Response of Garden Court Chambers Housing and Civil Teams to "Transforming Legal Aid: Delivering a more credible and efficient system"

Introduction

1. This is the response of the Garden Court Chambers Housing and Civil Teams to the Ministry of Justice consultation paper "Transforming Legal Aid: Delivering a more credible and efficient system"[1] (the consultation).

2. The Housing Team at Garden Court Chambers is one of the largest specialist housing law teams in the country (over 20 barristers) and has a reputation for excellence in this area. We cover all aspects of housing law including security of tenure, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. We are particularly committed to representing tenants, other occupiers and homeless people.

3. Our work is not confined to the courtroom. We also spend time training, advising and writing on housing issues. We were the first chambers to serve as a Legal Services Commission Specialist Support Service provider in housing law, and from 2004-2008 we offered specialist support and training under contract direct from the LSC.

4. The Civil Team at Garden Court Chambers is made up of a number of sub-teams each of which specialises in protecting civil liberties. Each sub-team contains leading practitioners many of whom are also the authors of textbooks in their field. The teams

[1] Judicial Review: proposals for reform CP14/2013, Ministry of Justice, April 2013 https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf

are as follows:

- Claims against the police and public authorities
- Community Care
- Court of Protection
- Employment, Discrimination and Professional Regulation
- Gypsy and Traveller Rights
- Inquests
- Mental Health
- Planning and Environmental Law
- Prison Law
- Property Law
- Public and Administrative Law
- Welfare Benefits

5. More information can be found about Garden Court Chambers and all of our barristers at www.gardencourtchambers.co.uk.

6. The consultation poses a number of questions. We have responded to these below in so far as they fall within our areas of expertise. However at the outset we wish to raise a number of general concerns about the politics behind the consultation.

The political context of the consultation

7. This consultation was published a little over a week after the sweeping cuts and changes to legal aid contained within the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force. In the foreword to the consultation, Justice Secretary Chris Grayling evinces an intention to put an end to legal aid lawyers "racking up large fees", clamp down on "frivolous claims", and to generally restore the credibility of the system in the eyes of the public.

8. Against this backdrop, firstly, we strongly object to the timing of the consultation. The cuts contained within LASPO constitute some of the most radical changes to the legal aid scheme since its inception in 1948. It is wholly inappropriate to propose further systemic change one week after these cuts came into force. Until the new

changes have had time to bed-in it is simply not possible to accurately gauge the money which these latest proposals will save or the impact which they will have on access to justice for those who cannot afford to pay.

9. Secondly, we reject the notion that these proposals are designed to clamp down on "fat cat lawyers". The impression given is that lawyers who derive income for the work they carry out from legal aid are charging at high rates which they are then paid. This is completely untrue. Except when costs can be recovered from the other party (even then subject to court assessment) the amounts paid have been and are controlled by the LAA (or by the court on assessment) so that they are at well below market rates. Not only has there been no increase in legal aid rates since 1994, but the bulk of Counsel rates were cut by 10% in 2012 (from a benchmark set by the LSC) by statutory instrument (the current rates referred to in Tables 13 and 14 of the Consultation Paper). Moreover costs are controlled throughout the life of a case. The usual practice is for each step in the litigation to be given a cost limit (e.g. drafting proceedings and issue) and each subsequent step and its cost has to be applied for and justified (e.g. interim injunction application). Those costs are still subject to final assessment. Thus costs are already carefully controlled. Ultimately these proposals will harm the vulnerable clients who we work with on a daily basis more than anyone else. Where the proposals do directly address the level of remuneration for lawyers, it is more likely that the effect will be felt most keenly by low-earning junior lawyers at the beginning of their careers.

10. Thirdly we do not accept the Government's assertion that legal aid is being used to subsidise frivolous cases at the expense of the taxpayer. Legal aid is subject to a strict merits test meaning that it is not available to fund frivolous cases. The Government has produced no evidence to support its assertion. Any attempt to curb citizens' access to justice can only be based on a sound body of evidence. Such evidence is distinctly lacking from the consultation. In any event, cutting legal aid does not stop litigants bringing frivolous cases. It just means that they will bring them without lawyers. In fact, without the benefit of sensible, robust legal advice litigants in person are far more likely to bring bad cases, to the detriment of the administration of justice. This observation has recently made in trenchant terms by the highly experienced former Lord Justice of Appeal, Sir Alan Ward in the case of *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234:

> 2. What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. <u>We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.</u>

We endorse these sentiments unequivocally.

11. Finally, we do not accept that the proposals contained within this consultation will promote the credibility of the legal aid system in the eyes of the public. Quite the opposite. Take the example of the proposed residence test. Under this proposal, groundbreaking cases which involved holding the State to account for the unlawful acts of the armed forces while abroad, such as *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26 (involving the death of Baha Mousa the Iraqi hotel receptionist, beaten to death while in British custody) could not have been brought. Such changes will damage the credibility of legal aid and the wider justice system in the eyes of the public. In any event we do not accept that the legal aid system has lost credibility with the public, despite the ridicule which certain newspapers have misleadingly directed towards it. We have seen no evidence of any general dissatisfaction (and the Consultation Paper produces none). Indeed the surveys of which we are aware show a general satisfaction with the legal aid system and concern at its reduction.

12. For these reasons and for the reasons set out in our responses to the specific questions, below, we oppose these changes. Should the Government elect to proceed with these changes regardless, we would take the view that they should be implemented by primary, not secondary, legislation to allow for an appropriate level of Parliamentary scrutiny, in view of the constitutional significance of the reforms.

Ch 3: Eligibility, Scope and Merits

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

13. We do not agree with this proposal and endorse the objections raised by the Howard League for Penal Reform, the Association of Prison Lawyers and Pete Weatherby QC of Garden Court North Chambers in their responses to this consultation.

14. The proposed changes affecting prisoners must be seen in the context of the entire consultation which proposes significant changes to the way criminal work is delivered (prison law – excluding judicial review – currently falls within criminal legal aid). Prison law will fall within the proposed PCT model – although some areas of criminal work (eg: Crown Court advocacy and VHCC) will be excluded. All those who bid for prison law work will have to establish that they will be able to provide prison law work and criminal appeal services. This is a significant change as it was only three years ago that the Government insisted that prison law work required a specialist approach – hence the introduction of the prison law contract and the requirement of prison law supervisor standards.

