Written evidence from the Association of Prison Lawyers (NSB0004)

About the Association of Prison Lawyers (APL)

1.1 The Association of Prison Lawyers was formed in 2008 by a group of specialist lawyers, to provide a voice during the Legal Aid Agency's funding consultation process that led to the 2010 prison law contract.

1.2 We continue to represent and provide training for our members, comprising specialist barristers, solicitors and legal representatives across England & Wales, and endeavour to represent our members' views in policy development.

2. This response

2.1 Our members represent prisoners including those convicted under the Terrorism Act in relation to those matters that are in scope under the criminal contract. Many of our members also practice in public law as well as prison law and act on behalf of Terrorist Act prisoners 'TACT prisoners' in Judicial Review proceedings challenging decisions made by the Secretary of State, the Parole Board and/or the National Probation Service or other public bodies.

2.2 Due to the specialist nature of the work of APL members representing prisoners, we have focused our submission on the proposals contained at Clause 62 of the Bill, which removes entitlement to civil legal aid for terrorist offenders.

2.3 According to the Ministry of Justice's Human Rights Memorandum, the aim of the measure is "symbolic", to reflect the significance of the bonds with the State and society that are broken by the commission of terrorist offences. It is not suggested that the measure is intended to reduce the risk of terrorism.

3. The importance of access to justice

3.1 Ensuring that ALL individuals have the ability to obtain legal advice and assistance is fundamental in a fair and just society. The availability of legal aid is vital to ensuring access to justice for all. Equal access to justice for everyone, including people in prison no matter what their offence, is essential to maintain the rule of law, and the true test of a democratic society.

3.2 In the words of the former chief inspector of prisons, Nick Hardwick, people in prison are uniquely vulnerable because "*there is a power imbalance between the prisoner and the jailer. If I am a warder and you are a prisoner I can use physical force on you. But also you are dependent on me for absolutely every aspect of your life*" (Hardwick, 2014).

3.3 Without access to justice, abuses of power go unchallenged and prisoners are pushed further away from the justice system. There is an obvious benefit to society in encouraging people to know, respect and enforce the law. (This was recognised by the Supreme Court in *R (UNISON) v Lord Chancellor*, [2017] UKSC 51:
"*People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable*."

3.4 The Court of Appeal has made it clear that without the provision of legal aid, prisoners are unable to effectively uphold their rights and challenge unlawful decision making (*Howard League and PAS v Lord Chancellor* [2017] EWCA Civ 244). The only way to engender personal responsibility in people in contact with the criminal justice system and thereby ensure less crime and fewer victims of crime, is to honour their rights. This means creating a culture in which they themselves are respected and able to access appropriate remedies.

3.5 If the justification for removal of civil legal aid from terrorist offenders is 'symbolic' to reflect the significance of the bonds with the State and society that are broken by the commissions of terrorist offences, it is irrational to further alienate those offenders from that system by treating them differently from other prisoners who commit criminal offences, removing their ability to access justice and creating a system which is inherently unfair. Failure to provide a legal aid system for terrorist offenders that is equivalent to other prisoners can only lead to the potential for injustice leading terrorist prisoners to the conclusion that it does not serve them to engage in the system. This will do nothing to reintegrate terrorist prisoners in society on their release and ultimately this policy is therefore likely to lead to increasing risk and undermining public safety.

4. Are the legal aid provisions in the Bill adequate (clauses 55 and 62-64). Do they ensure adequate access to justice, enforcement of human rights and respect for the right to a fair trial (Art 6 ECHR?)

4.1 Legal advice and representation must be available to everyone involved in the criminal justice system to ensure that the system functions properly. Legal intervention for prisoners, through challenging unlawful decision making such as challenging the failure to progress, can lead to prisoners being able to move through the system and ultimately lead to their successful resettlement thereby reducing the risk to public safety.

