TRANSFORMING LEGAL AID: DELIVERING A MORE CREDIBLE AND EFFICIENT SYSTEM (CP14/2013)

RESPONSE BY THE

CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION
and
THE BAR EUROPEAN GROUP

Introduction

1) This is a joint response prepared by Constitutional and Administrative Law Bar Association ("ALBA") and by the Bar European Group ("BEG").

2) Both ALBA and BEG are professional associations for legal practitioners, public law in the case of ALBA, and European Union and European Convention on Human Rights law in the case of BEG. ALBA exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles; BEG has like objectives in relation to EU and ECHR law. They are predominantly associations of members of the Bar (being two of the specialist bar associations recognised by the Bar Council), but amongst their members and participants are also judges, solicitors, lawyers in public (including Government) service, academics and students. ALBA currently has over 1,000 members, including barristers who act for claimants and defendants in judicial review proceedings and in statutory appeals including in immigration, public procurement and planning cases. BEG has over 500 members who act extensively in EU judicial review and regulatory proceedings and appear in criminal proceedings raising specialist EU points, both for and against the Government/public body in question. Not all members of ALBA or BEG do publicly funded work, but a substantial number will have some contact with such work and some will do a great deal of it.

3) The members of both organisations are overwhelmingly civil practitioners and we focus in particular on the civil (non-family) questions. However, the proposals in respect of

criminal legal aid, particularly for price competitive tendering, threaten gravely and irreparably to damage the quality of criminal legal defence in this country and this is a matter of fundamental concern to anyone interested in the rule of law and access to justice. The detail of these proposals will be dealt with in other responses but members of BEG and ALBA have particular experience and expertise in dealing with public procurement cases and we address the PCT proposals from this perspective. We do not respond in detail to the remaining questions concerning criminal or family legal aid but this should not in any way be taken as an indication that we agree with them. On the contrary. We have though chosen to concentrate on questions where we can speak from genuine experience and expertise.

4) We are opposed to the proposals for the reasons we outline in this paper. In very broad summary:

   a) They will drastically reduce the availability and quality of publicly funded legal services in this country. In criminal cases the proposals for tendering will do irreparable damage to the quality of representation and miscarriages of justice will be bound to result. In civil cases reductions in funding will mean that practitioners will be unable to continue to provide a service in critical areas. It is not an exaggeration to say that this is a threat to the Rule of Law since it will leave many people unable in practical terms to enforce or defend rights of vital importance to them.

   b) Time and again when one considers the detail of the proposals, the people who will lose out will be the most vulnerable. The civil changes are liable to impact especially harshly on those who need to access the court to enforce basic standards to matters such as housing or community care services.

   c) We consider that these are short sighted proposals that will not save costs in the long run. In some cases litigants will be forced to represent themselves and judges have frequently remarked that this causes delays and additional cost. Just as important the consultation paper fails to quantify the social costs and costs to other public services that will be caused when, for example the innocent are wrongly convicted or families are split up when they have wrongly been denied housing or other support.

5) We deal with the specific questions raised below but at the outset it is necessary that we register our concern about the way in which these proposals have arisen and the manner in which they are presented.

6) Firstly, we are concerned about the unacceptably short time frame for the consultation. The proposals were published[1] on 9th April 2013 with a consultation period of only 8 weeks to 4th June 2013, including two Bank Holiday weekends. The paper raises a very large number of questions in diverse areas concerning matters of very great public significance. The government apparently intends to make changes by regulation or by non-statutory means[2] so that there will not be a full Parliamentary debate and the consultation process is therefore an important part of ensuring that the proposals receive proper scrutiny. Given the scope of the proposals the present exercise does not remotely comply with the consultation principles published by the Cabinet Office in July 2012 which provide inter alia that "*Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response*."

7) Our second concern is related to the first, particularly regarding the proposed changes to civil legal aid. The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) has already made extremely radical changes here and those changes were extensively considered in Parliament. They represented what was then thought to be a proper balance between cost and the need to preserve access to justice for those without means. The Civil Legal Aid (Merits Criteria) Regulations 2012 were also debated and these gave effect to the detail of the scheme envisaged by LASPO. That scheme deliberately kept in scope the matters that this paper now proposes to exclude and practitioners arranged their affairs on the basis of it. Yet this paper was published only 8

[1] Even then the consultation paper was published in a flawed state and required correction through an addendum.

[2] We explain below why we think that in a number of areas this will not be possible and changes of the kind envisaged can only be made through primary legislation.

days after LASPO came into force when the obvious thing to do would be to assess how the framework introduced by that Act operated in practice.

8) Thirdly, we are concerned that the consultation paper is unacceptably vague in its account of the reasons for particular proposals. The financial case set out in the consultation paper is at best materially incomplete. In many instances proposals threaten to cause very significant damage where the gains have not been quantified at all. Broad statements are made, such as "*the system has lost much of its credibility with the public*", and "*the cost of the system spiralled out of control*" (both in the Ministerial Foreword at p. 3) which are not developed or substantiated coherently or supported by facts. We address costs issues in specific areas below but the claim of loss of credibility has never been properly explained and is not backed by any evidence. It is contradicted by a poll conducted on behalf of the Bar Council which shows that the system of legal aid enjoys considerable support among members of the public[3]. We also note that the senior civil servant responsible for the Consultation Paper appears to have said to a public meeting that she is unable to point to any evidence to support the claim but that it was something that *"ministers want addressed*" ("Legal aid tendering: will it actually work?", Joshua Rozenberg, The Guardian, http://www.guardian.co.uk/law/2013/may/08/legal-aid-tendering-moj).

9) Fourthly, we are concerned that some comments made by the Secretary of State strongly suggest that decisions have already been made on the core proposals and that he is not approaching this consultation with a genuinely open mind. In order to be lawful consultation must be carried out when the proposals are still at a "*formative stage*" (*R v Brent LBC ex p Gunning* [1986] 84 LGR 168) and a decision will be liable to be quashed on judicial review if this requirement is not observed. In an interview with the Law Society Gazette on 20th May 2013 the Lord Chancellor was quoted as stating (in relation to price-competitive tendering or 'PCT' for criminal defence representation) as follows:

> "But, he adds, 'unless somebody's got a stunning alternative to PCT', it will go ahead in some form. The fiscal imperative remains and 'not saving the money is not an

[3] http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/may/7-out-of-10-of-the-british-public-fear-legal-aid-cuts-will-lead-to-injustice-%E2%80%93-new-poll/

option'. Grayling acknowledges opposition to the proposals, saying 'there are clearly people in the legal profession who are very unhappy'. But he insists not everybody in the legal profession shares that view. 'We've had plenty of conversations with people who intend to bid for the contracts and who are thinking about how to re-engineer their businesses.'

"What contingency plan is there if too few firms bid? Grayling replies: 'they will bid. I have no doubt whatever. There's a lot of noise at the moment, but the smart people in the industry are already working on their plans for this, thinking through their business models. That's what's to be encouraged and supported".

We return to this point, particularly when dealing with pre-permission costs.

10) Fifthly, ALBA and BEG are troubled by the statistics used to support these proposals. Those used in this paper are selective and it is difficult fully to respond without access to the full data. We have seen the request for further information made by the public law project in their letter of 30 April 2013. It is disappointing that the MOJ has chosen in response to rely on the costs limit in the Freedom of Information Act 2000 rather than providing the information to assist debate on what is clearly a matter of great public interest. The observations that we make in this response must be subject to the significant caveat that we have been prevented from making a fully informed response by the lack of statistical material, in particular that necessary to assess the actual costs or savings or impacts of the proposals made. We are additionally concerned by the apparent misuse of statistics by the Ministry of Justice in announcements linked to this consultation concerning judicial review. We address this under that heading.

Chapter 2 - Introduction

11) This chapter of the consultation paper sets out what are said to be the objects of the current proposals. They are:

"to bring down the cost of the scheme, but to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it. Our proposals are also designed to drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system" [para 2.4].

12) Para 2.5 states:

> "we do not believe it is right for the taxpayer to pick up the bill for those who can afford it, for civil cases that lack merit, or for matters which are not of sufficient priority to justify public money and which are often better resolved through other non-legal channels. We are also clear that someone should have a strong connection with the UK in order to benefit from civil legal aid".

13) We are concerned that these objects are expressed with a certainly that appears to preclude discussion on the main issue. Thus the paper is "clear" about the need for a strong UK connection and this seems to limit the consultation to the detail of how this should be achieved.

14) We are also concerned by what is missing from this section. There is no reference here, or elsewhere, to the quality of legal services or a proper assessment of the extent to which these proposals will damage it or do harm to equality of arms. Indeed the paper barely acknowledges the constitutional importance of access to justice, in civil or criminal cases as an essential component of the rule of law which is a particular concern of the Lord Chancellor under section 1 Constitutional Reform Act 2005. As Baroness Hale of Richmond, a senior Supreme Court Justice, put it in a speech to the Law Centres Federation Annual Conference 2011 on legal aid and access to justice:

> "First, there is the level of constitutional principle. We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. As the Bar Council1 has put it, 'individuals' belief that they live in a society in which harm done falls to be recompensed, or that obligations made will be honoured, is important.' If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall".

15) Writing in 2010 the late Lord Bingham said that the rule of law in this context means that: "means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve" and "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law" (The Rule of Law, Allen Lane (Penguin), London, 2010, pp. 85 and 88) He quoted with approval, Dr E.J. Cohn's work of 1941, "Legal Aid for the Poor", which set out important principles underlying legal aid as not merely altruistic provision, but as something required as a matter of principle in a modern democratic society:

> "Legal aid is a service which the modern state owes to its citizens as a matter of principal. It is part of the protection of the citizen's individuality which, in our modern conception of the relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc., so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike, for the rich and the poor".

16) The right of unimpeded access to the courts has long been recognised as a common law right of fundamental importance (see as examples *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710 quashing immigration removal policy as "unlawful because it abrogated the constitutional right of access to justice" and confirming that "in order to have effective access to the courts, the person served with removal directions… needs[s] to have a reasonable opportunity to obtain legal advice and assistance."; *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [1994] QB 198, "the right of access to justice… is a fundamental and constitutional principle of our legal system"; and *R v Secretary of State for the Home Department ex p. Leech* [1994] QB 198, "It is a principle of our law that every citizen has a right of unimpeded access to a court… Even in our unwritten constitution it must rank as a constitutional right")[4]. However, in many cases the exercise of this essential right is only possible because of legal aid. We believe strongly that it is wrong to treat legal aid for public law including judicial review either as a mere commodity or as an obstacle to legitimate action by the executive, rather than acknowledging this as a component in the democratic balance of powers. What is at stake is a right of such weight that "the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right" – *R v Lord*

[4] It is notable that each of these landmark cases would not have qualified for funding under the current proposals. The first two would not qualify because of the 12 month residence rule and the third because on the removal of legal aid in prison cases. The *Medical Justice* claim involved basic standards of fairness applicable to persons facing removal from the UK, *Anufrijeva* upheld a requirement that the state must notify adverse decisions to individuals before they could be effective (in that case a failed asylum claim) and *Leech* established the right of a prisoner to correspond with their solicitor.

Chancellor ex p Witham [1985] QB 575 at 585. Any limitation will be carefully scrutinised by the courts and we doubt whether many of the changes contemplated can properly be introduced by means of secondary legislation.

17) We now turn to the specific questions in the consultation paper.

Restricting the scope of legal aid for prison law

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.

18) We do not agree with this proposal. The basic premises on which this proposal is based are fundamentally flawed.

19) Firstly, paragraph 3.10 of the Consultation Document asserts that the internal prison requests and complaints system is "*robust"* and is a key element of ensuring that the Prison Service meets its obligation of "*dealing fairly, openly and humanely with prisoners"*. We are concerned by these assertions, which are unsupported by any evidence. It does not appear that the authors of the Consultation Document have carried out any meaningful analysis of the prison complaint system in order to satisfy themselves that it represents an adequate form of redress for the many important legal issues that the Consultation Document proposes to remove from the scope of the criminal legal aid contract. When the available evidence is considered, it appears that, rather than offering a "*robust"* avenue of redress for prisoners, the prison complaints procedure is itself marked by systemic problems. The recent reports of Her Majesty's Chief Inspectorate of Prisons suggest that the complaints system in many prisons is flawed. By way of example, in HMP Brixton, the Inspector concluded that applications were not dealt with promptly, complaints procedures were crudely managed, recording procedures were not accurate,

and replies were curt and did not respond to the complaint.[5] This was not an isolated example of problems with the prison complaint system.[6]

20) Secondly, paragraph 3.11 of the Consultation Document appears to assert that the Prisons and Probation Ombudsman, Independent Monitoring Boards, and/or the Parliamentary Commissioner for Administration offer adequate protection for prisoners. This assertion is incorrect. None of these bodies has the power to make directions binding on the Prison Service. Nor are proceedings before these bodies simple. In cases involving disputed issues of policy or law they require the assistance of expert legal advice. Finally, proceedings before the Ombudsman are lengthy, and cannot match the ability of the Administrative Court to intervene in an urgent case. We are unaware of any authority in which the Courts have concluded that proceedings before any of these bodies is a suitable alternative remedy in treatment, discipline, or sentence cases.

