Response of Robert Stephen Symonds to *Transforming legal aid: Consultation paper* (CP14/2013):

I am currently a full-time Masters (MA Philosophy, Politics and Economics of Health) student at University College London. Before commencing this course, I have had two decades' experience (based in London and Greater Manchester) of legal practice as a non-practising barrister working in the not-for-profit sector providing free advice and representation in relation to criminal injuries, employment, immigration and asylum, and social welfare-related law. At various times, I have provided advice and representation under legal aid funding and under other sources of funding (including local authority grant, charitable foundation grant and private charitable donation), directly benefiting thousands of British citizens and foreign nationals in these various areas of law. Over the same period, I have spent many hours (sometimes paid, sometimes voluntary and unremunerated) providing advice, training and other support to those providing legal advice and representation in these areas.

On 23 May 2013, I attended a consultation event organized and hosted by the Ministry of Justice at Park Crescent Conference Centre. While I am grateful for the time given by representatives of the Ministry at this and other events, it did not inspire confidence. In response to questions seeking explanation or justification, evidence or analysis of the proposals, and Government claims made in the consultation paper or in relation to it, civil servants offered virtually nothing beyond 'please put your concerns in your response to the consultation'.

Below I address questions in the order they appear in the consultation document, under headings identifying each question. Generally, I restrict my response to those questions in relation to which I have particular relevant expertise and experience. I also provide some brief response to some questions relating to prison law and criminal law, areas in respect of which I have no direct legal practice experience. That I do not answer other questions should not be taken as indication that I agree with other proposals included within this consultation.

Before addressing specific questions, however, I make some general remarks relating to the consultation. These relate to both proposals on which I provide specific comment and proposals on which I do not.

General remarks:

I here cover three general matters relevant to my later responses to specific consultation questions: (i) the matter of public confidence and this consultation; (ii) the abandonment of assurances so recently given by this Government, entailed by proposals now put forward; and (iii) the carelessness for justice evidenced by this consultation. These are covered under distinct subheadings.

First, I offer the following observations, which run through this response:

- The consultation constitutes an assault on justice, and particularly on its equal distribution
- The proposals are either inadequately thought-through or explained, and the lack of evidence or analysis presented is astounding
- The consultation does nothing to promote public confidence and much to undermine such confidence in the justice and legal aid systems
- If implemented these proposals can be expected to increase not reduce costs (in some cases legal aid expenditure may be reduced, but this will not mitigate costs to public funds elsewhere)
- Any serious ambition to promote public confidence, uphold justice and reduce costs to public funds would focus on bearing down on the delaying, inconsistent and abusive practices of public bodies (both those practices that give rise to litigation and those that extend litigation), but these proposals are, or at best seem, designed more to pander to political audiences and agendas than to address real and effective inadequacies in the delivery of justice

I add that I am not sanguine about the ability or professional commitment of all lawyers (whether professionally qualified or not). I am unfortunately very familiar with the damage caused by poor advisers and representatives, just as I am familiar with the exceptional work done by many others. The former, of course, make their own contribution to undermining justice and confidence in it; while good advice and representation promotes justice and enables the justice system to work more smoothly. No doubt that is one reason why I, and many others, from working at the Refugee Legal Centre (RLC), can recall many occasions of being asked by ushers to come into court to then be asked by an immigration judge (previously an adjudicator) whether the RLC could assist the person then before the court who was without representation. Good lawyers assist the smooth running of the justice system by identifying what is relevant and irrelevant, presenting what is relevant clearly and, in many cases, helping their clients to understand that the law cannot assist and litigation would be fruitless. Sadly, Government has for some years seem set upon impeding or excluding the good lawyer from assisting the poor, while easing the path for the incompetent or even unscrupulous lawyer in harming or exploiting them.

The matter of public confidence and this consultation:

The consultation paper proceeds on the basis that the legal aid system has lost credibility with the public.[1] There may be some justification for such a diagnosis, but no evidence is provided to support it. On the other hand, the way in which this

[1] Introduction, p13, paragraphs 2.1 & 2.4; and Ministerial Foreword, p3

consultation has to date been presented is either reckless as to, if not designed to undermine, public confidence in the legal aid system. Here are some of the ways in which the consultation is undermining of public confidence:

- It is claimed there is a concern that foreigners may be bringing their legal disputes in the UK attracted by the prospect of legal aid.[2] No evidence is presented, doubtless because none is available. Has the Ministry forgotten (or does it not know) to what types of cases civil legal aid is restricted, particularly since April 2013 (the month this consultation paper was published)? Nobody comes to the UK hoping to be detained, domestically abused or trafficked that they might then benefit from legal aid. Nor do they anticipate their being separated from their children by the UK authorities, or their being abused by the UK authorities or agents of the UK in this country or overseas, in the hope of receiving legal aid. Yet these are the types of cases, in which the proposed residency test would exclude legal aid.

- The consultation paper contains the trite assertion that civil legal aid is not generally available for matters of law other than that of England and Wales, while noting that foreign nationals in the UK or overseas may apply for it.[3] Could nobody at the Ministry think of nothing more informative to say as to for what types of cases civil legal aid remains available? The equalities impact assessment in relation to the proposed residency test, to which this trite assertion also relates, is equally banal in identifying that those affected by the proposal will be affected by being rendered ineligible for legal aid without any attempt to identify who such people will be and in what situations they will be so deprived.[4] Whether intended or not, the consultation leaves open the suggestion that civil legal aid is far more ubiquitous than is the case; and disguises the severity of the impact proposals will have.

- In relation to the consultation, the Lord Chancellor told *The Law Society Gazette* that he has received letters and emails from people anxious about migrants receiving civil legal aid.[5] It is difficult to understand what relevance such correspondence is supposed to have. The letters are not cited in the consultation paper. I am sure that is wise. On the face of the matter, they suggest a misunderstanding on the part of those who have written,[6] and on

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[2] Consultation paper, paragraph 3.44
[3] Consultation paper, paragraphs 3.45-3.47
[4] Consultation paper, Annex K, paragraph 5.3.1
[5] Report of interview, published in *The Law Society Gazette*, 20 May 2013
[6] Immigration was largely removed from civil legal aid scope following the commencement of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in April 2013; and what is left within scope is restricted to matters said to be of the "*highest priority*" (*Hansard* HL, 16 Jan 2012 : Column 349, *per* Lord McNally, Minister of State).

the part of the Lord Chancellor in referring to these letters in support of his proposals. I have, for example, lost count of the number of times I have heard and read complaints of asylum-seekers having access to council housing and welfare benefits from which they are excluded. Indeed, googling this quickly reveals a headline and story on the British National Party's website[7] falsely claiming that asylum-seekers have access to the full range of such benefits on top of other cash benefits. If concerned to address any loss of public confidence, the Government could start by correcting false claims rather than pandering to those who promote them.

- The consultation paper presents several figures concerning judicial review claims, including that in 2011/12 in only 330 of 845 judicial review cases refused permission, which were funded by legal aid, was a substantive benefit recorded as secured for the claimant.[8] Yet the consultation paper is silent as to the number of the 4,074 total judicial review claims funded by legal aid in 2011/12 in which a substantive benefit was recorded. It is silent on the fact that merits decisions are made not by legal representatives, but by the Legal Aid Authority and previously the Legal Services Commission (save where legal aid providers with devolved powers may act in emergencies, even then required to submit a full application to the Legal Aid Authority within five working days). It is silent on the conduct of public authorities in failing to respond to requests or court directions for disclosure or detail of the way in which the public authority intends to defend the claim. Does the Ministry not understand how judicial review proceedings work?

