Response to the Government's consultation paper *Transforming Legal Aid: Delivering a more credible and efficient system*[1]

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Introduction

1. 1 Crown Office Row is a leading civil and public law barristers' chambers with a pre-eminent reputation in healthcare and public law. Members of Chambers are recognised as leading practitioners in a range of areas including public and administrative law, public inquiries and human rights.

2. We limit our responses to questions related to the collective experience of the public law team, and so primarily respond to those which relate to legal aid in judicial review. We have sought to capture, in a single and concise document, the concerns raised by our members. The nature of barristers' chambers means that not every member may have expressed themselves in the same way in respect of every answer, or share every concern raised herein. Likewise, a failure to answer a question is not to be construed as support for the proposal it relates to – we have, for example, very serious reservations about the legitimacy of a system of criminal legal aid which removes a person's right to be represented by a lawyer of his or her choosing.

General Remarks

3. We note the justification given for the proposed changes is twofold:

    a. Reducing costs; and

    b. Restoring public confidence in legal aid.[3]

    We recognise the need for the Government to spend efficiently and fairly. However, we are concerned by the paucity of evidence, either of genuine savings (as opposed to movement of costs between budgets), or of a lack of public confidence in the provision of legal aid in judicial review cases, to justify the currently proposed changes.

4. To be clear, our point is not that there is *no* need for costs to be reduced, or that the system *cannot* be improved. We simply are not convinced that these proposed measures – which are far reaching and untested – are an appropriate or effective

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[1] "The Consultation"

[2] www.1cor.com

[3] The Consultation at §2.1: *"…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".*

means of achieving that goal. We are particularly concerned that they may undermine the fundamental principles of the rule of law and equal access to justice.

5. Any material changes to public funding for judicial review must be made with the utmost care, and must be scrupulously justified. In our view, the proposed changes do not meet these requirements.

6. Judicial review plays an essential constitutional role. It is the means by which those affected by Government actions are able to challenge poor or unfair decision making and the excessive use of power. The importance of judicial review in holding Government and public bodies to account cannot be overstated. Indeed, we believe that the mere fact of *susceptibility* to judicial review works to ensure decisions are better, fairer, and in accordance with the proper powers of the decision maker.

7. It is a simple reality that very few non-legally aided persons can afford to bring a claim for judicial review. It follows that it falls to publicly funded judicial review claims to encourage, and if needs be enforce, rigour in Governmental decision making. Nowhere in the Consultation is an assessment made of the costs of judicial review against its benefits in ensuring good public administration.

8. Further, we observe the timing of this consultation – released within days of the implementation of far reaching reforms to civil legal aid in the Legal Aid, Sentencing and Punishment of Offenders' Act 2012 ("LASPO") – and query the wisdom and necessity of further cuts to civil legal aid before the current changes have bedded in and their impact has been properly assessed.

Responses to Chapter Three: Eligibility, Scope and Merits [Questions 1, 4, 5 and 6]

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.

9. Cases removed from the scope of criminal legal aid would include all "treatment matters" and the great majority of "sentencing matters".[4] The proposal appears to envisage that these matters are either insufficiently important to merit public funds, or can be adequately remedied through the internal prison complaints and Ombudsman system.

10. As is noted in the Consultation, the 2010 changes already significantly reduced funding for treatment matters, but retained the ability for exceptional cases to be funded, for instance, in cases involving prisoners with learning difficulties or mental health issues.[5] Under the proposal, this exception is to be removed.

[4] The Consultation at §3.17 and 3.18
[5] Consultation at §3.9

11. We do not agree with the proposal regarding prison law. We are particularly concerned by the removal of the exception, so that even the most vulnerable prisoners – such as those with learning difficulties – would be denied access to legal representation or advice. These people cannot represent themselves, nor can they pay for representation. They will therefore in effect be entirely shut out of the justice system in respect of matters which affect their fundamental rights. We cannot see how the removal of this narrow exception can be justified by any cost savings, especially before the impact of the 2010 changes has been properly assessed.

12. We also do not agree that many of the matters to be excluded from legal aid are of "insufficient importance".

    a. Treatment matters extend to decisions concerning medication, sanitation and food. Legal advice would not be available for issues concerning treatment in mother and baby units, failure to provide halal food and provision of medication.

    b. Sentencing matters include, for example, all decisions relating to categorisation, delays in decision making and access to courses: case law has confirmed that these are decisions which affect the liberty of the subject.