21) Thirdly, the discussion of the costs of legal aid in prison law, as set out at paragraphs 3.12 and 3.13 of the Consultation Document, does not provide any contextual analysis for the purported increases in prison legal aid expenditure. When considered carefully, it becomes clear that legal aid has fallen in recent years. The figures in Table 1 show a reduction of £3m in legal aid expenditure in prison law cases between 2010/11 and 2011/12. This reduction demonstrates the impact of the introduction of the 2010 Standard Crime Contract, which brought into force changes such as the effective removal of treatment cases from the scope of advice and assistance. It is to be regretted that this fall in legal aid expenditure has not been considered when considering whether further reductions to prison legal aid expenditure are warranted. Secondly, the Consultation Document fails to explain that the cost of legal aid in prison cases is linked to the inevitable results of government penal policy, and not to any "*frivolous*" or unnecessary legal actions. Indeed, the average prison population has increased by more than 25%

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[5] "*Report on an announced inspection of HMP Brixton 1- 10 December 2010*":

http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/brixton/brixton-2010.pdf

[6] See the other inspection reports, available at:

http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/

between 2001 (when the average population was around 66,300[7]) and December 2012 (when the average prison population was around 83,205[8]). This increase was, itself, largely related to the introduction of indeterminate sentences for public protection ("IPPs") by section 225 of the Criminal Justice Act 2003. The Courts have noted that the introduction of IPPs was not resource-neutral.[9] It seems clear that a large amount of legal aid expenditure has been caused by this change in sentencing policy. That is because the sudden increase in prisoners brought with it a concomitant increase in the number of oral hearings before the Parole Board and of disciplinary cases before adjudicators. It is therefore inapt to present the increase in prison legal aid expenditure without explanation or to suggest that prison legal aid is "*spiraling out of control"* or linked to "*frivolous"* claims.

22) Fourthly, and most importantly, when setting out the background to the proposals, we regret that the authors of the Consultation Document do not appear to have had any regard at all to the fundamental importance of access to justice in prison law cases. For many years, it has been well-recognised that prisoners are particularly vulnerable and so require particular protection. This is an assertion that is accepted by expert commentators (the United Nations special rapporteur on torture, Mr Manfred Nowak has noted that, "*persons deprived of liberty are among the most vulnerable and forgotten human beings in our society*"[10]) and by the courts. Indeed, possibly the two greatest jurists of recent years have acknowledged the importance of prisoners having access to the law:

a) Lord Woolf recognized, in his report entitled Prison Disturbances: April 1990 (Cm 1456, 1991), that 'a prisoner, as a result of being in prison, is particularly vulnerable to arbitrary and unlawful action' [14.293].

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[7] http://www.mywf.org.uk/uploads/projects/borderlines/Archive/2007/r195.pdf

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/163219/prison-population-monthly-dec2012.doc.doc

[9] See, amongst other authorities, *R (James, Lee, and Wells) v Secretary of State for Justice* [2010] 1 AC 553, at paragraph 3, and *R (Faulkner and Sturnham) v Parole Board* [2013] 2 WLR 1157, per Lord Reed, at paragraphs 2 and 4.

[10] http://www.ohchr.org/EN/NewsEvents/Pages/ConditionsInDetention.aspx

b) Similarly, Lord Bingham in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 noted that it was important that a prisoner retained their right of access to the law [5]. The issue in *Daly* concerned a failure by the Prison Service to respect the confidentiality of prisoners' legal correspondence. On any view, this was an issue of the utmost importance. Under the proposals in the Consultation Document, such a claim would no longer fall within the criminal legal aid contract.

c) These conclusions are consistent with the comments of the European Court of Human Rights. By way of example, in *Campbell and Fell v. United Kingdom* [1984] 7 E.H.H.R. 165, the European Court of Human Rights held that, "*justice cannot stop at the prison gates"* [69].

23) These judicial comments are consistent with the relevant academic studies, which have emphasized that fair treatment and access to justice are fundamental to a prisoner's rehabilitation. By way of example, Ms Nicola Padfield has commented that:

> *"An unusual and perceptive small study is Digard (2010). Having interviewed 20 recalled sex offenders, he found offender views of the system focused almost exclusively on the procedural fairness of the process. He concluded that:*
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> > *"disregard for procedural fairness may decrease offender's levels of mental well-being, engagement in their management, motivation to forge new lives, and respect for authorities and the civic values they represent. It may inhibit the maintenance of an effective probation/client relationship and increase resistance."*[11]

24) It is perhaps unsurprising that research shows that treating a prisoner unfairly should prejudice their rehabilitation. It is obvious that there is a risk that a prisoner will reject society if the prisoner concludes that society has treated them unfairly. Denying prisoners the rights to legal aid enjoyed by all other members of society is likely to be regarded as unfairly.

25) The failure to recognize the fundamental importance of access to justice for prisoners is material. It suggests that the authors of the Consultation Document have failed to consider what the true impact of the proposals will be (both in terms of impact on the rule

[11] Understanding Recall 2011, (University of Cambridge Faculty of Law Research Paper No. 2/2013) at p.10.

of law and on public expenditure caused by preventing the effective rehabilitation of prisoners) and have failed to adequately balance the risks and savings of each of the proposals.

26) Having addressed the purported premises of the proposals, we will now consider the proposals themselves.

27) The first proposed reform is the removal of treatment cases from criminal legal aid contracts. The consultation document suggests that there have only been 11 such cases since 2010. It follows that any savings that flow from this proposed reform will be no more than minimal. This minimal saving is far out-balanced by the impact of these proposals on the rule of law and on prisoners' access to justice.

28) The second proposal is to remove criminal legal aid advice and assistance for sentencing matters. The logic of this proposal is inconsistent. Paragraph 3.18 asserts that matters that "*relate to a review of ongoing detention"* will continue to be funded, whereas the following matters will not: "*matters related to categorisation, segregation, close supervision centre and dangerous and severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions"*. This is not a legally sustainable distinction. Indeed, in categorisation matters, the Courts have repeatedly recognised that there is an obvious link between a prisoner's security category and his prospects of success, particularly as regards Category A reviews[12] and Category D transfers.[13] The same logic applies to issues relating to accessing risk-reduction opportunities, such as the dangerous and severe personality disorder unit, which plainly impact on a prisoner's early release.[14] As regards the removal of a prisoner to segregation and the close supervision centre, such transfers may impact on a prisoner's mental

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[12] See, amongst many other authorities, *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 All ER 277, at 288B-D

[13] *R (Hill) v Secretary of State for the Home Department* [2007] EWHC 2164 (Admin), at [7]; *R (Yusuf) v Parole Board* [2011] 1 WLR 63, at [7]; and *R (Haney) v Secretary of State for Justice* [2013] EWHC 803 (Admin), at [46].

[14] Indeed, a systemic failure to provide rehabilitation opportunities can render the detention of an indeterminate sentence prisoner "*arbitrary"* and in breach of Article 5 of the European Convention of Human Rights: *James, Wells and Lee v United Kingdom* (2013) 56 EHRR 12.

health[15] and/or engage Articles 3 and 8 of the European Convention of Human Rights.[16] It follows that these issues cannot be dismissed as unimportant, frivolous, or undeserving of expert legal advice. It is unclear how providing legal aid to enable a vulnerable prisoner to consider and/or challenge the legality of any of these issues could be said to bring the credibility of the overall legal aid system into question. The likely savings from this proposal are estimated at just £4 million.

29) The third proposal is to remove criminal legal aid from disciplinary cases which do not engage the *Tarrant* criteria, which are not referred to an independent adjudicator and which do not involve the determination of a criminal charge for the purposes of Article 6 of the European Convention of Human Rights (paragraph 3.19 of the Consultation Document). This proposal is similarly flawed. In particular, this proposal fails to recognise that the outcome of prison disciplinary proceedings even before a governor can have a very serious impact on a prisoner, both in terms of his prospects of release and in terms of his treatment within the prison estate.[17] Disciplinary findings can prevent a prisoner from transferring through the security categories, from accessing periods of release on temporary licence, from being held on normal wings, from obtaining particular privileges, and from obtaining directions for release from the Parole Board. Moreover, this proposal cannot be read consistently with the Ministry of Justice's own policy for disciplinary cases against prisoners, which requires adjudicating governors to grant an adjournment of disciplinary proceedings where they are satisfied that legal advice or assistance is necessary.[18] In cases falling outside those defined in paragraph 3.19 of the Consultation Document, such a prisoner would not be able to receive legal advice or assistance, even if such an adjournment were granted. For particularly vulnerable prisoners (including young prisoners, prisoners with mental health problems or

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[15] As recognised in the introduction to the relevant HM Prison Service policy, PSO 1700.

[16] *Ramirez Sanchez v France* (2006) 45 EHRR 1099, and *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, per Lord Bingham, at [32].

[17] *Learning from PPO investigations: Adjudication Complaints*, Prisons and Probation Ombudsman, March 2013, at p.10.

[18] PSI 47/2011, at [2.16].

disabilities, and prisoners who do not speak English clearly), the right to seek legal advice and assistance can be of the utmost importance. This proposal would render any right to seek an adjournment nugatory. The legal advice and assistance that follows such an adjournment is doubly important. That is because it is usually only after such an adjournment that a prisoner can obtain legal advice, and thus prepare the representations that are needed to persuade an adjudicating governor that the *Tarrant* criteria are met. The proposal in paragraph 3.19 of the Consultation Document will therefore effectively reduce the number of adjudications in which legal representation will be granted.

30) The result of these proposals would be the removal of criminal legal aid for cases that require legal advice and representation. In recent years, the Prison Service has been found to have unlawfully separated mothers from their babies[19] and to have treated a prisoner in breach of Article 3 of the European Convention of Human Rights (the protection against inhuman and degrading treatment) by handcuffing him during medical treatment.[20] The list could be continued. These are all cases that it would appear will be denied criminal legal aid funding under the proposals. This flies in the face of justice.

31) The removal of criminal legal aid for these cases will have a significantly negative impact on the ability of prisoners to access justice. Firstly, they will be unable to obtain advice for legal disputes that fall within these issues. Secondly, prisoners will find it difficult to access civil legal aid specialists, given that their primary form of contact with solicitors is through services provided on the criminal legal aid contract. Thirdly, specialist legal aid solicitors will find it more difficult to continue to provide a service to prisoners, if the income from these areas of the criminal legal aid contract were removed. Prison law is a fast-developing and highly technical area of law, requiring experience and expertise. The ability of specialist legal aid solicitors to assist prisoners with these types of cases is central to the efficient running of the justice system. Were the proposals in the Consultation Document to come into effect, there is a significant risk that specialist solicitors will be unable to continue to provide this service. There is a strong public

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[19] *R (P and Q) v Secretary of State for the Home Department* [2001] 1 WLR 2002.

[20] *R (Graham) v Secretary of State for the Home Department* [2007] EWHC 2950 (Admin)

interest in ensuring that specialist legal aid practitioners are properly funded. As Lord Hope held in *Re appeals by Governing Body of JFS* [2009] 1 WLR 2353, at [25], "*the system of public funding … depends on there being a pool of reputable solicitors who are willing to under take this work*". The continuing availability of civil legal aid to challenge this type of cases by way of judicial review is no answer to these problems.

32) The impact assessment for these reforms entirely fails to adequately address the likely detrimental impact on prisoners in general, but also on minority groups within prison. It is well-recognised that there are disproportionately high numbers of ethnic minorities and of individuals with mental health problems within prisons.[21] The impact assessment does not appear to have adequately considered the likely impact on these minority groups. Moreover, the real impact of these reforms will be an imbalance between prisoners and the Ministry of Justice in future litigation. That is because, in the event that these proposals become reality, prisoners may be required to bring claims as litigants in person against the Ministry of Justice, which is likely to be represented by well-remunerated lawyers with full access to all relevant legal materials. This not only raises an issue in relation to the equality of arms, but it also is likely to lead to a rise in costs elsewhere in the court system (as recognized in *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234) and to increasing difficulties for those representing the state.

33) These proposals are not only unfair and unjustified, but they are also legally flawed. The European Court of Human Rights has held that denying a prisoner services that are enjoyed by the community at large may well violate Article 14 of the European Convention of Human Rights.[22] Given that the result of these proposals will be that prisoners will be withheld legal aid that may otherwise be available to members of the community, it is likely to be the case that Article 14 will be violated by the proposed changes.

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[21] More than 70% of the prison population has two or more mental health disorders. (Social Exclusion Unit, 2004, quoting Psychiatric Morbidity Among Prisoners In England And Wales, 1998).

[22] *Shelley v United Kingdom* (App no. 23800/06).

34) Overall, therefore, the cost savings associated with the proposed changes are low. Those cost savings need to be set against the increased costs for the Court Service resulting from some prisoners lodging their own court proceedings. Moreover, the proposed changes are also likely to have very serious consequences. They will deny prisoners the opportunity to obtain redress for denials of fundamental rights and they will potentially undermine rehabilitation.

Crown Court financial eligibility thereshold

35) We do not respond to questions 2 and 3 (imposing a financial eligibility threshold in the Crown Court).

Introducing a residence test

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

36) We do not agree.

37) We take issue with the starting point of the proposal that an individual should have a strong connection with the UK in the sense of residence. Paragraph 3.44 of the consultation paper voices a "*concern … that the availability of legal aid for cases brought in this country, irrespective of the person's connection with this country, may encourage people to bring disputes here*". No supporting evidence is adduced. BEG and ALBA do not have access to the data but they suspect that Claimants and Defendants who do not reside in the UK are likely to litigate in England for *jurisdictional* rather than financial reasons. For instance, pursuant to the Judgments Regulation a Claimant may bring a claim, away from their domicile so long as the Defendant is a UK domiciliary (e.g. a Russian trafficked woman suing those UK nationals or officials responsible for her exploitation or ill treatment during a period of unlawful residence in the UK). Equally, a non-UK domiciled Defendant may face a claim because the damage was suffered in England, thus establishing jurisdiction under Article 5.3 of the Regulation. Common law jurisdictional tools may arrive at much the same result. Thus a Claimant from abroad (e.g. a parent in a child custody or non-payment of maintenance case – where this remains within scope) may choose to sue in England because the English courts would clearly

have both jurisdiction and the means easily to enforce a judgment (e.g. over a parent resident in the jurisdiction). Indeed, legal aid may simply be required in order to enforce an order already obtained in another jurisdiction. In other cases, persons abroad may be challenging the decisions of a United Kingdom public body and such a claim can only be by judicial review in this jurisdiction.