- The Lord Chancellor has compounded these concerns by his misuse of statistics on BBC Radio 4's *The Today Programme* on 23 April 2013 where he juxtaposed 144 successful judicial review cases with 11,359 total cases in 2011.[9] Again, the consultation paper does not cite what the Lord Chancellor relies upon. Again, wisely. The Lord Chancellor was silent as to the only appropriate comparator to the number of successful judicial review claims successful on a final judgment of the court (144) – i.e. those unsuccessful on a final judgment (212).[10] He was similarly silent as to the vastly greater number that succeeded long before any final judgment might have been sought. Just as he was silent as to the majority proportion of the 11,359 cases to which he drew attention, which were not legal aid funded.[11]

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[7] http://www.bnp.org.uk/news/revealed-how-asylum-seekers-are-paid-more-british-pensioners

[8] Consultation paper, paragraphs 3.65 to 3.68

[9] http://www.publiclawproject.org.uk/documents/TranscriptChrisGraylingToday.pdf

[10] http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf

[11] For example, prior to April 2013, Treasury solicitors have given estimates that between 70% and 80% of immigration judicial review cases were not brought on legal aid (see Immigration Law Practitioners' Association briefing of December 2011 on Legal Aid,

Those attending the Ministry of Justice event on 23 May 2013 raised several of the above matters, and similar matters, seeking explanation as to what evidence or analysis lay behind assertions, as to how it was thought these could do anything but harm public confidence, or clarification as to any further explication that could justify them. No substantive response was given to near all such questions. Instead, those attending the meeting were advised to include concerns in their consultation responses. I am sure those representing the Ministry did not withhold substantive responses to questions and concerns raised at the meeting. There was rightly considerable anger that this consultation should be put out in this manner. Organizational and individual responses to the Ministry cannot repair false impressions given to the public by this consultation. And those responding are left to supply evidence, analysis and assessment absent from the consultation, without any opportunity to engage in a dialogue with the Ministry about evidence, analysis or assessment because it is absent from the consultation paper (and was absent in the Ministry's responses at the meeting). This is especially poor consultation.

Its overall poverty is compounded by the recitation of the usual bogeymen in the Ministerial Foreword (wealthy criminals, extravagantly paid legal aid lawyers and excessive litigants) without evidence as to whether these bogeymen exist, or in what number, or to what degree or how proportionately any of the proposals may address them. Despite all of this, evidence does exist concerning public confidence in legal aid. The claim that public confidence (credibility) has been lost is contradicted by research conducted by Legal Action Group.[12]

The abandonment of assurances so recently given by this Government, entailed by proposals now put forward:

The proposals relating to civil legal aid are not consistent with the basis on which the Government explained the changes made to civil legal aid provision which took effect the same month (April 2013) as the consultation paper was published. The Government had said as follows:

- In advance of publishing its earlier proposals for restricting civil legal aid, the then Lord Chancellor claimed the Government would cease what was described as the "*salami slicing*" of legal aid by the previous administration.[13] He expressly recognized that salami slicing was damaging

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Sentencing and Punishment of Offenders Bill HL Bill 109, Amendments 55-59, fn. 3); and the changes introduced from that date have reduced those that can be brought on legal aid.

[12] http://www.baringfoundation.org.uk/CivilLegalAid.pdf

[13] Speech given by the Lord Chancellor at the Centre for Crime and Justice Studies on 30 June 2010, which speech (despite its title) was not limited to criminal law; and see Ministerial Foreword to *Proposals for the reform of legal aid in England and Wales*, p3

for lawyers and clients by disabling legal aid providers from planning and undermining their sustainability. He repeated the Government would cease salami slicing when introducing the Bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at its Second Reading.[14]

- The Government emphasized in the consultation preceding the Bill that civil legal aid would be retained for those cases and only those cases of the utmost importance by reason of both their seriousness and the inability of individuals to secure justice without legal aid.[15] This was similarly emphasized throughout the passage of the Bill, including by the current Minister of State responsible for legal aid, Lord McNally, e.g. when reasserting the Government had:

  > "*…prioritised funding so that civil legal services as set out in Part 1 of Schedule 1 will be available in the highest priority cases; for example, where a person's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.*"[16]

- In response to criticism at the absence of any statement of principle in the Bill requiring the Lord Chancellor to secure access to justice, and concerns at powers in what became section 9 for the Government to vary the scope of civil legal aid by removing or reducing those services listed in Part 1 of Schedule 1, Lord McNally offered the following assurances:

  > "*…there is no question as to what services might be funded, they are in the Bill for all to see. Consequently, the amendment based on Section 4(1) of the Access to Justice Act is not appropriate.*"[17]
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  > "*The power to vary a service allows us to amend the existing services within* [Part 1, Schedule 1] *where they need to be altered, but without the need to omit a service and then add a new service.*"[18]

Legal practitioners bid for and accepted civil legal aid contracts in the last tender process based on these assurances. Parliamentarians on all benches in the

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[14] *Hansard* HL, 29 Jun 2011 : Column 989

[15] *Proposals for the reform of legal aid in England and Wales* (Cm 7967), paragraph 4.12; *Reform of legal aid in England and Wales: the Government's response* (Cm 8072), section 3, paragraphs 6-7

[16] *Hansard* HL, 16 Jan 2012 : Column 349

[17] *Hansard* HL, 5 Mar 2012 : Column 1569

[18] *Hansard* HL, 27 Mar 2012 : Column 1253; Lord McNally went on to give an example concerning the need to vary what is now paragraph 29, Part 1, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Lords reluctantly accepted the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on their basis. Barely one week after commencing the civil legal aid provisions in that Act, the Government has published proposals to make further, substantial restrictions to civil legal aid. It turns out the Government's intention is not that civil legal services to be funded are to be those on the face of the Act, despite Lord McNally's 'it does what it says on the tin' assurances.

Indeed, the residency test now proposed would render significant parts of the Act almost redundant e.g. by excluding all or many of those to whom apply paragraphs 19(5) to (7) (a restricted category of claimants in judicial review cases concerning immigration control), 24 (appellants before the Special Immigration Appeals Commission), 25 to 27 (immigration detainees, and those at risk of immigration detention), 28 & 29 (certain migrant victims of domestic violence), 31(1)(a) (those eligible for accommodation under section 4) and 32 (certain victims of human trafficking). The Act largely removed legal aid for immigration cases, but the above categories were retained on the basis they were of the utmost importance (concerning e.g. risks of domestic abuse, sexual and other exploitation, homelessness and unlawful and/or excessive detention) and without legal aid those affected could not secure justice (there being no alternative source of funding or representation, and their inability to effectively represent themselves).

It is difficult to conceive how the Ministry expects others to have confidence in it when putting forward proposals that effectively abandon the position it had argued for barely one week after that position took effect.