15. For the limited areas of prison law work that will remain in scope, the paper has no specific proposals for quality assurance. This will mean that there will be an inevitable reduction in the quality of service, particularly as a firm will be obliged to take on a prison law client if s/he is eligible for legal aid, regardless of location, capacity or if the prisoner is represented by another firm in criminal proceedings.

16. It is not proposed that prison law work itself will be subject to PCT, but instead the costs will be set administratively at a reduced price. We would oppose this change[2] since this model will put at real risk prison reform charities/ niche providers, such as the Howard League for Penal Reform and the Prisoners' Advice Service, which provide invaluable expert advice and representation (via their not for profit legal departments) especially to children and young people and other vulnerable prisoners and who do not hold a general crime contract. They will not be in a position to bid for a crime contract and nor will those who bid wish to engage niche specialists who will make a loss for them on the set low fees proposed.

17. In our view the increase in prison law legal aid spending is largely a result of Government sentencing policy, most notably the introduction of the IPP sentence, which flooded prisons with those most needing access to a solicitor. The Government has legislated for, but has not yet exercised, a power to lower the threshold for release of those prisoners, which would reduce the legal aid burden substantially, as well as making greater savings generally. Instead the Government proposes to reduce the legal aid spend by taking out of scope a range of issues that should properly attract legal aid.

18. Specifically, the Government's proposals are to remove the majority of prison law matters from scope save for those engaging Art.5 & 6 ECHR (i.e. leaving in scope only parole cases, adjudication cases where Art.6 engaged and sentence cases affecting length of sentence). "Treatment" cases are in any event currently subject to prior authority and the LSC has only granted permission in 11 such cases since 2010.

19. There is no lawful basis for removing from scope cases that invoke other ECHR rights or common law rights. Examples of complaints taken out of scope would be women being strip-searched without proper cause (breach of Art.8), rehabilitation and resettlement issues (which are claimed to be central to Government policy), segregation, decisions on whether a prisoner should remain in a particular security category, and on whether the Children Act 1989 has been properly applied to child detainees. Decisions affecting fundamental human rights will be taken behind closed doors and will go unchallenged; for example, a vulnerable prisoner wrongly segregated who ends up taking his own life. This substantial detriment is proposed

[2] Please accept this as our response to question 8 of the consultation.

with a view to savings that will amount to only £1 million a year by 2013/14. These are modest sums and completely disproportionate in the context of the harm they will do.

20. The Government believes that prisoners' issues can be adequately redressed through the prison complaints system. As any practitioner in this field knows this is unrealistic and ignores that by the time most prisoners contact a solicitor they have already exhausted the internal complaints process unsuccessfully. Not all prisoners know how to use the system effectively, know how to read or write (oral complaints to staff are possible but of course these are much harder to make), or have any detailed knowledge of the many PSOs and PSIs that regulate prison life.

21. The irony is that prisoners will have recourse to the Prisons and Probation Ombudsman (PPO) as an alternative to a legal aid solicitor. The PPO's decisions are not binding. Moreover, its 2011-2012 report shows that on a budget of nearly £6 million the PPO resolved around 5,000 complaints. In other words it cost taxpayers around £1,200 for each PPO complaint to be resolved. A legal aid solicitor is paid £220 for an advice and assistance file. Thus by taking these proposals out of scope taxpayers will spend more, not less, money in resolving prisoner complaints.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

22. No. We strongly disagree with this proposal for reasons outlined below. Our objections fall within two main headings:
   i. Limiting legal aid in this way undermines the rule of law and is unjust;
   ii. The proposal would be administratively unworkable, expensive, inconvenient and cumbersome.

Undermining the Rule of Law

23. It is a hallmark of our legal system that there must be equality before the law. It is a constitutional principle that there must be access to the courts to secure the rule of law. The right to access the courts is not only entrenched in the common law, it is also informed by the UK's obligations under Art.6, ECHR and Art.47 of the EU Charter on Fundamental Rights. As was stated by Lord Bingham in *The Rule of Law* (Allen Lane 2010), "means must be provided for resolving without prohibitive cost or

inordinate delay, bona fide disputes which the parties are unable themselves to resolve" and "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law." Given we have an adversarial legal system, this necessarily means that there must be equality of arms.

24. Indeed, the Lord Chancellor in the foreword to the consultation accepts that "access to justice is not to be determined by your ability to pay, and I am clear that legal aid is the hallmark of a fair, open justice system". Yet the proposal of a residence test does precisely the opposite, because:

   i. It undermines the rule of law, a fundamental feature of which is that everyone is equal before the law;
   ii. It leaves people open to abuses of power and arbitrary decision making as they have no means of funding a challenge to such decisions;
   iii. It means that individuals, groups and public bodies can act with impunity as there will be little risk of legal sanction for unlawful action;
   iv. It will impact on the most vulnerable members of our society, such as survivors of human trafficking, destitute families with children and mentally ill immigration detainees;
   v. It is likely to have an adverse impact on protected equality groups, which does not appear to have been adequately considered by the Government;
   vi. It is potentially discriminatory and fails to meet the UK's EU obligations and obligations under the ECHR.

25. The requirement that one has to be 'lawfully resident' misunderstands that often, the lawfulness of a person's residence may be the very matter in issue in the proceedings for which legal aid is needed, whether the proceedings are to do with immigration, other aspects of public law or homelessness.

26. For example, the case of *Pryce v LB of Southwark [2012] EWCA Civ 1572* involved a parent who was not an EU citizen and who lacked domestic leave to remain but yet was the sole carer of a British child and EU citizen. She challenged a decision by the local authority as to her ineligibility for housing assistance. The Court of Appeal determined that by virtue of EU law, she had a derivative right of residence and thus was eligible for housing assistance. The appellant in *Pryce* would not have been able to bring this claim if the proposal were implemented.

27. Another example might be an elderly person unaware that their country of origin's

independence from the British empire has affected their immigration status. They would not be able to seek to have that matter resolved.

28. The effect of the proposal will be to leave some of society's most vulnerable without a remedy in respect of unlawful decisions. For example, a trafficked person brought to the UK will almost always have entered illegally by some form of coercion for the purposes of exploitation. S/he will inevitably require assistance when s/he first comes to the attention of the authorities. S/he may not necessarily have a claim for asylum because claims for asylum relate to risk on return and not to what has been suffered in the past. S/he will not be eligible for legal aid if an asylum claim is not made. This will result in a direct contravention of Art.47 EU Charter of Fundamental Rights and the EU Directive on Trafficking in Human Beings (Directive 2011/36/EU). See, for example, the case of *R (N) v LB of Barnet [2011] EWHC 2019 (Admin)* where a girl who was trafficked for the purposes of sexual exploitation had her age disputed by the local authority. The result was that she was denied access to social welfare services from the local authority's children's services. She was not lawfully resident at the time of the litigation and would have been precluded from pursuing a claim challenging the local authority age assessment, which she ultimately won.

