of the High Court has been appealed by the

<sup>15</sup> HRC, Concluding Observations: UN Doc. CCPR/C/GBR/CO/7, 2015, para. 15;

<sup>16</sup> HRC, Concluding Observations: UN Doc. CCPR/C/GBR/CO/7, 2015, para. 15; Amnesty International UK Press Release, “UN slams Northern Ireland executive on abortion and ‘troubles’ issues”, 24 July 2015, <https://www.amnesty.org.uk/press-releases/un-slams-northern-ireland-executive-abortion-and-troubles-issues>

<sup>17</sup> CEDAW, Concluding Observations: United Kingdom, UN Doc. CEDAW/C/GBR/CO/7, 2013, para. 51.

<sup>18</sup> CEDAW, Concluding Observations: United Kingdom, UN Doc. CEDAW/C/GBR/CO/7, 2013, para. 51.

<sup>19</sup> Department of Justice NI, “The Criminal Law on Abortion: Lethal foetal abnormality and sexual crime: A consultation on amending the law by the Department of Justice,” October 2014, <http://www.dojni.gov.uk/consultation-on-abortion-2014>. Amnesty International’s response to the consultation can be found here: Amnesty International UK, Submission to the Department of Justice consultation, The Criminal Law on Abortion: Lethal foetal abnormality and sexual crime,” January 2015, [http://www.amnesty.org.uk/sites/default/files/aiuk\\_doj\\_ni\\_submitted\\_copy.pdf](http://www.amnesty.org.uk/sites/default/files/aiuk_doj_ni_submitted_copy.pdf).

<sup>20</sup> Department of Justice NI, “Consultation on Abortion 2014: Summary of responses,” 16 April 2015, <https://www.dojni.gov.uk/publications/consultation-abortion-2014-summary-responses>

<sup>21</sup> “No extending abortion act to Northern Ireland, first female leader says,” The Guardian, 6 January 2016, <http://www.theguardian.com/world/2016/jan/06/no-extending-abortion-act-to-northern-ireland-first-female-premier-arlene-foster-court-ruling-rape> and Amnesty International UK Press Release, “Northern Ireland: new First Minister must change ‘unlawful’ abortion law”, 6 January 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-new-first-minister-must-change-%E2%80%98unlawful%E2%80%99-abortion-law>.

<sup>22</sup> Amnesty International UK Press Release, Northern Ireland: Amnesty urges politicians to back abortion law change, 9 February 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-urges-politicians-back-abortion-law-change>

<sup>23</sup> The Northern Ireland Human Rights Commission’s Application [2015] NIQB 96, 30 November 2015 and The Northern Ireland Human Rights Commission’s Application [2015] NIQB 102, 16 December 2015.

<sup>24</sup> Amnesty International UK Press Release, Northern Ireland: Amnesty welcomes landmark court decision on abortion law, 30 November 2015, <https://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-welcomes-landmark-court-decision->

Attorney General of Northern Ireland and the DOJ, and cross-appealed by the NIHRC.<sup>25</sup> Amnesty International is an intervenor in these proceedings.

Even in situations where women and girls have a legal right to access abortion as set out under the current Northern Ireland law, they are often unable to exercise that right to access pregnancy termination services. Notably, Northern Ireland lacks clear guidelines for health professionals on the abortion law applicable in the region which adds to the climate of uncertainty and fear.<sup>26</sup> Following longstanding criticism, protracted legal battles between civil society groups and the Department of Health, Social Services and Public Safety over the lack of clear guidance on the abortion law in Northern Ireland, in March 2016 the new Health Minister published long-awaited guidelines.<sup>27</sup> Notwithstanding the new guidelines, which offered limited clarity on the current law on abortion in discrete circumstances, healthcare professionals in Northern Ireland still operate in a climate of uncertainty and fear regarding abortion services.