The carelessness for justice evidenced by this consultation:

Each of the preceding points show a reckless attitude to justice on the part of the Government in putting forward this consultation.

Moreover, beyond platitudinous statements as to pride in the impartiality and fairness of British justice,[19] there is remarkably thin recognition or elaboration upon the reasons that underpin the delivery of justice or the role of impartiality and fairness in our justice system. It is not good enough to merely regret that there is no objective basis for factoring in values of fairness and justice when delivering savings, as was remarked by a Ministry representative at the Park Crescent Conference Centre meeting on 23 May 2013. (I am not sure if the irony escaped me or the official making those remarks, given than no basis, objective or otherwise, had been offered in response to several questions asking about various matters which on the face of the consultation paper have been factored in.)

[19] Consultation paper, paragraph 2.1

Of this Government's previous major consultation in this area (Cm 7967)[20] it might at least be claimed that some modest (if inadequate) attempt was made to set out what legal aid was for, and what importance its provision had for the delivery of justice for those otherwise unable to afford legal advice and representation. No such redeeming claim could be made for the current consultation, which speaks clearly of a lack of ambition or interest to uphold justice.

I doubt that Ministers or civil servants would make proposals for proportionate restriction of public funding of, for example, defence, education or health without considerably more than a nod to the importance of national security, education and public health and the role of the armed forces, security services, schools and universities, and NHS in delivering upon these. Yet even a nod to the importance of justice is barely a feature of the current consultation, still less the role of legal aid in delivering on that. Why is this? The urgent need for an answer is exacerbated by this latest consultation, yet it is beyond the reasonable scope of this response to attempt a comprehensive answer. Instead, I offer the following thoughts drawing upon analogy with health and health policy.

It was remarked in the previous consultation (Cm 7967) that since the introduction of legal aid in 1949 the scope of the legal aid system has grown substantially.[21] The previous year, the NHS was established and since then the scope of NHS provision has grown enormously. Since 1948, there has been increasing recognition of a need to address significant inequity in the distribution of health[22] while a far greater range of conditions of ill-health and therapies for preventing, curing or alleviating these have been identified.[23] While that has serious cost implications in relation to health and healthcare, anyone suggesting the progression of healthcare provision should simply be reversed could expect to be regarded as ignorant, callous or lunatic.

Yet the growth of legal aid has been modest by comparison[24] while similarly responding to growing recognition of inequity in the distribution of justice and identification of new conditions of injustice (including in accessing a growing

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[20] *Op cit*

[21] *Op cit*, Ministerial Foreword, p3

[22] See e.g. Rudolf Klein's *Accepting Inequalities*, in Marmor & Klein's Politics, Health & Health Care: selected essays, Yale University Press, 2012; and the BMA's *Social Determinants of Health – What Doctors Can Do*, October 2011, with foreword by Sir Michael Marmot

[23] As Roy Porter in *The Greatest Benefit to Mankind: A medical history of humanity from antiquity to the present*, Fontana Press, paperback edition (1999), p710 wrote: "*At the close of the twentieth century, new horizons are visible, but so are new problems. Westerners are now living longer. But longevity means more time for illness, and implies that greater effort and resources will need to be devoted to keeping well…*"

[24] I later compare expenditure on NHS in England and legal aid in England & Wales during the previous decade.

range of equality entitlements or rights[25] and resisting a growing range of executive powers,[26] for which parliament has positively legislated or neglected to constrain). In considering what should be our attitude to these developments, the following similarities and differences between justice and health are particularly relevant:

- Both justice and health as social values have long histories. Yet both "*I will use my power to help the sick to the best of my ability and judgment*" (from the Hippocratic Oath, of uncertain date)[27] and "*To no one will we sell, to no one deny or delay right or justice*" (from Magna Carta, 1215)[28] are of no less vitality while, if respected, of immeasurably greater reach today.

- Neither injustice nor ill-health are established merely by an individual's considering his or her condition to be other than optimal. An accurate diagnosis of either is dependent upon the relative experience and expertise of the person offering the diagnosis because neither is merely a matter of general classification according to client/patient-type or professed symptom. Thus, the opportunity to identify and remedy or address injustice as ill-health will reduce the less time and expertise is available to be directed to diagnosis even within reasonable constraints of triage according to case-specific complexity. Moreover, in relation to injustice as ill-health, the less the junior practitioner works with those of greater experience and expertise, the less will his or her expertise grow to be able to either identify or address case-specific complexity.[29]

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[25] cf. the 1970s during which decade came the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Race Relations Act 1976, and the Industrial Relations Act 1971 and Trade Union and Labour Relations Act 1974

[26] cf. the expansion of immigration officer powers (including of arrest, search and detention, and prosecution of various offences) through successive Acts since the Immigration Act 1971

[27] Taken from version of the oath appearing in Roy Porter's *The Greatest Benefit to Mankind: A medical history of humanity from antiquity to the present*, Fontana Press, paperback edition (1999), p63

[28] Taken from Magna Carta extract appearing in Tom Bingham's *The Rule of Law*, Penguin Books (2011), p10

[29] As Kathryn Montgomery writes in *How Doctors Think: clinical judgment and the practice of medicine*, Oxford University Press, 2006, p16: "*...clinical knowledge remains first of all the interpretation of what is happening with a particular patient and how it fits the available explanations. Such knowledge is still called an opinion; the skill used in arriving at that opinion is called judgment. In this, physicians resemble lawyers and judges, and medical rationality resembles jurisprudence. Both professions are engaged in practical reasoning.*" Two decades of experience of legal practice confirms this analysis for me. The ability of the legal practitioner to interpret his or her client's account and how it fits the available legal explanations and remedies is dependent, as for the physician, on giving adequate time and care to the client and having adequate experience and expertise for the client's situation.

- As the NHS is not the sole means to reduce ill-heath, so legal aid is not the only means to reduce injustice. Legal aid is, however, the most targeted and decisive means to reducing inequality in the distribution of justice so long as it is adequately resourced and directed via appropriately experienced and expert providers. This is because it goes directly to ensuring those, who might otherwise be ignorant of their rights, know what are their rights (and the limits of these); and are placed on a more equal footing with the relatively wealthy, educated and otherwise empowered in pursuing such rights. The central importance of legal aid greatly increased as legal aid substantially replaced local authority funding as the major source of funding for a range of legal advice and representation services following the introduction of legal aid franchising in the not-for-profit sector in the early-mid 1990s.[30]

- The state is directly responsible for the law in a way it is not responsible for certain important matters relating to health (e.g. disease, ageing, genetic predisposition etc.).[31] This responsibility goes further than merely the making of the laws, but in key respects extends to their implementation. Thus, by way of example, the mind-boggling proliferation and rate of change of rules, powers, criteria and policy in relation to immigration law[32] is compounded by (and doubtless also compounds) the seemingly intractable delays, inconsistency and arbitrariness of the Home Office and related immigration authorities.[33]

- The size and rate of growth of public expenditure on health is far in excess of the size and rate of growth of public expenditure on legal aid. The Lord Chancellor refers to the previous decade.[34] In 2000/01, NHS expenditure in England was £56.0 billion. In 2009/10, such expenditure was £102.5

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[30] My first paid role as a legal adviser was under a Legal Services Board legal aid franchise pilot in employment law (I began in 1996, but the pilot had begun in 1994).

