RESPONSE OF LEIGH DAY TO THE MINISTRY OF JUSTICE CONSULTATION

TRANSFORMING LEGAL AID: DELIVERING A MORE CREDIBLE AND EFFICIENT SYSTEM

Leigh Day

1. Leigh Day is a leading claimant-focussed law firm specialising in International & Group Claims, Clinical Negligence, Personal Injury, Employment Discrimination and Human Rights & Public Law.

2. Leigh Day's Human Rights & Public Law department is one of the UK's largest specialist practices in this field. It is recognised by its peers and the Legal Directories as one the top ranked practices in the country. It is one of only three firms named in Band 1 of both Chambers & Partners and the Legal 500 in the areas of Administrative & Public Law and Civil Liberties. Seven of the department's lawyers are named as leaders in these fields.

3. Our clinical negligence department has unrivalled experience in bringing claims on behalf of those who have suffered injuries as a result of medical accidents. It currently has 26 solicitors specialising in clinical negligence and our senior partners have been leaders in the field for 20 years or more. We are rated in Band 1 by both Chambers & Partners and the Legal 500

4. The firm holds a contract with the Legal Services Commission to provide specialist services in Public Law and has done so since specialist franchises were first awarded.

5. Leigh Day are instructed in dozens of judicial reviews at any one time. The firm have been involved in some of the most important judicial review and public law cases over the last two decades including:

    5.1 R (oao Corner House Research)-v-DTI [2005] EWCA Civ 192

    5.2 R (oao Corner House Research & CAAT)-v-Director of the SFO [2008] UKHL 60

    5.3 R (Wright & Ors)-v-SSH [2009] UKHL 3

    5.4 R (oao Binyam Mohamed)-v-SSFCA [2010] EWCA Civ 65

    5.5 Yunus Rahmatullah-v-SSD & SSFCA [2012] UKSC 48

6. Drawing on this vast experience and knowledge, Leigh Day are thus well placed to respond to those parts of the Ministry of Justice's ("MoJ") proposals which relate to or will have a direct impact upon judicial review. We are also well placed to respond on the proposals relating to expert fees.

Focus of this Response

7. The majority of the Transforming Legal Aid consultation paper deals with proposals relating to the reform in the provision of criminal legal aid services. While we share the widely reported concerns as to the impact of those proposals, we do not have the relevant expertise to respond in substance to those proposals.

8. Instead we confine this response to the proposals in respect of civil legal aid contained in the paper and, in particular, the unprecedented attack on the constitutional right of access to the Courts in judicial review. This response is therefore confined to addressing the following proposals

   8.1 Restricting the scope of legal aid for prisons law (Q.1)

   8.2 Introducing a residence test (Q.4)

   8.3 Paying for permission work in judicial review cases (Q.5)

   8.4 Civil merits test – removing legal aid for borderline cases (Q.6)

   8.5 Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings (Q.31)

   8.6 Expert fees in Civil, Family and Criminal Proceedings (Q.33)

9. Although some of these proposals apply across the board to civil legal aid, judicial review appears to be the main target of the government in these further cuts in the availability of civil legal aid. The proposal relating to expert fees will have some impact on judicial review but will have the greatest impact in other areas of civil work most notably in Clinical Negligence which is an area of expertise for this firm, and we respond accordingly.

10. Given the ramifications of these proposals, we are concerned that they have been wrapped up in the same consultation document as the fundamental reform of criminal legal aid services and question whether it was appropriate to do so and whether sufficient care and attention has been paid to these proposals.

Important background to the judicial review proposals

<u>Fundamental Reform of Legal Aid and the Legal Aid, Sentencing and Punishment of Offenders Act 2012</u>

11. 1 April 2013 marked the introduction of reforms following the biggest shake up of civil legal aid for at least 15 years and probably since its introduction as a key pillar of the

welfare state. This followed an extensive period of consultation under the title *Proposals for the Reform of Legal Aid in England & Wales* and the subsequent detailed legislative scrutiny as the Legal Aid, Sentencing and Punishment of Offenders Bill passed through Parliament.

12. During that reform process which took large areas of previously funded work out of scope, the Government repeatedly recognised the pre-eminence of judicial review within the constitution of the UK and specifically retained almost all areas of judicial review work within the scope of legal aid:[1]

> *In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*[2]
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> *In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities.*[3]
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> *We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained.*[4]

[1] With the limited exceptions of judicial review arising out of a course of business and certain specific immigration/asylum judicial reviews targeted to address specific abuses raised by the Judges Council.

[2] Paragraph 4.16 of *Proposals for the Reform of Legal Aid in England & Wales*.

[3] Paragrpah 4.97, *ibidem*.

[4] Paragraph 4.99, *ibidem*.

13. Where other important areas of law were taken out of scope, the Government repeatedly emphasised that the safety net of judicial review was not being taken out of scope, for example:

> *We therefore propose to exclude all education cases from the scope of legal aid. As with other areas of law, we recognise the importance of being able to challenge public authorities' decisions on such matters via judicial review, and this will remain in scope.*[5]

14. Judicial review was thus retained within scope, almost in its entirety, for very good reasons which go to the heart of the constitutional settlement in this country.

Constitutional Role of Judicial Review

15. Judicial review is one of the key processes by which the separation of powers and the rule of law under our unwritten constitution are maintained. Any interference in the fundamental constitutional right of the citizen must be effected only with the utmost care and delicacy. As Lord Mustill put it:

> "*The Courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive. To verify not only that powers asserted accord with substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended…. To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground… Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved...is not to be disturbed, and all the recent advances undone."*[6]

16. As Lady Hale has put it:

> *"the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which parliament has enacted."*[7]

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[5] Paragraph 4.187, *ibidem.*

[6] *R-v-SSHD ex p Fire Brigades Union [1995] 2 AC 513*, 567D-568B.