29. Similarly, any child who has been abandoned here in the UK by their parents or carers, resulting in him or her overstaying their visa, would not meet the requirements of the residence test. If they try to seek support from a local authority and are refused, as is often the case, particularly for 16 and 17 year olds, they will have no way of challenging this decision. This will include children who have been living in private fostering arrangements, who may have been abused, neglected or suffered domestic violence. The prevalence of vulnerable children in abusive private fostering arrangements was well documented in a report published by the Children's Society in 2009 called *Hidden Children*. See also the case of *TK v Lambeth LBC [2008] EWCA Civ 103* where the Court of Appeal had to consider the identity and the age of a child who had been under a private fostering arrangement with a man who purported to be her father but turned out not to be so. The Court determined her identity and age and directed her to be placed in the care of the local authority for her own safety.

30. In addition the requirement for 12 months lawful residence will exclude a broad range of persons from legal aid who do have a strong connection with the UK,

including (but not limited to):

i. Refugees who are in the UK on temporary admission pending determination of their asylum claim who will have to wait for a year post the grant of asylum when in fact assistance is most vital at the time when they obtain recognition as a refugee to aid them with integration into UK society. This contrasts with their position while their claim for asylum is pending. This example highlights the particular unfairness of paragraph 3.57 of the Consultation.

ii. All persons in the first year of their valid leave or with leave of less than six months. This includes persons who fully anticipate remaining in the UK for their rest of their lives and taking British nationality, such as spouses, partners and children joining parents.

iii. Children whose claims for asylum have been refused but who have been given limited leave of less than one year because no arrangements can be made for their safety and welfare on return. These children will have no right of appeal against the refusal of asylum unless they are given leave of more than one year (12 months would not itself suffice) or until they face removal.

iv. Victims of domestic violence and their children who have fled violent relationships and present to local authorities requesting protection and a place of safety and assistance. As their leave as a spouse will at first normally be probationary and only for six months, they will be precluded from accessing support at a time when they and their children need it the most.

v. Migrant domestic workers are now given only a six-month visit visa. Research by leading anti-trafficking charity Kalayaan shows that many of these are trafficked and others may have been exploited. They will not be eligible for assistance under the residence test.

vi. Children who are British by virtue of their parents' nationality but who have never spent a continuous period of 12 months in the UK.

vii. EEA nationals exercising their free movement rights in their first year of living in the UK.

viii. Age disputed minors who are detained will not be able to seek to challenge their detention or age assessment. In the case of *Durani v SSHD [2013] EWCHC 284 (Admin)*, the child was detained under immigration powers with a view to removing him to Afghanistan on

account of a finding by the Secretary of State that he was an adult, not a child. This assertion as to his age turned out to be wrong. He was detained for 20 days before he was released by an order of the High Court. He is now in the care of the local authority and in education and an integrated member of society. A similar experience can be found in the cases of *AAM v Secretary of State for the Home Department [2012] EWHC 2567 (QB)* and *R (J) v Secretary of State for the Home Department [2011] EWHC 3073 (Admin)*.

31. The range of matters which are likely to arise on which persons would not receive assistance include:

i. Housing and community care cases including homelessness, support for persons who have been trafficked, support for those whose claims for asylum have failed but who cannot be removed, and community care cases about support for children and families. See for example the case of *R (Clue) v Birmingham CC [2010] EWCA Civ 460* where a destitute Jamaican national overstayer with dependent children had an outstanding claim for further leave to remain pending at the Home Office. She successfully challenged the local authority's refusal to provide her and her children with support pending the determination of their application for leave to remain. The Court of Appeal held that to deny support to the family would contravene the best interests of the children and breach their rights to private and family lives.

ii. Cases of Third Country nationals who are primary carers for British citizen children and who have derivative rights to remain in the UK under EU law and domestic legislation (under Immigration (EEA) Regulations 2006, regulation 15A). These individuals are not required by the Home Office to apply for a grant of leave. By operation of law they are entitled to reside in the UK. This was confirmed explicitly on behalf of the Secretary of State for the Home Department to the Court of Appeal in the case of *Pryce v Southwark*, supra. In cases such as these, and others, there is a real risk of a person with rights of residence being excluded from assistance because s/he cannot produce a document proving a right of residence.

iii. Third Country national carers of British children who are under the age of 1 will also be automatically precluded from accessing legal aid as their child will not have accrued 12 months' residence because of their age.

iv. Challenges to detention: applications for bail, judicial reviews of unlawful detention, habeas corpus applications and actions for damages for unlawful detention. Contrast this with the approach to prison law cases where it is stated that cases going to questions of liberty should continue to be funded. Immigration detention is without limit of time and a person is not brought before a court automatically, but must instigate any challenges to detention themselves. See the cases referred to above relating to age-disputed children including *Durani v SSHD*, *J v SSHD*, and *AAM v SSHD*. See also the case of *Muuse v Secretary of State for the Home Department [2010] EWCA Civ 453* where a Dutch national was unlawfully detained and wrongly treated as a Somali national for the purposes of deportation in circumstances where the claimant repeatedly told immigration officers he was a Dutch national and they failed to look into his citizenship. He was wrongly detained in what Lord Justice Thomas called *"an outrageous and arbitrary exercise of executive power."*

v. Immigration cases including challenges to unlawful refusals to transfer from one immigration status to another; particularly involving age disputed minors, victims of domestic violence and victims of trafficking;

vi. Age dispute cases and other challenges to local authorities brought by children whose asylum claims have finally been determined. See for example *R (AA) v Secretary of State for the Home Department [2012] EWCA Civ 1643*.

vii. Family law cases where applications for residence are made on behalf of children who have been abandoned by parents and whose family or friends' wish to apply for a residence order.

32. It is suggested that legal aid should be preserved for persons seeking asylum because they are "vulnerable". The examples above illustrate that many of those who do not meet the residence test are equally vulnerable. Under the proposal these individuals will be denied the protection of the law.