13. We also disagree that the internal prisoner and probation complaints systems are adequate. Our experience is that the quality of decision making in these complaints processes can be inconsistent and is at times poor. In any event, it is imperative to the rule of law that decision-making institutions are not the final judges of their own actions and yet, given the control of the prison authorities on prisoners and the very limited financial means of most prisoners, that is exactly what will happen in the vast majority of cases. Our concerns are not met by access to an Ombudsman: they are not an adequate substitute for judicial scrutiny nor are they in a position to resolve issues concerning fundamental rights. The removal of legal funding, and thus access to external legal oversight, will undermine the protection of prisoners' basic rights.

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.

14. We do not agree. It is uncontroversial that decisions should be made fairly, and excesses or abuses of power avoided, *regardless* of whether or not the person affected by the decision or act has a strong connection with the UK. It seems to us that the proposal is formulated to cut the number of claims without appreciating the true role of judicial review. We cannot put it better than the Bingham Centre for the Rule of Law, which, at paragraph 15 of its response to the Consultation has said:

"by advocating that those lacking a "strong connection" with the UK should be ineligible for legal aid, the Consultation Paper implicitly assumes that the matter should be approached exclusively from the standpoint of the prospective claimant. However, at least where the issue at stake is one of public law, any such assumption is unjustified. That is because the function of public law transcends the protection of individuals' rights and interests: as the Supreme Court has recently reiterated, the role of public law proceedings extends to ensuring government according to law. There is, then, a public interest in ensuring that standards of legality are upheld, and it would be anathema to the rule of law, in effect, to permit those standards to be breached with impunity merely because the immediate victims were unable to satisfy the residence test."

15. Some high profile examples of important litigation that, in most likelihood, would not have been possible had legal aid not been available, include *Baha Mousa*, *Binyam Mohamed*, the *Iraq Historic Allegations Team*[6] and the *Gurkha* litigation. These cases have undoubtedly had far reaching affects in improving conduct and decision making in this country.

16. Further, the rigid and arbitrary criteria proposed for determining who has a strong connection with the UK amount to a blunt instrument that would exclude certain categories of people without any substantive justification. We are particularly concerned by the exclusion of groups such as persons 'innocently' in the UK (for instance, victims of trafficking and family members of those without leave). They may be particularly vulnerable and in need of support.

17. As a result, we do not believe the 'public confidence' concern is made out: what the taxpayer should demand is proper treatment by British decision makers of those affected by their decisions, whatever their nationality. A failure to make proper and lawful decisions should be able to be met by legal challenge, which in many cases will only be possible through access to legal aid.

18. We note that no estimate of the savings which could be made by the residence test has been attempted. We are concerned that the costs on the public purse would not, in the event, be reduced:

    a. The burden of these applications would fall on the LASPO 'exceptionality' test for funding. This will require personnel to assess claims of exceptionality and is likely to lead to further judicial review arising from refusals to grant funding.

    b. We fear that the proposals will inevitably cause a number of small, specialist solicitors' firms to go out of business. We are concerned that the end result will be an advice and expertise desert: we recognise that good legal aid solicitors can bring about incalculable savings by diverting claims to complaints procedures or the Ombudsmen, by making proper submissions or simply by advising that no proper claim exists. This preliminary

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[6] See the recent decision of the Divisional Court: *Mousa & Ors, R (on the application of) v Secretary of State for Defence* [2013] EWHC 1412

diversion of weak claims is carried out without remuneration. Without access to early 'diversionary' advice, and/or without access to funding, the number of unmeritorious claims may increase.

c. We believe that many of these desperate persons, with little or nothing to lose, will bring claims in person. Dealing with litigants in person and poorly drafted claims is disproportionately costly in court time, and for defendant lawyers. These costs are also shouldered by the tax payer. We note the observations of Ward LJ in the Court of Appeal in *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 at §2 as to the burden on the Courts caused by increasing numbers of litigants in person.

d. We do not see that the (unspecified) reduction in costs to the legal aid bill will be outweighed by the costs and pressures which will be moved to other parts of the system.

19. Finally, in respect of the proposed exclusions: we are concerned that there is no exception in the proposal for challenges to be brought with legal aid by those held in immigration detention. Such an exception is necessary. Recent history has taught that the length of detention for some individuals has been significant. In any event, they are surely entitled to the courts' protection of their rights, and would not be able to enforce those rights without legal aid. If this proposal were to go ahead, we would hope this type of challenge would also be excluded.

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.

20. Members of chambers frequently represent defendants in judicial review. We agree that claims without merit should not receive public funding. However, for a number of reasons we do not agree that the proposal offers an appropriate mechanism for dealing with this issue. It is a sledgehammer to crack a nut.