[7] *R (Cart)-v-Upper Tribunal [2011] UKSC 28*, [37].

17. It is the natural inclination of the executive to bear against any restriction and checks on its powers. Judicial review is perhaps the paramount of those checks. Judicial review is of such overriding constitutional importance that the government must take the greatest care in any attempt at reform to ensure that it is doing so within the bounds of the executive's own constitutional powers and without upsetting the separation of powers and the rule of law.

Judicial Review: Proposals for Reform

18. Earlier this year the Government consulted on a number of hastily pulled together and ill-thought out proposals for reform to judicial review. Leigh Day were among over 250 consultation respondees, the overwhelming majority of whom resisted the proposals forcefully, pointing out the magnitude of the constitutional changes being put forward which the Government erroneously considered could be brought into effect under secondary legislation.

19. These proposals included ousting judicial review in cases of public authority abrogation of duty, continuing unlawful acts, omissions and delay.

20. As was pointed out by a number of the respondees, the proposals appeared to have been put forward solely on the basis of a political speech given by the Prime Minister and there was no evidence whatsoever to support the premises on which the proposals were based.

21. Fortunately, in light of the responses received, the Government dropped the most disturbing proposals and proceeded with a rump of reforms of minimal consequence.

22. However, the fact that these proposals were put forward at all is in our view a classic example of the executive seeking to remove or weaken the constitutional checks and balances on its authority.

23. A further sign of the creeping attack on judicial review is foreshadowed in the Government's response to this consultation where it is announced that there will be a further round of consultation on proposals relating to judicial review which may bear on housing and infrastructure projects.[8] Proposals are apparently to be brought forward in the summer.

The present proposals

24. The present proposals, put forward so recently after the *Judicial Review: Proposals for Reform* consultation, are a further manifestation of exactly the same defensive instinct

[8] Paragraph 24 of the consultation response.

of the executive – to insulate the Government from the inconvenience and potential embarrassment of being held to account in the Courts.

25. On this occasion however, perhaps learning from the last consultation, the approach is less direct, presumably in an attempt to avoid the constitutional opprobrium that the last set of proposals attracted. The Government seeks to cover its intentions through focussing its attack on three bête noirs in the myth of popular media: prisoners, foreigners, and the lawyers who represent them.

26. Nevertheless, the purpose and effect of the proposals would be entirely the same: to insulate the Government from the constitutional checks on its unlawful acts. This is to be achieved through an indirect attack on the public's ability to access the Courts and enforce their constitutional rights by seeking to put publicly funded legal representation beyond their reach through a direct attack on the sustainability of the lawyers who work in the field. There is no doubt that if the proposals are implemented as proposed the very viability of specialist claimant public law practitioners will be put in doubt.

Justifications for Proposals

Bearing down on the cost of civil legal aid

27. The view that the primary motive behind the judicial review proposals is to insulate government is further demonstrated by the fact that the figures for estimated savings to the Legal Aid Fund[9] (which the MoJ concedes are based on guesswork) are minimal. The consultation paper itself states "Given the reforms to civil legal aid which have just been implemented, we accept that there is little room for making further substantial cost reductions in that area." The projected savings set out in the Impact Assessment are:

    27.1 Restricting the scope of legal aid for prisoners - £4 million

    27.2 Introducing a residence test - unquantified

    27.3 Paying for permission work in judicial review cases - £1 million

    27.4 Civil merits test – removing legal aid for borderline cases - £1 million

[9] Consequential costs to the justice system and other publicly funded services have not been assessed or set off against the putative savings to the Fund. Actual savings to the Fund are likely to be offset by increased public expenses elsewhere – we address this further below.

27.5 Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings - £3 million

28. Only £1 million of the projected savings to the Fund would be solely attributable to judicial review work.

29. Furthermore, there is no assessment of the consequential costs of introducing the proposals, both to Defendants and the Courts Service through an increase in litigants in person and the wider consequential costs to public services and society caused by unlawful actions of public authorities going unchallenged.

30. Research has demonstrated that rather than detracting from the quality of local government, an increased level of judicial review challenge leads to improvements in levels of performance against the government's own indicators.[10]

31. Guidance published by the Government agrees: the Cabinet Secretary's foreword to the 2006 edition of *The Judge Over Your Shoulder*[11] describes judicial review as "*a key source of guidance for improving policy development and decision making in the public service.*"

32. The projected savings fail to take any account of the consequential costs of the envisaged restrictions on judicial review and, to the extent that there may be any net saving to public funds (which is doubtful and for which there is no evidence), are entirely disproportionate to the harm that the proposals will do in undermining the rule of law in this country.

33. The stated primary aim of the proposals - to bear down on the cost of legal aid and ensure the best deal for the taxpayer - will not be achieved in the context of the proposals for civil legal aid in general and judicial review legal aid in particular.

34. That leaves "credibility" and "the confidence of the public".

<u>Credibility</u>

35. The proposals, so far as they relate to civil legal aid and judicial review, are primarily justified in the consultation paper on the basis that the public has lost confidence in the system and that it is unfair on taxpayers.

36. The first point to note is that no evidence whatsoever has been put forward to show the alleged loss of confidence. This continues a worrying trend of changes to law and

[10] *Judicial review litigation as an incentive to Change in Local Authority Public Services in England and* Wales, Sunkin, Platt and Calvo, Institute for Social and Economic Research, no.2009-05 (February 2009)

[11] http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf

policy put forward by the government in the complete absence of any evidence for the need for change. Such proposals are clearly driven by political ideology alone. In the context of the rule of law in a modern democratic state, this is a worrying and dangerous trend of an executive overstepping its bounds under the separation of powers.