Unworkable, expensive, administratively inconvenient and cumbersome

33. The residence test is also administratively unworkable. First, it will result in insurmountable evidential hurdles. It will require solicitors in all areas to act as immigration experts in circumstances where they are simply not equipped to do so. This will cause chaos. The question of lawful residence is a complex legal one which

practitioners will be unable to resolve in many cases, particularly where the question of residence itself is at the very heart of the legal dispute. For example:

i. How will historic questions of lawful residence be determined by non-immigration practitioners? Some people may have been part of the British overseas territory but their status may have changed over time due to changes to British nationality law. How will practitioners go about determining the status of someone who claims that they were lawfully present here in the 1960s?

ii. How will practitioners determine whether lawful residence has been granted by operation of law, for example under section 3(c) of the Immigration Act 1971 or as a result of the *Zambrano* litigation? These residence rights vest automatically and are not based on documentary evidence. There may often be no way of checking the length of such persons' residence in the UK to determine whether they satisfy the length of stay required.

iii. How will practitioners determine the length of stay of EEA nationals when their entry and exit into the UK are not endorsed on their passports as they are not required to enter / exit using passports, just their EU identity card.

34. Second, the test will result in significant satellite litigation about whether or not a person is or has been lawfully resident in the UK. In respect of trafficked persons, separated children, survivors of domestic violence and detainees, they will very frequently not have the required documents to enable such checks to be made. Obtaining these documents may involve subject access requests to the UK Border Agency which does not always manage to respond within the statutory time scales.

35. Third, the evidential difficulties will result in a significant administrative burden on the Legal Aid Agency who will be responsible ultimately for assessing whether lawful residence has been sufficiently evidenced. This in turn is liable to lead to increased litigation against the LAA. Both consequences have costs implications for the taxpayer.

36. Finally, the proposal is likely to lead to an increase in litigants in person who without legal aid will have no option but to bring the case themselves without legal assistance, clogging up the courts with cases that are poorly prepared and poorly argued. The burden placed on the court system to ensure cases for litigants in persons are dealt with fairly will have significant costs implications for the taxpayer.

Impact assessments

37. The Equality Act impact assessment accompanying this proposal recognises that it will have an adverse impact on those who do not satisfy the residence test but makes no attempt to measure this: no meaningful consideration is given to who will fail the test or what the consequences will be for them. In view of this we do not accept that the impact of the proposal has properly been considered.

38. Further, we do not regard exceptional funding as a sufficient safety net. The fact that exceptional funding is available on paper does not mean that it will be available in practice since there is a financial risk to providers in making applications. Increased reliance on exceptional funding will also result in a large volume of satellite litigation against the LAA as to why any particular case must have legal aid available to avoid a breach of EU or ECHR rights. Again, this will generate unnecessary knock-on costs to the taxpayer.

39. The justification that asylum seekers will be excluded from the residence test therefore minimizing the impact on those with protected characteristics is ill thought out and indicates a narrow understanding of who may be vulnerable in this context. Examples of vulnerable individuals who will not satisfy the residence test are set out above.

Q5. <u>Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)?</u>

40. We do not agree with this proposal. Our objections are set out below. In addition we endorse the objections voiced by the Public Law Project in their response to the consultation. In particular we wish to associate ourselves with PLP's letter to the Ministry of Justice of 22 May 2013, to the effect that the Government's failure to provide sufficient statistics relating to this proposal has denied respondents a fair opportunity to respond.

41. In summary it is our view that this reform:
    i. Will undermine the rule of law and and access to justice;

ii. Will disproportionately affect the most disadvantaged in society;
iii. Will reduce accountability of Government and public bodies which will undermine public confidence in the civil legal aid system rather than promote it;
iv. Leaves people open to abuses of power and arbitrary decision making;
v. Is not properly costed, the evidence relied on by the Government is unreliable and the equality impacts have not been adequately considered;
vi. Will necessarily lead to more satellite litigation on costs issues which will add to cost to the taxpayer;
vii. Is unrealistic, unjust and unnecessary;
viii. Will be administratively unworkable and expensive;
ix. Appears to be aimed at restricting and reducing accountability of Government and Public Bodies rather than saving money;
x. Will likely lead to a reduction in the number of providers willing to bring judicial review claims given that the costs of bring a claim are front loaded.
xi. Overlooks the benefit of judicial review claims.

42. The High Court in judicial review proceedings acts as a constitutional court. Any reforms which restrict access to the court change the balance of power between the executive and the courts favouring the executive. It is our view that such reforms have to be approached with great care and that this care has not been taken with the proposals set out in the consultation. The case for reform has not been made out.

43. The proposal states there should be a positive grant of permission by order of the court before payment to solicitors and/or counsel can be made (save for reasonable disbursements). The consultation at paragraph 3.62 suggests that there needs to be greater "incentive" for providers to give more careful consideration to the strength of the case before issuing a claim for judicial review. It is intended that this will be achieved by passing the financial risk to the provider. However, the proposal maintains legal aid for funding of all pre-action steps and an assessment of merits prior to issue of a claim (paragraph 3.71). It is worth pointing out that legal aid for those steps is not granted until the LAA has considered the merits of the case (or shortly after in the case of self-certifying). With reference to paragraph 3.72 of the consultation it is difficult to see why the lawyers are thought to be in a better position than the LAA to assess merits at that stage as both are working on the same information.

44. Once a claim is issued the Claimant remains costs protected for the issue of the claim and the decision on permission. Peculiarly the argument which is relied on by the Government at paragraph 3.70 to justify undertaking the work at risk is where there has been an application for permission to appeal in the Upper Tribunal and permission is refused then funding of the application will not be granted. However the circumstances of such an application are clearly distinct to a claim for judicial review where there has not been any consideration of the merits of the claim by a First Tier Tribunal. The analogy is clearly flawed given that there has been no prior independent examination of the decision under scrutiny.

45. The recurring theme from the Government is that judicial review applications are seen as a "bad thing". We disagree. Judicial review promotes lawful, rational and fair decision making. See the advice given to the Civil Service by the Government Legal Service in the publication the Judge over Your Shoulder. In the introduction to the paper Sir Gus O'Donnell commends this publication "as a key source of guidance for improving policy development and decision making in the public service".

46. Our concern is that providers will be unwilling to bear the financial risk of issuing a claim and that the practical effect of this proposal will be to curb the right of the citizen to hold the state to account. The Government has failed to properly consider this impact.

