Public Interest Lawyers

PUBLIC INTEREST LAWYERS' RESPONSE TO MINISTRY OF JUSTICE CONSULTATION ON PROPOSED REFORMS TO LEGAL AID: 'TRANSFORMING LEGAL AID: DELIVERING A MORE CREDIBLE AND EFFICIENT SYSTEM'

Introduction

1. This is the response of Public Interest Lawyers (PIL) to the Ministry of Justice's consultation paper: 'Transforming Legal Aid: delivering a more credible and efficient system'. The consultation period runs from 9 April 2013 to 4 June 2013.

2. PIL are a firm of public, international and human rights law specialists who, over a number of years, have developed expertise in claimant-focused judicial review proceedings against public authorities and Government departments in both domestic and international contexts. The range and breadth of our work is set out in our response to this consultation. However, in order to highlight the important litigation that PIL has brought on behalf of publicly funded clients, we provide below a list of litigation in which PIL have acted. Importantly, all of the following cases would either not be funded by way of legal aid, or would face considerable difficulty in being funded by way of legal aid, were the Ministry of Justice's (MoJ's) proposals (particularly the proposed 'residence test' proposal) to be adopted in full:

    i. *R (Ali Zaki Mousa) v Secretary of State for Defence No.2* [2013] EWHC 1412 (Admin)
    ii. *R (Ali Zaki Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334
    iii. *R (Gurung) v Ministry of Defence* [2002] EWHC 2463
    iv. *Al-Jedda v The United Kingdom* (2011) 53 E.H.R.R. 23
    v. *Al-Skeini and Others v The United Kingdom* (2011) 53 E.H.R.R.18 (litigation which led to the Baha Mousa Public Inquiry)
    vi. *Al-Bazzouni v The Prime Minister & Ors* [2011] EWHC 2401 (Admin)
    vii. *Al-Saadoon and Mufdhi v The United Kingdom* (2009) 49 E.H.R.R. SE11
    viii. *Al-Sweady & Ors, v Secretary of State for the Defence* [2009] EWHC 1687 (Admin) and *Al-Sweady & Ors, v Secretary of State for the Defence* [2009] EWHC 2387 (Admin) (litigation which led to the Al-Sweady Public Inquiry)
    ix. *Al-Jedda v Secretary of State for Home Department* [2010] EWHC Civ212
    x. *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587.
    xi. *R (Haidar Ali Hussein)* v Secretary of State for Defence [2013] EWHC 95 (Admin)

3. We concentrate below on those proposals for reform which will have a direct impact upon PIL's clients and upon the areas of work within which PIL retain expertise. Accordingly, we provide detailed responses to the following questions:

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

Question 5: 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?)

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?

4. In addition, acknowledging areas in which PIL have familiarity if not expertise, we provide brief responses to the following areas:

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

   Question 31: 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 advocates appearing in those courts?

   Question 33: Do you agree with the proposal that fees paid to experts should be reduced by 20%?

5. Those remaining proposals for reform fall outside of PIL's expertise and we do not seek to address those matters in detail. We are content for colleagues who are better versed in those matters to respond to the MoJ's consultation.

Preliminary Observations

6. The proposed reforms have the potential to irreparably undermine constitutional principles and norms that have underpinned our democratic and legal systems for many centuries. These principles include (amongst others) equality of arms between parties to litigation, equal protection to all who seek recourse to the courts and the accountability of the executive to those who elect them. These legal norms can all succinctly be considered as falling within perhaps the most important constitutional principle of all; a constitutional principle which ensures the equitable and just running of, not just our legal system, but our democratic society as a whole the rule of law.

7. Therefore it might be assumed that such reforms would only be contemplated as a matter of last resort; that they would be suggested only for the most principled and coherent of reasons; that those reasons, in turn, would be supported by irrefutable evidence and with the benefits of the changes clearly being demonstrated to outweigh the very considerable costs to our democratic and legal systems.

8. The fact that none of these requirements appear to be met and, indeed, that the following holds true of this consultation process, suggests an administrative and consultative process flawed on many levels:

   8.1 Only a matter of weeks after the consultation process had begun, the Lord Chancellor appeared on the *Today* programme on Radio 4 (on 23 April 2013) stating that: *'We're changing the legal aid rules so that you're not going to be able, your lawyer won't get legal aid'*. This gives a clear indication that the Lord Chancellor has already arrived at a position of 'changing the legal aid rules' before the consultation has concluded (or really even begun); a position that demonstrates the consultation process is inherently flawed (see *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at para 108: proper consultation requires that *"the product of consultation must be taken conscientiously into account"*; a requirement reiterated in *R v London Borough of Barnet ex p B* [1994] ELR 357 at para 357C: "*the important thing is that the council should have embarked upon the consultation process prepared to change course, if persuaded to do so"*). It also does not assist the MoJ that the 'Civil Credibility Impact Assessment' describes, on the first page of a document considering the proposed changes to the scope, eligibility and merits of civil legal aid, the consideration process having already reached the stage of 'Enactment'.[1]

   8.2 Nor has the MoJ's (apparently definitive) position been arrived at through the careful consideration of detailed and accurate evidence. We adopt Public Law Project's draft response to this consultation[2], which highlights the serious statistical errors in the data used by the Lord Chancellor during that interview.