37. The 'credibility' and 'confidence' of the public which is repeatedly referred to in the consultation paper, unevidenced though it is, can only be the credibility and confidence of a certain part of the public. To other sections of the public the proposed changes would have exactly the opposite effect and will damage and undermine credibility and confidence in the justice system.

38. Even were it the case (and we repeat that no evidence has been put forward in this regard) that the majority of the public supported the Government's apparent view, it would still not be appropriate to interfere with an individual's ability to access the Courts and enforce their rights in accordance with the rule of law.

39. It is an essential principle on which the modern democratic state is founded that the rule of law will protect minorities from the tyranny of the majority. The separation of powers, equality before the law and (critically) the ability to access the Courts and enforce those rights with the benefit of legal representation where required are all essential ingredients in the rule of law.

40. The present proposals seek to restrict those rights, particularly and directly for unpopular minorities. Judicial review will become the reserve of the wealthy and commercial interests. As such they are an affront to the rule of law and cannot on any objective level be said to be credible.

41. The credibility of the proposals are further undermined by the ignorance of the operation of judicial review demonstrated both in the consultation paper itself and, indeed, by the Secretary of State for Justice.

42. In announcing this consultation on the Today programme on 23 April, the Secretary of State opened by saying:

> "*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, 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.*"

43. Even on a sympathetic reading that statement is grossly misleading. The Secretary of State fails to clarify that very many of the cases issued are in fact likely to have been

successful – the majority settling even before an initial permission decision. The legal system and the Civil Procedure Rules actively discourage litigating cases through to conclusion and the figures relied on by the Secretary of State reflect this. The small number of cases which actually progress to final hearing each year demonstrate that lawyers take the imperative to minimise costs very seriously.

44. The statistics show that in 2011 there were 6,264 permission decisions taken by judges. That means that 5,059 settled pre-permission and research[12] and our own experience shows that the majority of these are likely to have settled in favour of the Claimant. After permission has been granted (1,200 cases in 2011), research has shown that approximately 56% of claims are withdrawn before final hearing.[13] Almost all of these cases will have been settled in favour of the Claimant – Defendants often wait to see if permission is granted or refused before deciding to settle claims. Of those claims which do proceed to a final hearing, 43% were successful in 2011. Looking at the figures in the round, the true position is that approaching 50% of all judicial reviews issued will have been successful.

45. To the extent that there may be a credibility problem for judicial review amongst the public, it is no great surprise when politicians are repeatedly misleading the public. Whether this is deliberately for political purpose or through simple ignorance, the problem of confidence and credibility is clearly based on mistakes of fact. The answer, if there is a problem, would be a programme of education for the public (and ministers) as opposed to unnecessary and harmful restrictions on access to justice and the rule of law.

46. In short, there is no evidence of a problem in credibility or confidence in publicly funded judicial review. To the extent that such a problem does exist, it is a creature of misinformation which is, sadly, being perpetuated by the Government. Contrary to the position put forward in the consultation paper, the credibility of the justice system and legal aid in this country would be seriously damaged by the proposals.

Consequences of the Proposals as a Package

47. The proposals in the consultation paper also appear to have overlooked one of the major likely impacts from the reduced availability of publicly funded judicial review (whether directly through removal of legal aid from foreigners or indirectly through

[12] *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Bondy and Sunkin, Public Law Project (2009).

[13] *Ibidem*.

the attack on lawyers): the fact that increased numbers of individuals will resort to attempting to access the Courts in person.

48. A marked increase in litigants in person is likely to have a significant impact on the costs of running the Administrative Court as well as on the legal costs of Defendants who will effectively have to act as an amicus to the Court to ensure that the Claimant's case is presented and defended properly. The Defendant's lawyers will have to do the work that a legally aided claimant's lawyers would previously have done. Given that Government solicitors' rates are now significantly higher than those paid under legal aid and that government barristers rates will be higher than those paid to legal aid barristers under the proposals in the paper, this is likely to lead to a net increase in costs to public funds if these proposals are introduced. An increase in litigants in person will also add to the delays which the Administrative Court is already suffering from and which goes on to impact upon infrastructure projects held up by legal challenge.

49. However, these factors have not been monetised in the Impact Assessments accompanying the consultation paper. A full study of the economic impact of the proposals should be undertaken before any final decision is reached to implement these proposals.

50. These concerns have already been aired publicly by the President of the Supreme Court[14] in the context of the LASPO cuts. Senior barristers who represent the Government have also aired their concerns at the impact of the proposals on equality of arms.[15]

Consultation Questions & Responses

Chapter Three: Eligibility, Scope and Merits

1) 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.

51. While we do not have a criminal legal aid contract and therefore would not be directly affected, we do not support the proposals to restrict criminal legal aid for prison law

[14] BBC News – Lord Neuberger, UK's most senior judge, voices legal aid fears. 5 March 2013.

[15] http://www.telegraph.co.uk/comment/letters/10084925/Proposals-to-limit-legal-aid-for-judicial-review-will-undermine-the-rule-of-law.html

to those matters meeting very specific and limited criteria. We consider that the proposals are likely to leave a vulnerable section of society without adequate legal representation and that the alternative routes suggested for resolving disputes are demonstrably inadequate substitutes. We also believe that the proposals are likely to result in minimal savings.

3) 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.

52. No. The proposed residence test is both unjust and arguably unlawful. It will do lasting damage to the UK's international reputation for justice, human rights and the rule of law. Any costs savings will be entirely disproportionate to the aims of the proposals.