38) Absent any sizeable pattern of established abuse (and suing where one can properly establish jurisdiction is not such an abuse) BEG and ALBA believe that the proper connection of the dispute with the Courts of England, sufficient to establish jurisdiction, should be and is in this context the only proper threshold condition for entitlement to legal aid provided the other criteria for eligibility and merits are met. Any different approach is only likely to lead to conflict with the UK's EU and international obligations.

39) The proposal is that an individual will not be granted civil legal aid unless he or she (i) is lawfully resident in the United Kingdom, Crown Dependencies, or British Overseas territories at the time of the application, and (ii) has been so resident for 12 months, unless an exception applied. There are to be exceptions for serving members of HM armed forces and their families and those claiming asylum. These are all claims that, by definition, would otherwise meet the strict requirements for funding set out in LASPO and in Regulations. The proposal operates as a bar on legal aid for claims that would be considered to sufficiently meritorious and of sufficient importance if only the applicant could satisfy the residence condition.

40) The effect (and indeed the object) is to create a class or classes of people for whom assistance in seeking justice is denied, no matter what was done or threatened to be done to them including deprivation of life or freedom[23]. As such it runs against fundamental principles of justice. *In R v Hull University Visitor ex p. Page* [1993] AC 682, at 704B, Lord Browne-Wilkinson citing an earlier decision of 1922 reiterated that "*There must be*

[23] It is no answer to say here, as seems to be suggested, that legal aid would be available on an exceptional funding basis under s. 10 of LASPO. That section looks primarily to Article 6 and not necessarily to the substantive right being breached. Legal aid might well not be available in principle, even in the case of the gravest violations. In any case, the LAA could refuse exceptional funding with impunity because the affected applicant could never obtain funding to challenge the decision. We note here that at para 3.54 the paper seems to misunderstand the scope of s. 10. It does not allow for funding in exceptional cases generally but only where failure to provide funding would breach a person's Convention Rights or EU Rights.

no Alsatia in England where the King's writ does not run". In *R v Commissioner of Police for the Metropolis ex p. Blackburn* [1968] 2 QB 118, 148E-G, Edmund-Davies LJ, as he then was, said that "however brazen the failure of the police to enforce the law, the public would be wholly without a remedy… The very idea is as repugnant as it is startling… How ill it accords with the seventeenth century assertion of Thomas Fuller that, 'Be you never so high, the law is above you'… Its effect would be to place the police above the law." It has always been a feature of our law that:

> "*Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in Sommersett's Case (1772) 20 St.Tr. 1*".

Khawaja v Secretary of State for the Home Department [1984] AC 74, per Lord Scarman at pp 111G-112A

41) *Somersett's* case, to which Lord Scarman referred is the celebrated decision which, in effect, abolished slavery in England. That claim was one of habeas corpus, brought to release a slave who had escaped but then been re-captured. Somersett was fortunate that his claim was backed by a philanthropic abolitionist and it is telling that under these proposals his present day contemporary will have to be in the same lucky position. Otherwise she will be without a remedy. This is not an extravagant or far-fetched point. A modern version of slavery is human trafficking and while the proposals exclude asylum claims trafficking victims are not, without more, entitled to claim asylum. So a victim would not be entitled to help in seeking an injunction against her captor or a claim against the police or home office if they refuse to accept her claim or against the local authority if she is forced to sleep on the street.

42) The proposal undermines the Rule of Law since it leaves affected persons open to arbitrary decision making and abuse of power by the state and exploitation by private individuals. Many will go without a remedy altogether or will be unable to defend spurious claims brought against them[24]. Others will be forced to represent themselves and

[24] A state of affairs euphemistically dismissed in the impact assessment as "decid[ing] not to tackle the issue at all" [para 24].

still others will resort to action outside the courts. It is hard to see how any of these options will produce any real benefit and even in the narrow financial terms used in the consultation paper they are likely to increase costs overall rather than reduce them.

43) In practice the proposal is likely to impact particularly harshly on the homeless and destitute, including homeless families, who are awaiting a decision on their status in the UK (for example on a fresh asylum claim or some other claim for leave to remain) but who cannot realistically leave the United Kingdom in the meantime. Individuals often have to wait for very long periods while the Home Office processes claims like these[25]. Pending a decision they are prevented from accessing most community care services such as those under the Children Act 1989 or National Assistance Act 1948 unless failure to provide support would breach their Convention or EU rights (see Schedule 3 of the Nationality Immigration and Asylum Act 2002). It follows that these are cases of the greatest need, where the claimant may be on the verge of being reduced to a state involving inhuman or degrading treatment (see *R (Limbuela v Secretary of State for the Home Department* [2006] 1 A.C. 396) or where children may otherwise need to be taken into care, at far greater cost to the state. The law and facts are often complex and the claimants are not in a position to represent themselves. Such cases often involve children and we consider that failure to make an exclusion is cases involving children may place the United Kingdom in breach of its duties under the UN Convention on the Rights of the Child to treat the best interests of a child as a primary consideration (Article 3.1).

44) The proposal would also mean that some of the most serious cases of abuse would go undetected and would be without redress. For example, it would, under these proposals, be impossible for victims of serious human rights violations perpetrated by British forces abroad to bring claims (see e.g. *Al Skeini v United Kingdom* (2011) 53 EHRR 18 the ECtHR). Similarly, a person who has been unlawfully removed from the country would be without legal help to allow them to return. We stress again that legal aid would

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[25] *R (Clue) v Birmingham City Council* [2011] 1 W.L.R. 99 concerned an overstayer whose relationship had broken down and who had applied for leave to remain with her 3 children, all of whom had been born in the UK. Dyson LJ observed that the case "exposed the problem that has been created for local authorities by delays on the part of UKBA in dealing with applications for leave to remain by persons in the position of the claimant and her family".

ordinarily only be allowed in these cases if they were sufficiently meritorious and so the object of this measure is to block funding for good claims.

45) In any case we consider that the proposal is very likely to be unworkable, it will not save money and is also likely to be unlawful.

46) As to unworkability, lawful residence can be extremely difficult to determine both factually and legally. It is hard to evidence without direct and immediate access to Home Office records where these exist: and even these are incomplete because of the absence of exit records of foreign nationals for many years and/or of records of residence by British citizens. British citizens and others who have been lawfully resident in the past may have no evidence of this and therefore be unable to demonstrate past residence. Individuals who are destitute or need urgent help may not have supporting documents. Even where an individual has leave to remain in the United Kingdom and so at one level is lawfully present, lawful presence may be undermined ex post facto by a claim of entry by deception. In some other cases, the lawfulness of a person's presence represents part of the subject matter of the claim so that requiring evidence of lawful presence is impossibly circular.

47) The paper does not explain how disputes about a person's status are to be determined. If the system is to operate fairly then there will have to be an opportunity to appeal to an independent authority and this will create further costs.

48) Quite apart from the issue whether or not somebody is lawfully resident exceptions to the proposed rule will be extremely difficult to determine. The paper rightly notes at para 3.53 that there will have to be an exception where necessary to comply with obligations under EU or international law. But unless this is clearly implemented in such a way as to identify those falling into that class then the proposal is itself likely only to lead to further cost falling on legal service providers. Indeed, the cost (probably unreimbursed) and inconvenience in having to establish such entitlement, if the classes of eligibility are not clearly identified, is likely to act in itself as a substantial impediment to effective assertion of EU and international rights. It is also liable to lead to satellite litigation (e.g. a claim for legal aid made by a work seeker lawfully resident in England in relation to events occurring during their lawful period of work seeking in the UK).

49) Even without these problems the impact assessment has been unable even to give an estimate of the amount that will be saved by this measure or what it will cost. This is despite the implication that the grant of legal aid to those who are not lawfully resident is sufficiently common that it undermines credibility. It is extraordinary that the paper has made no attempt to quantify the amounts involved apparently on the basis that "*the LAA do not currently record the residency status of a client and therefore the data is not available to estimate the impact on the value or volume of cases this policy affects*" (see para 21 of the impact assessment). Moreover there is no attempt to assess the further costs that are liable to be incurred through processing claims and dealing with disputes about lawful residence or entitlement to funding under one of the exceptions[26] or the additional costs to the justice system more generally as litigants are forced to act in person or take the law into their own hands. The paper also fails to recognise that the loss of legal rights on the part of those affected is a cost in itself.

50) Finally we come to the lawfulness of this proposal. We consider that it is open to challenge on a number of bases and the measure cannot be introduced without primary legislation. In what follows we set out briefly what we think will be the main areas of challenge:

51) The proposals are *ultra vires* the Regulation making powers conferred by LASPO. This is for two main reasons:

a) Firstly, nothing in the Act permits the Lord Chancellor to exclude altogether classes of persons from eligibility for legal aid, whether defined by nationality, residence or any other characteristic. Section 1 provides that he "must secure that legal aid is made available"…and while, by section 2 he may make "different arrangements…in relation to (c) different classes of person" this is with a view to carrying out his primary duty to secure legal aid. He may not make arrangements in order to deny legal aid. Section 11 permits the Lord Chancellor to set criteria for the grant of legal aid but the factors to which he may have regard do not include nationality or

[26] The IA states (para 20) that this will be a small ongoing cost but not attempt is made to quantify this. We expect that if this proposal does go through then there are likely to be very substantial satellite disputes about whether or not a person qualifies.

residence and nothing in this section empowers him to make a blanket rule excluding a class of people that would otherwise be eligible.

b) Secondly the proposed rule would be inconsistent with other parts of the Act where Parliament has already decided that funding should be available for cases that would inevitably be excluded if there was a residence test. So, for example, paragraphs 25 – 30 of schedule 2 provide for immigration issues to remain within scope in respect of detention, temporary admission and for residence etc restrictions and applications for ILR from victims of domestic violence. Some of these cases will be asylum cases but many will not and these paragraphs necessarily assume that funding is not limited to asylum cases. Paragraph 31 includes legal aid in respect of accommodation under s. 4 of the Immigration and Asylum Act but this is for former asylum seekers and so by definition covers people who are not lawfully resident. Paragraph 10 deals with unlawful removal of children and paragraphs 17 and 18 deal with EU and international agreements concerning children or maintenance. Parliament must have contemplated when enacting those paragraphs that at least one of the parties to the proceedings would not have been resident in the United Kingdom for more than 12 months.

52) In addition the rule is discriminatory for the purposes of Article 6 of the ECHR taken together with Article 14. It self-evidently discriminates against non-British nationals and while this might be described as indirect discrimination it is so clearly targeted against foreign nationals that we have no doubt that weighty reasons would be required to justify it. There are no such reasons since the claimed justifications are without any empirical foundation as we have already explained. The proposed savings have not been identified and even if they had been obvious costs have been left out of account. The consultation paper fails to identify how there is any lack of credibility in the current system. Other explanations that have been given do not withstand scrutiny. In an interview reported in, among other places, the Daily Telegraph[27] the Lord Chancellor is reported as having said when announcing this consultation:

[27] http://www.telegraph.co.uk/news/politics/9976786/Legal-aid-curb-for-foreign-migrants.html

> "There have been examples of people who have come to the country for extraordinarily short periods of time who have had a relationship breakdown and then they end up in our courts at our expense to determine custody of the children".

53) We make no comment on whether or not this happened in the past or how often it happened, but this overlooks the fact that ordinary residence and contact disputes have already been removed from the scope of legal aid by LASPO. So the very example given could not justify the measure.

54) The proposal is also incompatible with the 1951 Refugee Convention. It is suggested that asylum seekers will be excluded from the new rule but when their claim succeeds then they will have to wait a further year before they qualify for funding. This is open to all the objections already identified but in addition it violates Article 16 which provides (added emphasis):

> "1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence *the same treatment as a national in matters pertaining to access to the Courts, including legal assistance* and exemption from cautio judicatum solvi.
>
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

55) The proposal may well also offend against EU law, particularly if: its 'carve out' in favour of EU obligations is so vague as to provide no certain guidance and merely generates satellite litigation or deterrent uncompensated cost for providers in assessing whether or not an EU obligation is in play; it operates to penalise litigants (including non-EU national litigants) who are given the jurisdictional right to litigate in the EU under instruments such as the Judgments Regulation. In this connection the recent judgment in *GREP GmbH v Freistaat Bayern* (13 Jun 2012) C -156/12 confirms at [43]-[45] that: falling within the scope of the Judgments Regulation's application engages EU law principles; and Article 47 of the Charter of Fundamental Rights may confer a right to free legal assistance and that it is for the national court to decide whether the denial of legal aid is a proportionate limitation on the right of access to the court.

Paying for permission work in judicial review cases

Q5. 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)? Please give reasons.

56) We do not agree. Changes of this kind should only be introduced where there is a compelling case for change and where the consequences can be predicted with accuracy. It is necessary to set the bar at this point because the proposal is liable to reduce access to legal services for this kind of work and to reduce the ability of affected claimants to challenge decisions by the state affecting their fundamental rights including under the ECHR. There is something extremely unpalatable about the government deliberately setting out to restrict access to the court to challenge its own decisions and this proposal has the appearance of self-interest. We recall the observations of Laws LJ in *R (otao Evans) v Lord Chancellor & Anor* [2011] EWHC 1146; [2012] 1 WLR 838.

> "In plain language this seems to me to assert that the consequences of an adverse result in such a public interest judicial review is a good reason for the denial of public funding to bring the case. It needs no authority to conclude that by law such a position is not open to government. For the state to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law. The point is one of principle; it is not weakened by the fact that such litigation might be funded by other means".

57) The paper counters this with the assertion that "*we continue to believe it is important to make legal aid available for most judicial review cases to ensure access to a mechanism which enable persons to challenge decisions made by public authorities which affect them*" but this is no more than lip service unless the government is prepared to think through its proposed limitations rigorously and to support them with robust evidence.

58) Unfortunately, public justifications for this measure that have been advanced do not meet this standard. In a recent interview on Radio 4 (24 April 2013) the Lord Chancellor said in relation to judicial reviews:

"Well let me give you a raw piece of statistic that will explain the nature of the problem. In 2011, the last year we had figures available, we had 11,359 applications for judicial review. In the end 144 were successful and all of the rest of them tied up government lawyers, local authority lawyers in time, in expense for a huge number of cases of which virtually none were successful".