Civil society organization working with young people (boys and girls, and young men and women) on issues of sexual and reproductive health, continue to raise concerns about the inconsistent delivery of “relationship and sex education” in Northern Ireland schools, including in relation to contraception and abortion.<sup>28</sup> Various UN Committees have stated the importance of comprehensive sexuality education which is non-discriminatory as part of the right to health.<sup>29</sup>

#### **Amnesty International calls on the authorities in United Kingdom to:**

- Ensure access to lawful abortion in Northern Ireland in line with international human rights standards;

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#### [abortion-law](#)

<sup>25</sup> Amnesty International UK Press Release, "Northern Ireland: Amnesty will resist attempt to overturn High Court ruling on abortion," 25 January 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-will-resist-attempt-overturn-high-court-ruling-abortion>; Amnesty International UK Press Release, "Northern Ireland: Amnesty response to Justice Minister's appeal of High Court ruling on abortion," 27 January 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-response-justice-minister%E2%80%99s-appeal-high-court-ruling> and NIHRC, "Human Rights Commission Set to Cross Appeal in Termination of Pregnancy Case," 27 January 2016, <http://www.nihrc.org/news/detail/human-rights-commission-set-to-cross-appeal-in-termination-of-pregnancy-cas>

<sup>26</sup> For a comprehensive analysis of this lack of guidance, please see Amnesty International, Northern Ireland: Barriers to Accessing Abortion Services, AI Index: EUR 45/1057/2015), <http://amnesty.org/en/documents/eur45/1057/2015/en/>, pp. 35-40.

<sup>27</sup> Amnesty International UK Press Release, "Northern Ireland: publication of abortion guidelines - long overdue and only a first step," 24 March 2016, <https://www.amnesty.org.uk/press-releases/northern-ireland-publication-abortion-guidelines-long-overdue-and-only-first-step>; DHSSPS, "GUIDANCE FOR HEALTH AND SOCIAL CARE PROFESSIONALS ON TERMINATION OF PREGNANCY IN NORTHERN IRELAND," March 2016, <https://www.dhsspsni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf>; and DHSSPS, "Health Minister welcomes Executive agreement on Termination of Pregnancy Guidance and provides update on FFA working group," 25 March 2016, <https://www.dhsspsni.gov.uk/news/health-minister-welcomes-executive-agreement-termination-pregnancy-guidance-and-provides-update>

<sup>28</sup> See Amnesty International, Northern Ireland: Barriers to Accessing Abortion Services, AI Index: EUR 45/1057/2015), <http://amnesty.org/en/documents/eur45/1057/2015/en/>, pp. 21-23.

<sup>29</sup> See, e.g., CEDAW, Concluding Observations: Belize, UN Doc. A/54/38, 1999, paras. 56, 57; Burundi, UN Doc. A/56/38, 2001, para. 62; Chile, UN Doc. A/54/38, 1999, paras. 226-27; Dominican Republic, UN Doc. A/53/38, 1998, para. 349; Lithuania, UN Doc. CEDAW/C/LTU/CO/4, 2008, para. 25; Nigeria, UN Doc. CEDAW/C/NGA/CO/6, 2008, para. 33; CRC, Concluding Observations: Cambodia, UN Doc. CRC/C/15/Add.128, 2000, para. 52; Colombia, UN Doc. CRC/C/15/Add.137, 2000, para. 48; Dominican Republic, UN Doc. CRC/C/15/Add.150, 2001, para. 37; Ethiopia, UN Doc. CRC/C/15/Add.144, 2001, para. 61; CESC, Concluding Observations: Bolivia, UN Doc. E/C.12/1/Add.60, 2001, para. 43; Honduras, UN Doc. E/C.12/1/Add.57, 2001; Libyan Arab Jamahiriya, UN Doc. E/C.12/LYB/CO/2, 2006, para. 36; Senegal, UN Doc. E/C.12/1/Add.62, 2001, para. 47; Ukraine, UN Doc. E/C.12/1/Add.65, 2001, para. 31. See also, UNESCO, Young people today. Time to Act now: Why adolescents and young people need comprehensive sexuality education and sexual and reproductive health services in Eastern and Southern Africa, 2013, available at: [unesdoc.unesco.org/images/0022/002234/223447E.pdf](http://unesdoc.unesco.org/images/0022/002234/223447E.pdf); World Health Organization, Developing sexual health programmes, A framework for action.