Costs savings

53. The Impact Assessment is unable to estimate costs savings to the Fund of this proposal. Furthermore, no effort is made to assess the consequential costs of the proposal. For instance, the marked increase in public costs incurred whilst a non-resident is being unlawfully detained.

54. In the public law field, almost all cases brought by non-residents will entail breaches or potential breaches of Convention rights and will thus be eligible for legal aid in any event under the LASPO exceptional funding provisions. No account is given in the Impact Assessment to the extra costs of processing these cases through the Exceptional Funding provisions. We would expect, from our own sample of cases, that such cases will run into the hundreds every year and it would be wholly inappropriate for them to be dealt with under the Exceptional Funding provisions of LASPO.

55. However, it seems clear that the aim of this provision is not to make any costs savings to the Fund but simply to discriminate in the provision of legal aid services to foreigners.

Credibility

56. The proposed change will do untold damage to the credibility of the UK's justice system through the blatant discrimination in the availability of legal aid services. This will be acutely the case in respect of public law cases where an individual has been treated unlawfully by the British state but will be prevented from seeking lawful remedies for that treatment.

57. If the proposal is to be introduced in any form it should explicitly exclude judicial review.

58. Judicial review is the ultimate safeguard against overweening executive power. In most cases the potential claimant will be vulnerable and at the mercy of the public authority challenged. It is this relationship which provides the nexus for the right to challenge the public authority, not the citizenship of the individual over whom the power (or purported power) is exercised. The Courts have long-recognised that the Courts are open to all to hold the UK state to account, irrespective of nationality.

59. The proposal seeks to *de facto* debar non-citizens from the ability to hold the British state to account. Without legal aid such individuals would not be able to afford lawyers and would be subjected to the chilling effect of the risk of inter partes costs awards.

60. There are likely to be two main classes of cases which would be caught by this proposal:

    60.1 Victims of abuses of power by the British state overseas. These cases are a small but very significant category of cases for the rule of law which include the well-known cases of Binyam Mohamed, Al-Skeini, Al-Rawi, and Baha Mousa. Restricting access to the Courts in these cases cannot be about public confidence or saving money. The only identifiable motivation is to protect the Government from political embarrassment. To seek to evade the rule of law and scrutiny of international human rights standards in this way would do significant and lasting damage to the UK's image and reputation abroad.

    60.2 Large numbers of the most vulnerable and marginalised people living in the UK – a very large proportion of those who currently bring judicial review cases in the Courts - fall into this category. These individuals have the fewest legal rights beyond the very basic human rights bestowed on them by the ECHR and Human Rights Act. They comprise individuals at risk of serious harm abroad seeking to remain in the UK outside of the asylum process (or not admitted to the asylum process) and those indefinitely detained under administrative detention powers. These are vitally important cases for the individuals concerned and for the rule of law and good administration in the UK. There is no evidence that these are hopeless cases of popular myth when they are brought with the benefit of legal aid. The Government holds the information in this regard but we would estimate that these cases would run into the hundreds every year and that the majority of them, from our experience, are successful.

61. Other significant cases which have attracted widespread public support, such as the Ghurka cases, the displaced Chagos islanders and the interpreters who served British forces in Iraq and Afghanistan, would also be excluded by the proposals.

62. The proposals will do lasting damage to the UK's reputation both at home and abroad.

Lawful?

63. Finally, there are serious question marks over whether this proposal would be lawful in view of the direct discrimination it engenders.

64. At present the strict tests for access to legal aid are applied equally to anyone who has a sufficient connection with the UK to access the Courts. The proposal seeks to directly discriminate against those who are not 'lawfully resident' in the UK[16], subject to two exceptions for asylum applicants and military personnel based overseas.

65. This means, for example, that an individual detained by state authorities in the UK would have access to legal aid (and de facto to the courts) only if they had British citizenship or leave to remain in the UK (and had done so for the 12 months prior). This amounts to direct discrimination and a breach of Article 14 of the European Convention on Human Rights (ECHR). It would be a direct breach of the ECHR in any case where convention rights were in play. The same principles would apply where EU law is in play pursuant to the EU Charter of Fundamental Rights which specifically prohibits discrimination on the basis of nationality.

66. The Equalities Impact Assessment published with the consultation paper recognises that the proposal will put non-British nationals at a particular disadvantage but goes on to state that it is a "proportionate means of achieving the legitimate aims set out in section 4". Those legitimate aims are stated to be:

> *"The primary objective of the proposed reform package is to bear down on the cost of legal aid, ensuring that we are getting the best deal for the taxpayer and that the system commands the confidence of the public. Our aim is to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system."*

67. It is difficult to see which, if any, of these aims the proposal represents a means of achieving. The only direct reference to an aim in consideration of removing legal aid

[16] Including Crown Dependencies and British Overseas Territories.

from non-residents is to "improving the credibility of the scheme" by targeting funds at those who have a strong connection to the UK. But:

67.1 the credibility of the scheme (and of the UK) would be undermined, not improved, by the adoption of discriminatory criteria; and

67.2 discrimination itself cannot be a 'legitimate aim'.

68. To the extent that costs-saving is considered to be the legitimate aim:

68.1 the Government itself is unable to quantify the savings which would flow (which itself begs the question as to how it can legitimately assess the equalities impact of the proposal); and

68.2 any savings involved (and there must be a question mark over whether there would in fact be any) would clearly be disproportionate to the impact on those oppressed by state power.

69. While the existence of these exceptional funding provisions as a safety net are not in dispute, the Exceptional Funding procedure places applicants for such funding at a distinct and substantial disadvantage to those applying with the ordinary scope of the Scheme:

69.1 They must find a lawyer prepared to make the application without remuneration.

69.2 They will not be able to access legal aid on an urgent basis.

69.3 They will have no right of appeal to an independent adjudicator should their application be refused.

70. There is therefore a very good case that the proposal is unlawful, certainly in the context of ECHR and EU law cases.