   8.3 Moreover, serious concern is to be raised when, not only does the MoJ appear to be working from an inaccurate data set, it also appears to be working from a misunderstanding of the very nature of judicial review litigation as a whole. This is explored below with particular reference to the proposal to only pay Claimant solicitors upon a grant of permission. However, an example is provided here by way of illustration. Throughout the consultation paper's consideration of proposals that will reduce individuals' access to legal aid funding for judicial review cases, there is

[1] IA No: MoJ194, p 1

[2] At page 2, paragraph 3 onwards (available at: - http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf)

constant reference to the mitigating effect of such individuals being able to *'address their disputes in different ways'* whether by representing themselves at Court, seeking to resolve issues by themselves, pay for services which support self-resolution or to pay for private representation. The possibility of 'alternative dispute resolution' is offered as mitigation to the proposal to impose a 'residence' test (Impact Assessment, page 9, para 24), for the removal of funding for 'borderline' cases (IA, page 12, para 52) and for those who cannot obtain publicly funded services because a solicitor is unable to take the risk of preparing their case without payment until a grant of permission (IA, page 10, para 36). Exactly the same mitigation (with exactly the same wording) is proposed by the MoJ in each instance. What this fails to understand, crucially, is that the relief or remedy sought in judicial review proceedings is often non-financial and, often, is confirmation that a public authority owes you a particular right (whether a human right or the right to good governance) or has acted illegally. These are not remedies typically made available through alternative dispute resolution (ADR) and we are aware of no case where, in response to proposed judicial review proceedings, a public authority has suggested that the matter be resolved by way of ADR. The proposed mitigation is therefore illusory. Moreover, even were ADR available, it is not clear how the MoJ propose that this would be funded. Those applying for legal aid do so because they meet strict financial eligibility criteria. Impecuniosity is a near prerequisite for legal aid services to be provided. That being the case, it is not clear how these same individuals would be able to pay for mediation services or ADR. Nor would paying for private representation be an option either. The complications of individuals representing themselves in Court are addressed further below. It is clear therefore that the main mitigating factors offered by the MoJ are all shown to be fanciful at best, and wildly implausible at worst.

8.4 The MoJ's misconceptions about judicial review can also, regrettably, be placed within a wider series of evidential failures that undermine the MoJ's consideration of this issue. For example, no data has been provided which permits the assessment of the proposed savings against the estimated costs. Savings of £2 million are suggested as accruing as a result of adoption of both the 'no payment without permission' proposal (at question 5) and the 'removal of funding for borderline cases' proposal (question 6). The MoJ does not quantify those savings that might be expected through introduction of the 'residence' test (question 4). It is submitted that savings of around £2 million cannot possibly justify the very serious constitutional consequences these reforms might have. What is more, the MoJ anticipates that, with respect to the 'borderline cases' proposal and the 'no payment without permission' proposal, the costs of implementing the changes may well amount to £2 million. We explain below why these estimated costs may not reflect the actual costs ultimately absorbed by the public purse but to provide just one example at this stage: if the proposals are enacted, a consequence of the reforms will be that fewer

individuals will be able to secure legal representation by way of legal aid. There will be an invariable increase in litigants in person conducting proceedings unaided. There will, in turn, be an invariable increase in the administrative burden placed upon HMCTS in conducting proceedings with a class of litigant entirely unfamiliar with Court machinery. To this end, the recent pronouncement of Lord Justice Ward during judgment in a case involving litigants in person provides timely and sobering cause for thought:

> *It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going away…I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid.*[3]

And yet, this anticipated cost does not appear to be considered in any (realistic) detail within the consultation papers[4]. Therefore, even on the MoJ's best estimate, the financial benefit of the reforms is cost neutral. In fact, it is clear that the adverse costs may in fact be very much greater than the MoJ anticipate. Neither scenario, it is submitted, provides sufficient justification for enacting the reforms and bringing about the very serious constitutional consequences that are explained will result through this response.

8.5 The lack of adequate evidence perhaps reflects the undue speed with which the MoJ seeks to bring about these reforms. These proposals were introduced only eight days after the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 introduced a series of substantial reforms to legal aid in judicial review (and other publically funded) cases. Before the impact of the LASPO changes has even begun to be weighed, the MoJ sees fit to begin consultation on a series of new reforms. Even then, the current consultation period (on the present reforms) has been limited to under two months which hardly provides an window in which to alert the public to the proposals, for the public to consider their substance and provide detailed and considered responses as to their potential effects.

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[3] *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 at paragraph 2

[4] At p 9, para 24 of IA No: MoJ194, the MoJ states that (with respect to the residence test proposal): *Individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in Court…*' At paragraph 28 of the same document it is admitted: *If individuals who are now no longer eligible for legal aid as a result of the residency test opt not to pursue their dispute, there will be a decrease in civil cases going to courts/tribunals. This may lead to savings to HMCTS expenditure. However, this is unquantifiable as behavioural response of client is unknown'*. The same reasoning is applied to the 'borderline cases'/'tightening of the merits test' proposal at page 12, paras 52 and 55 of the same document.

8.6 Finally, we question the reasons provided by the MoJ for these reforms. The MoJ suggests that these changes are driven by a need to cut costs as well as a need to improve public confidence in the legal aid scheme. The evidential basis for the former is, as suggested above (and explored further below), tenuous at best. The evidential basis for the latter is non-existent. Throughout Chapter 3, the MoJ presents no evidential basis to justify the assertion that public confidence in the legal aid system is lacking. Given that the consequences of the proposed reforms will be a diminution of the public's ability to hold the executive to account and a consequential increased immunisation of public authorities to judicial oversight and scrutiny, it should be expected that the public would retain a very real interest in these proposals. In the absence of the MoJ's own evidence of a lack of public confidence in the legal aid system, it is hoped that the department will have proper regard to the responses it receives to this consultation paper and will accept them as evidence to the contrary: that the public, and the court systems and democratic functions that represent their interests, are not well served by these proposals and that they should be abandoned.

Response to Specific Consultation Questions

9. We now turn to address, where relevant and by reference to PIL expertise, the specific questions raised by the MoJ in its consultation document.

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

10. We do not agree with this proposal. We are concerned that the proposals unduly narrow the areas in which legal aid will be provided to a prisoner and that a number of very grave matters affecting prisoners will fall outside of the scope of legal representation. This has the potential to leave a frequently vulnerable sector of society entirely without a voice to articulate maladministration and abuses of power within the prison estate. We do not believe that the alternatives to legal representation suggested by the MoJ (self-representation in the internal prisoner complaints system, prisoner discipline procedures and probation complaints system) offer sufficient safeguards to abuses of executive and administrative power.

Question 2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court?

11. Together with questions three and seven to twenty-nine, this question relates to matters of legal aid funding of criminal cases. It is vital that those brought into custody and facing

criminal sanction of the state have access to capable and committed lawyers prepared to represent their client's interests to the best of their ability.