The test for permission

47. The consultation paper states that "[t]he Court will only grant permission if it thinks the case is "arguable" and merits full investigation by the Court". It is our view that this is a misleading oversimplification of the test applied by judges in granting permission for judicial review. It shows a misunderstanding of judicial review by those developing the policy and/or drafting the consultation document.

48. There are no express criteria to inform the court as to when permission should be granted or refused in the Supreme Court Act 1981, secondary legislation or in the Civil Procedure Rules. The test for "arguability" at the permission stage is applied flexibly depending on the nature and gravity of the issue before the court and the wider public interest that the claim is sought to review. The lack of clarity in the threshold of the test was identified by the Law Commission in its 1994 report Administrative Law: Judicial Review and Statutory Appeals (No 226) at 5.13 – 5.14:

> "A large number of consultees, although supporting a filtering requirement, criticised the lack of any clear criteria in the Rules for leave being either granted or refused. Concern was expressed about the wide disparities in granting leave as between different subject matters of applications and as between different judges. In the consultation paper we referred to a survey which found that, although the majority of case were determined on a "quick look" approach, a sizable minority were subjected to what is termed a "good look" with more consideration of the merits of the application [footnote reference to A Le Sueuer and M Sunkin, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102]. Since then the Public Law Project has published the preliminary results of a statistical analysis of application for judicial review which confirmed the disparities [footnote reference to M Sunkin, L Bridges and G Meszaros, Judicial Review in Perspective (1993) Public Law Project pp 86 – 97]"

49. This paragraph confirms that judges who heard cases considered they had discretion to operate the test on permission flexibly. In addition, "[i]n their response the nominated judges did not favour having their discretion to refuse leave fettered by legislative prescription", paragraph 5.15.

50. The Law Commission recommended the test for permission should be whether "the application discloses a serious issue which ought to be determined". The recommendation that the test to be applied by the court at the permission stage be made explicit was not implemented by Government. The Law Commission's recommendation was accepted by Sir Jeffrey Bowman in his Review of the Crown Office List (2000) (paragraph 13 on page 64) but this was not implemented by Government and an undefined flexible test continues to be applied.

51. In *Sharma v Deputy Director of Public Prosecutions & others (Trinidad and Tobago)* [2006] UKPC 57 at paragraph 14(4) Lord Bingham explained the need for flexibility:

> The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p

> 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.

52. Thus what "arguability" means in any particular case is a matter on which a Claimant cannot be clear at the outset of the claim. This is a fact which has been overlooked in the consultation.

53. Further the "ordinary rule" referred to by Lord Bingham is subject to exceptions as discussed in *R (Federation of Technological Industries and others) v The Commissioners of Customs and Excise* [2004] EWHC 254 (Admin) at paragraph 8.

> The orthodox approach is to give permission to apply for judicial review if the claimant shows an arguable case. But the court in the exercise of its discretion whether to give permission may impose a higher hurdle if the circumstances require this. Factors of substantial importance in this context may include the nature of the issue, the urgency of resolution of the dispute and how detailed and complete is the argument before the court on the application for permission.

54. So where the court, in the exercise of its case management powers, orders a permission decision be listed for a lengthy oral hearing, or as frequently happens, for a "rolled up" permission/substantive hearing where the substantive hearing follows immediately if permission is granted the Claimant may likely be faced with a more demanding threshold to gain permission. At the point of issue the Claimant cannot know what case management directions the court may make and so cannot know exactly how the test for permission will be applied. And if an order is made for a rolled up hearing with the substantive hearing to follow directly following the permission hearing, the lawyers concerned will be obliged to prepare for a full hearing as well as the permission hearing in the event permission is granted. That makes the financial risk all the greater.

55. A "significantly higher" threshold than arguability has been held to apply in cases where a grant of permission may cause expense or delay to an interested party (*R (Grierson) v Office of Communications (OFCOM)* [2005] EWHC 1889 (Admin) paragraph 27). This is not likely to be evident to the Claimant at the time of issue of claim.

56. The current proposal to make funding contingent on the grant of permission, in order to force providers to consider the merits of cases more carefully, fails to address the flexible nature of permission is set out above. The Government's stance on this issue is overly simplistic.

Disparity between different judges

57. As the Law Commission noted in its report referred to above, there is a disparity between the rates of grant of permission between different judges. This is born out in research carried out by the Public Law Project and the University of Essex in 2005. The results were reported in the Dynamics of Judicial Review. Judicial inconsistency is considered in detail at page 67 of the report, with table 4.6 identifying a variation between 11% and 46% between different judges in non- immigration and asylum cases.

58. Further there is a clear perception among Claimant lawyers that the permission criteria are vague (see page 64, paragraph 4.5 of Dynamics of Judicial Review).

59. These factors are clearly relevant to the willingness of Claimant solicitors to bear the financial risk inherent to bringing every publicly funded claim. The consultation has not taken these points into account.

Lack of evidence available to the Claimant

60. At the time of issue the Claimant will frequently not be in possession of the all the relevant documents. For example the claim may be extremely urgent and it will not have been possible to gather all relevant information or the Claimant may have sought disclosure in the pre-action stage but the Defendant has failed to comply.

61. The clear problems with disparity of information available to the Claimant in judicial review claims is identified in the Treasury Solicitors document of 2010 Guidance on discharging the duty of candour and disclosure in judicial review proceedings. The guidance identifies the trigger in responding to a pre-action letter but timely disclosure is not always complied with and disclosure of documents may often only happen after issue of claim.

62. The consultation seeks to justify this proposal on the basis that "the provider is in the best position to know the strength of their client's case and the likelihood of it

being granted permission" (paragraph 3.72). What the above shows is that "the provider" is not in a position to judge, with any degree of certainty, whether permission is likely to be granted because of the above factors. The effect of this is that the apparent merits of a claim may change as the claim progresses and more documents and evidence come to light following the issue of proceedings. The consultation fails to take this into account.

Interim relief and mandatory injunctions

63. The Consultation Paper appears to consider that the first step in an issued claim for judicial review is the determination of permission. This is not always the case. Often the first steps in the claim are applications for urgent injunctions to restrain or require a Defendant to act in a particular way. In the case of mandatory injunctions the test to be applied is the demonstration of a "strong prima facie" case which is arguably higher than that for permission. If a court grants such an injunction there must be evidence upon which the court determines this. Further, although most applications are made on paper they can be made by *ex parte* applications via telephone or the court listing the matter for a hearing. Such applications would incur greater costs than those considered by the Government and there is no consideration of these issues in the consultation document.