4) 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.

71. No. It undermines the rule of law and the principle of equality of arms. It flies in the face of the previous considered Government position on this issue without identifying

any credible justification for the *volte face*. It manifests a wholesale failure to understand the reality and economics of the judicial review process. It threatens to drive specialist public law practitioners out of business. It will debar people from accessing one of the most fundamental constitutional rights in this country, leaving judicial review as the preserve of the wealthy and commercial interests. It threatens to flood the Courts with litigants in person causing extra costs to be incurred by the Courts service and Defendant Public bodies. It will do lasting damage to the rule of law and the UK's credibility as a modern democracy.

Change of policy without justification

72. The first point to emphasise is that this proposal flies in the face of the Government's previously publicly stated position on the importance of legal aid funding for judicial review. That position was reached after very careful consideration following on from the much more detailed consultation process preceding the introduction of LASPO.

73. In the consultation paper *Proposals for the Reform of Legal Aid in England & Wales,* the Government floated the idea of introducing risk rates for lawyers bringing legal aid judicial reviews.

74. However, the proposal put forward was that risk rates should only apply *after* permission had been obtained. The Government recognised then that a significant proportion of judicial reviews will settle favourably but without costs at the pre-permission stage:

> *7.23 In judicial review cases, while costs often follow the event, if the decision under challenge is amended at the pre-permission stage, it would be less common to receive costs. We therefore propose that in judicial reviews, 'risk rates' will apply either after the initial application for permission has been considered, or when the costs of the case reach £25,000, whichever is the sooner.*

75. However, following the consultation process, the Government dropped this proposal because it recognised that it was inappropriate to introduce risk-based payment in judicial review:

> ***"Risk rates" (question 35)***
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> *241. The consultation proposed extending the use of "risk rates" in cases where costs are likely to be recoverable from the opponent if the case is successful. Fees paid at risk rates, which are currently only used in high cost cases, are much lower than those paid under standard legal aid rates and are paid only when costs are not recovered in full from the opponent. They are designed to encourage litigators to consider*

the likelihood of success, and the recoverability of costs, in deciding whether to pursue the case.

Key issues raised

242. There was strong opposition to extending the use of risk rates. Many respondents argued that legal aid rates were so far below private client rates that they already represented risk rates. They also argued that it could have unintended consequences by discouraging parties from settling in cases, for example in judicial review, because of disagreements about which side should bear the costs.

The Government response

243. In view of the force of the arguments, the Government is persuaded that it should not extend the use of risk rates.

76. Yet, now the Government proposes precisely such a scheme – indeed a far more draconian one, without justification or explanation, which goes substantially beyond even the original discarded proposal in the Reform of Legal Aid consultation. The concerns which applied to the original proposal apply *a fortiori* in respect of the new proposal.

77. No evidence has been put forward of any change in circumstances that can possibly justify an absolute *volte face*. There is simply no rational basis to go behind the decision encapsulated in the previous, far more detailed and considered, consultation process.

<u>Misconceptions</u>

78. The proposal is based upon a wholesale failure to understand judicial review, its mechanics and economics. The misconceived premises on which the proposal is pitched is highlighted by the Secretary of State's quotation above. Whether this is deliberate or borne out of ignorance is unclear but the fact is that only two years ago the Ministry of Justice clearly did understand these issues.

79. The proposal proceeds on the premise that a claim for judicial review which is not given permission ought never to have been brought and that the lawyers representing the claimant ought therefore to be penalised by not being paid for their work. This premise is wholly misconceived:

79.1 Judicial review is a front-loaded process for Claimants. The overwhelming majority of work in running a judicial review claim (certainly for the solicitors) is carried out at the outset in preparation of the claim – reviewing the merits,

instructing counsel, preparing the evidence and the papers. The Claimant must present his case as fully as possible when applying for permission – unlike the Defendant who need only respond in a summary manner before permission is granted.

79.2 Nearly half of all judicial reviews which are issued settle before the permission stage is reached.

79.3 The majority of these cases will be settled by withdrawal following a concession in the Claimant's favour by the Defendant.[17]

79.4 In some of these cases the Claimant will secure payment of costs from the Defendant (following the *Boxall* and *Bahta* line of authority). However, in many cases inter partes costs awards will not be received and the legally aided claimant's lawyers will take payment from the fund. This is because in some cases the outcome will not be clear cut, blame cannot be apportioned or changes of circumstances unrelated to the actions of the Defendant will render the claim academic. The jurisprudence rightly mitigates strongly against lawyers getting caught up in time-consuming satellite litigation over costs where a case is otherwise no longer pursued.

79.5 In other cases, the claim will be withdrawn following receipt of the Defendant's response to the claim when new facts come to light. In the vast majority of such cases Defendants will be to blame for failing to comply properly with the Pre-action Protocol. Yet, because the claim has been undermined or has fallen away, there is no prospect of recovering inter partes costs and a claim must be made on the fund.

79.6 Judicial review is by its nature a difficult area in which to assess the merits of a claim and it is inherently risky for claimants and practitioners to bring judicial review proceedings. In the majority of cases there will be an arguable point of law with respectable legal arguments on both sides. Unlike other areas of civil law such as tort claims, it is in the vast majority of cases not possible at the outset to assess the chances of success as being very high. Most judicial reviews brought with legal aid will have prospects of success in the region of 50-60%. This means that even with consistently accurate assessments of the merits of judicial review claims, even specialist practitioners are likely to lose somewhere between 40-50% of cases.

[17] *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing*, Bondy and Sunkin, Public Law Project (2009).