59) This misrepresents the true position which is explained in the note at the Public Law Project website at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf.

60) A better comparison is between the 78 (civil non-immigration) cases (40%) that succeeded at a final hearing and the 114 that failed in 2011. But even that fails to take account of the fact that the vast majority of claims are resolved before they reach a final hearing often with substantive benefit to the client. This is partially shown in the statistics used in this paper. Those that get to a hearing will tend to be the strongest ones from Defendant's point of view (it having generally settled meritorious claims precisely in order to avoid them getting to Court).

61) In the same interview the Lord Chancellor went on:

"We're changing the legal aid rules though so that you're not going to be able to, your lawyer won't get, legal aid unless the judge says "yep, this is a case that has merit and needs to be heard in court." That's reasonable because otherwise we end up paying for endless cases that a brought that have got no chance of success.

JH: is that a sort of no win no fee thing though?

CG: Well, I mean, it basically says to the lawyers: if your case isn't serious then it's not worth your while bringing it because you're not going to end up being paid which seems to me to be entirely sensible. And this is not about whether the case is right or wrong it's about whether the judge, who takes an initial look at the papers, actually says "this case is so absurd that I'm not going to give it the time of day, it will not get a hearing."

JH: And that doesn't happen at the moment?

CG: Uh, that doesn't happen at the moment, that's one of our legal aid changes".

62) As with other aspects of the proposals this appears to indicate a closed mind on this issue.

63) In the language of Chapter 2 of the consultation paper the rationale advanced for this change is that the taxpayer should not pay for "*cases that lack merit*". The converse is that the costs of claims that do have merit should be paid provided that the other relevant

criteria are met. We therefore need to consider how far this proposal will achieve these twin objects. For reasons we develop below we consider that the case for change is simply not made out. In fact the change is positively damaging because, as the authors, acknowledge, it will also sweep up a substantial number of meritorious claims. Our reasons under this head fall into three parts:

a) The existing controls are sufficient and recent changes have not been assessed.

b) When the statistics are properly understood it can be seen that even if "success" is defined as either being granted permission or obtaining a substantive benefit then legal aid practitioners do significantly better than the non-legally aided market and the success rate is relatively high.

c) In any case the grant or refusal of permission is not an adequate indicator of merit.

64) Applications for public funding for judicial review are already subject to strict merits criteria under what are now the Civil Legal Aid (Merits Criteria) Regulations. These reflect the changes brought about by LASPO and have only been in force since 1st April 2013. It can hardly be said such far-reaching changes have been allowed to bed in before the need for further change has been assessed. The Regulations and practice under the LAA follow the former funding code in many respects but they are significantly stricter in two principal ways:

a) They require greater notice to the Defendant and the restrictions on bringing claims where there is an alternative remedy are tighter.

b) Solicitors may no longer exercise delegated powers in judicial review claims so it is not possible for the legal aid agency to exercise closer scrutiny over claims before they are issued.

65) These two changes may well affect the number of cases being brought. That impact needs to be assessed before proposing yet further change.

66) But in any case there is no proper foundation for the claim that the present criteria do lead to an unacceptable number of cases being brought where they "*lack merit*". On the contrary, the present controls work well. The first point to make here is that "*merit*" for

these purposes cannot mean the ultimate outcome because any funding system must recognise that it will back some cases that will not succeed. This is reflected in the current merits criteria. Merit means sufficient prospects of success to justify bringing the claim.

67) The figures used in this consultation show that:

a) Applications were made for permission in 1799 legally aided cases[28]. Permission was refused in 845 cases (about 46% of the total) but in 330 of the refused cases (16% of the total) the proceedings achieved a substantive benefit for the client. This leaves 954 (54%) cases. The paper implies that these cases were granted permission although some may have been settled. The public law project study referenced above showed that the majority of cases settled in this way achieved a success for the client. If this is applied here, then in the cases where they apply for permission, legally aided clients achieve success in 70% of their cases (54% not refused + 16% refused but with a benefit).

b) This compares favourably to the success rate used by the government in its last consultation on judicial review (CP25/2012) in which it said that that only around 1/6 of cases were granted permission. This includes legally aided cases and non-legally aided ones and suggests that legal aid solicitors are better at predicting a successful outcome than their non-legally aided counterparts.

68) These figures show that it is quite wrong to use the actual grant of permission as an indicator of whether the claim had merit. There are two main reasons for this:

a) Often a claim is properly brought but is defeated by evidence adduced after issue. This material ought to have been produced in response to the pre-action protocol but Defendants frequently fail properly to engage with the process until they are forced to by court proceedings. In these cases the claim may fail at the permission stage but the claimants and their solicitors had no way of anticipating this when they started

[28] This cohort is already pre-selected to contain the more challenging cases since a number of the more obvious errors will have been corrected at the pre-action stage.

proceedings. Similar problems may arise, particularly in fast-moving test-case litigation affecting substantial number of cases (which may be stayed pending a test case), where the law changes between the issue of proceedings and the consideration of permission.

b) Secondly, a significant number of claims settle before the permission stage. The PLP study referenced above found that this was some 34% the majority of which settled on terms favourable to the Claimant. Often Defendants will not respond or agree prior to the issue of proceedings but they then take advice after issue and agree to settle the claim.

69) The above two sub-paragraphs suggest that the real cause of excessive cost at the permission stage is inefficient action by public authorities and their advisers. But the paper does not address this and the proposal is likely to make matters worse. If claimant's solicitors are made to bear the risk at this stage then they will be under pressure to bring fewer cases and defendants will have a corresponding incentive to play a game of brinksmanship, only settling if the claim is actually issued. This will also give them an incentive to provide unhelpful responses to pre-action letters or no response at all since this will increase the risk to practitioners as they will be unable to predict what new material might emerge later on.

70) In any case the grant of permission is not a reliable indicator because in practice judges tend to apply a much higher standard than 'arguability' when deciding permission and this is something that the paper has failed to consider. For example: Sunkin: Accessing Judicial Review 2008 PL 647 states:

> "The greater use of the written process and the greater involvement of defendants at the permission stage, in particular, have made it more difficult for claimants to persuade judges that their claims are sufficiently arguable, and have enabled the judges to be more discriminating in their assessment of the quality of claims for permission. While there has been no formal change in the permission criteria, the consequence has been to heighten the de facto barrier facing claimants".

71) Responses to CP25/2012 drew attention to the failure to refer to publicly available material like this and it is unfortunate that once again the authors of a consultation paper proposing radical changes have failed to undertake basic research.

72) The short point is that even if a claim has been refused permission that does not mean that it was without merit or that the advisers were in a position to realise that permission would be refused. It would be a relatively simple matter for the LAA or the MOJ to carry out more research into this issue by considering the individual files or the comments of judge's refusing permission. But this has not been done and the result is that the paper does not begin to make out its case for change.

Impact and assessment of the proposed change

73) The impact assessment says under "key assumptions" that:

> "There is a risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may in future rest with them. However, these are likely to be causes that would not be considered by the court to be arguable in any event".

74) This repeats the misunderstanding of the role and practice relating to permission outlined above. It is a gross oversimplification to dismiss cases where permission is not granted as those that would not be considered by the court to be arguable in any event. It also underestimates the likely impact of a cut in income for this part of the case of at least 46% (this is the proportion refused permission but as already explained a substantial number will settle before this stage and this may be as high as 34% of cases issued. That could result in no payment in 80% of cases). The paper does not propose an enhancement for cases that succeed to make up for the ones that are lost. The likely result is that many specialist and expert providers will leave the market. This change is not about cutting off the weaker cases but about cutting out this part of the legal services market altogether. Paragraph 35 of the impact assessment states:

> "We think that the risk of providers refusing to take on judicial review cases more generally will be mitigated by providers carefully assessing the risk of permission being granted and therefore no longer taking forward weaker cases only".

75) We have some difficulty with this. The problem that needs to be mitigated is that the proposal will make it too risky for advisers to take on good cases because they fear they will not be paid. The behaviour predicted in this passage does nothing to mitigate this. It simply says that they will not take on weaker cases either. The point being made may be that loss of the good cases is a price worth paying if the weak cases will not be funded

either but that is a different kind of argument and one which fails, essentially for the reasons we outline in this section. But it is wrong to pretend that not funding the weaker cases in some way makes this proposal less damaging. We also have difficulty with the word "only" at the end of this paragraph. It implies that advisers deliberately seek out weak cases and only take those, or at least favour them. No evidence has been put forward to support the suggestion that this kind of strange behaviour is prevalent. If it was then the LAA would already have ample powers to deal with it under the terms of its contracts.

76) The consultation paper assumes that providers are in a position to assess the merits and the LAA is guided by them [3.72]. However:

a) This is inconsistent this with the decision to remove devolved powers. The paper asserts at para 3.72 that the LAA is strongly guided by the provider's assessment but it has now stopped them from exercising that independent judgment. In any case, if this was a good point then it would apply to all legal aid and not just judicial review.

b) The paper fails to explain what the "merits" means in this context. Some 330 cases out of those that are refused permission do actually achieve a benefit for the client and so by definition those cases had sufficient merit to be brought and the practitioners cannot be criticised for bringing them. But they must still bear the risk of doing so under these proposals. What this seems to mean then is that the solicitor must not simply assess the merits but also the prospects of a costs order against the defendant. But the problem here is that a successful case will not necessarily be awarded costs – particularly if it settles quickly. So the paper creates a disincentive against bringing some of the strongest cases.

77) In any case the paper fails to recognise the realities and to understand the difficulties that practitioners face in fully assessing the merits before issue or the range of cases that will conclude without permission.

a) Even in the best case there is only limited time to investigate a case within the 3 month window for bringing proceedings. As already noted Defendants often fail properly to engage with the pre-action protocol process.

b) Often cases are so urgent that there is no opportunity to investigate the merits in depth.

c) Often interim relief is granted which, in effect, concludes the proceedings.

d) The court often orders a "rolled up hearing" in which permission and the substantive hearing is dealt with together. Under the proposals then preparation for the full hearing will be at risk.

78) The analogy with immigration appeals is a bad one [3.70]. We do not support practitioners being at risk on these appeals (see below) but by the time a case reaches this stage there will have been a reasoned judicial decision and the advisers are likely to have been involved at an earlier stage. It will therefore be easier for them to assess the merits. Moreover, the costs at risk are in no way comparable. The costs of drafting an appeal in existing proceedings are in no way comparable to the very heavily front-loaded costs of the originating documents in a judicial review – claim form and supporting evidence – which it is proposed will be at risk.

79) The proposal is very likely to lead to an increase in litigants in person. This is because the policy far overshoots its aim and includes a number of cases that are meritorious in the sense that they are likely to produce a successful outcome for the client (or at least would do if they were properly represented). In those circumstances some clients may well chose to represent themselves with consequent waste of court resources.

Mitigation and Costs Orders

80) One of the solutions proposed is that practitioners who achieve success may apply for a costs order. This misunderstands the current law on costs orders and is unrealistic.

a) Costs can be awarded in some cases where a claim settles but this is far from a universal practice. Costs will usually only be awarded in favour of a Claimant where the court can clearly judge that they have succeeded in the claim or would have done (see *M v Croydon LBC* [2012] 1 W.L.R. 2607). It is simple to assess this where the claim is for a sum of money but less so in public law cases where there can be several

way of achieving the same result. So an authority might withdraw or vary a procedure that has only indirectly been the subject of challenge but which makes it academic, or they might reach a fresh decision. This is a successful outcome for the client but costs may well be refused if the order does not clearly match the relief sought in the claim. It is also extremely rare for costs to be awarded to a claimant who is refused permission even thought they might well have achieved success earlier in the proceedings (e.g. by obtaining an injunction) or where the claim has only failed because of evidence or arguments produced late in the day. These claims will have been meritorious but an *inter partes* costs order will still not be made.

b) The proposal is unrealistic because every Claimant will be forced to make an application for costs if the claim settles since they will not be paid any other way. This will waste the court's resources dealing with contested applications and will increase the costs burden on local authorities since they will have to bear their own costs of preparing submissions resisting costs and the Claimants costs where the application succeeds. The practice may well also put Claimants in a position of conflict with their advisers if, as may well happen, Defendants make offers of settlement on terms that there be no order for costs. In that case the practitioner may have to turn down an offer that provides great benefit to the client. We note here that the clients concerned may be highly vulnerable with multiple housing and care needs and so hardly in a position to turn down the offer. Practitioners might wish that they could deal with these claims for no payment – but they would quickly go out of business if they did.

A more focussed rule

81) The proposed rule catches many cases that have merit and so on the paper's own logic ought to be funded. We consider that the rule is unlawful for that reason and it is likely that it will, if introduced, be the subject of a successful judicial review challenge on the basis that it is a disproportionate and irrational blanket rule. Paragraph 34 of the impact assessment claims that there will be *"an increase in public confidence in the legal aid system resulting from not paying the provider for work carried out on an application for permission for judicial review unless permission is granted*". However we cannot see

how confidence will be increased by not paying providers for work that they do properly on meritorious cases. Nor can we see how confidence will be instilled if, for example, a client is told that they have a good case but the solicitor will not issue proceedings because the Defendant has not replied to the letter before claim and something adverse might lead to permission being refused. The Government has clarified in response to a Parliamentary Question from Lord Lester that there will be no discretion in the judge considering permission to reverse the costs rule, even in a case such as this scenario (i.e. of proceedings that could have been avoided by a proper response to a pre-action Protocol Letter). The "public" for these purposes must be taken to understand that it is wrong to equate not getting permission, or even the refusal of permission with a lack of merit when the claim was started.