[31] Similar observations by Dr E J Cohn were cited with approval by Tom Bingham in his 1998 lecture at Toynbee Hall on the centenary of its Legal Advice Centre, see Tom Bingham's *The Business of Judging: selected essays and speeches 1985-1999*, Oxford University Press, reprinted 2011, p398: "*It is therefore the duty of the State to make its machinery* [of law] *work alike for the rich and the poor.*"

[32] In November 2011, Lord Justice Jackson said in *R (Sapkota) v Secretary of State for the Home Department* [2011] EWCA Civ 1320 of an issue affecting the situation of persons liable to removal: "*…this area of immigration law has now become an impenetrable jungle of intertwined statutory provisions and judicial decisions.*" Several similar judicial observations have been made before and since.

[33] Many of these concerns are identified by the Home Affairs Committee in its most recent report on *The work of the UK Border Agency*, HC 792, March 2013.

[34] Consultation paper, Ministerial Foreword, p3

billion.[35] That is a rise of 83.0%. By contrast, total legal aid expenditure in England and Wales in 2000/01 was £2.099 billion; and in 2009/10, this was £2.146 billion.[36] A rise of 2.24%. By comparison, UK GDP grew over the period 2000 to 2009 by 17%.[37]

It is no simple task to measure the delivery or distribution of justice (or indeed health). The foregoing comparisons do not of themselves reveal what is the appropriate attitude or commitment to legal aid, but they do throw light on claims made about growth in legal aid spending. When, therefore, the Secretary of State asserts, as he does in his Ministerial Foreword to the current consultation, that "*over the past decade, the* [legal aid] *system has lost much of its credibility with the public*" and over that period "*the cost of the* [legal aid] *system spiralled out of control*" he ought to reflect that:

- A rise of 2.24% in legal aid expenditure does not *prima facie* look anything like out of control when set against increases of 17% in GDP or of 83% in NHS spending. The current consultation states that legal aid expenditure is now nearly £2 billion, i.e. it is below its 2000/01 and 2009/10 levels (if measured in real terms). Within these global figures, more meaningful analysis would identify different fluctuations of expenditure in particular areas of law – e.g. civil legal aid expenditure fell from £0.998 billion in 2000/01 to £0.941 billion in 2009/10, a fall of -5.71%; and figures for public law and immigration legal aid (these remained constant or fell significantly) over these periods do not substantiate the Lord Chancellor's claims in respect of these areas.[38]

- If the general picture he presents were properly reflective of what had happened in legal aid over the past decade, it is hard to conceive that the rate of growth of legal aid expenditure could have been so modest by comparison to the growth in GDP and other areas of public expenditure such as on the NHS; or indeed that over the whole period to this point legal aid expenditure has fallen.

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[35] Figures are from Government sources compiled by the House of Commons Library, Standard Note, SN/SG/724, 3 April 2012; expenditure is presented in real terms at 2010/11 prices

[36] Figures are from Ministry of Justice data supplied to the Justice Committee, presented in the Committee's report, *Government's proposed reform of legal aid*, HC 681, 29 March 2011; expenditure is presented in real terms at 2009/10 prices

[37] Office for National Statistics (ONS) data (seasonally adjusted, at 2009 baseline) gives 2000 GDP as £1,198.146 billion and 2009 GDP as £1,427.087 billion; see ONS Preliminary Estimate of GDP Time Series Dataset 2012 Q4

[38] Figures available from the Justice Committee report, *op cit*; presented as real terms figures at 2009/10 prices

Improving public confidence in the legal aid system will not be achieved unless and until Ministers, Members of Parliament and others cease the general depiction of those working within that system as gluttons imposing an ever-increasing burden on public funds. Many legal aid providers receive significantly less remuneration for that public service than do many less than senior public servants (and without additional benefits available to many of those public servants);[39] and many of them provide considerable *pro bono* service including doing vital, additional work on legal aid cases for which additional work no legal aid remuneration is provided.[40]

Moreover, ceasing this egregious depiction would be in itself insufficient because, if it continues to be the case that legal aid provision is inadequately valued and supported, the quality of justice delivered for those dependent upon and able to access legal aid will itself be insufficient as will the quality of justice delivered for those excluded from legal aid and thereby from legal advice or representation. Nor will such concerns often be easily remedied by judges, courts and tribunals who are presented with inadequate or erroneous material by litigants who have failed to understand what may be relevant or irrelevant to the justice of the case,[41] still less where the recipients of injustice are without the wherewithal to bring their circumstances before those judges, courts or tribunals. However, in the absence of legal aid, more litigants in person may be anticipated – both those bringing bad cases (for want of any advice as to the poor prospects of the case), and those bringing good cases (which may not however be well presented, identified in pleadings or supported by evidence), with a consequent adverse (and costly) impact upon the courts and beyond.[42]

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[39] See e.g. legal aid jobs advertised at http://www.younglegalaidlawyers.org/jobs

[40] My own experience when working under a legal aid contract was and is far from unique, and involved my spending many hours above and beyond my employment contract undertaking work that would not be remunerated under the legal aid contract, without which work my ability to provide any adequate quality of work for my legal aid clients would have been substantially, even fatally compromised.

[41] UK judges, even in tribunals, are not Continental-style inquisitorial magistrates and rely upon the parties, and their representatives, to ensure that relevant evidence is obtained and presented.

[42] Ministry of Justice Research Summary 2/11 (*Litigants in person: a literature review*) describes that: "*…most research suggested that litigants in person may experience a number of problems, which in turn impact upon the court. For instance, the research pointed to problems with understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case… A number of sources also pointed out that litigants in person may have difficulty understanding the nature of proceedings, were often overwhelmed by the procedural and oral demands of the courtroom, and had difficulty explaining the details of their case…*" This literature review was conducted at the time of the 2010/2011 consultation (7967), which led to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is remarkable that the Ministry has undertaken no further investigation of these and related concerns. See also the Civil Justice Council report *Access of Justice for Litigants in Person (or self-represented litigants)*, November 2011, which identified in the executive

The key question, therefore, particularly at a time when the financial climate calls for reflection upon the sustainability of public expenditure, is: What should we value and to what degree? In relation to this consultation (and previous): What value should we set on justice and on its being accessible to all? The proposals and their presentation in this consultation paper indicate that the Government either considers the answer to be (at best) little or is careless as to this question. That is itself a damning indictment of the consultation and whatever thinking may lie behind it.

In concluding his 1998 lecture at Toynbee Hall, Tom Bingham observed in commenting upon proposals for then reforming civil legal aid:

> "*For us in judging these proposals, and for government in implementing their proposed changes, the guiding principle must surely be that so clearly recognized by the founders of the Toynbee Hall Poor Man's Lawyer a century ago and by those who introduced the legal aid scheme half a century later: that the laws of our country exist for the benefit of the poor as well as the rich; that equality before the law is a pretence if some citizens can assert and protect their rights and others cannot; that the rule of law, to be meaningful, must ensure that justice is available to all, irrespective of means.*"[43]

I merely add that Tom Bingham, formerly Lord Bingham of Cornhill and the first person to have held the positions of Master of the Rolls, Lord Chief Justice and Senior Law Lord of the United Kingdom, clearly did not intend to imply any exclusion of foreign nationals subjected to UK law (e.g. detained or otherwise subjected to the action of UK authorities or their agents), or such others whether British or not as may be deemed of insufficient connection, to be excluded from such basic principle. Nor would anyone with any care for the rule of law, whether practiced in the UK or elsewhere, insist on such a distinction. Certainly, any such distinction if pursued in the UK, would set a bad example for others whom the UK may otherwise hope to encourage to improve their respect for the rule of law; including in respect of British citizens overseas.