79.7 Some of these cases will be lost at the permission stage. The Government takes the view that funded cases should not fail at the permission stage. That is stated expressly in the Lord Chancellor's Guidance on Civil Legal Aid (para 4.1.6): "In principle no case that is brought with the benefit of legal aid should fail at the permission stage, since even where services can be made available on the basis of 'borderline' prospects of success, the relevant test is at least as stringent as that for permission." That misapprehension underpins this proposal.

79.8 The reality is that what was originally devised as a low-threshold test to wean out hopeless cases at minimal costs (and without the need for the Defendant to respond or attend any hearing) has become a much higher threshold test – something along the lines of 'has a good prospect of succeeding at final hearing' and a much more adversarial process than originally envisaged. Research has also demonstrated that there is a wide divergence in the rates of grant of permission amongst the judges of the Administrative Court.

79.9 It is not uncommon for oral applications for permission to go on for the best part of a day before a judge, with both sides presenting respectable arguments, but for the judge to refuse the application permission (ostensibly as unarguable), sometimes in a reserved judgment.

79.10 "Rolled-up" hearings are not infrequent. These are hearings at which permission and substantive arguments are heard at the same hearing. These are frequently used in urgent cases or are directed by judges when considering paper permission applications where the legal or factual issues appear too complex to assess on the papers. In such cases, Claimants must prepare for a final hearing before permission has been obtained. It is open to the Court, having heard a day or more's argument to refuse permission at the conclusion.

80. These are some of the practical realities of the mechanics and economics of acting in judicial review claims and which the Government appears to have failed to acknowledge. If Claimant lawyers are not paid for cases in which they do not obtain permission, they will not be paid for the majority of the cases they bring, despite frequently successful outcomes for the client.

81. If the logic of the proposal is followed through, then the lawyers acting for Defendants (also at public expense) should not be paid for any work resisting a permission application where permission is subsequently granted (which in reality they do in almost every case where permission is granted). If they waste time arguing that a claim is 'unarguable' but the judge holds that it clearly is, they should not be paid.

This would at least encourage a more sensible approach by Defendants in judicial review proceedings and would save Court time and public expense to all parties. Yet even the introduction of a mirrored punitive regime for defendant lawyers would not be as damaging for the finances of the Treasury Solicitor's department because the judicial review process is back-loaded in terms of work for the Defendant, unlike for the Claimant.

82. The analogy which the consultation paper draws with the current position on legal aid funding for appeals to the Upper Tier Tribunal in immigration cases also demonstrates a failure to understand judicial review. Such cases are essentially an appeal from a reasoned decision on a point of law rather than the moving target of a public authority's decision, action or omission in a judicial review claim. It is much easier to assess merits of such a statutory appeal and the work required is minimal since the substantive work has already been carried out in the tribunal appeal.

83. Further the logic of the proposal flies in the face of the recent decision to remove delegated powers from all public law providers. Proposing that the lawyers representing claimants should take the risk of payment based on their assessment of the merits whilst on the other hand maintaining the decision to remove the merits assessment from those lawyers is simply irrational. Either public funds are placed in the trust of the LAA, as now, or they are placed in trust of the lawyers with the incentive that they are not paid if they fail. To do otherwise simply duplicates costs over the justice system with merits first assessed by lawyers (albeit unpaid), then by the LAA, then by the Court.

84. Understanding these dynamics should remind the Government why it reached the conclusion it did on the previous proposal to introduce risk rates and why the present proposal is unsustainable as a matter of simple logic.

<u>Why this is not just an attack on lawyers</u>

85. The Impact Assessment seeks to play down the impact of this proposal on the clients who would seek to bring a case with legal aid. The proposal includes maintaining funding of disbursments and provides costs protection to the client.

86. However, the reality is that lawyers will simply not be able to take the risk of taking on most cases and clients will be turned away to face injustice or attempt to access the Courts without legal representation.

87. Where a case is very strong, the lawyers will have to turn it away because the probability is that the case will conclude pre-permission and they would not be paid.

88. Where a case is risky, the lawyers will have to turn it away because the risk of failing to get permission and not being paid is too high.

89. The difficulty of assessing risk in judicial review cases will mean that many providers may simply not be able to continue working in the field. Public law work is unlikely to remain financially viable in isolation and only those firms able to cross-subsidise the work and prepared to run the risk of a loss-leading department would continue to offer the service. Specialist public law providers may simply wither away.

90. Ultimately it will be the British public, access to justice and the rule of law in the UK which will suffer.

Costs savings & Credibility

91. The costs savings identified of £1 million represent a tiny proportional saving to the fund. The projected savings are clearly and entirely disproportionate to the impact that the proposal will have.

92. However, in all likelihood, the overall costs of the proposal will be significantly higher than the projected savings. Lawyers will simply be unable to risk taking on many cases and in consequence the Courts and Defendants will have to deal with unrepresented litigants in person.

93. Furthermore, where lawyers do take cases on they will have no choice but to fight cases all the way in an attempt to secure permission and inter partes costs where before they would take the expedient course of settling a case where a reasonable offer is on the table. To do otherwise will risk putting them out of business. Additional unnecessary costs will be incurred on unnecessary legal argument and satellite costs litigation to the detriment of all parties and ultimately the public purse.

Alternative Proposal

94. We would like to put forward an alternative model which would better address the Secretary of State's stated aim to penalise lawyers financially for bringing hopeless cases.

95. One of the reforms to judicial review to be implemented following the *Judicial Review: Proposals for Reform* consultation is the introduction of a "totally without merit" certification to be applied by the Judge considering an application on the papers. The consequence of such a certification is that the claimant will lose the right to an oral renewal hearing.