- Remove the threat of criminal sanction from women in Northern Ireland who undergo abortion and healthcare professionals who provide termination advice and services;
- Ensure access to comprehensive sexuality education, including information about abortion and contraception, are delivered by the devolved authorities in Northern Ireland in compliance with the UK's international human rights obligations.

### III. IMPACT OF CIVIL LEGAL AID CUTS ON ACCESS TO JUSTICE AND ENJOYMENT OF ESCR (ARTICLE 2 (I))

Access to justice is an essential prerequisite for the protection and promotion of all human rights including those rights enshrined in the Covenant. All states are under an obligation to ensure remedies which are “accessible, affordable, timely and effective”.<sup>30</sup> Without the ability to effectively request, inform or challenge decisions, rights cannot be secured. Governments must therefore remove obstacles to access to justice, including those that disproportionately exclude people living in poverty and discriminate against other marginalised groups and individuals.

Providing a system of legal aid is a significant part of how the UK ensures access to civil law justice and meets its obligations to ensure equality before the courts and tribunals for all. Previously, the status quo in England and Wales was that legal aid was available to help people access justice with respect to almost all aspects of English civil law, with narrowly prescribed exceptions. This situation was completely reversed with the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in April 2013 which brought about wholesale change to the legal aid system for family and civil law.<sup>31</sup> Civil legal aid is now only available for a narrow number of prescribed topics and types of legal work (“general cases”), subject to an override for exceptional funding in other cases (“exceptional cases”).<sup>32</sup> Areas of law that can no longer be funded through legal aid include: housing matters (except for narrow exceptions such as where the home is at immediate risk); immigration (except asylum and detention); private family law (other than cases where strict criteria are met regarding domestic violence or child abuse, or for child parties); employment; welfare benefits (except for appeals on a point of law in the Upper Tribunal); and education (except for cases of Special Educational Needs).<sup>33</sup>

Since October 2015, Amnesty International has been researching the impact of the legal aid cuts as a result of the introduction of LASPO on access to justice in England and Wales. In the context of this research the organization has, to date, interviewed 90 individuals or organizations who either provide legal advice, information, representation, or other support to individuals affected by the legal aid cuts or who have been directly affected by the cuts. The research is expected to be published in the coming months, however, Amnesty International would like to share a number of findings that have already emerged from the research with the Committee.<sup>34</sup>

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<sup>30</sup> UNCESCR, General Comment No. 9: The domestic application of the Covenant (1998), UN Doc E/C.12/1998/24

<sup>31</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at: <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

<sup>32</sup> LASPO 2012, s.10(3), available at: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted>

<sup>33</sup> LASPO 2012, Schedule 1, available at: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted>

<sup>34</sup> It should be noted that the concerns raised in this submission do not represent the totality of issues that have emerged from the research Amnesty International has undertaken over the past 6 months on the impact of LASPO 2013 on access to justice.

In 2015, during its review of the UK, the Human Rights Committee expressed concern about “the impact of reforms to the legal aid system on access to justice”.<sup>35</sup> Amnesty International’s currently ongoing research supports the concern of the Human Rights Committee, indicating that the cuts have had a seriously detrimental impact on access to civil justice and effective redress for a range of rights. This includes those rights protected by the International Covenant on Social, Cultural and Economic Rights, which disappointingly were not explicitly or fully considered in the equality impact assessment carried out by the Ministry of Justice prior to the introduction of LASPO. As opposed to progressively realizing the rights contained under the Covenant, the cuts brought about by LASPO represent a retrogressive step in ensuring equal and effective access to civil justice.<sup>36</sup> Amnesty International is particularly concerned that the cuts have had a disproportionate effect on disadvantaged and/or vulnerable people, including children, those with mental health problems, people with a range of disabilities and those living in poverty.