Frivolous claims – the misuse of statistics

64. The reliability of the evidence relied on in the consultation and by the Lord Chancellor in radio interviews has been subject to considerable criticism: see "PLP debunks the Lord Chancellor's misuse of Judicial Review statistics".

65. Independent research by the Public Law Project suggest that a large number of cases settle with a positive outcome for the Claimant: (a) after the claim was issued but before the permission application was determined; (b) after permission was refused on the papers but before an oral renewal hearing; and (c) after permission was granted but before the substantive hearing. However, the precise figures within these categories have not been made available by the Goverment. What is clear from the Government's statistics is that the outcome of many thousands of cases is unaccounted for. For example there is a significant difference (4551) between total number of judicial review cases issued (11, 539) and the total number of cases that received a paper permission decision (6, 988) in 2011.

66. It is also of note that there is no comparison between the cases that are publicly funded with those that are privately funded. In order to sustain any argument that there was a waste of public funding by the issue of unmeritorious claims such an analysis would be required.

67. Further it is our view that the statistics disclosed at paragraphs 3.65 – 3.68 of the consultation do not support the bald assertion by the Government that "substantial sums of public money" have been wasted through weak judicial review claims brought by Claimant lawyers. On the figures:

i. Paragraph 3.65: in 2011 – 12 there were 4,074 grants of legal aid for actual or prospective judicial review claims. 2,275 were concluded before applying for permission and probably before issue. Based on the Public Law Project research it suggests the majority would have settled in favour of the Claimant. Thus 56% benefit from the process by early engagement and settlement and cannot reasonably be labelled a waste of public funds;

ii. Paragraph 3.66: 1,799 were considered but 845 ended after permission was refused. This amounts to a respectable 53% success rate in addition to the above cases;

iii. Paragraph 3.67: of the 845 known to have been refused permission, 330 were recorded as having a positive outcome. The net result is that only 515 out of 4,074 legally aided cases (13%) ended at permission with no benefit to the Claimant. This would appear to be a beneficial use of legal aid;

68. On these figures the contention by the Government that there is a "serious waste" of public funds on account of weak cases being brought by Claimant lawyers is not sustainable and at worst deliberately misleading. In any event the fact that a case is initially refused permission does not mean that the case is frivolous or a waste of money. *R (G) v Southwark LBC* [2009] 1 WLR 1299 is a good example of a important Supreme Court case where permission was initially refused. Hence, the proposal will not achieve its objective in any event.

Costings

69. In the evidence base at paragraph 31 of the consultation the Government identifies approximately 800 cases where permission was not granted in 2011-12. The paper states that "[w]e are unable to establish the cost of preparation permission applications, however the LAA have advised us that the default emergency certificate limit is £1,350 per case. We therefore estimate that civil legal aid providers will

receive £1m per annum less in legal aid funding in respect of such cases. However, this might be higher if they refuse to take on these cases". But at paragraph 41 the paper states "[t]he assumed cost of preparing a permission application is uncertain. In some circumstances it might be higher and in other circumstances it might be lower than assumed. The estimated cost to provider might therefore be higher or lower than estimated".

70. It is our view that the highly speculative nature of the proposed cost savings of this proposal undermines the case for reform. There is no cogent evidence that this reform will provide any meaningful saving to the taxpayer. The uncertainties presented will in our view lead to loss of provision, additional satellite litigation and a loss of public confidence in the legal system and the administration of legal aid.

The context of the proposal – fees

71. The chilling effect of these reforms has to be considered in the context of the low existing rates of remuneration for providers set in 1994. Providers are already incentivised against bringing claims without merit because the existing rates they receive from legal aid do not make their practice financially viable. In our view these reforms, which increase the financial pressure on providers, threaten the viability of these practices.

72. In addition, the proposition of further cuts to specialist counsel's fees is likely to remove expertise from this area of law with the effect that more cases without merit will be brought before the court as inexperienced and non-specialist practitioners attempt to fill the gap.

Satellite litigation and the Jackson reforms

73. At paragraph 3.75 – 3.76 of the consultation the Government suggests that in cases which settle upon the Defendant conceding the case before permission, the Claimant could then seek to recover costs from the Defendant. There are several issues that arise here.

74. First, the Government did not seek to implement the one way cost shifting reforms as set out in the review of Lord Justice Jackson, namely:

i. That one way costs shifting should be introduced in judicial review claims;

ii. That if the Defendant settles the case after the issue of claim and the Claimant has complied with the pre-action protocol, the normal order is that the Defendant do pay the Claimant's costs.

75. Despite the attractive simplicity of the proposal this did not find its way into LASPO nor is there any indication that the Government intends to enact this reform. Instead the courts will have to grapple with costs arguments in a case-by-case manner that is wholly unsatisfactory and adds to the expense for both Claimant and Defendant. It seems that the Government is endorsing the approach that this satellite litigation should continue thus adding to the expense for both parties and the court system. This extra cost has not been factored into any analysis of costs implications.

76. Second, it is unclear whether in the absence of a grant of permission any proposal to settle by the Defendant would allow for the court to make an order which is "no order as to costs save for a detailed assessment of publicly funded costs". Thus the Defendant is tied to either resisting or accepting liability for costs.

77. Third, there is no requirement in this scheme for Defendants to account for payment of the Claimant's costs in respect of claims settled pre-permission by the publication of reports.

78. It is our view that given one way costs shifting has not been implemented in judicial review claims, the likely prospect is that there will be an increase in satellite litigation both in the High Court and the Court of Appeal by Claimants who will be forced to seek their costs against any Defendant whose actions result in a compromise of a claim prior to a grant of permission. This will add to the costs generated by this reform.

Conflict of interests and professional conduct issues

79. The proposals will create a conflict of interest between the lay client and their lawyers as to issuing the claim. This will create professional conduct issues for the Claimant's lawyers as they will often be in the position where the claim ought to be issued but will be forced to consider the financial consequences for them rather than the primary consideration of the interests of the client.