4.2 Illustrative of this point are a number of cases where the court have made important findings on applications brought by prisoners convicted of terrorist offences that they have been subjected to unlawful decision making by the prison and parole authorities. These cases include *Hindawi v Secretary of State for Justice* [2011] EWHC 830 (QB);*Shaffi v Secretary of State for Justice* [2011] EWHC 3113 (Admin); *Hindawi v Parole Board* [2012] EWHC 3894 (Admin); *Zaman v Secretary of State for Justice* [2022] EWHC 188 (Admin). There are many more.

4.3 Under the proposed legislation, the removal of civil legal aid will mean that these cases which also had a significant benefit to the wider prison population could not have been taken because it involved issues of procedural fairness and other public law principles rather than Convention Rights. These cases will not therefore be eligible for Exceptional Case Funding.

4.4 Removing civil legal aid will also mean that TACT prisoners will be unable to challenge decisions ancillary to their Parole Review. Parole proceedings for TACT cases are extremely complex and could include Judicial Review of challenges to a Local Authorities refusal to provide Housing, or a challenge to the Parole Board's decision in relation to the Secretary of State's Non-Disclosure Application. Legal Intervention in these matters assists in better and informed decision making by the Parole Board.

5. Are the restrictions on civil legal aid for those convicted of terrorism offences (clause 62) justified and fair?

5.1 The justification for the removal of legal aid on the basis that it is 'symbolic' is clearly no justification at all and disguises the fact that it is a wholly punitive sanction and is discriminatory. It is a longstanding principle of domestic law that prisoners retain all rights save for those taken away expressly or impliedly by the fact of their imprisonment (*Raymond v Honey* [1983] 1 AC 1) The principle that those convicted of crime retain their rights was recently affirmed by the High

Court in *Cojanu v Essex Partnership University NHS Trust* [2022] EWHC 197 (QB) where Ritchie J firmly rejected the suggestion that criminality should deprive a claimant of their rights:

"Regrettably there are hundreds of drugs related gang stabbings in London and around England each year. Young men cut and kill each other over territory and drugs or other matters. If every one of those who were brought into hospital or prison and who denied criminality or starting the fight (and yet was convicted) is to be deprived of any civil claim when the hospital negligently cuts off the wrong leg or fails to treat the young man at all (because he is presumed to be a criminal), then the common duty of care owed by the NHS to all residents would be wholly undermined and likewise the will of Parliament when it imposed the equality principle for medical treatment of prisoners" [69]

5.2 To remove legal aid on the basis of someone's offence is discriminatory. It sets a dangerous precent. It allows other public bodies to make decisions to treat someone differently because of their offence. Not because of their risk but something else. As Johnathan Hall said, "*If this principle is accepted, it may be asked why future legislation should stop at restrictions on civil legal aid, and not apply to other civic payments provided in cases of need, such as housing benefit. Even symbolic restrictions may have practical consequences. No released terrorist offender is going to reoffend merely because their access to civil legal aid is restricted. But legal advice and assistance is relevant to securing help on housing, debt and mental health. A homeless terrorist offender, or one whose mental health needs are unaddressed, will present a higher risk to the public. There is a risk of unintended consequences.*[1]

5.3 In a civilised society everyone is entitled to justice. In *R(Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1W.L.R 1299 Baroness Hale said, at [61]: "*Mr Shepherd Kambadzi may not be a very nice person. He has certainly overstayed his welcome in this country for many years. He has abused our hospitality by committing assaults and sexual assault. It is not surprising that the Home Secretary wishes to deport him. But in Roberts v Parole Board [2005] UKHL 45, 2006] 1 All E.R 39 at [84]… Lord Steyn quoted the well known remark of Justice Frankfurter in Unites States v Rabinowitz (1950) 339 US 56, at 69, that "it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people". Lord Steyn continued: Even the most wicked of men are entitled to justice at the hands of the state'. And I doubt whether Mr Kambadzi is the most wicked of men".*

6. **Do those provisions comply with the right of access to justice, the right to a fair trial, (Article 6 ECHR) the right to an effective remedy (Article 13 ECHR) the right to family and private life (Article 8 ECHR), especially as concerns immigration matters), the right to peaceful enjoyment of possessions (Art 1 of Protocol 1 ECHR) and freedom of discrimination in the enjoyment of those rights (Article 14 ECHR)**

6.1 The provisions do not comply with either Article 6 or Article 13. As noted above, the right to a fair trial in civil matters is, for prisoners, dependent upon the provision of legal aid (*Howard League* case above). The removal of legal aid therefore deprives this group of prisoners of the right to an effective remedy under Article 13.