12. We are alarmed at the prospect that an individual detained on criminal charges might not be allowed the opportunity to instruct a lawyer of his or her choosing. We are further concerned that those lawyers that will be providing representation will be operating under increased financial restrictions. A fair, efficient and effective criminal defence system must be commercially viable. If not, it will not attract lawyers of sufficient skill nor dedication to ensure confidence in and, more importantly the fair operation of, the criminal justice system as a whole.

Question 3: Do you agree that the proposed threshold is set [at] an appropriate level?

13. See paragraphs 11 to 12 above.

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

14. We do not agree with the proposal.

15. In summary, we submit below that there are already adequate restrictions on the funding of cases concerning non-residents; the proposal would prevent accountability for serious human rights abuses and dangerously weaken the rule of law; the proposed mitigating measures are inadequate; it represents a potential breach of the ECHR; it is discriminatory; it fails to meet the Government's stated purpose and is disproportionate; and its impact has been poorly assessed (even for a preliminary impact assessment). We develop each of these below.

16. As described above, PIL has represented hundreds of judicial review claimants who are not resident in the UK, but who are victims of torture, unlawful killing and arbitrary detention at the hands of the UK Government. These (and other) cases have secured significant redress for victims and have been amongst the most significant judicial decisions of the last decade, both nationally and internationally. As a direct result of PIL cases (such as *Al-Skeini and Others v The United Kingdom* (2011) 53 E.H.R.R. 18 and *R (Ali Zaki Mousa) v Secretary of State for Defence No.2* [2013] EWHC 1412 (Admin)), the practice of the British authorities and their agents in foreign conflict zones (or where those same agents have authority or control over individuals extra-territorially) has been brought under the scrutiny of the British courts. These cases have been of pronounced benefit to victims and the public and have extended the rule of law where before there was little or none. Unlawful action by British authorities overseas is no longer outside of the consideration of the British courts. All of these cases would have been excluded from ordinary legal aid funding under the proposals. As a consequence, they would not have

been brought: the complexity and cost of such proceedings cannot be borne by them, or by NGOs, nor pursued through alternative means. Baha Mousa's father would not have obtained justice for his son; human rights standards would not have extended to the actions of British security forces abroad; non-UK nationals would have remained in arbitrary detention for several years; persons to be handed-over to the death penalty would have been unable to prevent their transfer; hundreds of victims of abuses by British forces in Iraq would not now be afforded the inquiry into these abuses that the recent *Ali Zaki Mousa (No 2)* judgment has granted them. By contrast, this proposal grants impunity to the UK for many of its most egregious human rights violations and leaves victims voiceless.

17. We also submit that this proposal is tainted by unfairness due to the failure to provide any meaningful statistical data in support. We adopt the reasons and the requests in Public Law Project's letter of 22 May 2013.

(1) Existing restrictions on funding

18. There are already restrictions on legal-aid for non-residents. These are the Funding Code and its associated Guidance. Just as for UK resident persons, this involves a careful analysis of the merits of the applicant's claim, the public interest in and importance of that claim and the financial means of the applicant. Non-meritorious or otherwise ineligible cases are already excluded from the system. Indeed, if proposal Q5 is carried through, the LAA would not in fact be asked to fund any non-resident judicial review case other than one which a judge had granted permission in respect of. If that proposal is enacted, this only deepens the disproportionate and unnecessary nature of the present proposal.

19. Furthermore, cases involving non-residents may only be brought in the domestic courts if they involve a sufficient nexus to England & Wales. The consultation document appears to be concerned that legal aid claimants are engaged in 'forum shopping' at taxpayers' expense. This is far from reality. In the case of judicial review, on which this proposal will have the most disproportionate impact, the nexus between the applicant and the UK stems directly from acts of the UK state: in many cases in unlawfully detaining, mistreating, torturing and killing them and their families. The English courts are their only hope. There is no need, nor any justification, for the LAA to impose a further, narrower test than that applied by the courts. Put simply, these claimants are "victims" for the purposes of the ECHR and thus the HRA 1998.

(2) Prevent accountability for serious human rights abuses and dangerously weaken the rule of law

20. The proposal is described variously in the consultation document as requiring that applicants have a *"strong connection"* with the UK; *"more than just passing connection"*; and as excluding individuals with *"little or no connection to this country"*. Yet there is a strong *"connection"* between the claimants and the UK in cases such as *Al-Skeini, Al-Sweady, Al-Saadoon, Ali Zaki Mousa* and *Noorzai.* It is a connection which often comes at the butt-end of a British-made rifle wielded by a British soldier in a British army base in a country (such as Iraq) occupied by the British Government. A prisoner held in incommunicado and indefinite detention in Afghanistan is not forum shopping. He is applying to the courts of his jailors – the UK Government – for an ancient writ of *habeas corpus*. Without legal aid, he is unable to do so. Although obvious, there is no acknowledgement in the consultation paper of the impact of removing these essential modes of legal redress from these victims. This has deprived the public of an opportunity to comment meaningfully on this.

21. We note that the armed forces benefit from a carve-out from this proposal (3.55), but not those they detain, mistreat, torture or kill. There is no exception for youth, so even young children, detained at port of entry, abused by agents of the British state, will not obtain legal aid. Nor is there an exception for cases concerning fundamental human rights.

22. The same public interest considerations which have dictated the funding of these claims in the past also require that the present proposal is rejected. Due weight has not been given to considerations other than economic or political ones. The effect is to:

    1. Ensure the complete disenfranchisement of already marginalised persons;
    2. Marginalise the role of the courts;
    3. Allow for the swelling of unchecked executive power in the area of extra-territorial Government actions; and
    4. Weaken the rule of law.

    Without public funding of these judicial review cases, there will be no such cases. It is difficult to overstate the negative effect that this proposal would have on the accountability of the British Government for the actions of UK agents abroad, or for the treatment of vulnerable groups such as migrant children, trafficking victims and immigration detainees in the United Kingdom. We do not accept that exceptional funding under LASPO is a sufficient answer to these concerns, for the reasons given below.