Impact assessments

80. We are of the view that the impact assessment accompanying this proposal is inadequate. In particular it does not take into account the impact on clients if providers are unable to continue with legally aided judicial review work on the basis that it no longer financially viable. The suggestion that clients may bring cases "privately" is misconceived. Legally aided clients lack the funds to bring cases privately. That is why they are eligible for legal aid.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

81. We do not agree. We support the current merits test. We agree that most legally aided cases should only receive public funding if the prospects of success are 50% or more and that those where the prospects of success are "poor" should not receive funding. This was the case under the previous Access to Justice Act 1999 regime and remains the case under the new LASPO Act and Regulations.

82. There is no funding for "borderline" cases where the only issue is damages. Those claims have to have at least "moderate" prospects of success. We support this. However both regimes recognize(d) that there are certain cases where it cannot be said on the information available at the time that the prospects are poor; and the issues at stake are of overwhelming importance to the individual or have significant wider public interest. In those circumstances legal aid should continue to be provided until such time as a more definitive analysis of the prospects of success can be given. If, at any stage, the merits change and became "poor", then legal aid should be withdrawn. Similarly, if the merits changed and became "moderate", "good" or "very good", then legal aid should continue.

83. Cases with "borderline" prospects of success which currently receive funding are only:
    i. Those with significant wider public interest or of overwhelming importance to the individual (Regulation 43 Civil Legal Aid (Merits) Regulations 2013); or
    ii. Investigative help for public law claims (Regulation 56);
    iii. For immigration cases, where the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of ECHR rights (Regulation 60);

iv. The case relates to possession of an individual's home (Regulation 61);
v. The case is a public law children case (Regulation 66);
vi. The case is a family case where domestic violence is an issue (Regulation 67);
vii. The case is a private law children case or involves breach of international treaties relating to children (Regulation 68);
viii. In other family cases, where the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of ECHR rights (Regulation 69).

In each of these cases, something more than money is at stake. The issue might be a person's right to remain in the UK, or potential loss of his or her home, whether or not children should be removed from their parents, or family disputes where domestic violence is at stake or a parent has abducted the child. These cases are of such importance that it would be wrong for legal aid not to be available at an early stage until a definitive assessment of merits can be undertaken.

84. We note that the impact assessment predicts that £1 million per annum would be saved by this proposal. It accepts however that there would be some administration costs for the Legal Aid Agency including costs incurred as a result of increase in requests for reviews to the LAA and appeals to the Independent Funding Adjudicator. It is our view that there will be a considerable increase in requests for reviews and appeals and the assumption under-estimates this impact.

85. The assumption is also made that there will be a decrease in civil cases going to courts/tribunals. We believe that this assumption is wrong. It is our view that there is likely to be an increase in litigants in person taking, defending or pursuing cases where lawyers have advised that the prospects of success are borderline and legal aid is refused. In those circumstances, the applicant has not been advised that his or her case should not be pursued, or that an early settlement should be sought. Instead, he or she will have been told that the merits cannot be assessed. We would expect many individuals – who want to defend their home, pursue their immigration claim or retain residence of their children – to start or continue with their claims. It is our experience that courts are already experiencing a significant increase in the number of litigants in person, who take up a disproportionate amount of court time and resources. Removing legal aid for borderline cases – where the cases concern such important issues – is likely to increase the number of litigants in person. The Impact Assessment has failed to take account of the potential increase in costs as a result.

86. Finally, we note that the Impact Assessment assumes that this proposal will lead to an increase in public confidence in the legal aid system. We believe that the opposite is the case. It is our view that any individual, told by a lawyer that his or her case was important and that the prospects of success could not be accurately predicted at this stage, but that legal aid was not available, would have very little confidence in the legal aid system.

Ch 6: Reforming Fees in Civil Legal Aid

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

87. No. We believe that family solicitors have already seen their profit margins reduced by 5% to 10%. A further cut makes their work unsustainable. Many will close or part company with publicly funded work. This has already happened and is continuing to happen. There are increasing numbers of "factory firms" employing armies of paralegals. This leads to a decrease in the quality of representation available in care proceedings that engage the rights of children and their families. Few areas could be of such significant concern to the state than the welfare of children, yet the proposals are bound to lead to a serious reduction in the quality of representation available in care cases.

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

88. No. We do not agree. This is not about harmonising; it is about levelling down. In our experience, solicitors do not undertake the amount, or type, of advocacy that civil barristers undertake. That is usually for two reasons:
    i. the rate of £60 per hour is not considered cost-effective by solicitors;
    ii. and most solicitors do not want to be advocates, at least in complex cases, and prefer that the advocacy role is undertaken by specialist advocates.

89. If the proposal is introduced, there will be fewer and fewer good quality advocates – solicitors or barristers – taking legal aid cases which involve advocacy. It will simply not be cost-effective for either part of the profession.

90. Barristers are subject to the cab-rank rule and cannot pick and choose their cases to achieve a particular balance of work. It is wrong to assume, as the consultation paper does, that just because a cut of 10% in rates has not affected supply, further cuts will not do so. The fees paid to barristers are fees from which they deduct their expenses and costs such as chambers rent, professional insurance, practising certificates, CPD courses and books etc. What remains is income which will be substantially less than £60 per hour.

91. The availability of a cadre of barristers skilled in civil trials (including unlawful detention and false imprisonment actions in civil courts, homelessness appeals, possession hearings involving numerous contested allegations of anti-social behaviour) who are able to undertake advocacy, provides a service to publicly-funded solicitors operating in this area. It allows them to secure advocacy services as and when they need them without having to go to the expense of maintaining in-house advocates regardless of the need for such advocates and where there may be insufficient work to keep such advocates fully occupied. Securing advocacy services from barristers on a case-by-case basis broadens access to justice in a cost effective way. A relatively small pool of barristers can provide a service a much larger pool of solicitors. To do this, there needs to be an understanding that the rates paid to individual barristers on a case need to be paid at a rate that allows this service to be maintained rather than seeking to adjust the rate downwards in pursuit of harmonisation for its own sake.

92. We note the assumption in the Impact Assessment that the supply of solicitors willing to undertake publicly funded advocacy at the current solicitors' rates is sufficient and that the quality of services supplied will remain the same. We question that assumption. It is our experience that most civil solicitors do not undertake their own advocacy, save in the most straightforward of cases, and do not wish to do so. This is not to denigrate a solicitor's legal skill and expertise; the legal skill involved in preparing and conducting litigation is different to that required for advocacy. The two sets of skills are complementary. It is our view that if this proposal is implemented, there will be fewer barristers wiling to undertake advocacy at these rates and there will not be sufficient solicitors to fill that gap.