6.2 We further consider that Clause 62 constitutes direct discrimination on the basis that it subjects terrorist prisoners to differential treatment to any other offender based on the type of offence for which he/she is serving a sentence of imprisonment. Clause 62 constitutes direct discrimination because it is explicitly only applicable to those within the category of "terrorist offenders". A terrorist offender is clearly being treated less favourably than another prisoner serving a sentence

[1] Independent Reviewer of Terrorism Legislation: Note on Terrorism Clauses in the National Security Bill (Paras24-25).

for an offence, who is not considered a "terrorist prisoner" by reason of a separate (unrelated) offence.

6.3. Clause 62 does not directly subject Muslim prisoners to less favourable treatment. On its face it is "neutral" in terms of religion, but it does have a "disproportionately prejudicial effect" on Muslim prisoners. That is because such prisoners are disproportionately likely to be convicted of terrorism offences and thus are disproportionately likely to be negatively affected by Clause 62.

6.4 We have set out above and at paragraph 8 below why Clause 62 does not afford prisoners convicted under the Terrorism Act access to justice.

7. Is the reliance on 'ECF' funding sufficient to ensure access to justice.

7.1 The reliance on 'ECF' funding is not sufficient to ensure access to justice. As set out above, many of the Judicial Review cases bought on behalf of Terrorist Act prisoners are based on challenges on public law principles or principles of common law fairness and would not be covered by 'ECF' funding. Those challenges not only lead to those prisoners progressing through the system and demonstrating what engagement within a system can achieve thereby reducing their risk but has also led to improved prison practices that have had a significant benefit on the wider prison population.

7.2 Whilst segregation engages Article 8 ECHR and therefore decisions in relation to it may be covered by 'ECF', often those challenges are taken (and succeed) on common law fairness principles such as Bourgass and Hussain v Secretary of State for Justice [2015] UKSC 54 which was a Judicial Review of prolonged segregation/solitary confinement for 6 months. This case established that common law fair procedures are required for decisions on prolonged segregation including in relation to disclosure of reasons why an individual is segregated, and amendments to the PSI 1700 policy which followed, benefitting all prisoners with fairer decision making. This case would not be covered by 'ECF'.

7.3. Even if cases are potentially covered by 'ECF' because they engage Human Rights issues, the threshold for demonstrating why it is necessary to receive legal representation is a high one and this funding is, by definition, awarded exceptionally.

7.4 Additionally, cases that engage Human Rights are often highly time sensitive, such as challenges to unlawful segregation decisions. Whilst it is possible to apply for urgent consideration it states on the form that there is no guarantee that the application will be determined before a hearing day or before specified urgent work is needed. It is the experience of our members that an application for 'ECF' requires significant work to show that the matter has satisfied the guidance and often weeks to receive a response.

7.5 The current on-line system of applying for 'ECF' is not available to prisoners and so we are unsure how prisoners are meant to exercise this right.

8 Does Clause 62 comply with Article 7 ECHR which prohibits a penalty being imposed on an individual retrospectively.

8.1 We consider that Clause 62 does not comply with Article 7 ECHR. The fact that there is no lawful justification for removing legal aid but is simply for 'symbolic' reasons is in effect a punishment or 'penalty' This measure applies to any individual who was sentenced to a terrorist offence after 2001 and therefore has retrospective effect on the individual who at the time of the offence would not have any knowledge or foresight of the measure.

17/06/2022