For example, and of relevance to the Committee, NGOs and civil society organizations have raised concerns that the removal of legal aid from most welfare benefits cases<sup>37</sup> has had a disproportionate impact on the ability of disabled people and people with mental health problems to secure their rights.<sup>38</sup> Indeed the government’s own statistics highlight the reach of the changes, with only 254 welfare benefits cases funded by legal aid in 2015, as compared to over 88,000 before the LASPO Act 2012 reforms took effect.<sup>39</sup> Statistical studies have shown that individuals who receive specialised advice and support in relation to

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<sup>35</sup> UNHRC, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (2015), UN Doc CCPR/C/GBR/CO/7 available at:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=CCPR/C/GBR/CO/7](http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/GBR/CO/7)

<sup>36</sup> The Ministry of Justice “Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA)” and other impact reports can be accessed here: <https://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information>.

<sup>37</sup> Prior to the introduction of LASPO, legal help was available for advice on welfare benefits cases and for support in preparing for a review or for preparing to take a case to the First-tier Tribunal. Legal aid was not available for representation in a tribunal. Following LASPO, Legal aid for welfare benefits is excluded under LASPO Schedule 1 Part 2 para.15 save for judicial review cases (LASPO sched.1 part 1. para 19) and for appeals, on a point of law, to the Upper Tribunal, the Court of Appeal or the Supreme Court (LASPO schedule 1 (8)). Prior to a case reaching the point of appeal however, individuals are required to submit requests to the First Tier Tribunal for permission to appeal. In order to achieve this, applicants are required to identify the alleged error or errors of law in the decision (The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 Rule, 38(6)) available at: <http://www.legislation.gov.uk/ukSI/2008/2685/contents> ). Thus, applicants are left to challenge a decision on a point of law without help or assistance.

<sup>38</sup> See the Equality and Human Rights Commission Submission to the United Nations Committee on Economic, Social and Cultural Rights on the United Kingdom’s Implementation of the International Covenant on Economic, Social and Cultural Rights for the list of issues, August 2015, page 78 which emphasises that the impact of these changes is likely to be particularly serious for people with disabilities, who made up 58% of the recipients of legally-aided advice for social security benefits in 2009/10. See also the Low Commission, Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales, 2014; Scope, Legal Aid in Welfare: the tool we can’t afford to lose, 2011 and Shelter response to Ministry of Justice consultation: proposals for the reform of legal aid in England and Wales, 2011. Also note that the government accepted in its initial legal aid consultation that withdrawing legal aid for legal advice about certain benefits would have a disproportionate impact on disabled people, see Ministry of Justice, Proposals for the reform of legal aid in England and Wales. Consultation Paper, 2010.

<sup>39</sup> Ministry of Justice & Legal Aid Agency, Legal Aid Statistics in England and Wales October to December 2015, (2016), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/512577/bulletin.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512577/bulletin.pdf) (January 2015-Dec 2015) . Compared to Ministry of Justice & Legal Aid Agency ‘Legal Aid Statistics in England and Wales’ (2013-2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/366575/legal-aid-statistics-2013-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366575/legal-aid-statistics-2013-14.pdf)

their case have significantly higher success rates than those without.<sup>40</sup> Reflecting these statistics, individuals and organizations that provide free welfare benefits advice who spoke to Amnesty International stressed the value of legal advice and support in the preparatory stage of a welfare benefits claim. They highlighted that the majority of the individuals using their services displayed a range of vulnerabilities, including poor literacy and numeracy, mental health problems, and a range of disabilities. That they often required help understanding their claim, what they were entitled to, what evidence was required to support it and how to collect it, as well as substantial support to effectively argue their case based on their circumstances and the law.<sup>41</sup>

LASPO provides for exceptional case funding (ECF) for cases where a failure to provide legal aid would result in a breach of the individual's human rights under the European Convention on Human Rights or rights under European law.<sup>42</sup> Following successful legal challenges brought by the Public Law Project, domestic courts ruled that the ECF scheme was not operating lawfully because the threshold set out in Lord Chancellor's guidance regarding when ECF could be granted was too high.<sup>43</sup> As a result of these court decisions there has been an increase in the number of individuals securing ECF for their case, with just over half of all applications for ECF between October and December 2015 being granted, the highest proportion of grants since the scheme began.<sup>44</sup>