23. We are bound to note that the cases we refer to have often led to political embarrassment for the UK Government, and it is legitimate to ask whether the inconvenience of the courts' judgments in these cases have been permitted to influence these proposals. The introduction states that *"legal aid appears to have been provided for cases that do not justify it and to those who do not need it, which undermines public*

confidence in the scheme". Is this referring to the cases referred to above? If not, the types of cases referred to should be explained. This is not a view shared by the majority in the profession, or in informed sections of the media and the public. And this unspecified "appearance" is no sensible justification for excluding whole classes of otherwise eligible claimants raising issues of fundamental human rights. If anything, it is a call to improve decision-making at the LAA.

24. It is also legitimate to ask whether other Government departments have prompted or been involved in discussions leading to the formulation of this proposal in particular. In PIL's case of *R (Evans (No.2) v Secretary of State for Justice*, the High Court found that the non-disclosure of the MoD's role in pushing for changes to legal aid eligibility in the 2010 consultation rendered the subsequent amendments to the Funding Code void. Please confirm what other Government departments have been involved in this proposal and disclose any relevant documentation. Please treat this as a FOIA request.

(3) Proposed mitigation measures are inadequate

25. The consultation paper states that "legal aid would continue to be available where necessary to comply with obligations under EU or international law". It appears that this would be through "exceptional funding" arrangements under Section 10 LASPO. However, it is unclear what the MoJ position is as to what types of cases are required to be funded under international law. Does it accept that international law requires funding in all cases of unlawful detention/torture or cruel, inhuman or degrading treatment/the right to life, all of which are *jus cogens* prohibitions imposing positive obligations on the state to ensure assertion of the rights and their protection? Without this clarification, respondents are unable to comment on the proposed mitigation measure, and the MoJ is unable to properly assess the impact of its proposal and the adequacy of its mitigation measures.

26. However, exceptional funding cannot cure the flaws in the proposal that we identify in this response. Exceptional funding is not guided by the Funding Code criteria. It is not an assurance of funding, but a mere power to grant. The power is only exercisable where the LAA Director determines that the HRA or EU law requires funding. This greatly narrows the scope of eligible cases and adds a further layer of LAA discretion. Exceptional funding will either exclude applicants who should receive legal aid for the reasons given above, or it will include all of them and therefore render this proposal otiose. Given that the EIA (5.3.1) acknowledges that there will be an impact on persons affected, then it appears that the former is correct: previously eligible applicants with good cases and who are victims of serious human rights violations will be excluded from legal aid and will not be granted exceptional funding.

27. Exceptional funding will also mire often urgent applications in a drawn out process ill-suited to a short judicial review limitation period (3 months) or to the urgency of some of the cases falling into this category. For example, exceptional funding was granted in one PIL recent case 17 months after application was first made to the LSC, due to the need to satisfy both LSC and MoJ processes.

(4) Breach of ECHR

28. As noted above, deprivation of legal aid funding in cases concerning the fundamental rights in Arts 2, 3, and 5 ECHR constitutes a breach of the Government's positive obligations to ensure protection of those rights.

29. In preventing access to the courts, the proposals also represent a clear breach of the MOJ's obligations under Article 6 ECHR, which protects the "*determination of [a person's] civil rights and obligations*", held to include a number of aspects of public law. In *Golder v UK (App. 22410/93)* the ECtHR observed:

> "*In civil matters one can scarcely conceive of the rule of law without there being possibility of access to the courts...The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognised fundamental principles of law..*"

30. More particularly in *Airey v Ireland (3 EHRR 592)* the ECtHR stated in relation to public funding of civil proceedings:

> "*it is not realistic, in the Court's opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case.... On the other hand, the Convention must be interpreted in the light of present-day conditions (above-mentioned Marckx judgment, p. 19, para. 41) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (see paragraph 24 above)...Article 6 para. 1 (art. 6-1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case*." (paras 24-26)

31. In *Steel and Morris v the United Kingdom (App. 68416/01)* the Court stated*:*

> "*It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (ibid.) and that he or she is able to enjoy equality of arms with the opposing side...The question whether the provision of legal aid is necessary for a*

> *fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.. It may therefore be acceptable to impose conditions on the grant of legal aid based, inter alia, on the financial situation of the litigant or his or her prospects of success in the proceedings*" (paras 59-62)

32. What was permitted by the Court here was a case-by-case approach. The limitations that it deemed reasonable are already reflected in the current Funding Code. It is clear that to go beyond this, to exclude further an entire class of (few, but important) litigants, in complex extra-territorial claims such as those we have already referred to, is a fettering of this approach and would be unlawful in light of the guarantee laid down in Article 6 (1). It also represents a breach of claimants' rights to an effective remedy under Article 13 ECHR, a remedy which Parliament has provided to non-resident persons in the Human Rights Act 1998. The possibility of exceptional funding is an insufficient safeguard, for the reasons given above.

(5) Discriminatory

33. The EIA supplied states that *"we do not consider that the proposals give rise to direct discrimination"* (4.4). We consider that the proposal <u>is</u> discriminatory. We have set out above that the persons excluded by the proposal have important legal causes of action that are exercisable only in the courts of England & Wales, and that the proposal will prevent them from pursuing these. To exclude them solely on the basis of residency status amounts to direct discrimination on the basis of race, ethnicity and/or nationality. There is a close correlation between residency and race, ethnicity and/or nationality. Exceptional funding may soften the blow, but does not eliminate the discriminatory effect, for the reasons given below.

34. The proposal is also discriminatory under Art 14 ECHR, which makes clear that:

> "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ....national or social origin*".

35. Discrimination on the basis of foreign residence amounts in practice to discrimination on nationality grounds. A measure which may otherwise be in conformity with the requirements of a substantive article may nevertheless infringe Article 14 when read in conjunction with it if it is of a discriminatory nature. There is very little margin of appreciation afforded in the field of discrimination on the basis of nationality. We have

set out above and below why Articles 2, 3, 5 and 6 ECHR require legal aid funding to be maintained.