96. It would make sense to use this certification process as the way to regulate the bringing of hopeless cases under legal aid. The certificate would also mean that in a

claim brought with legal aid, the lawyers concerned would lose their right to remuneration for their work. Any payments on account would be recouped and the lawyers would receive no public funds.

97. This would enable good lawyers to maintain a sustainable practice whilst giving reassurance to those elements of the public where there is a credibility deficit that lawyers who bring hopeless cases will not be paid out of public funds.

98. We would urge this sensible and proportionate alternative solution upon the Secretary of State.

5) 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.

99. No. We consider that the proposal would be a false economy. The projected savings are only £1 million. The benefits of the funding of borderline cases clearly outweigh the very small costs of operating the system.

100. The Consultation paper states at 3.80 "to warrant public funding …a case should have at least 50% prospects of success". No reference is specifically made to those cases, the prospects of success of which are unclear, which are currently funded by way of investigative help. We assume legal aid will continue for those cases. If this is not the intention then we suggest this question requires amendment or a separate consultation should be carried out.

<u>Costs & Credibility</u>

101. It is clear that this proposal will not have a significant impact on providers. There are only a very small number of cases each year, estimated at 100. However, we note that the consultation paper does not put forward any statistics about the relative success rate of such cases. This should clearly be a relevant consideration in considering whether to continue this funding provision.

102. In our view the proposal will have a disproportionate impact upon (a) wider public interest and (b) the most vulnerable.

103. The present legal aid scheme provides that cases which are borderline (ie: not less than 50:50) –may be funded provided that the case:

103.1 Is of significant wider public importance; or

103.2 Is of overwhelming importance to the client.

104. The costs analysis in the Impact Assessments is interesting because it suggests that there is an average legal aid spend of £10,000 on each of the 100 or so cases which proceed under this provision. This significant average figure (bearing in mind some cases must win and no claim will be made on the fund) suggests that the majority of such cases will advance beyond the permission stage which itself suggests that the Courts see these cases as important. This is perhaps no surprise given that cases must be very important (to an individual or the public at large) in order to justify funding under this head.

105. The borderline funding provision is particularly important in the area of Public Law. These cases are often, by their nature, legally difficult – often testing the detail of the law for the first time and achieving judgments which clarify the law. Public law is 'public facing' and a case very often may have implications for the relationship between the state and a very large number of individuals.

106. Removing the borderline category of cases is likely to be a false economy directly in cases of wider public interest, less directly but just as importantly in the case of an individual facing deprivation of liberty, homelessness or serious harm as a result of an untested decision or piece of law. The Government, in effect, would be able to hide behind such legal grey areas in its dealings with the poorer and more vulnerable parts of society.

107. This tiny proportion of expenditure does significant good at minimal costs. Arguably every pound spent on this category is a pound better spent than in a run-of-the-mill legal case with good prospects of success.

108. Furthermore these types of cases are very important for the credibility of the legal aid scheme, recognising wider public benefit and particular vulnerability. The proposal would do serious damage to the credibility of the legal aid scheme.

Chapter Six: Reforming Fees in Civil Legal Aid

2) 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.

109. No. The proposed harmonisation of barristers' fees is with the wrong comparator. Any harmonisation that is introduced should be with the fees paid to barristers from

public funds when instructed by a public body. The introduction of Treasury rates for counsel acting for Claimants as well as Defendants would reinforce the principle of equality of arms whilst ensuring the specialist public law bar continues as a viable practice area.

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.

110. No. Any reduction will reduce further already limited access to justice for those who by the very fact they are entitled to legal aid have been identified as amongst the most vulnerable members of society, by:

    110.1 Prejudicing their position as they will be limited to choosing less skilled experts, if they can find an expert to act at such rates or at all.

    110.2 Putting them at a disadvantage because the Defendant will still be able to instruct the experts of their choice, who are best for the job. There will be no equality of arms.

111. As indicated above we are specialists in clinical negligence, the area of law which is most heavily dependent on experts. It is impossible to prove a clinical negligence claim without expert input. However, the same principles and difficulties apply in other civil areas of law, including judicial review, where expert evidence is occasionally required.

112. We cannot emphasis enough that the rates currently being paid by the LAA are not realistic and mean that those clients in receipt of legal aid have restricted, if any, access to justice through legal aid. There is no doubt about this.

113. The Government decided only last year to keep some clinical negligence cases in scope for legal aid – those claims arising from neurological damage suffered during pregnancy, at birth or within the first 8 weeks of life causing severe disability. We assume that this was because, having carried an Equalities Impact Assessment, it was accepted that such Claimants are the most vulnerable through both their age and disability. Yet, despite this, the current proposed changes will prejudice those exact same vulnerable members of the public.

114. The comments made in Chapter 7 of the Consultation paper to justify this further reduction in experts' fees appear to be based on false premises. There is a notable and alarming lack of evidence to suggest that the proposed changes will achieve any of the

stated objectives; to save costs and restore the credibility of and public confidence in legal aid.

115. A reduction of 20% in experts' fees will most likely increase the overall cost to the public purse because more work will be required to deal with less experienced experts and less skilled experts will mean more cases will need to be abandoned, will be lost at trial or there will be a failure to beat a Part 36 offer at trial. This will mean an increase in costs and a reduction in public confidence, if it is being argued that public confidence in the system is based solely on how much it costs.

116. If the current codified rates are reduced by 20% and those are the maximum rates that the LAA will pay then legal aid can no longer be considered a form of funding that is in the best interests, or indeed useful at all, for those members of society who it has been decided should rightly be entitled to it. That will mean a reduction in access to justice and the Community Legal Service will be failing to provide the service it is designed to. That will adversely impact on the credibility of the legal aid system, which the Consultation paper refers to as an issue these changes are intended to address.