Despite the improving success rates for ECF, Amnesty International remains concerned that - in practise - the scheme still does not provide a truly effective safety net for vulnerable or disadvantaged people who are struggling to navigate complex legal processes and effectively advocate for their rights. This is in part evidenced by statistics from the Ministry of Justice,

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<sup>40</sup> See, for example, Child Poverty Action Group, August 2011 "Legal Aid – benefits advice reduces poverty amongst disabled children" that reports that "55% of social security and child support appeals succeed where the claimant has had advice, help or representation, only 28% succeed without this, a 27% difference." Likewise Bristol and Avon Law Centre report a 70-80% success rate on appeals against "fit for work" decisions, as opposed to 38% national appeal success rate, <http://www.ablc.org.uk/margarets-story.html>, see also recent news stories on this <http://www.independent.co.uk/news/uk/politics/legal-advice-centre-helps-95-of-people-declared-fit-to-work-by-dwp-get-decision-overturned-10482768.html>. See also "Access to Justice: Beyond the Policies and Politics of Austerity", edited by Ellie Palmer, Tom Cornford, Yseult, January 2016 and "Not seen and not heard – how young people will lose out from cuts to civil legal aid, a report by Sound Off for Justice and Just Rights on the impact of the proposed Legal Aid and Sentencing and Punishment And Offenders Bill on children and young people", "statistics show that cases where a client has had pre-appeal advice have a 55% success rate, as against a success rate of only 28% in cases where no advice has been taken."

<sup>41</sup> Some of these concerns regarding the challenges facing individuals trying to navigate complex legal systems without support are reflected in the following reports: "Citizens Advice Submission to the Justice Select Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, April 2014; Justice Committee – third report, "Government's proposed reform of legal aid, chapter five, HC 311 12 March 2015; Improving advice journeys: Reform advice in Westminster, June 2015, pages 18, 24-25 and Scope, Legal Aid in Welfare: the tool we can't afford to lose, 2011.

<sup>42</sup> LASPO 2012, 10(3)(i)(ii). It is worth noting that the determination of eligibility for ECF would not include whether failure to do so would breach an individual's right under the ICESCR or any other UN treaty.

<sup>43</sup> *Gudanaviciene and Ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin) six claimants arguing they should have received ECF for their cases relating to immigration. In *I.S. (by his litigation friend the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) related to a claimant who was blind and had a cognitive impairment. The court found the Merits test applied to determine whether an applicant should receive ECF to be rigid, unsatisfactory and unreasonable.

<sup>44</sup> Ministry of Justice & Legal Aid Agency, Legal Aid Statistics in England and Wales October to December 2014, (2015) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417157/Legal-aid-statistics-bulletin-oct-dec-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417157/Legal-aid-statistics-bulletin-oct-dec-2014.pdf) Between October – December 2015 57% of cases determined were granted ECF.

which had predicted 5,000 and 7,000 applications for ECF would be received each year, substantially higher than the actual current figures of 1,279 applications in 2015.<sup>45</sup> The reasons for this statistical disparity are numerous and complex, but include: a lack of knowledge and awareness of the ECF scheme, including the improved success rates; the view of many organizations providing free legal advice and assistance, as well as lawyers, that ECF applications are an ineffective and inefficient use of resources; and the difficulty faced by NGOs and individuals to find lawyers willing to do ECF applications for clients, particularly outside of London. Many who spoke with Amnesty International also shared the view that only individuals with serious and possibly multiple vulnerabilities would be eligible for ECF. As a consequence ECF was, in their opinion, simply not considered an option for many disadvantaged individuals or those who have a degree of vulnerability, in spite of the challenges that they would have accessing, navigating and understanding the legal processes. Amnesty International was given examples of the following vulnerabilities that were encountered by organizations and lawyers supporting people who were no longer entitled to legal aid, but who they did not consider applying for ECF: mental health problems (a range of challenges from depression to people with diagnosed mental illnesses); learning disabilities; low numeracy and literacy; language problems; physical disabilities; medical conditions such as terminal illness; and alcohol and drug dependency.