36. In *Frette v France* (App. 36515/97) the Court held that *"a difference in treatment is discriminatory for the purposes of Article 14 if it 'has no objective and reasonable justification' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'"* We explain below how the MoJ have failed to adequately justify these proposals and to demonstrate their proportionality.

(6) Fails to meet stated purpose and is disproportionate

37. The proposal fails to meet the MoJ's stated purposes:

    (a) The MoJ's stated aim is to *"target legal aid at those most in need"* (2.2). As many of the applicants most in need of legal aid are non-residents, the proposal fails to meet this aim.

    (b) The MoJ's primary objective regarding all of the consultation proposals is stated to be saving costs (EIA 4.2), but no figures have been provided to support this proposal and no sensible judgment can be made whether this aim has been met or is proportionate.

    (c) Finally, the MoJ refers to the need to ensure that the *"system commands the confidence of the public"* (EIA 4.2), but this can be achieved in informing the public, not cutting services they are ill-informed about (due, it must be said, to the hostility of this Government and sympathetic sections of the media). It is highly dangerous to formulate justice policy based on the (perceived) views of the majority. Justice in these cases often concerns vulnerable minorities. Further, no evidence at all is provided regarding this loss of confidence, or the need to elevate it. Certainly, the vagaries of an ill-defined "public confidence" should not trump the rights of the victims of fundamental human rights breaches.

38. As we note above, the Government has made no attempt to quantify the costs savings that would be achieved by this change. The 180 page consultation document annexes many tables showing current costs levels and projected savings in relation to other proposals. But nothing in relation to this proposal. There is no indication of how much non-resident cases are costing the LAA, still less an attempt to offset this against inter-partes recovery of costs in those cases that are successful, and the non-liability of the LAA for inter-partes costs in first instance judicial reviews. Certainly, PIL's track record in extraterritorial cases in recent times demonstrates that the costs of these cases to the LAA is minimal. Virtually all have succeeded and have therefore been the subject of *inter partes* costs orders.

39. Because of this, the "proportionality" of the proposals simply cannot be evaluated. Nor can a sensible judgment be reached as to whether the purported aim of being "as fair on taxpayers as on legal aid applicants" has been achieved.

40. The public is therefore deprived of adequate information to comment meaningfully on the proposal, and the proposal is tainted by unfairness as a result. The 2010 Consultation (referred to in the current consultation paper) accepted that the number of cases affected, and the cost savings involved, in a similar proposal were small. You have provided no reasoning to depart from this earlier analysis. The cost of human rights cases concerning non-residents is a minute proportion of the overall civil legal aid budget. Judicial review cases brought by them are even smaller still. Yet these cases, funded by the Legal Services Commission/Legal Aid Agency have produced quite astonishing achievements, as we set out above. And it is also very important to note that these cases have cost the taxpayer very little, as successful cases result in the offending Government department paying the claimant's costs. There is no indication in the consultation document that the importance of these cases has been taken into account, nor their success (and the consequent preservation of taxpayer legal aid monies).

(7) Impact poorly assessed

41. Finally, the accompanying impact assessments are inadequate, for the reasons already given. In summary:

    1) They fail to recognise the discriminatory effect of the proposal.
    2) No attempt has been made to quantify the current costs and projected savings. Nor has this been identified as one of the "evidence gaps" in the EIA.
    3) The EIA fails to take account of disproportionately large benefits to equalities groups that one such case can have (e.g. *Ali Zaki Mousa (No.2)* resulting in inquests for all deaths in Iraq). Cutting such funding will therefore have the opposite, disproportionately large, impact for such a group – an ethnic minority, comprising large proportions of psychologically damaged 'victims' (as a result of their treatment by the UK).
    4) The EIA fails to note the highly detrimental impact on human rights accountability for extra-territorial acts of the British state that will result.
    5) The Impact Assessment states that *"civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution"*. With respect, this is simply wrong, and has no evidential foundation.
    6) The Impact Assessment makes a positive assumption that there will be a *"wider benefit"* in that *"it is expected that there will be an increase in public*

confidence in the legal aid system resulting from the introduction of a lawful residency test". This is an unsubstantiated assertion that has no lawful basis.

Question 5: 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?)

42. We do not agree with this proposal. We believe that the case for reform presented by the MoJ misunderstands the nature of judicial review litigation and does not present sufficient justification for the changes suggested. Indeed, the proposed reforms have the potential to do great damage to the ability of judicial review proceedings to achieve their function: to ensure oversight of, and offer a check to, abuses of executive and public authority power.

43. The MoJ sets out its case for reform at page 30, paras 3.61-3.62 of the consultation paper. The MoJ is *'concerned that legal aid is being used to fund a significant number of weak cases which are found by the Court to be unarguable and have little effect other than incur unnecessary costs'*. It's proposal to address this problem is set out, in broad terms, at page 31, para 3.69: *'providers should only be paid for work carried out on an application for permission…if permission is granted by the Court'.*

44. As suggested, in arriving at this proposal, the MoJ misunderstands a number of issues relating to judicial review litigation. Firstly, at page 30-31, paras 3.63-3.68, the MoJ sets out a statistical analysis of applications to the Courts for judicial review in 2011-12. These statistics are used to support the contention that *'there are a substantial number of cases which benefit from legal aid; but are found by the Court to be "unarguable"'* (para 3.68). As suggested above, these statistics have been the subject of analysis by the Public Law Project (see para 8.2 *ante*) and have been shown to misrepresent the extent to which applications for judicial review can be shown to have been 'successful' by reference to a grant of permission. In so far as the MoJ relies on these statistics to evidence its understanding of *'Current practice'* in judicial review litigation, it fundamentally misunderstands that practice and proceeds on a false premise. Proposals made in light of such a misunderstanding are unsustainable.