117. At paragraph 7.5 of the Consultation paper it is suggested that the current codified rates were based on "benchmark rates that have been developed by LSC caseworkers drawing on experience of the charges most typically paid for expert services". Despite having previously requested the information on which these benchmark rates were based such data has never, to our knowledge, been disclosed. In the absence of any such data we cannot accept that the LSC has evidence that in 2011 the majority of experts would act for the apparent "benchmark rates" they set.

118. A consultation of those benchmark rates was never carried out and neither was a full consultation carried out of the impact on clinical negligence cases of the 10% reduction in experts fees' brought in in October 2011.

119. At paragraph 7.3 of the consultation paper it is stated that the market has adjusted to the new codified rates. No evidence of this is provided. Indeed, it is not actually stated if there is any such evidence. Our experience suggests that there will not be any evidence of market adjustment and our clear view is that that statement is categorically wrong.

120. We have seen no evidence of experts reducing their rates to the current level of codified rates. The experts we use have told us that it would not be economical for them to do so and so they cannot and will not work at current codified rates.

121. Over the course of the last 18 months we have been in correspondence, and have met, with members of the LSC/LAA, specifically to raise concerns about the unrealistic current level of codified experts' rates. We know that we are not the only solicitor's

firm to do so. We know that the Association of Personal Injury Lawyers (APIL) and a number of experts' organisations have also expressed their concerns.

122. Indeed, since this Consultation has been open we have received a letter from the MOJ confirming that they agree that in respect of some specific specialisms of experts it may be necessary to pay rates higher than the current codified rates.

123. We note there is no reference to these concerns or this acknowledgment in the Consultation paper.

124. At paragraph 7.3 of the Consultation paper the explanation given for the lack of any hard evidence on experts' fees is that data on experts' rates only started to be collected in February 2012. This is surprising as, whilst the LSC may not contract directly with experts, there was previously a mechanism by which prior authority was sought for experts' fees and High Cost Case Plans had to be submitted, both of which required experts' rates to be stated. Therefore, it is wrong to say that that data was not available to the LSC. If the fact is that data, although available, was not collected or considered until February 2012 that is still over 12 months of data. It is suggested that that data has not yet been assessed when it could have been.

125. Given this it seems premature to suggest further changes to experts' fees when "robust data" is not yet available but presumably will be soon and then can be analysed and published so that any revision of experts' fees can be based on hard evidence of what access to experts will be available to those on legal aid.

126. It is suggested that changes are needed now as there is no justification to pay experts higher fees under legal aid. It is unclear on what evidence the suggestion that experts are paid more under the legal aid scheme than they would be otherwise is based. Only reference to fees paid by the CPS is made by way of comparison, but of course this 20% reduction is intended to apply to civil and family legal aid too, where what the CPS pays is of no relevance to the expert. Indeed, many experts affected by these proposed changes will do no criminal/CPS work.

127. Moreover, whether the expert be doing criminal, family or civil work they are an expert because they have built up their expertise by working in their specialist area, which for most is what they spend the vast majority of their time doing. As far as we can see there has been no attempt as part of this Consultation to confirm the hourly rates that experts are paid for all other work they do. Most experts do other private work, for example an expert obstetrician in a clinical negligence case will spend the majority of his time not on medico-legal work, but seeing patients or, for example, carrying out research for which he will be paid his usual hourly rate. Even in his medico-legal work an expert will advise both Claimants and Defendants and, of course, not all Claimants are legally aided, and so again for the majority of medico-

legal work an expert will be paid his usual hourly rate. Therefore, the rates that the experts we use quote are what they are paid for the other work they do. It is only when working for a legally aided Claimant the expert would not be paid his usual hourly rate. The reality is not that experts are paid higher under legal aid; in most circumstances they are paid considerably less under the legal aid scheme than they would be for other work they do.

128. Their other work in clinical negligence cases includes the work they do for the Defendant, who is more often than not the government themselves through the guise of the NHSLA. It cannot be considered fair or equitable that the government restricts what Claimants can pay experts, and so prejudices their position, whilst imposing no such restriction on itself/the NHSLA. The question must be asked: if experts are more than willing to act at codified rates why are the NHSLA paying the experts they use on their cases considerably more?

129. The comments above apply to the position now – before a further reduction of 20% is applied.

130. There is no explanation or justification for how the figure of 20% was reached as an appropriate percentage reduction. It appears to have been plucked out of thin air.

131. We note that there is no evidence that experts will act for legally aided Claimants at the proposed rates. We do, however, have evidence that experts will not act for current higher rates, which we have already provided to the LSC/LAA, as referred to above.

132. Finally, paragraph 7.10 of the Consultation paper refers to how the ability to apply for higher rates will still be available in exceptional circumstances. This is cold comfort and likely to be of no practical assistance to any Claimant struggling to find an expert to act at codified rates. All applications we have made for prior authority to exceed the codified rates due to "exceptional circumstances" since the current rates were introduced in October 2011 have been rejected by the LSC/LAA even when we have been unable to find any expert to act at the rate set by the LSC/LAA.

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?

133. While the Equality Impact Assessment is not as glaringly flawed as the Credibility Impact Assessments (as referred to throughout), it is clear to us that there is (a) a strong argument that the proposal to remove legal aid from non-residents amounts to unlawful discrimination against a protected class, (b) a strong argument that it is in breach of Articles 14 and 6 (and other potentially relevant articles on a case by case basis) of the ECHR, and (c) completely underplays the impacts on protected classes of the proposal to make pre-permission work conditional upon obtaining permission from the Court. We elaborate on these concerns above and put forward suggestions for how the present proposals can be moderated or amended to mitigate these impacts.

Leigh Day

3 June 2013