Amnesty International is also concerned that the cuts to legal aid have led to a loss of specialist legal advice at an early stage of an individual's problem.<sup>46</sup> Early legal advice can forestall an escalating sequence of problems, notably in the context of welfare benefit, debt, housing and family law. For example, legal advice in relation to Housing Benefits is one of the areas no longer within the scope of legal aid. However, early advice on Housing Benefits problems can resolve rent arrears, making it less likely that problems will escalate and lead to possession proceedings and evictions.<sup>47</sup> Similarly, legal aid is only available for cases of disrepair where a 'serious risk of harm to the health or safety' of the tenant or a family member is involved.<sup>48</sup> Individuals who spoke with Amnesty International raised concern that this allowed cases of disrepair to escalate until they were severe enough to reach this threshold. They also highlighted that the removal of legal aid for damages claims in cases of disrepair had, in their view, removed an important deterrent for landlords to not allow disrepair to worsen.<sup>49</sup> Loss of early intervention that would help avoid escalation of problems would

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<sup>45</sup> Report by the National Audit Office "Implementing Reforms to Civil Legal Aid", 20 November 2014, page 7, outlines expected figures from the Ministry of Justice. See also Ministry of Justice, Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment, (2012). The total figure for applications received for ECF was calculated using the Ministry of Justice's quarterly reports available here: <https://www.gov.uk/government/collections/legal-aid-statistics>. Of the ECF applications received in 2015, 37% were granted ECF, those as noted above the last quarterly figures were high, at over half of applications being granted ECF.

<sup>46</sup> The Law Society, Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid, (2016) pg. 15 <http://www.lawsociety.org.uk/policy-campaigns/consultation-responses/documents/law-society-submission-bach-review-march-2016/>

<sup>47</sup> The Low Commission, Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales, (2015) <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>

<sup>48</sup> LASPO Schedule 1 Part 1 (35)

<sup>49</sup> Shelter, Legal Aid, Sentencing and Punishment of Offenders Bill Evidence submitted by Shelter to the HoC Public Bill Committee, [https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0006/370779/Legal\\_Aid\\_Sentencing\\_and\\_Punishment\\_of\\_Offenders\\_Bill\\_-\\_Shelter\\_bill\\_committee\\_submission.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0006/370779/Legal_Aid_Sentencing_and_Punishment_of_Offenders_Bill_-_Shelter_bill_committee_submission.pdf) Shelter consider that restrictions on claiming legal aid for housing cases, "...will all make it much more difficult for vulnerable tenants to hold rogue landlords to account."

also appear to run counter to the government's stated rationale for pursuing the legal aid reform in order to "make legal aid more effective".<sup>50</sup>

In the context of immigration law, the cuts to legal aid have had a notably negative impact on families. As noted above, people with immigration claims are no longer eligible for legal aid (except for asylum and detention claims), this includes individuals who have claims under Article 8 (right to respect for their private and family life) of the European Convention on Human Rights. The loss of legal aid in these cases is often of particular significance for cases involving children because of the special importance of family life to children.<sup>51</sup> Three factors were highlighted to Amnesty International during its research which have contributed to the loss of legal aid in this area being particularly acute. Firstly, immigration law in the UK is highly complex and difficult to navigate effectively, particularly given the inequality of arms in these cases arising from the disparity between the individual's resources and those of the State.<sup>52</sup> Secondly, many individuals with article 8 family cases present with additional vulnerabilities or challenges that make effectively navigating the complex legal processes difficult. Examples raised during the research included; language difficulties, lower levels of literacy, lower educational levels, high levels of poverty, and, for some, pursuing claims whilst being detained under immigration powers. The third factor concerns the importance of what is at stake in these claims; an unsuccessful application may result in the breakdown of a family and the separation of a parent from his or her children. Relatedly, legal aid has also been lost in family reunification cases, where refugees are no longer eligible for free legal advice and assistance to help them in making often complex applications seeking to have their families join them in the UK.<sup>53</sup>

Further to this Amnesty International is deeply concerned by the UK government's plan to introduce a residence test for civil legal aid.<sup>54</sup> With certain exceptions, such as for asylum-seekers and resettled refugees, the test is designed to limit funding to people who are lawfully resident in the UK and who, at some point, have been lawfully resident for at least 12 months continuously. The result of the test will mean that any individual recently moved

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<sup>50</sup> See UK State Party Report to CESCR, 25 September 2014, UN Doc E/C.12/GBR/6 page 30 para 116.