45. Secondly, at page 31, para 3.70, the MoJ suggests the 'payment at permission' model works adequately within the context of immigration cases before the Upper Tribunal and, therefore, could be translated to a judicial review funding model. The systems are not comparable. As is suggested below, the provider of legal aid funded public law advice is faced with considerable uncertainty when first assessing the merits of a proposed claim for judicial review. This is not the same position as faced when making an application for

permission to appeal to the Upper Tribunal. In the latter instance, the provider has the benefit of knowledge of the history of proceedings before making a decision to apply. His or her client's case (and the evidence substantiating it) will be clear as will the position adopted by the Defendant/Respondent. Legal issues will have been narrowed and points of contention will have been explored by lower Courts. In light of those proceedings, the provider is evidently in a better position to use his or her knowledge and expertise to determine the merits of applying for permission to appeal.

46. By contrast, and in contradiction to the assertion made by the MoJ at page 32, para 3.72, the public law advisor cannot, at this early stage of proceedings, be *'in the best position to know the strength of their client's case and the likelihood of it being granted permission.'* For a start, the Claimant may not have access to all the evidence that will ultimately substantiate a claim for judicial review. Judicial review seeks scrutiny of impugned public authority practice and administration. More often than not, it is the public authority and not the Claimant who holds vital information relating to the alleged grievance. Defendant practice is often not to provide this evidence (and the proposed reforms will do nothing but encourage Defendants to further delay the provision of evidence – to which see below at paragraph 52) until Detailed Grounds and Evidence are served (and often not even at that stage). By CPR r.54.14(1)(b), this occurs 35 days *after* the grant of permission making it extremely difficult for a provider to be able to accurately assess merits at any time before this point. Even assuming the conscientious Defendant serves full details of its defence with supporting evidence with its Acknowledgment of Service (twenty one days after service of details of the claim), the public law provider will still be required to have prepared a great proportion of the Claimant's case potentially without knowing the full details of the Defendant's defence and thus at a considerable disadvantage in assessing the merits.

47. Difficulty in assessing merits is also compounded by the uncertainty surrounding the judicial approach to granting permission. What passes the threshold of being 'arguable' such that permission will be granted is not only a fact and law specific inquiry but also relies heavily upon the interpretation of an individual judge (to this extent, the summary provided in the consultation paper at page 30, para 3.63 is oversimplified and misleading). As the Public Law Project and University of Essex's combined work assessing grant of permission rates by reference to individual judges demonstrates[5], there is no exact science in determining when the threshold for a grant of permission will, or will not, be passed. The grant is discretionary and the ability of the provider to predict accurately whether that discretion will be exercised in favour of the Claimant is severely inhibited at the early stages of preparing a case when the proposals would require they not be funded.

[5] See *The Dynamics of Judicial Review Litigation* – available at PLP's website (http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf) and the detail of which is referred to within PLP's draft response to this consultation

48. What is more, the proposal also seems to undervalue the valuable, rigorous and, it is submitted, entirely sufficient role the Legal Aid Agency (LAA) already plays in assessing the merits of a case when determining if funding should be granted. Para 3.72 *'recognise[s] that the merits criteria are in place to help weed out weak cases'* but this is deemed to be insufficient *'to address the specific issue identified in judicial review cases'.* Assuming that issue to be that *'there are a substantial number of cases which benefit from legal aid; but are found by the Court to be "unarguable"'*, we again refer to the position stated above, namely that the MoJ, in arriving at this position, has proceeded on a false premise and by misunderstanding the true nature of judicial review litigation. The LAA's current scrutiny of a case for funding (including assessment by reference to a stringent merits and cost benefit criteria) is clearly the more suitable basis upon which to determine if the Claimant's solicitors should be paid. Moreover, the LAA has extensive audit and contractual powers which can be used to penalise a firm who continue to make ill-conceived applications for judicial review. The ultimate consequence of repeated ill-conceived applications would be the loss of a firm's contract to undertake legal aid work.

49. Page 32, para 3.75-3.76 of the consultation paper suggests alternative costs arrangements by which Claimant's solicitors will ensure remuneration for their work notwithstanding a lack of legal aid funding. These arrangements again misunderstand the processes at work within judicial review litigation. The MoJ's suggestion is, in short, that Claimant's solicitors, in the event they achieve a successful resolution of a matter before permission being considered, will be able to recover their costs in achieving this result by seeking a costs order. Notwithstanding the additional satellite litigation this will create in Claimant solicitors applying to Court for such orders (again, all work undertaken without payment and at risk), it assumes too readily that costs are automatically recoverable once a matter has been resolved to the Claimant's benefit. Although there is a presumption that the successful party will recover costs (CPR 44.3(2)(a), costs do not flow automatically. A Court has a discretion not to determine costs if it would require *"disproportionate expenditure of judicial time"* (per Stanley Burton LJ in *R (M) v Croydon LBC*, para 77). In cases where interim relief is achieved and the Claimant's claim falls away or where the Defendant changes its position such that the claim becomes academic, it is perfectly feasible that the Defendant will seek to argue that the Claimant was not in fact 'successful' such that costs should flow. Finally, our experience is that Defendants will often seek to hold off paying costs orders for as long as possible. Where firms are reliant upon these costs arrangements to be financially viable, the delay occasioned in (and extra, 'at risk' work required) recovering costs will prove fatal.

50. The above are the misconceptions that undermine the MoJ's proposal. The potential consequences that flow from the proposal are worse still.

51. Firstly, as is suggested above, it undermines the legal principle of 'equality of arms' by putting the Defendant in an advantageous position in comparison to the Claimant. The Defendant public authority will be well aware of the costs risks the Claimant solicitors are operating under. There will be a perverse incentive for the Defendant not only to delay disclosure or details of its case so as to force the Claimant to weigh the risks of pursuing proceedings from a disadvantaged position but, more importantly, it offers a disincentive to the Defendant to engage seriously with, and seek to settle, the Claimant's case where the Defendant is in possession of material suggesting this is the most appropriate course of action. The Defendant instead can afford to take a default position of opposing judicial review claims in the knowledge that many claims might not be pursued any further than pre-action correspondence because of the costs risk inherent in preparing a case for issue. It can also encourage additional stages in proceedings (oral hearings seeking permission to renew) safe in the knowledge that such stages are undertaken at the Claimant's risk.