I turn to specific consultation questions.

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summary: "*...we will find more cases started by self-represented claimants that need not have been started, more cases where self-represented defendants are involved for longer than need be, and more cases not starting when they should be started so that they can be resolved. We will find problems clustering, with increasingly wide and serious consequences for the individual, for families, and the state.*"

[43] *Op cit*, p407

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

No: I disagree with the proposed restrictions.

I have no direct experience of prison law, though I have advised and represented clients who were in prison and/or have been imprisoned. I do not consider that internal procedures such as the prisoner complaints, probation complaints and prisoner disciplinary procedures systems, or ombuds systems, are adequate for the most isolated prisoners – e.g. those suffering from serious mental illness, unfamiliar with any similar formal regimes or who do not speak English. Foreign national prisoners, who may be detained long after their prison sentence ends, would be disproportionately affected by the proposal – including being left unable, because without legal assistance, to access rehabilitation programmes, prison transfers or recategorisation by reason of prison service unwillingness to take relevant decisions while waiting for the Home Office to decide upon whether to pursue deportation. His Majesty's Inspector of Prisons and the Chief Inspector of Borders and Immigration have reported (the former over many years) on the particular isolation of, and inadequate attention to, foreign national prisoners in prisons.[44] Concerns are exacerbated in the prison estate because foreign national populations are unpredictable and in some cases intermittent, with a great variety of languages, many prisons are very isolated, and foreign nationals often have especial difficulty maintaining contact with family. Insofar as this is not already the case, foreign national prisoners, their interests and needs would become lost in the system. I have spoken with several prison officers who share similar concerns about Home Office practice.

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

No.

The Secretary of State in his Ministerial Foreword asserts there to be three principles underpinning the proposals in this consultation: "*to ensure that those who can afford to pay do so; to make certain that legal aid is not funding cases which lack merit or which are better dealt with outside court; and to encourage greater efficiency in the criminal justice system.*" This proposal, however, bears no relation to any of these principles. By contrast, it bears explicit and opposite relation to any principle that right or justice will be denied or delayed to no one.

In its previous consultation (Cm 7967), the provisions now implemented by the

[44] e.g. *The effectiveness and impact of immigration detention casework: joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration*, December 2012; and *Report of unannounced full follow-up inspection of HMP Wormwood Scrubs, 20-24 June 2011 by HM Chief Inspector of Prisons*, November 2011

Legal Aid, Sentencing and Punishment of Offenders Act 2012 were said to restrict the availability of civil legal aid to those cases where legal aid was necessary having regard to the importance of the issues at stake, the ability of a litigant to present his or her own case, the availability of alternative sources of funding for legal assistance or opportunities to address the relevant issues.[45] These were explained as cumulative (not separate) considerations.[46] As regards what was considered of sufficient importance, this was said to be cases where life or liberty is at stake, there is an immediate risk of serious harm to the individual, of homelessness, or the state intervening in family affairs including so as to remove children, or there is a need to check the exercise of executive power.[47] On the Government's analysis, therefore, from April 2013, the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has already restricted civil legal aid to cases of particular need and severity having regard to what is sufficiently important and the additional considerations of capacity for individuals to access justice without legal aid. (I imply no acceptance of the propriety of the restriction of civil legal aid scope established by that Act, which I consider to be an egregious assault on access to justice. While what has been left within civil legal aid scope far from encompasses even all of what would be necessary to cover basic and urgent needs, it is clearly now restricted to a confined area of what is of particular need and severity.)

The proposal is to restrict civil legal aid to those able to satisfy a 12 months' continuous lawful residency test.[48] It is said that it is unfair to the UK taxpayer if legal aid is expended on persons not satisfying this test and that the Government is concerned that legal aid currently acts as an incentive for foreign nationals to bring civil legal disputes in the UK.[49] Neither the main body of the consultation paper nor the equalities impact assessment provide any analysis of what are the cases for which it is claimed legal aid is currently and unfairly or improperly provided. Thus, the contention that legal aid is an incentive is entirely speculative; and for reasons elaborated in my general remarks, absurd. The situations in which many people in the UK would be unable to access legal aid by reason of these proposals must be limited (certainly from April 2013) to situations of particular need and severity as outlined. Thus, it must be assumed to be the Government's intent that (save as to asylum-seekers and members of the armed forces and their family) access to justice to protect against loss of life or liberty, or serious harm, homelessness, or arbitrary or other unlawful exercise of executive power (including in separating families) should be dependent on satisfaction of 12 months' continuous lawful residency.

I cannot conceive by what measure it can be thought unfair or improper to provide equal access to justice in protecting all in the UK against these risks – for

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[45] Cm 8072, *op cit*, pages 11-12, paragraph 6
[46] Cm 8072, *op cit*, page 12, paragraph 7
[47] as outlined in my general remarks
[48] Consultation paper, paragraph 3.48 to 3.54
[49] Consultation paper, paragraph 3.44

example, the UK authorities' wrongful separation of someone from his or her children or parents, or the UK authorities' wrongful detention of someone or his or her family or someone's being made homeless or his or her life or physical or mental well-being being directly and immediately threatened. (I have elaborated upon some of the specific cases that would be affected in my general remarks and do not repeat these here.) If the Legal Aid, Sentencing and Punishment of Offenders Act 2012 had not be enacted and commenced it would be reasonable and necessary to extend the argument further, but the general restriction of legal aid under the provisions of that Act mean that these are the situations, and only these, for which it is proposed to restrict access to justice on the basis of a residency test (even though the Government has expressly acknowledged that legal aid is necessary to ensure justice is secured in those areas otherwise retained within civil legal aid scope).

If it is the case (it appears at best extremely unlikely and no example is provided) that there is any (let alone any significant) problem of foreign nationals bringing legal disputes in the UK so as to take advantage of legal aid, that provides no reasonable grounds for depriving legal aid to those (British citizens or others) who cannot satisfy a residency test. This is not simply because one person's abuse (still less the risk of such abuse) of any general entitlement system, for example an expenses regime, should not of itself provide ground for simply removing the regime for all beneficiaries. It is also because the nature of what is at stake (equal access to justice) ought to be valued as fundamental. The proposal makes a mockery of the Secretary of State's assertion in his Ministerial Foreword that "*legal aid is the hallmark of a fair, open justice system*" or similar platitudinous statements in this and previous consultations as to the value of justice (and fairness and impartiality) in this country or to this nation. Many – such as those unlawfully detained by UK authorities or who are afraid to escape traffickers or domestic abusers for fear of the immigration consequences – will, if this proposal is implemented, not only be excluded from justice, but will be left to suffer far from sight with the risk of additional and severe further harms, even death. I have addressed the yawning gap in analysis of what value ought be given justice in my general remarks, and do not repeat these here.