93. The Impact Assessment also assumes that the supply of advocates willing to undertake cases at these rates is sufficient and that the quality of services supplied will remain the same. Again, we question the assumption. We are certain that it will no longer be economically viable for us to continue as advocates specialising in legal aid cases and believe that the same applies across the Bar. We repeat that there will be fewer barristers wiling to undertake advocacy at these rates and there will not be sufficient solicitors to fill that gap.

94. Quite simply, it is our view that fewer and fewer members of the legal profession will be prepared to take legal aid cases at these rates. The result will be that whilst civil legal aid will technically be available – subject to scope, merits and means – there will be so few providers that in reality, legal aid will not be available to the majority of those seeking representation at court. The impact of this would be out of all proportion to the comparatively small saving of £3mn per annum projected in the Impact Assessments.

Ch 7: Expert fees in Civil, Family and Criminal Proceedings

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

95. We do not agree with this proposal. The underlying thinking on which it is based is set out in the Impact Assessment, which states that "[a] reduction in the fee paid to experts is considered unlikely to have any negative equality impact on legal aid clients." We find this implausible. Experts do not only work as witnesses in the legal system. Before anything else they are GPs, consultants, surveyors, etc. The old (pre-2012) legal aid rates were intended to approximate the market rates that they could charge for these services. It follows that the new rates, which are nearly 30% less, require experts to work for significantly less than they usually receive. In many cases, the new fees are now set so low that they will not cover the rates that the employers charge third parties for the experts' services (which comprise both the expert's salary, and an administrative "on-cost", levied by the employer). In other words, employers who agree to release experts to advise the courts will make a loss, and for that reason it is unlikely that they shall allow experts to do this work in future.

96. At para 7.3 of the consultation document, reference is made to the previous consultation, after which fees paid to experts were reduced by 10%. It is said that the LSC monitored the effect of the new fees, and that their monitoring "has confirmed that the market has adjusted to the new codified hourly rates." This research has not been produced, and we do not believe there is anything more to it than a convenient assertion with no real basis to it. Our day to day experience is that the lack of experts is already undermining other measures which the Government has introduced to cut the legal aid bill. For example, in family law, there is a already a shortage of skilled experts in areas such as Radiology and Child Psychology, which is causing cases to be delayed outside the 26 week window. Where there are presently teams of experts who can share expert opinions, we are informed that they are urgently considering their future since it is barely viable; and this is before the 20% reduction. Few paediatricians, we anticipate, are likely to make themselves available in future for court work at just £72 per hour. If the most experienced, and therefore efficient, experts are taken out of the system, their less experienced replacements will be more likely to cause the courts further delays and result in miscarriages of justice.

97. We are told that the proposal is intended to align legal aid experts' fees with the fees paid by the prosecution in criminal cases but under the proposed 20% general reduction, a wide range of experts would be entitled to significantly lower maximum fees than they would be if they appeared in criminal cases for the CPS, including engineers (maximum of £72 p/hr or £28 p/hr less than their CPS counterparts), medical practitioners (maximum of £72 p/hr or £28 p/hr less than their CPS counterparts), and surveyors (non-disrepair) (maximum of £40 p/hr or £60 p/hr less than their CPS counterparts). No justification has been given for paying lower rates to legal aid experts.

98. The authors of the consultation appear not to have grasped the extent to which the 2012 changes to legal aid "scope" have concentrated legal aid in areas where experts are especially necessary. For example:
    i. In housing disrepair, where legal aid remains available only where a claim is needed to remove or reduce a serious risk of harm to the health or safety of occupants. It is the very nature of this test that such a risk cannot credibly be established merely by the evidence of the tenant but requires expert assessment of harm. That, by definition, requires the corroboration of an expert.
    ii. In employment law, the restriction of legal aid to discrimination and trafficking

cases makes it more likely that expert evidence will be needed e.g. to contest an employer's defence that the worker is not a protected disabled person within the meaning of the Equality Act 2010.

iii. In private children law the restriction on legal aid to cases brought by victims of domestic violence makes it more important that the victim can corroborate her case with evidence from a GP, consultant or healthcare professional.

In all these areas, and many others, the effect of the reduction in experts' rates will be to reduce the number of experts; reducing the pool of expertise will make it harder for members of the public who are eligible for legal aid to access justice.

Ch: 8 Equalities Impact

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

99. See above.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

100. See above.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

101. We do not believe there is any mitigation which will counteract the damaging effect of these proposals.

Conclusion

102. We firmly believe that the Government has failed to fully identify or engage with the impact of these proposals. These proposals will result undermine access to justice and impact dramatically upon the most vulnerable in society.

103. The proposals in respect of the introduction of a residence test are arbitrary (i.e. excluding asylum seekers but preventing those who have just been granted refugee

status from accessing legal aid) and discriminatory. Both the residence test and the proposals for judicial review fail to engage with the quantity of satellite litigation that will necessarily be born of these changes. Further, both proposals raise potential professional conduct issues. The former where solicitors who are non-immigration specialists are required to act as immigration lawyers to establish eligibility for legal aid. The latter, where solicitors are required to determine whether they are willing to take the costs risk of protecting the best interests of their client.

104. We believe that the Government's underlying assumption that solicitors will fill the gap left by members of the specialist Bar withdrawing from legally aided work and the profession, is misplaced. The specialist Bar is recognised as providing a real service to members of the public and this includes those expert within the fields most affected by these changes i.e. prison law, housing, family and immigration. Reforms that in practice result in experts barristers leaving the field will result in significant loss of expertise and experience that will not be easily replaced. Clients will lose out as a result.

105. It is also the case that justice will not be done where the court considers that expert evidence is necessary to assist the court to resolve disputed issues, but experts will no longer be willing to provide reports in legally aided cases due to the reduction in fees.

106. Viewing the proposals as a whole, the Government has failed to adequately engage with the extent to which a legal aid system that exists in name but not in practice will result in lack of access to justice for the most needy and vulnerable members of society or the expense that will be generated by an increase in litigants in person.

107. The Government has also failed to adequately appreciate that a legal aid system that does not offer genuine access to justice will lack credibility. The United Kingdom prides itself on its international reputation as a home for justice. For this reason the UK Government hopes to attract more international litigation to our court system. However, a legal system only has credibility if is fair, accessible and delivers justice at all levels. A justice system that only genuinely offers redress or protection to those with large amounts of money to spend but not for the poor and vulnerable is a system which is not worthy of its name.

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May 2013