82) For related reasons the rule is also *ultra vires* LASPO and cannot be brought into force without primary legislation. Section 11 sets out the framework for when a person qualifies for legal aid and the cases to which this measure will apply will, by definition, have passed that test. If they did not then legal aid would not have been available for them in the first place. The effect of having passed the s. 11 qualifying conditions is that s. 9 applies and that legal services "are to be available" to the client. Legal services for this purpose include representation (s. 8). This reflects the position that has long been the case in legally aided work that the retainer between client and solicitor is co-terminous with the grant of legal aid. But the proposal then undermines this by providing that the practitioner must undertake the work at risk. They obviously cannot be compelled to undertake work on this basis and so the effect is that the client is both legally aided and not legally aided and this is incompatible with the statutory grant of legal aid. The client is in the anomalous position of having a retainer that they cannot enforce since even though their instructions to proceed are reasonable and even though all parties (client, legal aid authority and solicitor think that the case meets the merits criteria) the solicitor might still fear that the risk of not getting paid is too great. Nothing in the Act permits this outcome. Indeed, it creates a fundamental and probably unlawful conflict of interest between the interest in properly representing the client and the lawyer's conflicting pecuniary interest in not taking on work for which he or she may not get paid.

83) The impact assessment at para 36 states that:

> "If this risk were to materialise, individuals may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all"

84) This is a stock paragraph deployed in response to any of the changes directed to taking away legal aid (compare para 24). It is particularly inapt in this case. Some clients might represent themselves but if they do it will be at great cost to the court service. They cannot realistically seek to "*resolve issues by themselves*" or "*pay for services which support self-resolution*" – whatever this means in this context. Judicial review is a remedy of last resort and so would only be available (and funding would only have been granted) if other avenues had been exhausted. They cannot pay for private representation since even if they could afford it s. 29 of LASPO would stand in the way. This leaves deciding not to tackle the issue at all. Many litigants may well have that "decision" forced on them but we repeat that a substantial number of the cases that do not get permission are meritorious cases that are properly brought.

85) The paper says that it is nonetheless necessary to have a blanket rule because it is too difficult to sort the meritorious sheep from the unmeritorious goats [para 3.74]. If this is the case then it is a reason for not introducing the rule at all given the clear injustice of excluding the good cases when there are already existing controls and when the proportion of cases refused permission for no benefit is small.

86) But we do not accept that it is only possible to use the blunt instrument of only paying when the court positively grants permission. For reasons we have given this is no indicator of the merits of the claim since many cases settle before then. Non-payment can only be justified in principle where permission is actually refused and where the claim ought never to have been brought. The best person to make a judgment about this is the judge refusing permission and the apparent object of this proposal could be met by a simple rule that legally aided costs could be disallowed by a judge refusing permission where they decide that the application for permission ought not to have been made. In fact such a rule is unnecessary because the LAA already has powers to disallow payments under its contracts but no wider rule can be justified.

Civil merits test – removing legal aid for borderline cases

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.

87) The proposal is to remove legal aid for "borderline" judicial reviews as set out at paras 3.81-3.85. We address this proposal primarily as it affects public law claims or claims against public bodies. The Consultation Paper itself recognises that "the cases to which the "borderline" exception applies are high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing" (para 3.87).

88) This seems to us another poorly considered measure with potentially very serious effects upon the Rule of Law as developed above. The Consultation Paper itself accepts that the cases which would be affected are priority cases concerning very important matters. The Impact Assessment (paras 49-50) suggests that the measure would reduce the number of funded cases by "approximately 100" and save the legal aid fund "approximately £1m." plus "possible small administrative savings in the long run", also claiming (para 51) the potential for increase in public confidence. This analysis comes nowhere near justifying the change. The borderline test forms part of a carefully constructed scheme set out in the Merits Criteria Regulations. Those Regulations were laid before Parliament as a whole and approved as a whole. It is unacceptable to seek to chip away at them in this piecemeal way so soon after they were introduced. The paper does not point to any difference between now and the circumstances that prevailed when the 2012 Regulations were passed.

89) The assumption is that borderline cases are insufficiently meritorious to warrant funding and that only cases with at least a 50% chance of success should qualify. This reasoning is defective for several reasons.

a) It misunderstands how the "borderline" category works. When a case is placed in this category then the advisers are not saying that the case has a less than 50% chance of success. That would mean that the prospects were "poor". Instead the assessment is that it is not possible to say whether the claim will succeed because of uncertainty

over the law, fact or expert evidence. The paper correctly sets this out but fails to follow through the reasoning. A case assessed as borderline may well be a good claim but there is some unresolveable uncertainty that prevents a conscientious lawyer from asserting that the prospects are better than 50%.

b) A related point is that the MOJ has failed to conduct any basic research into what actually happened in the 100 borderline cases that were funded. The assumption in the paper is that they are likely to fail but the paper does not present any data to support this. We have seen a response to a request for further information sent to Doughty St Chambers on 3rd June 2012 and which provides some of the information requested. It shows that in the last 3 years borderline cases achieved a substantive benefit for the clients in 50% of cases (47%, 49% and 56% respectively, an average of 50.66%). This is exactly what one would predict if practitioners were conscientiously and accurately using this category. It certainly does not support the suggestion in the paper that these cases have a less than 50% chance of success. Unfortunately, no further data has been provided and it is difficult to assess the real costs and benefits without knowing more about the cases in this small group, especially the 50% that succeeded and what the issues were in those cases.

90) The paper does not explain how the figure of £1m has been arrived at. It seems from the FOI response in the preceding paragraph that the MOJ may be intending to limit the estimate to the costs of the claims that fail. But if this is so then the IA is defective in at least two respects.

a) Firstly, the number of borderline cases has been falling over the last 3 years and in the last year only 74 ended without a benefit to the client. This is smaller than the 100 cases referred to in the IA and so the savings have been over-estimated, however they have been arrived at.

b) Secondly the IA under-estimates the impact of this measure in withdrawing funding for cases that would ultimately be successful. It gives the impression that there are only 100 borderline cases overall whereas there were 146 in the last year, half of which succeeded.

91) In any event the paper fails to consider the additional public costs incurred through not providing funding in these cases. For example, in a possession case the true costs of not funding a defence include the costs of supporting the family once it has been evicted.

92) We do not understand the claim that removal of this category will increase public confidence. Once again the authors of the paper and impact assessment offer no evidence at all that this is the case or that there is any lack of confidence in the existing system. The claim is also hard to understand on a common-sense basis. The Merits Criteria Regulations reflect the idea that legal aid funds should only be put at risk where it is proportionate to do so having regard to the likely outcome. For that reason the criteria take into account the importance of what is at issue as well as the prospects of success. The borderline category fits well and can easily be understood against this framework. Where something is truly of overwhelming importance or a case raises matters of wide public importance then the natural and rational response of an ordinary person is to support funding for it even though there is no clear assurance of success. Such a person would feel that the system was defective if it withheld the opportunity to vindicate important rights simply because the prospects were uncertain in some way, particularly if the uncertainty arose because the law was unclear or essential facts had been withheld or denied by a public body – those being matters in the control of the state. We consider that the better view is that the borderline category fosters public confidence and does not undermine it.

93) The correct balance is already struck in that borderline cases are only funded in the most serious and important cases. The paper fails to give any proper weight to this and it fails altogether to take account of the damage done to individuals (who may for example lose their home or suffer other vital loss) or to the public interest if important rights are not upheld and wrongs identified and corrected. Here as elsewhere the paper fails completely to recognise the cost, moral and actual, that is incurred when justice is not done.

94) We note that under "key assumptions" the impact assessment says: "legally aided aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue)". This bears no relationship to reality. These are, by definition the most difficult

cases and ones that clearly require representation to give the assisted person a reasonable chance of success requiring, as they do, skilled analysis of uncertain facts, expert evidence and law. In fact it is unclear what assumptions have really been used because the narrative in the impact assessment also resorts to the stock phrase at para 52: "individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all". If they make the last "decision" then they will not achieve the same outcome and the paper cannot have it both ways. Besides, the claim that this is even an option in many borderline type cases is fatuous. How is a homeless family or one facing possession proceedings expected not to "tackle the issue at all"?

Chapter Three: Eligibility, Scope and Merits

Criminal Legal Aid

The basis for ALBA's and BEG's intervention

95) Whilst sensitive to the fact that it is those working within the criminal justice system – barristers and solicitors alike – that are best placed to comment on the likely combined impact of yet further substantial fee cuts and price competitive tendering ("PCT"), ALBA and BEG feel it necessary to comment on these proposals for three reasons:

a) First, they have considerable experience in the legal issues connected with and practical results flowing from tendering, whether through involvement in EU procurements, PPP/PFI projects or like exercises. The tenders envisaged appear to be public service contracts falling under Annex IIB point 19 of Directive 2004/18/EC ("the Directive"). They must therefore comply with general principles of transparency, non-discrimination on grounds of nationality, equal treatment.

b) Secondly, the combined effect of sharp cuts and PCT seem to BEG and ALBA to produce profound rule of law issues upon which all public and constitutional lawyers should be as concerned as criminal lawyers.

c) Third, issues of administrative and EU law figure ever more prominently as issues in criminal prosecutions and BEG and ALBA members are thus exposed to criminal law issues as mixed practitioners or by reason of issues generated in a judicial review, case stated or appellate context.

The Cuts proposed in Chapter 4

96) ALBA and BEG have seen in draft the CBA's response as to the likely impact upon them of the cuts proposed and are profoundly troubled by its contents.

97) As to the fee cuts proposed in Chapter 4 of the Consultation ALBA and BEG find entirely credible the repeated protests of experienced criminal law practitioners that the effect of these cuts (30% Crown Court Advocacy, 30% in VHCCs, at least 17.5% in work put out to PCT) will be catastrophic in terms of: retention of current and recruitment of future defence advocates and litigators of the quality and experience of those working today; the production of high quality prosecution lawyers (given the interwoven nature of both aspects of criminal practice); addressing the problems in having an inclusive and socially representative specialist advocacy profession; and recruiting future Judges from the widest possible pool of well qualified and talented candidates.

98) Should the cuts proposed be so severe as to:

a) destroy the economic viability of the current publicly funded criminal Bar (or large parts of it), which is the current mainstay of both criminal prosecution and publicly funded defence work, since it provides the lion's share of the cadre of experienced, full time, high quality experienced professional advocates;

b) impede the recruiting of a future cohort of talented, well qualified but yet more diverse and representative specialist advocates required to provide the future generations criminal advocates and litigators operating to similar standards,

that will cut to the very foundations of the social compact upon which this critical limb of the welfare state, so vital for the rule of law, justice and social cohesion, depends. Simply put, a criminal justice system must produce sufficient high quality criminal advocates and litigators, and make them available to all irrespective of means, if it is to work both efficiently and in the interests of justice.

99) Like the CBA, Bar Council and Law Society, ALBA and BEG fear these reforms will lead inexorably to a rigid two tier criminal justice system with markedly different quality standards available to those who can pay (in short, an ever closer variant on US-style Public Defender system); and severe capacity problems in the supply of both criminal advocates and criminal litigators in the short and medium term after the early flight of experienced professionals from the professions, whether to other part of the legal profession (whether domestic or abroad), early retirement and career change, with all the problems of delay, injustice and inefficiency that will result from an understaffed and less qualified pool of replacements. Poorer quality advocates lead to poorer outcomes, that is wrongful acquittals and convictions, and the less efficient conduct of proceedings. Nowhere does the Consultation document or the IAs accompanying it attempt to capture the costs transferred to other parts of the CJS, like the prosecution, court service and the judiciary, in costs wasted through delays, adjournments, overran trials, part heard matters, increased appeals and so forth.

100) Similar changes to other areas of publicly funded public service delivery by professionals are unthinkable. Whilst it is a convenient distraction to concentrate on gross fee earnings (a bit like confusing what GP practices are paid with what taxable income and benefits partner and salary GP practitioners generate), and to concentrate upon the yearly earnings of the highest paid lawyers (a bit like assuming all Judges, from DDJs upwards earn the same as Supreme Court Justices or the Lord Chief Justice), the

reality is that mainstream criminal legal aid provides for the vast majority of typical practitioners a modest return broadly on a par with, and often very much less than, that paid to NHS hospital doctors (but certainly not GPs), senior teachers or lawyers in the civil service. Any fair analysis must also take account of the fact that, because of their self-employment (or employment by firms) such practitioners and the professions they enter pay for their superannuation, benefits and training (it is the Bar and solicitors profession that fund pupillage awards and training contracts), even in those parts of the profession fully geared up to training lawyers for public defence and prosecution work.

101) Against this backdrop ALBA and BEG urge the Government to reconsider the cuts proposed and to identify savings elsewhere or less draconian in effect (such as increased contributions, increased court fees elsewhere, more proactive use of costs orders in trials to deter inefficient conduct of proceedings by prosecution or defence, a far more convenient means of identifying poor quality organization or presentation).

Analysis of proposed PCT changes

102) Turning then to the PCT model proposed proposed for the distribution of criminal defence work in Chapter 4, looked at in the round it has three key attributes:

a. Price is the sole criterion for the award of work. Quite exceptionally for a procurement of this kind (as opposed to, say, buying generic goods) bid quality forms no part of final bid assessment. Such quality control as envisaged is of a "pass/fail" nature. Moreover the Consultation Paper is silent on what quality threshold (if any) the "delivery plan" in any tender may have to pass and indeed what technical specification/service quality requirements (if any) will be included in the contracts to be tendered.

b. The 400 contracts are awarded in each of the 40 or so CJS Areas, with each applicant awarded no more than one contract/share in each Area, with clients being automatically allocated to contracting providers by random methods

unconnected with case type, provider locality or speciality, each contractor getting "an equal share of access to cases" in the relevant procurement area: see §4.42-4.78.

c. There is no client choice of provider or for providers to match their skill sets or business attributes with the type of client they are allocated: see §§4.79-4.86. This is because providers are to be chosen because of their ability to deliver large scale service delivery and need not show experience of doing so in the legal industry. The only control is that they must list their intended sub-contractors/agents in their bid. The absence of client choice is thus vital to the "tradeability" or "transferability" of the client that the market envisaged requires.