52. One invariable effect of the costs risk that Claimant solicitors will face assuming the implementation of the proposal, will be that less claims for judicial review will be pursued in light of those risks. This may have the effect of discouraging some unmeritorious claims but it will also have the effect of discouraging a great many meritorious claims precisely at a time when it is difficult to accurately assess those merits. This 'chilling effect' will see the overall effectiveness of judicial review (and the judicial scrutiny of executive action which flows from proceedings) reduce dramatically. It is likely that many legal aid funded claimant judicial review practices will not be viable. For the others, it will disincentive the difficult cases which often produce the most profound results. Quite in contrast to the unevidenced assertion in the Impact Assessment that *'there will be an increase in public confidence in the legal aid system'* (page 10, para 34), the effect will be to move increasing numbers of cases of executive maladministration and equalities and human rights breaches outside of the scrutiny of the Courts. This will have a severe impact on victims of maladministration and breaches of fundamental human rights and this can only impact negatively upon public confidence in the authorities that are supposed to serve them.

53. However, it must also be considered that many judicial review cases are not the subject of a final Court determination as to permission at all. This is because a potential Defendant is often notified in writing by the responsible Claimant's solicitor of receipt of a certificate of public funding allowing for a claim to be issued. The conscientious Defendant (assuming they accept the strong merits in a Claimant's case and do not adopt the position described in the paragraphs above), only at this point taking the Claimant's case seriously, suddenly begins efforts to resolve the issues at stake so as to achieve resolution. Under these current proposals, the Claimant's solicitors would not be paid for this pre-permission work at all even though it may lead to a successful outcome

for the Claimant. This will, in turn, create a perverse incentive for a Claimant solicitor who finds him or herself representing a client with a strong claim (and in receipt of a certificate of public funding) *not* to engage (cost effectively and proportionately) with the Defendant to achieve resolution through correspondence but instead to issue a claim in order to ensure that a decision on permission is made (thus maximising the potential that the Claimant's costs will be recovered). This will see the Courts burdened with considering permission on a whole series of claims that might otherwise have been resolved without recourse to litigation. The obvious implications of extra (but unnecessarily issued) claims for judicial review requiring the time and attention of Court staff and Judges is obvious. Moreover, both parties will be incurring unnecessary costs in litigating matters that might have been resolved far earlier. It should be borne in mind that the public purse will suffer not just in terms of costs incurred by HMCTS but also because it will be the Defendant who will bear liability for *inter-partes* costs if cases are settled post permission in this scenario.

54. Where there is a system that can create simultaneous but diverging incentives (for the Claimant solicitor to issue a strong claim that might not otherwise be issued to protect his/her cost position but also for a Defendant solicitor not to engage with that same Claimant as a matter of course in an attempt to draw out litigation and discourage a Claimant from issuing), the result can only be an increase in confusion. Considerations other than the interests of parties and a proportional and cost effective approach to litigation take hold as parties allow financial incentives to guide them. It will see both increased costs to the public purse as unnecessary litigation of claims which might otherwise be disposed of earlier are pursued through the Courts instead (those claims described at paragraph 53 above) but will also see a series of cases which are entirely meritorious (but are not pursued because Defendant inaction and uncertain merits means a Claimant solicitor will not risk issuing a claim – see paragraph 51) might never receive judicial scrutiny.

55. Finally, as is suggested above, the MoJ's anticipated financial implications (neutral cost benefit) do not reflect the true costs (financial, structural and symbolic) of the proposal. These include the costs to HMCTS of dealing with litigants in person for whom solicitors have refused to act as well as the additional costs of satellite litigation relating to costs. Even assuming just a neutral cost benefit, the consequences of this proposal severely outweigh the proposed benefits. There is already in place an adequate system both for assessing whether funding should be granted and ensuring unmeritorious claims do not proceed such that this proposal is entirely without merit.

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?

56. We do not agree with this proposal. Again, the reform suggested does not justify the negative consequences of its adoption. The MoJ's evidence for the proposed reform is insufficient and the reasoning behind the proposal flawed.

57. The MoJ's proposal for reform here is to *'abolish the 'borderline' prospects of success category which would mean that these cases would cease to qualify for civil legal aid funding'* (page 35, para 3.86). The MoJ's case for reform (at least within the consultation paper) is that *'as a matter of principle we believe that limited public funding should be directed to cases with at least 50% chance of success'*. This principle appears to derive from a concern that *'current merits criteria regarding cases assessed as 'borderline' are too lax'* (page 33, para 3.80).

58. The consultation paper itself does little to further substantiate reasons as to why the proposed reform is necessary. The Impact Assessment identifies three possible benefits being (1) *'a reduction in the volume of civil legal aid cases by approximately 100 and sav[ings to] the legal aid fund [of] approximately £1m'* (page 11, para 49); (2) a possibility of *'small administration savings'* to the LAA as a result (para 50) and; (3) *'an increase in public confidence in the legal aid system resulting from the removal of borderline cases from receiving legal aid'* (para 51).

59. We do not consider that these benefits are either robustly evidenced or likely to be achieved.

60. With respect to the savings to the legal aid fund of £1 million. As the MoJ do not identify how it has been determined that 'approximately 100' cases will not be funded as a result of introducing this proposal, it is difficult to assess the veracity of this assertion.[6] Even if they are savings that can be realised, they will be far exceeded by the consequential costs that will flow to HMCTS as it deals with litigants in person who have been refused legal aid. Moreover, even were there not to be these additional, consequential costs, the figure of £1 million is insufficient benefit to justify the legal and constitutional effects of introducing this proposal (see below).

61. With respect to the 'small administration savings' possibly afforded to the LAA as a result of introducing the reform. It is submitted that such administrative savings as would be made by removing borderline cases from funding will be offset by the LAA having to process, and refuse, applications citing better than borderline merits. Disputes as to

[6] At IA, page 11, para 49, there is a reference to *'LAA 2011/12 closed case administrative data'* having been used '*to estimate the benefit of this policy'.* No further details are given.

whether a case has 51% prospects of success (so as to be funded) as opposed to 50% prospects of success (so as not to be funded) will increase the costs incurred by, and the administrative burden on, both the LAA as well as the Independent Funding Adjucator who the MoJ propose would resolve such disputes (page 35, para 3.88).