<sup>51</sup> See for example, Bail for Immigration Detainees (2014) Written evidence to the Justice Committee inquiry in to the Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which includes case studies demonstrating the impact on children of their parent's removal or deportation, in particular on children's mental health.

<sup>52</sup> See, for example, Equality and Human Rights Commission, Equality, human rights and access to civil law justice: a literature review, October 2015; Armstrong, N. 'LASPO, Immigration and Maaouia v United Kingdom', *Judicial Review*, Vol 18(2), 2013; Meyler, F. and Woodhouse, S. 'Changing the immigration rules and withdrawing the 'currency' of legal aid: the impact of LASPO 2012 on migrants and their families', *Journal of Social Welfare & Family Law*, Vol. 35(1), 2013, Liberty, Liberty's response to the Ministry of Justice Proposals for the Reform of Legal Aid, 2011.

<sup>53</sup> See European Council on Refugees and Exiles & the Red Cross, *Disrupted Flight: The Realities of Separated Refugee Families in the EU*, (2014). In December 2014, the High Court of England and Wales ruled that because family reunification was an obligation arising out of the Refugee Convention – widely interpreted – it should actually remain in scope for legal aid. (See case of 'B' in *R(Gudanaviciene) & Others v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin)) This was because paragraph 30 Schedule 1 LASPO states that services provided in relation to rights to enter, and to remain in the United Kingdom arising from the Refugee Convention are within scope of eligibility for legal aid. The Court of Appeal however overturned that following an appeal from the government. The Court confirmed that while family reunification cases could be eligible for exceptional case funding they were not entitled to automatic provision of legal aid as the right to family reunion was not a right arising directly from the refugee convention narrowly interpreted. (*R(Gudanaviciene) & Others v Director of Legal Aid Casework* [2014] EWCA Civ 1622) Lawyers have requested permission to appeal to the Supreme Court which is currently pending.

<sup>54</sup> Ministry of Justice Consultation paper, *Transforming Legal Aid: Delivering a more credible and efficient system*, (2013) <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

to this country, or who have insecure immigration status, and who is treated unlawfully (e.g. by the police, their landlord, the NHS or a local authority) will have no access to justice unless they are in a position to financial pay for legal representation. Many of those who will get caught in this test are vulnerable and will not have the financial means to pay for legal representation. Although this is a test of residence rather than nationality, Amnesty International believes that it is discriminatory and is fundamentally contrary to the principle that all individuals should have equal access to justice.

On 18 April 2016, the Supreme Court ruled that the government's plans to introduce a residence test via secondary legislation was unlawful because the Lord Chancellor did not have the legal power to introduce the test as it was *ultra vires* the enabling statute.<sup>55</sup> In light of this finding the Supreme Court did not examine the issue of whether the residence test was unjustifiably discriminatory and so in breach of the Human Rights Act 1998. The government has stated it is waiting to see the full judgment from the Supreme Court before determining its response. Amnesty International hopes that the Supreme Court's ruling will bring an end to the government's plans to introduce the residence test. However, concerns remain that the government may, in the future, seeks to alter LASPO in order to grant the Lord Chancellor the necessary powers to introduce a residence test.

**Amnesty International calls on the UK authorities to:**

- Immediately review the impact of reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 on access to justice and protection of their human rights including economic and social rights, particularly on vulnerable and disadvantaged groups, including children, people with mental health problems, people with disabilities and migrants.
- Abandon plans to introduce a residence test for civil legal aid.

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<sup>55</sup> The full written reasons of the Supreme Court were not at the time of the submission available. <https://www.supremecourt.uk/news/r-on-the-application-of-the-public-law-project-v-lord-chancellor-160418.html> . LASPO 2012 s. 9(2) imbues the Lord Chancellor with the power to add, vary or omit services under Schedule 1 of the Act.



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