In the circumstances, I am wholly against this proposal which should be entirely abandoned. However, there are the following further discrete comments which it is necessary to make:

- The suggestion that legal aid should be in some way linked to taxpaying is misleading and shocking. Under the proposal some of those who would be excluded will have been UK taxpayers, and subject to the workings of the continuous residence criterion may have paid UK taxes over many years. Alternatively, some (including British citizens) eligible for legal aid will not be taxpayers. That someone should be treated justly, and should be permitted effective access to the justice system to ensure this, ought not be determined on the basis of whether he or she is or has been a taxpayer.

That is especially so where the injustice he or she faces is at the hands of the UK authorities or their agents.

- The proposal to permit asylum-seekers access to civil legal aid, but not at or beyond the point at which any asylum-seeker is granted leave to remain in the UK (save to continue proceedings already commenced) is arbitrary. Why, for example, should someone be denied access in circumstances where someone similarly situated is eligible for civil legal aid simply because the relevant issue arises or is recognized after a decision to grant leave to remain in his or her case and before such a decision in the other's? This aspect of the proposal would exacerbate the difficulties asylum-seekers face in seeking to settle in the UK following a grant of leave, itself already compounded by the effective abandonment by the Home Office of integration as a policy concern.[50] I assume the origins of the proposal lie in some distorted concept of equalities in that it is feared that permitting those granted leave to remain following an asylum claim would render it unlawful or otherwise indefensible to refuse legal aid to others with leave to remain (or British citizens and certain others who might fail the residency test). If so, the Ministry would do better to reflect that the critical element in this is not the similarities in status but the fundamental importance of legal aid in access to justice. That is why much more might well be expected by way of justification of any discriminating policy on a basis relating to immigration status, which exposes why the proposed residency test is *in toto* indefensible.

- The test, if implemented, will exclude eligible people from civil legal aid because evidencing and assessing whether the test is met will be complicated and thereby constitute a strong disincentive to legal aid providers concerned at the risk that they commit to undertaking significant work, which is ultimately not remunerated. Moreover, the more that is done to mitigate arbitrariness in particular cases or the rigid application of a current and continuous residence requirement, the greater the complication and disincentive. The administration of the test would add to the work of legal aid providers, and since many people do not have passports and may struggle to evidence they satisfy the test, that addition may be considerable and may lead to some being wrongly excluded from legal aid. Will this later be advanced as a reason for returning to the policy discussion on introducing identity cards? In any event, it seems inevitable that those most likely to suffer improper impediment and exclusion by reason of this test will

[50] In 2011, the Home Office ceased funding the Refugee Integration and Employment Service (which sought to assist those granted leave to make the transition from asylum-seeker to leave status). Several of the difficulties experienced by those granted leave are discussed in: http://www.refugeecouncil.org.uk/assets/0001/7080/Limited_leave_report_final_September.pdf

be those from black and minority ethnic communities.[51]

- As regards incentives to foreign nationals to bring cases in the UK, a more realistic concern might be that the UK courts are seen as an attractive location for private disputes brought by those with substantial wealth consuming significant time and expertise of UK courts.[52] As to whether there would be merit in considering further steps to limit the types of such cases permitted to be brought before UK courts or whether UK courts being seen as an attractive location for these litigants should be viewed positively, I make no comment. However, if courts are available for foreigners who pay (including for actions that have little if anything to do with the UK) but not effectively available for those who cannot satisfy a residency test because without representation they know not how to access or make effective use of these (particularly in cases where they are seeking to defend themselves against actions of the UK authorities) this will suggest a wider appetite for not merely denying or delaying justice to some, but for selling justice too.

- If those subject to immigration detention and removal proceedings are excluded from legal aid, this will lead to an increase in the number who fall prey to unscrupulous or negligent advisers (some of whom will take money from family or friends). I have seen the damage and disruption caused when desperate individuals are led to pay money they cannot afford to advisers who submit judicial review papers only to demand ever larger sums of money and then cease to act leaving the individual with a hopelessly prepared claim before the court despite his or her having a strong claim to put forward if and when someone suitably expert and experienced is able to take charge of the case. The distress caused to such individuals as I have come across in my previous practice and the delays caused in the courts have been substantial. Further exclusion of legal aid will exacerbate these concerns.

- The consultation paper asserts that in exceptional cases, legal aid may be granted despite the residency test. This is explained as permitted under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.[53] Those responsible for this proposal appear not to have read the Act sufficiently

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[51] The concern expressed by Shelter at the recent announcement of an intention that landlords should conduct immigration status checks is in part based upon similar concerns, see http://blog.shelter.org.uk/2013/03/immigration-status-the-wrong-priority-for-renting/ and the Home Office has repeatedly revealed how assumptions based on such matters as a person's race, colour or language can be difficult to shift even in extreme cases – such as where a Dutch national was detained for months on the basis of an intended removal to Somalia (despite the Home Office holding his Dutch passport), see *R (Muuse) v Secretary of State for the Home Department* [2010] EWCA Civ 453

[52] http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article

[53] paragraph 3.54

carefully. Section 10 of the Act, which contains the exceptional cases provision, applies only in respect of matters falling outside the scope of Part 1, Schedule 1 to the Act. In other words, the exceptional scheme does not apply to those areas already regarded as so serious to demand the retention of civil legal aid (subject to means and merits). Given the way by which it was identified what should be retained in scope (see previous, including general remarks), it is unsurprising that exceptionality was not seen as relevant (then or into the future) in respect of such legal services as listed in the Schedule.

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)?

No.

I was appalled to hear the Secretary of State on BBC Radio 4's *The Today Programme* on 23 April 2013 make the following statement in connection with this proposal, which can only have been calculated to undermine public confidence in the legal aid system:

> "*…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, there were 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.*"[54]

What did the Secretary of State mean by successful here? Clearly, he did not mean that the claimant secured a change of position on the part of the relevant public authority. The 144 figure refers to cases that succeeded at full hearing. Very many more cases succeed without such a hearing. The only reasonable and responsible comparator to the bare 144 figure would be the number of cases unsuccessful at full hearing. That figure is 212.[55] If the Secretary of State is at all interested in securing or restoring public confidence in the legal aid and justice systems, he must cease using figures in ways as here that can only mislead the uninformed. Moreover, the linking of concerns, regarding judicial review to legal aid, was implicitly debunked by the Government's own statements in relation to the last major consultation. It was there expressly acknowledged that such judicial reviews that were said to be a concern for wasting court and public

[54] http://www.publiclawproject.org.uk/documents/TranscriptChrisGraylingToday.pdf
[55] http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf

authorities' time were not generally funded by legal aid.[56] This is unsurprising since legal aid cases are subject to a merits test, which does not apply in other cases; and which test is applied by the Legal Aid Agency, previously the Legal Services Commission (see further, my general remarks). I have addressed more generally the lack of care for public confidence in the legal aid and justice systems in my general remarks, and do not repeat these here. Such problem as there may be regarding the volume of judicial review cases (it is correct that the High Court judiciary have expressed concerns) bears little if any relation to legal aid,[57] and would not be addressed by this proposal.