62. With respect to the supposed *'increase in public confidence'* that will result from introducing the reform. The basis of this alleged benefit is unsubstantiated. We have demonstrated repeatedly through this response that there is a very serious risk that these reforms will have the precise opposite effect that the MoJ intend and that the reforms will undermine public confidence in the efficacy and transparency of executive action and the rule of law will be weakened.

63. Finally, it is noteworthy that the consultation paper states that the implementation of this proposal would simply lead to 'borderline' cases being *'treated in the same way as cases assessed as having "poor" prospects of success'* (page 35, para 3.88). 'Borderline' cases are those where the prospects of the case are unclear by reason of disputed law, fact or expert evidence. Cases with 'poor' prospects of success mean a case in which an individual is unlikely to obtain a successful outcome. Borderline cases do not have 'poor' prospects of success, they have unclear prospects of success that may be resolved in the Claimant's favour following analysis and resolution of the issue which is unclear. The distinction is crucial because the LAA will fund a 'borderline' case only when particular criteria are met (the case involves a breach of human rights, has a significant wider public interest or an overwhelming importance to the client). 'Borderline' cases are, by definition therefore, significant and important cases. The consultation paper recognises that *'the cases to which the 'borderline' exception applies are high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing'* (page 35, para 3.87). What it does not adequately recognise is that this is precisely why funding is provided to these cases; because, in spite of their difficulty, they raise vital issues of law and/or fact which require resolving. To remove funding for them is to remove funding for cases which often define legal and constitutional principle; which explore the boundaries at which an individual's human rights are delineated and the point at which State action becomes unlawful. They are unclear precisely because they raise such crucial and difficult issues, issues which often have not been tested in the Courts at any time before.

64. We have suggested above that these proposals appear to have a disproportionate focus (given the minimal benefits that will apparently accrue) on removing funding for cases which often lead to political embarrassment for the UK Government. Borderline cases are often these sort of cases (as the consultation paper appears to acknowledge). The majority of the PIL cases cited at paragraph two above would not have been litigated had this proposal been in place. All raised difficult, complex, highly controversial and fiercely contested points that rendered it difficult to assert their merits from the outset. To

take just one example of a PIL case that was initially refused funding by the Legal Services Commission and eventually funded on the basis of 'borderline' prospects of success. R (*Evans (No. (2)) v the Lord Chancellor and the Secretary of State for Justice* [2011] EWHC 1146 (Admin) related to the 2010 consultation process and subsequent reforms by the MoJ to the criteria by which a claimant would be granted legal aid. The High Court found that changes were unlawful because of undue pressure put upon the MoJ by the Ministry of Defence. Lord Justice Laws' judgment observed:

> *24. In plain language this [correspondence between the MoD and MoJ] seems to me to assert that the consequences of an adverse result in such a public interest judicial review is a good reason for the denial of public funding to bring the case. It needs no authority to conclude that by law such a position is not open to government. For the State to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law. The point is one of principle; it is not weakened by the fact that such litigation might be funded by other means.*

65. Such important judicial findings, which relate to this very consultation process, would not arise if this proposal went ahead. In light of the foregoing, it is submitted that the MoJ presents no compelling reason as to why this proposal should be adopted especially in light of the risk that it will remove a whole class of vital claims from the Court's consideration.

Questions 7 to 29

66. See paragraphs 11 to 12 above. These questions relate to proposed reforms to the criminal legal aid system in which PIL do not have expertise.

Question 30: Do you agree with the proposal that the public family law representation fee should be reduced by 10%?

67. This relates to an area of law in which PIL do not have expertise. We defer to the submissions of our colleagues in the field with respect to these proposals.

Question 31: 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 advocates appearing in those courts?

68. We do not agree with this proposal. PIL works extensively with experienced civil barristers, primarily in High Court and Appellate Court settings. An independent,

innovative and dedicated civil Bar has been, and will continue to be, vital in maintaining the rule of law through acting in judicial review (and other legal) challenges.

69. We note that the MoJ accept in the consultation documents that the Bar is a 'well respected part of the legal system in England and Wales' (p 14, para 2.8) suggesting that due regard to the ongoing 'viability' of the profession must be given. PIL are concerned that cuts to hourly rates in the order of 40-50% will erode, or even lead to the collapse, of the publicly funded Bar and will see the effectiveness and power of judicial review as a vehicle by which to provide oversight of executive action suffer inexorably as a result.

70. We accept our colleagues at the Bar are better placed to explain the consequences of these fee reductions and therefore defer to the submissions of our colleagues at the Bar with respect to this proposal.

Question 32: 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?

71. This relates to an area of law in which PIL do not have expertise. We defer to the submissions of our colleagues in the field with respect to these proposals.

Question 33: Do you agree with the proposal that fees paid to experts should be reduced by 20%?

72. We do not agree with this proposal. We consider that it has potential to undermine the principle of equality of arms. The reduction in experts' fees will make it more difficult to persuade experts to appear on behalf of publicly funded litigant. The range, experience and quality of experts who will undertake publicly funded work will diminish. This will put the publicly funded litigant at a disadvantage especially within the context of judicial review cases where public authorities will have access to considerably larger funding streams to access the experts they wish to instruct.

Question 34: Do you agree that we have correctly identified the range of impacts under the proposals set out in the consultation paper?

73. In light of the above analysis, we trust it is evident that the consultation papers fail to adequately identify the range of impacts under those proposals discussed in detail in this response.

Question 35: Do you agree that we have correctly identified the extent of impacts under these proposals?

74. In light of the above analysis, we trust it is also evident that the consultation papers fail to correctly identify the extent of impacts under those proposals discussed in detail in this response.

Question 36: Are there forms of mitigation in relation to impacts that we have not considered?

75. It is PIL's submission that no form of mitigation ameliorates the impacts that will flow from the proposals discussed in detail in this response. Those proposals are misconceived, threaten to undermine constitutional and legal principle and should be abandoned in their entirety.

31 May 2013

Public Interest Lawyers