103) Such a model has a central avowed aim and a central intended consequence.

104) The avowed aim is the reduction of the number of service providers from 1,600 odd contractors at present to 400 odd contractors (which could be held by as little as 40 odd national operators, themselves in fact not necessarily regulated parties but in effect service companies). Those new providers will be structured so as to provide large scale homogenous and generalist services, because the aim of the proposal is to prompt consolidation and economies of scale. This is recognition that without such efficiencies being generated a further reduction in fee levels would be incapable of being absorbed by the market. Such a drive against the community or local high street solicitors to pursue economies of scale (e.g. supposedly in pooling offices, IT infrastructure, staff) seem to take no account of where the clients (who are typically poor) live, to where they must travel to receive advice or *vice versa* (an invisible cost) and the nature of service expected to be provided (e.g. a 24 hour on call to various police stations). Most critically, it seems to be entirely without evidence that there are such efficiencies (sufficient even to achieve the 17.5 minimum "haircut"), that they will or can be achieved by the providers, that they are so achievable in the 3 year contract terms envisaged, that they can be achieved

without an unacceptable loss of quality, and that they will not come without substantial countervailing costs falling on other parts of the CJS.

105) The unstated counterpart to such reform is the practical destruction of any form of niche or specialist defence practices unless such can survive by sub-contracting or private client work. Specialisms in the criminal law exist for good reasons. They are a function of: client choice; economies of scale achieved by combining like cases; and the pursuit of sectoral excellence to attract such clients in such like cases.

a) Such specialists abound in the criminal justice system precisely because criminal cases are not homogenous. No one familiar with the criminal justice system would recommend the same legal aid solicitors firm or solicitor for every type of case arising, e.g. road traffic or shaken baby. No criminal solicitor would use the same barrister or same barrister's chambers for every client to be defended. That is a reflection of the fact a lawyer who concentrates on, say, fraud or theft offences has a very different skill set and knowledge base from a specialist in youth offences or child sexual abuse.

b) Other areas are intensely technical and call for the deep understanding of complex areas of law and practice: fisheries offences for example; or health and safety prosecutions.

c) Some such specialist firms will tend to have a national scope precisely because their specialism cannot be supported by the levels of cases generated in regional or local offices.

d) Equally importantly, the effective lawyer requires the trust of his or her client with whom an effective working relationship must be built in order to deliver effective representation. It is for reasons such as this that some lawyers specialize in working with certain communities to which the generalist cannot or does not effectively reach

out: say particular ethnic communities; those whose criminality is a reflection of wider social problems such as drug use.

106) Thus, the PCT Model will result in many of these existing practices being destroyed or fundamentally altered in the shape, goal, ethics and values. At best they will become dependent upon the agency/sub-contract market which is unlikely to function at all or function efficiently for firms with an existing national catchment for their specialist work when contracts are broken down into small regional shares. This is likely invariably to be the case where such firms presently trade on the high quality nature of their services, specialisms or other value adding features. Quite how this would work is unclear and the absence of any transitional arrangements or pilots merely aggravates the problem of planning for existing as a sub-contractor to a provider in this new world. Equally, without detailed granular information for providers as to what sort of specialist services it is likely to need to buy in based upon past work arising in a CJS Area, it will be impossible rationally to price or provide for such specialist services. So they will not make such provision, and generalists will be used where they are both less efficient and provide a lower quality service.

107) Secondly, the PCT model aims to eliminate the current competition that exists within the existing fee structure that is based upon the quality of service. The quality of the services currently offered will be reduced from its current quality levels to a base of merely "acceptable service". This is all but admitted by para 23 of the Impact Assessment: Introducing Competition in the Criminal Legal Aid Market ("the PCT IA") which states, in terms deserving repetition:

> "Client choice may in certain circumstances (where quality is easy to measure and clients have good information about the relative effectiveness of different providers) give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price. The removal of choice may reduce the extent to which firms offer services above acceptable levels. We will ensure that quality does not fall below acceptable levels by carefully monitor quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level. We will also work with regulators to ensure they are aware of such a risk and through the enforcement of the relevant Codes of Conduct, identify and address any shortfall in standards."

108) Reduced to plain speaking, what this says is: client choice is an important driver of quality-based competition (whether in the form of specialization or otherwise); removal of such client choice will reduce the incentive for quality based competition and standards will decline in consequence to the merely acceptable (indeed, we would add that it is hard to see, other than personal pride, what other driver for quality above the "acceptable", presumably some form of regulatory floor, actually remains, particularly when fees are to be reduced so substantially as a premise of the bid); and regulators will have to work in unspecified fashion to ensure that standards do not fall below the "acceptable" whatever that may be.

109) Critically, quite how such quality safeguards will be delivered both at the bid qualification and post bid enforcement stage is not made clear.

110) The BSB, SRA and Ilex appear poised, under the aegis of the LSB, to induce QASA for Advocates, work that currently falls outside the PCT scheme. (Whether the QASA is lawful in its present design or will be accepted by the professions remains to be seen). But the BSB does not endorse the use of QASA for anything other than a higher level check upon advocacy standards. It is certainly not a quality setting benchmark of the kind required for such a tendering scheme. (That said, the duplication of QASA type schemes with LAA/MoJ schemes or further regulator schemes is likely to be legally vulnerable). But QASA is not yet operative and is intended only for advocacy services largely excluded from the scope of the PVT. As such, even if were fit as a quality standard (which it is not), there is no such quality standard or guarantee for the work to be covered by the provider within the scope of the PCT scheme; nor is there any attempt to cost how it will be provided.

111) The Consultation Paper simply asserts that "*we will ensure that quality does not fall below acceptable levels by carefully monitoring quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level*." No details of the "*monitoring*" or "*quality assurance processes*", if there are any specific processes

envisaged, are provided nor any details of their organization or cost given. There is no evidence whatsoever to show that they themselves can be relied on to ensure that quality does not fall to an "unacceptable level", whatever that may be.

112) The result is a scheme designed to encourage a price race to an unknown and undefined bottom, that is a price competition for a service where the quality standards that should set the bottom of "acceptable" quality of that service are not even defined. The clear incentive for many providers, faced with clients having no choice in their provision and no real opportunity to vote with their feet, is to provide the lowest quality of service that they can get away with. Providers will no doubt rush to employ young, inexperienced, less qualified or otherwise unemployed lawyers to drive costs down. The quality standards will fall in consequence.

113) Put bluntly nothing is in place as to the standards that must be maintained, nor it is likely to be so imminently; and no costed enforcement mechanism is in place to ensure that such standards will be honoured. Quality assurance, in those unpromising circumstances, can be based only on hope rather than experience.

114) Putting these factors together, any scheme that requires all entities winning contracts to operate criminal legal defence franchises to be generalist in structure and operation, and to compete for work by area on price alone, with an automatically allocated client base, is therefore highly suspect in legal and policy terms for four interlinked reasons:

a) It treats as an impersonal generic service something that is or is often intensely specialized, heterogeneous and personal.

b) It eliminates client choice. Indeed a client may find they have a lawyer they don't want who then transfers the client (under a sub-contract) to another lawyer they do not want.

c) It is avowedly intended to reduce the quality of service from its high levels to the merely "acceptable" in order to save money.

d) It strongly tends to eliminate specialism (and tendency accelerated or amplified by the brake-neck speed of change proposed) and with it both the substantial efficiency that flows from specialization and the higher quality and more effective representation that specialization can deliver.

115) The net result may be headline cost savings in the LAA budget but BEG and ALBA fear that any such savings will come at the cost of profound wider systemic inefficiency, wider and larger aggregate costs to MoJ and the Justice System, and at the price of greater injustice:

a) Lower quality representation produces lower quality outcomes, and with lower efficiency. Headline savings will be illusory.

b) Forcing someone to work with a representative they have no role in choosing is, quite apart from its fundamental inconsistency with just about every other area of public service provision where choice is promoted so far as possible (e.g. school allocation, doctors used), likely in a number of cases to lead to ineffective representation. A substantial number of clients will not trust or be able effectively to work with their allocated lawyer. They will resent the appointment of someone they would not themselves have chosen. It is not hard to see how this will produce inefficiency and injustice: the drug addict given an inappropriate sentence because of their failure to explain their true problems to a lawyer with whom they do not effectively communicate; the Bangladeshi client forced to use a firm with no native Bengali speakers.

c) In particular, eliminating client choice and thereby forcing a case suited for and justifying a specialist to be litigated by a generalist will tend to produce either

injustice (points that should have been taken, will be missed) or inefficiency (cases badly prepared for specialist advocates, so long as there is choice on that market; providers having to familiarize themselves with areas of the law with which they are not familiar and not using to the maximum skills they have), and quite probably both.

d) Very substantial gaps are likely to emerge between the quality of representation available to those able to afford private representation (at whatever long term cost to them and their family) and those who are not. Such gaps will be productive of deep social injustice of the kind widely associated with the US Public Defender system, in all its variants, as described in the CBA Response.

116) These costs are not captured by the PCT IA nor is there any recognition of their existence. More basically, there is no attempt to generate an evidence base to assess these matters properly, for instance by running a pilot of appropriate design, clarity and scale.

ALBA and BEG's position on Price Competitive Tendering

117) Given the above, ALBA and BEG are fundamentally opposed to the price competitive tendering model ("PCT") upon which the proposed "introduction" of competition in the Criminal Legal Aid Market is premised and the manner of its introduction.

118) To describe the changes as the "introduction" of competition to this market is regrettably misleading. Rather the premise of the scheme is to replace a system of mixed price and quality-based competition that achieves high standards with a system in which price competition is the only consideration and in which standards are accepted to fall as a necessary consequence to an unspecified and unenforceable base. No attempt is made to identify the adverse consequences of such changes and the reduction of quality in representation.

119) Whilst ALBA and BEG accept that *properly devised* PCT models *may* have a place in delivering greater efficiencies in the use of the legal aid budget, the present model is not properly devised as:

a) It disenfranchises those receiving public assistance by removing client choice.

b) It thereby eliminates the main incentives to provide high quality services.

c) It wrongly treats the diverse services provided as largely generic, instead of recognizing different cases make different demands on time and proper representation. The form of procurement proposed might be appropriate to the purchase of goods of a certain description or services of a coherent and consistent nature (e.g. weekly bin collections) but they do not suit the purchase of diffuse, highly variable services.

d) It provides capped fee levels set so low, and probably subject to further intermediary fees and costs that the brokering/sub-contracting practices that the reform will almost certainly create by entities like Serco, G4S and Eddie Stobart (which will in effect be services brokers), that will necessarily maximize incentives on those actually providing legal representation to cut corners or skimp on the service provided to make ends meet.

e) There is no recognition of the inevitable consequences of a procurement where those being asked to price and then deliver the services: (i) they have no means to control the major risks presented by flat or graduated fees (e.g. trial adjournment, late disclosure, witness non-attendance); (ii) they have no means properly to price the market, as transparent information about the nature and spread of services to be provided is not readily available; (iii) tenderers are being asked to prepare to tender in October 2013 in a vacuum, without detailed tender specifications identifying the nature and quality of service –required being provided; (iv) there are no concrete

mechanisms for policing and enforcing any such standards; and (v) there will be strong financial incentives to encourage guilty pleas (because of flat fees) or skimp, as set out above.

120) The inevitable consequences of such a scheme will be highly variable, unrealistic and uncompetitive bids in both directions. Bids that price services too low are if anything more of a threat to the efficiency, quality and continuity of legal services than bids that price too high by an equivalent amount, given the costs of contract failure (as rail franchises and the PPP for the Tube demonstrate. This will lead to yet further pressure to skimp on work done to make contracts profitable. The recent unfortunate experience in the tender by MOJ to ALS/Capita of interpreters' services, so clearly exposed by the recent Select Committee Report, is a clear indicator of the dangers and likely consequences of such an approach to tendering, albeit on a very much larger scale in an area of even greater complexity.

121) Such a model is not only strikingly bad policy, it is also likely to be unlawful on a number of grounds, not least for the following reasons:

a) The PCT scheme proposed eliminates client choice contrary to the common law right to effective access to the Courts and/or contrary to Article 6(3) (c) ECHR (and the EU Charter Rights provided by Articles 47). As the key driver towards higher quality representation, client choice is a key part of having effective access to justice. The notion, propounded by the Lord Chancellor, that consumers of legal aid do not and are not able to exercise choice, is both wrong and patronizing. Simply because people are poor enough to qualify for legal aid does not make them stupid or uncaring over a decision that may well have a profound impact on their life; they are just as much capable of exercising client choice over a lawyer as they are over a primary or secondary school; or an NHS doctor.

b) If changes are not made to primary legislation, such secondary legislation may well be outside the powers conferred by section 27(6) of LASPO 2012 In particular the powers conferred by this section to remove the right of client choice conferred by section 27(4) must be read down by s.3 HRA 1998 so as to comply with Article 6(3)(c) HRA or must be read down in accordance with the common law principle of legality. On any view section 27(6) cannot be used to abolish, in all but name, the right clearly conferred by section 27(6) LASPO 2012. Parliament cannot have intended that a power to restrict a right by regulations can be used to remove such right entirely (or to do so in substance if not form).

c) The Scheme accentuates to an intolerable degree the already substantial conflicts of interest for the lawyers affected – a conflict between pecuniary interest and discharging ones duties to provide the client with the best and most effective representation - as lawyers may be compelled to operate individual cases at a considerable loss. Such is a particular feature of the capped fee proposals. Given the importance of legal representatives acting free from pecuniary interest or conflict – a principle described as "constitutional" by Lord Hobhouse in *Medcalf v Mardell* at [51]-[52] – we are concerned that the scheme as a whole will lead to conflicts of interest so stark as to breach this principle. Simply put an advocate who is not being paid for a trial that continues on and on through no fault of his own will be tempted to take a short cut or change the manner of his representation so as to bring the trial to an earlier close.

d) At present, because the details of the proposed procurement are so vague and many critical details are missing it is impossible to subject it to much considered legal analysis. However, the tender design and its operation may well be economically incoherent and, through poor design, produce the type of chaotic and poor value results delivered by the ALS/Capita contract. The final scheme and the awards made under it may well give rise to tendering challenges on grounds of transparency (particularly if providers change sub-contractors), lack of equal treatment or

straightforwardly defective design (making the tender process incapable of realizing the goals for which it was intended).

e) Because the disproportionate and inflexible system eliminating client choice (or restricting it to an unjustified degree) will probably result in the unnecessary and unjustified destruction of high quality specialist providers, it is likely to be contrary to A1P1 ECHR and/or Articles 16 and 17 CFREU.