A false comparison is drawn with the situation of legal aid practitioners preparing grounds of appeal to the Upper Tribunal (Immigration and Asylum Chamber).[58] I have many years' experience of drafting such grounds (and the equivalent stages, including opt-in applications to the Administrative Court, in the preceding regimes of the Asylum and Immigration Tribunal, and the Immigration Appeal Tribunal), and advising and training others in that. All or near all of what one needs to know in these tribunal proceedings is in the papers to hand (save where one is taking on a case where the individual was represented by others and not all the papers are disclosed, or the individual was without representation and does not have the relevant paperwork). That is not the case in judicial review proceedings, where much is revealed – often very late in the day – by the public authority. Moreover, the amount of work entailed in drafting grounds of appeal in the tribunal process is far more contained (in terms of volume and the period over which it will extend). Any reasonable comparison of the two areas of work would reveal that they are not similar. Tribunal arrangements are no indication of what are suitable arrangements to be made in relation to judicial review. However, undertaking a comparison properly might well be useful in highlighting the particular difficulties (including obstruction, evasion and secrecy)[59] advanced by public authorities in such litigation. As indicated elsewhere, the Ministry should be more concerned to improve transparency and good practice on the part of public authorities (including its sister Government departments such as the Home Office) rather than rewarding them with greater impunity to judicial scrutiny by measures such as those proposed here.

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[56] Cm 8072, *op cit*, paragraph 14, page 13

[57] *ibid*

[58] Consultation paper, paragraph 3.70

[59] Examples from Home Office practice are legion, but the most egregious is perhaps that revealed in *R (Abdi) v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin). The judgment of Davis J spells out how the Home Office failed to disclose (to detainees, their representatives, courts and the Counsel instructed by the Home Office) its secret detention policy over a period of about two years. As regards delay and obstruction in litigation, *R (S & Ors) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin) is a striking example. In that case, the Home Office effectively sought to ignore or subvert a tribunal decision and High Court litigation protocols and procedures.

The proposal would cause serious damage to justice and considerable additional costs. Success in judicial review proceedings is more often achieved by persuading the relevant public authority to revise its position without the need to pursue the matter to a full hearing. Indeed, this can be achieved at the pre-action stage, pre-permission stage, or post-permission stage (including post-refusal on the papers) but before any substantive hearing of the claim. Thus, claimants with good claims may not get legal assistance from legal aid providers concerned that their prospect of being remunerated will be jeopardised if the public authority effective concedes prior to a grant of permission. In such cases, however, some will bring cases without representation and others may be exploited by unscrupulous advisers (see discussed in my general remarks and response to Question 4). This will increase court time and delays in dealing with inadequately prepared or knowledgeable litigants. On the other hand, legal aid providers who do bring cases will be very reluctant to compromise cases with public authorities before a grant of permission if legal aid will not be paid in such cases. Thus extending litigation beyond stages, at which the great majority of successful claims are currently withdrawn. Public authorities should also expect much more rigorous pursuit of costs against them.

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

No.

However, I would welcome a wholesale removal of the merits criteria for asylum cases in the detained fast track. These cases proceed with unsafe and unreasonable speed meaning that legal aid providers can hardly have made any settled or reliable assessment of merits by the time a merits decision for granting continued legal aid for an asylum appeal is required. Any proposal that may aggravate the already grossly inadequate situation whereby significant number of asylum appellants in the detained fast track are left to pursue their appeals without legal assistance, in circumstances where they will often have had very little time given to them or their case by a legal representative prior to refusal of their asylum claim, should be rejected.

Q7 Do you agree with the proposed scope of criminal legal services to be competed?

No.

I have no direct criminal law experience. However, I wish to make clear my opposition to the proposals to greatly reduce the number of criminal legal aid providers and introduce a price-competitive market for the delivery of criminal legal aid. The proposals constitute a serious threat to justice because price competition can be expected to lead to horizontal and vertical integrations, with

power ultimately resting with large monopolies which will reduce their costs by concentrating on work that is profitable (e.g. treating unlike cases as like cases, and spending minimum time on client care). The Legal Services Commission has shown itself incapable of maintaining or monitoring quality in the provision of civil legal aid (e.g. in immigration and asylum), and I see no grounds for thinking the Legal Aid Agency will be any more capable of doing so in either criminal or civil areas. At the Park Crescent Conference Centre meeting of 23 May 2013, Ministry representatives were markedly reluctant to answer questions relating to quality. It was suggested that one such question was irrelevant to the consultation. While I accept that officials did not want to be drawn into an open discussion about the quality or otherwise of legal aid provision in an individual case (it was not clear whether that was the ultimate aim of the questioner), quality ought to be at the heart of the Ministry's concerns.

These concerns are exacerbated by the risks that market share becomes dominated by monopolies with no effective competitors offering any alternatives to the Legal Aid Agency, that expertise and experience is lost and cannot be replaced, and independence and confidence is lost because new providers are engaged in incompatible business ventures (e.g. providing legal aid to defendants or prisoners while running prisons; more recently the prospect of their also running courts has been raised).[60]

I would add that many criminal law practitioners have neither the substantive immigration knowledge nor the practical experience and expertise needed to properly advise and represent foreign nationals in relation to possible defences against criminal charge,[61] or as to the possible consequences of criminal sentence,[62] or as to the practice of the Home Office and how this may affect prospects of release or preparation for release at the end of sentence (and what steps may be taken to address this). Reducing the number of criminal legal aid providers is likely to seriously prejudice foreign nationals who may be wrongly convicted because a defence is not run or imprisoned (or held in immigration

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[60] It is a feature of much of the literature, research and other commentary in the field of health policy that the perceived attractions of introducing competition into public health services are outweighed if that competition is not in some way actively and effectively regulated and monitored by Government (or some agency accountable to Government, or in the minds of those more ambitious directly to the public), hence the concept of 'managed competition'. But nobody has yet identified just how Government can or will effectively manage competition save perhaps in discrete niches within the overall service. In relation to health, this has been on the policy agenda or within the policy discussion in many countries in one way or another for decades. That does not inspire confidence in competition-based proposals to be introduced for any part of our justice system.

[61] Article 31, 1951 UN Convention relating to the Status of Refugees; and section 31, Immigration and Asylum Act 1999

[62] e.g. how this relates to deportation, or a mandatory re-entry ban; such practitioners may also be unable to properly advise on cautions or early release schemes with particular application to foreign nationals

detention) indefinitely and for many months or years after completion of sentence because nothing is done to address Home Office delay or prevarication,[63] and do not have the wherewithal to effectively demand action on the part of prison and probation services in the face of that. I have spoken with several prison officers who have expressed exasperation at the practice of the Home Office and the difficulties caused to them in seeking to manage and assist foreign national prisoners. These concerns are exacerbated by the proposals to restrict legal aid for prison law and to introduce a residency test for civil legal aid.

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?

Not as the proposal is presented here.

In 2011, the Government reduced civil legal aid rates across the board by 10%. At the time, no attempt was made to consider the sustainability of legal aid provision at these rates in immigration and asylum cases. There has been none since, despite the closure in successive years of Refugee and Migrant Justice (formerly the Refugee Legal Centre) in 2010 and the Immigration Advisory Service in 2011. Just as there has been no consideration of the sustainability of provision, so there has been a failure to evaluate the adequacy or quality of the provision of legal advice and representation to asylum-seekers (and the small proportion of immigration cases that remain within scope from April 2013). Simply carving off this uplift without evaluating the effect of doing so upon legal advice and representation (and ensuring that access and quality will be adequate) in what remains of this area within legal aid would be reckless.