122) Moreover, the proposed introduction of changes of such magnitude by Autumn 2013 (when the tendering process will start) with a view to roll out in 2014 without any form of piloting or any sensible form of transitional period in which affected existing businesses may be restructured or wound down in an orderly fashion (e.g. to run of leases; to adjust programmes of staff hiring and training etc) and after a consultation lasting just 8 weeks is itself highly problematic and is itself liable to lead to legal challenge. ALBA and BEG would point out that:

a) The information provided, for example about the tender process and requirements, is insufficient to provide any meaningful response.

b) Even if sufficient information had been provided, the eight week period of consultation is inadequate for informed and evidenced response to many of the questions raised. Its abruptness may well prompt fairness challenges from stakeholders unable to address issues of such complexity in full in the limited time provided. Certainly the time provided has not permitted a debate in which fair opportunity has been provided to all parties affected (which go well beyond the legal professions) to commission, marshall and deploy statistical and economic evidence.

c) The absence of piloting means that the Ministry of Justice has no basis upon which to assess whether or not reforms of this magnitude and ambition will in fact work. If, as ALBA and BEG suspect, they do not, and chaos ensues, the state may well face

compensation claims from solicitors practices destroyed unnecessarily by incoherent, untested and ultimately unjustified changes to the system of criminal legal aid.

d) Quite apart from potential inherent unworkability, the speed of the proposed transition is itself likely to produce seriously unfair consequences at least for some providers, not least because of the pressure to bid in the dark without full understanding of or transparency of the workings of the system. Such is a strange approach when one of the justifications for the move to stable three year contracts is to promote greater certainty to provide room for the sort of planning and consolidation likely to produce efficiencies. Nothing is likely to be more inimical to such efficiencies that the rush to fundamental change underpinning the planned move to PCT.

e) The absence of any consultation upon the quality standards to be set at part of the PCT design and upon the means of their enforcement raises problems as to whether there has been proper consultation upon the PCT method, and whether if implemented in the present form the PCT will have a lawful design.

123) All of these objections, taken with the substantive objections detailed above, may combine to support an argument that the consultation and the proposals are cumulatively so flawed that any adoption of the proposed PCT Model would be so unfair or flawed as to amount to an abuse of power.

Question 9

Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons

124) BEG and ALBA do not have the expert evidence available (nor the time and resources needed to obtain it) in order to answer this question in any adequate fashion. However, they would be surprised if the promise of a three year franchise would be sufficient to

provide the sort of stability necessary to effect the wholesale restructuring of the present legal market, so as to achieve the supposedly realizable economics of scale. Moreover, BEG and ALBA cannot believe that any putative private market investor would commit the capital required for such a project against a backdrop of a contract that is in fact terminable without fault upon the provision by the MoJ of six months notice, at least without: (a) clarity as to the level of compensation payable in such circumstances; and (b) confirmation that such compensation would result in the recovery of unrecouped capital.

Question 10-13

Geographical areas for the procurement etc, contract value etc

125) See general commentary above.

Questions 14 and 15

Q14. Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

Q15. Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

126) It is very difficult to comment on these proposals absent any detailed analysis of their probable operation. The proposal proceeds on the unsafe assumption that larger CJS providers will simply emerge from a real permanent consolidation or merger of existing practices/providers delivery lasting scale efficiencies. Little if any attention seems to have been given to the application of competition law and competition economics to the arrangements under consideration or the realities and costs of provision under the new arrangements. Whilst there may be only 400 provider contracts that does not mean that there will, nationally be 400 providers or 400 contracts of relevance. In fact, the number of providers could be heavily concentrated (e.g. into four or five national providers

having operations in most CJS Areas, together with a number of smaller providers), whilst the number of sub-contractors could widens out beyond the existing 1,600 existing providers to include those unable to win such tenders or unwilling to bid for them (e.g. because themselves unable to meet tendering standards). No consideration has been given to the implication of such potential concentration upon the potential concentration of other legal services currently delivered by existing high street practices (e.g. wills, family law, conveyancing etc), and the loss of consumer choice and local service delivery that may result.

127) Just how separate each provider, or more particularly each set of sub-contractors need be from each other is unclear. For instance, a sub-contractor might be able to work for a number of different providers. Absent consolidation, (and there is nothing to suggest the promise of a three year contract will necessarily prompt the type of consolidation the Department seeks) this may well mean that 1,600 contracts in standard form are replaced with many times that number of agreements – as each provider enters into various agreements with its sub-contractors/joint venture partners needed to deliver services in each CJS region. No attempt has been made to identify the costs implications of this increasingly complicated network of contracts, each presumably with detailed pricing terms and quality guarantees.

128) One peculiarity, however, is the proposed protection of the PDS, which is to be automatically allocated a provider contract in each CJS region in which it operates. When created the PDS was meant to show how centralised public defence provided directly by the state could offer value for money/greater efficiency over the service provided by private contractors (solicitors/bar). Quite why the PDS requires protection in the way proposed if indeed it operates in this way is unclear: it should be able to compete for and win such contracts on merit. BEG and ALBA are concerned that the reason the PDS is not required to compete is because it could not compete upon the terms upon which private providers are required to compete, with the result that the PDS would cease to exist. Not only would this demonstrate that services were only being provided at standards lower than those attained by the PDS, but it may also have substantial cost implications for the redundancy of PDS staff that would result.

Question 17

Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

129) BEG and ALBA do not agree with such approach, which is unlawful for the reasons explained above. It is important to note why the removal of client choice is a fundamental aspect of the scheme. Were client choice retained clients would migrate from low quality providers to higher quality providers. Without the guarantee of allocation of a fixed number of clients those offering lower prices to MoJ that were premised upon offering lower quality services could not be confident that they would retain any work. The removal of client choice is thus required in order to drive down standards to the merely unspecified and undefined level of the "acceptable" and thereby to drive down cost.

130) The contract for legal services is the quintessence of a contract for personal services, in which the client needs to have a high degree of trust in the competence and good faith of the lawyer. The notion that a client can, quite against their will, be compelled to use the services of a particular low quality service provider, and can in effect be traded by such provider pursuant to a network of sub-contracts is repugnant to that conception. It is, as explained above, almost certainly contrary to Article 6(3)(c) ECHR and the common law right of access to the Courts, as well as Article 47 CFREU. Whilst *some* restrictions upon these rights may be permitted in a scheme of publicly funded criminal legal aid, such restrictions cannot lawfully go further than an initial random allocation method to a particular provider, combined thereafter with the unfettered ability of the assisted party to choose to move to any provider or any provider's sub-contractor who has agreed to take clients referred by the provider, should such counterparty be willing to accept such instructions.

131) In any event, as explained above, such a change cannot be made without primary legislation, given the limitations on the use of regulations made under section 27(6) of LASPO to restrict the right to choose a provider as conferred by section 27(4) LASPO.

Question 18 – case allocation

132) All of these allocation methods are inherently objectionable unless combined with real client choice for the reasons set out above.

Question 20

Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

133) No, for the reasons given above.

134) Furthermore, the criteria which it is proposed to use to identify the "exceptional" circumstances in which a client might move are unduly restrictive and take no account of the fact that, in the current market, the client is responsible for the *initial* choice of provider.

135) BEG and ALBA would also point out that in a system of imposed providers of deliberately lower quality, client-lawyer relationship breakdowns are likely to be very much more common. For instance, where a client reasonably believes that work of a certain kind is required in the interests of their effective defence (e.g. review of a large amount of unused material), and the solicitor resists (motivated by cost considerations) it is entirely predictable that the relationship may deteriorate rapidly beyond repair.

Question 25

Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

136) No for the reasons given above.

Question 26

Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

137) No. In principle, rewriting contracts in this way is liable to breach both the contracts and substantive legitimate expectations unless the contract contains a clear power of prospective unilateral variation. Even then, unless accompanied by safeguards (e.g. the entitlement on the counterparty's part to terminate should rates be so varied), the exercise of any such power to effect substantial unilateral variation is liable to be challenged on public law grounds.

138) Since the exercise of such powers in relation to future work under current contracts is likely in many cases to render the contracts loss making or simply unattractive to perform, the MoJ must take account of the real prospect that the exercise of such unilateral variation powers will be accompanied by a widespread responsive exercise of such termination rights.

Chapter Six: Reforming Fees in Civil Legal Aid

Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme:

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

139) For the reasons identified above, we do not respond to this proposal.

Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings

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.

140) We do not agree with this proposal and we adopt the submissions made on this issue by the Bar Council.

141) In relation to judicial review we consider that the proposals are particularly inapt. All of this work is highly specialised and is done in the High Court. This is type of work that is almost never done by solicitor advocates and it simply does not compare like with like to suggest that this is comparable to any other advocacy in any forum so that a single advocacy rate can be applied to it.

142) We are particularly concerned about the effect of this proposal on members of the junior bar, who may face fee reductions of up to 50% and for whom legally aided public law work may prove unviable.

Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

143) We do not agree. The rates for this work have not risen for over a decade whilst the relevant law has become far more complex and demanding of practitioners, time deadlines have reduced, and other expenses borne by representatives such as travel costs have greatly increased. It is correct that the uplift was originally intended to be

compensation for work being at risk and that now only the permission stage is at risk. However, the uplift has in effect provided some minimal compensation for the erosion of rates by inflation for more than 10 years and for the reduction of the fixed payments for conduct of appeals below a viable level. Underlying rates in immigration and asylum cases are essentially unchanged, save for a 10% cut in 2012, for over 10 years. The proposed rates can be compared with the Guideline Hourly Rates used by the High Court in assessing costs. They fall far short.

144) Currently the rates for travel time are, at least nominally, between £26.51 and £36.82, preparation and attendance at between £47.30 and £74.36 (The higher rate in each case being the current uplifted rate paid in only a select few Upper Tribunal cases), against which overheads have to be accounted for. In these cases no payment at all is made to solicitors or Counsel until the case is concluded, which may be a matter of years. Ongoing reduction of rates is a severe deterrent to well qualified and skilled people doing this work, rather than private work for those able to afford their own representation. For advocates of any experience or reputation even at the most junior level, the rates for this work are in general considerably less than they would earn doing comparable private work where available.

145) The suggestion that the rate incentivises appealing in weak cases is backed by no evidence. Permission can by law be granted only where an error of law potentially affecting the outcome is found.

146) Aside the manifest illogicality, it is a slur on those practising in this field accordance with their professional obligations to suggest that they would take weak cases for the uplifted fees. And it is a sorry reflection on the Legal Aid Agency if it has contracted with persons who are not practising in accordance with their professional obligations. Competent solicitors have insufficient legal aid matter starts to run a viable business, the Legal Aid Agency having given a standard number of matter starts to all firms rather than focussing on firms doing quality work. If there are persons who are not competent representatives then this should be addressed by separate but appropriate means.

Chapter Seven: 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.

147) We do not agree with this proposal. Expert evidence is used relatively infrequently in public law cases and so the main impact of this proposal will be felt in other areas. But where such evidence is used it will clearly be liable to have an important bearing on the outcome.

148) The rates proposed are likely to lead to an under-supply of competent experts prepared to take on work at this level and will lead to substantial inequality of arms.

149) The comparison with the CPS is not apt [para 7.4, 7.6]. Although both schemes allow for higher rates to be paid in exceptional circumstances there is no analysis as to how the exceptional criteria work. The CPS is in a completely different position because it is the litigant and it can decide when a case demands payment at a higher rate. In contrast a legally aided client will always have to justify a higher payment to the LAA. There is also no analysis of how hourly rates are allocated. It is one thing to pay a relatively low hourly rate and then permit the expert to spend the time that they consider the case needs. It is quite another to set an hourly rate and then dictate how much time an expert should be permitted to spend on the case. Moreover, this does not compare like with like because the market conditions are wholly different. Experts may well be prepared to work at CPS rates where there is a regular flow of work and the chance of higher rates being paid in exceptional cases.

150) There is no evidence that experts will be prepared to absorb the reductions proposed or that they will continue to do the work. Most of them will have other areas of practice.

151) The explanation for the proposal is at para 7.11:

> "This would ensure that legal aid rates better represent value for money, capitalising on the efficiencies of reforms in the justice system, and ensuring that they were more closely aligned with those paid elsewhere for comparable services".

152) We can understand the objective of paying less although we disagree with it and consider that it is a short-sighted proposal that will lead to miscarriages of justice and will cost more in the long run. We can also understand the point about alignment although this too is wrong for the reasons we have given. But the middle part of the sentence makes no sense at all. Reducing the amounts payable to experts does not "capitalise" on efficiencies (if there are any) made elsewhere in the system. It simply means that they are paid less. The paper might be trying to make the point that if there are bulk providers in the system then experts will be prepared to work, in quantity, at lower rates. But this simply shows how far this paper proposes to sacrifice quality or even suitability. It presumably envisages that criminal contract holders will enter into bulk purchase arrangements with experts so that the same experts will be used on all of their cases, no matter how unsuitable they might be in the individual case.

153) In any case this logic cannot apply to civil cases and certainly not to judicial review where the limited number of expert instructions means that there is no room for economies of scale.

Chapter Eight: 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.

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

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

154) We deal with these questions together.

155) As a starting point we have to note that the focus of this impact assessment is fundamentally flawed. Paragraph 4.5 refers to the "advancement of opportunity and the

need to foster good relations" but the assessment overall is primarily only concerned with *unlawful* discrimination. This is not the object of s. 149 of the Equality Act which requires a focus on each of the aspects of the equality duty. The defects in the approach taken can be illustrated by two points:

a) Firstly the EIA repeatedly focuses on statistical comparison between different groups sharing protected characteristics as the only way of measuring whether or not a particular policy has a potentially discriminatory impact which needs to be justified. We consider some of the problems with the statistics below but this fails altogether to consider whether or not some of the policies might be inherently likely to damage the equality objectives in s. 149. It also fails to conduct any *qualitative* assessment of the likely impact. For example, it is not particularly helpful to know simply that proportionately more learning disabled prisoners will lose out as a result of the withdrawal of funding for prison law. If the impact of the measure is really to be understood then there should be some analysis of what kinds of case will be affected and how they will impact on the ability of these disabled prisoners to achieve fair outcomes or humane treatment in prison.

b) The discussion of the criminal proposals opens its consideration of the impact on providers by saying:

"We anticipate that the proposal will have an adverse impact on providers as they will see a reduction in legal aid income (assuming for this purpose the proposal amounts to a provision, criterion or practice)".

The words in parentheses are only relevant if the focus of the enquiry is *unlawful* discrimination. They are irrelevant to the remainder of s. 149.

156) We do not agree with the analysis on the limitations on data sources or the implied suggestion that no more could have been done. Para 3.2 refers to the limitations on disability data. The MOJ appears to have considered only statistics that have already been recorded and not to have considered generating its own material, for example by sampling of case files or surveys.

157) Para 3.3 asserts that the LAA is "unable" to assess the impact on providers legal aid income by protected characteristic because the changes already made by LASPO will not

have shown in the statistics. This is a reason in itself why these measures should not be introduced at this stage. This can only refer to civil claims because those claims are the ones most affected by the existing LASPO changes. The savings in this field are negligible but the impact assessment itself accepts that the potential damage to providers is, quite literally, incalculable.

158) Para 4.6 asserts:

> *"The nationality or immigration status of civil legal aid recipients is not routinely recorded. Our initial view, however, is that the nature of the proposals is such that they are unlikely to put people with these protected characteristics at a particular disadvantage".*

This is an extraordinary claim. The residence test is expressly directed at those without a connection to the UK and to those without 12 month's lawful residence. It is plainly intended to affect foreign claimants and will have an adverse impact on them.

159) Para 4.6 goes on to say that it is unlikely that there will be an impact on the sustainability of the legal aid market but then contradicts this by saying that the provider response is unquantifiable. In fact the paper offers no support for the suggestion that there will be no adverse impact on the market or on the availability of legal services. The potential impacts on criminal work are addressed elsewhere and so we focus on civil (non-family) providers. There has been no attempt to model the impact on them of the various changes. Huge cuts are proposed in scope and basic fees and we predict that specialist providers will be forced to leave the market. It is particularly concerning that the paper makes no real attempt to consider the cumulative impact of the proposals, especially on specialist providers. By way of example we are concerned that the proposals concerning payment for judicial review will impact harshly on the junior bar (which is, as the EIA recognises more likely to contain larger proportions of women and members of BAME groups). But this is also the group that will be most affected by the proposed reductions in advocacy rates.

Restricting the scope of legal aid for prison law

160) This is addressed at 5.1. The analysis of impact on prisoners consists simply in mapping the breakdown of the prison population against the population at large. The conclusion is that male and BAME groups are overrepresented. It also mentions potential adverse impact on those with learning difficulties or mental health problems. The assessment completely fails to conduct any qualitative assessment as to the probable impact of the substantive restrictions proposed. It fails to consider how far those with protected characteristics, particularly those with disabilities or learning difficulties are able to assert their rights in prison without legal help. The proportion of disabled prisoners is plainly underestimated. The government's own research summary 4/1229 estimated that there were 36% disabled prisoners in the UK.

161) We do not address proposal 5.2 – imposing a financial threshold in the Crown Court.

Residence test 5.3

162) Para 5.3.1 grudgingly recognises that there is the "potential" for this proposal to put non-British nationals at a particular disadvantage. This is disingenuous. This quite plainly its aim and British nationals are overwhelmingly likely to satisfy the requirement of 12 months residence at some point.

163) As with the prison proposal there is no attempt to conduct any qualitative assessment of the impact or to consider what kinds of claims will be affected. It seems highly likely that a large number of claims will be those involving access to housing or community

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[29] http://ccs.infospace.com/ClickHandler.ashx?du=https%3a%2f%2fwww.gov.uk%2fgovernment%2fuploads%2fsystem%2fuploads%2fattachment_data%2ffile%2f162358%2festimating-prevalence-disability-amongst-prisoners.pdf.pdf&ru=https%3a%2f%2fwww.gov.uk%2fgovernment%2fuploads%2fsystem%2fuploads%2fattachment_data%2ffile%2f162358%2festimating-prevalence-disability-amongst-prisoners.pdf.pdf&ld=20130529&ap=1&app=1&c=iminentxml2.hmpg.uk&s=iminentxml2&coi=239138&cop=main-title&euip=86.181.158.173&npp=1&p=0&pp=0&pvaid=bda844e5828a40bc916c176f2c584a15&ep=1&mid=9&hash=5BF062E2E934414A567D4EA246795964

care or services under s. 4 of the Immigration and Asylum Act. These involve access to basic food and shelter to avoid destitution. In such cases the claims are often only arguable where failure to provide services will amount to a breach of Convention Rights. Similarly people who are unlawfully detained or removed from the UK will be affected. These are self evidently matters of the greatest importance and the gravity of the impact needs to be understood when weighing it against the limp language used to justify in para 5.3.3.

164) We also consider that the impact assessment is wrong here simply to focus on the statistical or differential impact. There is no attempt to consider equality of opportunity for non-British nationals (which the proposal self evidently fails to deliver) or whether denying them assistance in access to the courts helps to foster good relations (it clearly does not since it makes them virtual outlaws and makes them vulnerable to exploitation and abuse).

165) This proposal is fundamentally wrong and we do not think that it can be mitigated. It might be slightly less damaging if:

a) Funding remained in scope for complaints of serious human rights breaches or discrimination or cases involving abuse of power (whether by public bodies or private persons).

b) Funding continued to be provided for those granted refugee status or for those otherwise granted humanitarian protection or similar leave to remain (for example victims of trafficking).

c) Funding continued where the claim involved or was likely to involve the welfare of children.

Paying for permission work in judicial review cases

166) We have already noted that the effects here have not been properly quantified. We do not accept that the MOJ was in some way prevented from doing so because of a lack of statistics or other material.

167) Again, there is no attempt to break this work down to assess the actual impact in individual cases or types of case. For example, we expect that many of the cases that are likely to settle (and so will not attract payment) will be those involving housing or community care. Many of these cases may involve care leavers and/or those with disabilities. The effect is that such cases are less likely to be brought with consequent disproportionate harm being caused to these groups.

168) The paper has failed to consider the potential for adverse impact on junior members of the bar who are more likely to be women and from BAME groups. They are likely to bear the brunt of the costs of drafting applications for judicial review at the point when the costs are at risk. They are likely to be presented with instructions to draft applications shortly before the deadline expires when it will be difficult for them to turn the client away. This needs to be considered together with the large reduction in fees contemplated elsewhere.

169) We do not think this proposal can be mitigated but we have identified a less drastic option above.

Removing legal aid for borderline cases

170) This is a tiny group (100 cases) and it is insufficient to pray in aid the "limited LAA data" available on them to justify taking away funding here. It would easily have been possible for the LAA to discover the position in much more detail by looking at each of the files and consulting the providers. Even on the limited data it is plain that disabled people are overrepresented in this group. We have already made the point in our substantive response that the MOJ could and should have conducted a qualitative assessment of what these claims actually were and their outcomes before concluding that they should no longer be funded.

171) Paragraph 5.5.1 repeats the error referred to above as to the nature of the borderline merits test. It is not right to say that such cases are ones "where the case has a less than 50% chance of success". Instead they are cases where it is not possible to say that the merits are above 50% because of some relevant uncertainty.

172) We do not consider that there is any mitigation measure that can limit or reduce the impact of this proposal.

Introducing competition in the current legal aid market

173) We have already dealt with the effect of this measure in our substantive response. The EIA gravely underestimates the likely impact on clients and on the quality of advice and representation. The prediction at the end of paragraph 5.6.2 that quality will be "maintained" and that there will be no "impact on the quality of advice received by clients" is complacent and almost certain not to be realised given the chosen model for PCT. As in the main paper the EIA offers no detailed explanation as to how quality can be maintained.

174) The EIA notes that loss of choice is a detriment and it accepts that this will fall more heavily on, among others, BAME people since they are overrepresented among criminal legal aid clients. But it fails to recognise that client choice is important in itself in promoting equality of opportunity and in fostering good relations. This applies to all individuals with protected characteristics and not just those under the headline BAME. People with protected characteristics may have their own experiences of the criminal justice system and may encounter different challenges as they progress through it. By exercising choice clients can select advisers who are able to address their needs. If they are denied choice then they are liable to be adversely affected relative to their peers who do not have those protected characteristics and whose cases are more likely to be suitably addressed by provision of a "generic" service. For example, a client with serious mental health issues or a learning disability will require specialist representation both as to the defences that may be available to them and as to disposal; a woman who has defended herself against domestic violence will require somebody specialist in that field. Here, as elsewhere the EIA is defective in that it has focussed too narrowly on statistical imbalance as the only measure of a relevant equality impact whereas it ought, in addition, to have considered whether the proposals were, by their nature, inherently likely to affect people with protected characteristics. In any case we also doubt whether the paper is right not to identify those with mental health issues or learning difficulties as being adversely

affected to a statistically disproportionate extent. We do not have access to the relevant statistics ourselves but the over-representation of this group within the prison population (see above and which the paper also failed to acknowledge) suggests that they also have more frequent contact with the criminal courts than the population generally.

175) The paper has also failed to address the impact of the proposal on good relations. This is related to the issue of choice above. If clients are denied the ability to choose legal advisers that they reasonably consider are needed to represent their interests then they will legitimately feel resentful and excluded as a result. The outcome can only be loss of confidence in the fairness of the criminal justice system. Far from fostering good relations it will encourage a belief that that system is institutionally biased against minorities.

176) Para 5.6.4 observes that a larger proportion of small firms are BAME managed and that the proposal is liable to have some disproportionate impact. We have already made the point here that this section appears to focus too narrowly on the statutory definition of indirect discrimination rather than asking, as it ought to, how the proposal fosters good relations or promotes equality. There is clearly much work that can be done here to understand why BAME managed firms are over-represented in this part of the market and how they relate to their clients. The LAA/MOJ cannot properly assess the real equality impact of this measure without investigating this. A starting point might have been interviews or surveys of selected firms and their clients. Without empirical study of this kind it is foolhardy to launch into a contracting process that is designed to drive out smaller firms. Paragraph 5.6.5 suggests that this can be mitigated by the ability of smaller firms to form consortia but there is no analysis of how realistic this is or whether such firms will be able to do so particularly given the brevity of this consultation period and the eagerness expressed in the paper to start the contracting process in autumn 2013. We have already drawn attention to some of the difficulties this produces in our substantive response.

177) BEG and ALBA would also point out that the proposals are likely to give rise to various forms of discrimination in pay. There may, for example, be increasingly glaring disparities between the pay available to advocates employed by the Public Defender Service, and/or retained by the prosecution/CPS, and advocates retained by the defence

and paid for from public funds. If so, there is a significant probability that women advocates suffering pay discrimination might be able to bring claims relying on their directly effective right to equal pay under Article 157 of the TFEU, on the ground that they were receiving lower pay than male advocates retained by the prosecution, or employed by the Public Defender system, for like work, and that the MoJ was the single source of the pay in question. Give the breadth and fundamental importance of the principle of equal pay in European law, the fact that advocates were self-employed rather than employees could not be taken to constitute a barrier to such claims. It should be noted that the existence of such discrimination could expose the MoJ to very large numbers of equal pay claims, at potentially very significant cost to the public purse.

178) We do not comment on the remaining criminal or family proposals (5.7-5.10).

Harmonising fees – 5.11

179) The paper correctly identifies the potential for this measure to impact harshly on the junior bar and consequently on BAME practitioners. It underestimates the impact because it fails to consider it alongside the other proposals that will further reduce the availability of legal aid and that will be likely to affect the junior bar.

180) The paper asserts a belief (para 5.11.2) that there will be little detriment because, among other things, solicitor advocates will be available. Neither the EIA nor the paper generally gives any evidence for this belief and there is nothing to suggest that solicitors, who are working to capacity in any case, will be able to take on advocacy as well if the publicly funded bar ceases to do so.

181) We do not address justification here as we have already made the point that the different fee rates do not compare like with like. Para 5.11.3 makes the claim that the proposed change "advances equality of opportunity". We do not understand this claim at least as far as those with protected characteristics are concerned. No evidence is produced in support of it and it is not further explained. It achieves equality in hourly rates between barristers and solicitors but they are not within the Equality Act. In any case their different business models means they are not comparable.

Removing the uplift in Immigration cases and asylum Upper Tribunal appeals

182) The assessment fails altogether to recognise that this is inherently likely to have an adverse impact on the grounds of nationality, race and colour. This work is already at the margins of viability and this change is bound to make practitioners less willing to provide it. If they do then the work they can spend on each case will self-evidently be less since their fees will be reduced still further. This obviously has an adverse impact on clients and providers.

Expert fees

183) Reductions in legal aid for expert fees will lead to a reduction in supply and in the quality of experts available to undertake legal aid work. There is no evidence at all for the assertion in para 5.13.2 that clients will receive the "same level of expert service". The paper and the EIA have instead assumed that this will be the case without any attempt to assess whether the market really will bear reductions of this kind. Any reduction is access to expert evidence will be felt in proportion to the other changes under discussion.

Constitutional and Administrative Law Bar Association

Bar European Group

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