This is an especially unwelcome proposal given that practitioners have bid and accepted contracts on the basis of the current arrangements, having been advised by this Government that 'salami slicing' was at an end (see further, my general remarks).

I also highlight the concerns I have expressed in my general remarks as to the generally degenerative impact on quality and justice where junior practitioners work in an environment that is inadequately supported by those with greater experience and expertise. The provision of legal aid services in the immigration and asylum area has already been so reduced as to risk chronic deficiency of expertise and experience.[64]

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[63] I am very familiar with such concerns, which continue to be expressed by independent inspectorates, see: http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf

[64] Most of the available literature relates to asylum (though I am familiar with concerns in relation to immigration), see e.g.

Q34 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?
Q35 Do you agree that we have correctly identified the extent of impacts under these proposals?

No & No. For convenience, I address these two questions together.

The extent to which any attempt is made in this consultation paper and related material to assess the likely impact of these proposals is generally shockingly inadequate. I address some examples, not all; and it should not be inferred that I have or would have no similar or other concerns relating to other proposals. Nor indeed should it be inferred that I have or would have only the concerns expressly stated about those proposals which I do briefly address.

Paragraph 5.3.1 of the equalities impact assessment at Annex K purports to address the impact of the proposed residency test on clients (by which I expect is intended to be meant those who might otherwise be eligible for legal aid). It is merely identified that they will no longer receive civil legal aid. No attempt is made to identify what types of person in what types of situation would be ineligible for legal aid. Given the severe restrictions as to scope of legal aid introduced from April 2013, it ought not to have been beyond the wit of those responsible for this impact assessment to have identified the types of civil legal aid claim for which legal aid remains generally available and the likely types of person, and in which types of situation, whom this proposal will, therefore, affect by excluding legal aid eligibility; and indeed (having regard to the basis on which the Government imposed the restrictions from April 2013) the likely severity of impact of that exclusion. I have made some reference to relevant concerns as regards the impact of the introduction of the proposed residency test in response to Question 4 (see also my general remarks). However, I make no claim to have undertaken a detailed and considered impact assessment as might well be undertaken in respect of this and other proposals. It is appalling that such a vacuous assessment is presented as constituting any sort of impact assessment in respect of a proposal such as this. I do not think it ought to be the role of those responding to consultations to undertake the task of impact assessment in circumstances where the Government has so clearly abrogated its own responsibility to do so.

The assessment in paragraph 5.4.1 as regards those potential claimants affected by the proposals on remuneration for judicial review work is barely any better. At a minimum, some attempt at an assessment of the volume of cases, and specifically legal aid cases, which are compromised by public authorities prior to a grant of permission ought to have been undertaken. Had that happened, perhaps the Secretary of State would have avoided his misleading explanation

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http://www.icar.org.uk/Cost%20of%20Quality%20Executive%20Summary.pdf and
http://www.asylumaid.org.uk/data/files/publications/208/Justice_at_Risk_Report.pdf

on *The Today Programme* (see above)? Moreover, for reasons outlined in my response to Question 5, an adequate assessment of the impact of this proposal would need to address the likelihood of increased litigants in person; changed behaviour (extending litigation) on the part of legal aid representatives; and changed behaviour on the part of public authorities encouraged more readily to flout their legal obligations if no longer subject to effective judicial scrutiny through the courts.[65]

The assessment at paragraph 5.5.1 concerning the removal of the borderline merits criteria, in particular, gives no consideration to the detained fast track. That is necessary, and indeed could best be approached having regard to the suggestion I have made in response to Question 6. I note the justification at paragraph 5.5.3 refers to an assessment of merits "*from the outset*" which implies that assessment is always undertaken at a time when it is possible to make a settled and clear assessment. This is not always the case in asylum (and other) cases, and is particularly not so in detained fast track cases. It is not clear to me whether the consultation paper is based upon and written with such concerns in mind.

The assessment at paragraphs 5.12.1 to 5.12.3 simply fails to engage with the key issue as regards impact for both providers and prospective clients, which is the future availability and sustainability of legal aid advice and representation of adequate quality. I have addressed this in response to Question 32. In addition to what I have said there, I note that paragraph 5.12.3 makes clear that the proposal is not a return to the status quo prior to the introduction of the uplift (even leaving aside what has since happened as regards legal aid remuneration

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[65] The record of the Home Office even now is poor to say the least. It is a matter of considerable concern how that department may behave if no longer or ineffectively held to account through the courts. There are too many examples to do this justice, but consider the failure of the Home Office to give to its own policy to protect children's welfare in detention (*R (Suppiah & Ors) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin)); its detention of mentally-ill men in conditions contrary to Article 3, European Convention on Human Rights and, in one such case, the "*callous indifference*" shown to the man's suffering (*R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin); *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin); *R (HA(Nigeria) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin)); its misuse of a policy, which had no application, to seek to justify the in any case unjustifiable and unlawful action in preventing a refugee from contacting his or any lawyer (or accessing the court) when removing him to the country where he was at risk of persecution (*R (N) v Secretary of State for the Home Department* [2009] EWHC 878 (Admin); and the recent failure to effectively apply its own policy intended to prevent the continued detention of torture survivors and others physically or mentally ordinarily unsuitable for detention (*R (EO & Ors) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin).

rates). Before the introduction of the uplift, no work was 'at risk'. The mere removal of the uplift will leave previously remunerated work unremunerated, being work on permission applications which are ultimately unsuccessful. Whether or not that is ordinarily a reasonable or appropriate approach in itself is not the key issue that falls to be considered here, having regard to the precariousness of legal aid provision in the area of immigration and asylum following the changes to legal aid made over recent years.

Finally, I note that one impact that appears to be not considered or ill-considered relates to the aim of restoring public confidence, which is said to underpin these proposals. Similarly, for reasons I have also discussed in my general remarks, the impact on justice remains for the Ministry to assess. The impact of this consultation document, Government statements that have been made regarding it and the proposals it contains can only undermine confidence and justice. On that, see my general remarks.

In March 2013, Lord Neuberger, the most senior judge in the UK, said to the BBC about the civil legal aid measures that took effect in April:

> "*My worry is the removal of legal aid for people to get advice about the law and get representation in court will start to undermine the rule of law because people will feel like the government isn't giving them access to justice in all sorts of cases.*
> "*And that will either lead to frustration and lack of confidence in the system, or it will lead to people taking the law into their own hands.*"[66]

The proposals if implemented would greatly exacerbate those concerns. Those unable to defend themselves against the actions of an overweening state, encouraged by its immunity from effective oversight of its treatment of those too poor to pay for legal representation, will hardly be inspired to respect their Government, the law or society more generally; and it can be expected that those who sympathise with them (be they family members, friends or others) will similarly lose confidence or trust in the society in which they live. That cannot be to the advantage of any of us.

R S Symonds
London W2

30 May 2013

[66] http://www.bbc.co.uk/news/uk-21665319