21. We note the statistics relied upon in the Consultation at §3.65-3.68. We have seen and agree with the analyses of the figures by the Bingham Centre for the Rule of Law and the Public Law Partnership in their responses to the Consultation. We therefore observe that the problem identified by the Government of failure at permission stage concerned only 515 cases (13%) of the 4074 cases in which legal aid was granted for judicial review in 2011-2012. We are unconvinced that public confidence in legal aid truly demands that the provider should bear 100% of the risk of a case being refused permission.

22. We are concerned this proposal will have two main effects, neither of which will enhance public confidence in legal aid or reduce costs. We think that making legal aid dependent on a grant of permission will:

    a. Disincentivise lawyers from taking on work in good claims not just weak ones since judicial review work is 'front loaded'. This means more litigants in person (on which point, we repeat what we have said at paragraph 18 above).

    b. Force lawyers who have taken on cases to seek permission rather than settle or withdraw, and to seek costs from defendants in cases where they do not currently do so.

23. We do not agree with the observation that claims which do not succeed have *"little effect other than to incur unnecessary costs for public authorities and the legal aid scheme"*[7]. We believe that having *"a judge on your shoulder"* makes decision making better, even where a decision under challenge was not in fact found wanting. There are many examples of cases where an individual claimant has been unsuccessful but judicial advice and warnings have nonetheless been properly incorporated into public bodies' guidance to their decision makers. It is difficult to avoid a concern, when analysing this proposal, that rather than welcoming proper scrutiny of its decisions, the Government is seeking to avoid it.

24. We note that the Consultation identifies a significant proportion of cases (330) which end with benefit to a claimant, but without the grant of permission.[8] The Government has confirmed that the lawyers conducting these cases will not be paid for this work. It is apparent that in order to make a living, these lawyers will be incentivised to avoid settlement. This is contrary to the wider principle of encouraging early settlement and will be more expensive, overall, for the tax payer. Even on a basic assessment, the act of cutting funding for these 330 cases where the case ended with a benefit to the Claimant, to save on funding 515 cases where the provider has not recorded a benefit, does not imply a significant saving. This is particularly the case if our concerns about the Government's statistical analysis of the 515 have merit.

25. Furthermore, this proposal displays a worrying lack of awareness about the process of litigation generally and judicial review in particular. There are many meritorious claims where proper advice has been given about the potential merits and prospects assessed as good, and yet permission is refused. There are a number of reasons for this.

    a. Firstly, "arguability" in judicial review is a flexible test: see *Sharma v DPP & Ors (Trinidad and Tobago)* [2006] UKPC 57 at §14.

    b. In any event, the Courts may, in appropriate cases, impose a higher hurdle at permission stage than a claimant showing an arguable case: see *R(Federation*

[7] The Consultation at §3.61
[8] The Consultation at §3.73

of Technological Industries and Others) v The Commissioner of Customs and Excise [2004] EWHC 254 at §8.

c. Further, as litigation continues matters change: issues are clarified, disclosure is made, evidence is served, and submissions may be made orally in court which were not made previously.

d. For a variety of reasons, good claims may be overtaken by events and rendered academic through no fault of a claimant. For example, a new decision might be made or third parties may intervene.

26. For the above reasons, assessing the prospects of a judicial review claim can be difficult. Legal advice in general is not an exact science, yet skewing the risk in the way proposed treats it as if it were, and in our view without proper justification. Legal aid lawyers can provide good, expert advice but not succeed in a grant of permission every single time. It should not immediately be assumed – as the Government does in the Consultation – that the claim should or could never have been properly brought. The proposed changes will therefore inevitably scare claimants (and/or their representatives) away from cases that may very well succeed.

27. We note that the Consultation anticipates, but does not attempt to calculate, the cost to the taxpayer of the litigation over costs which may result from these changes.[9] We suspect these may prove significant.

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.

28. We do not agree with the proposal. Our starting point is the definitions. Borderline cases are defined:

> *"borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to (a) decide that the chance of obtaining a successful outcome is 50% or more; or (b) classify the prospects as poor*[10]
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> *We recognise 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. However, even for such cases there must be an assessment of merits and a decision must be made as to whether the prospects of success justify the provision of public funds. For example, under the existing merits criteria any case, even if it concerns an important issue such as domestic violence, which is assessed as having "poor" prospects of success is*

[9] The Consultation at §3.75-3.76
[10] The Consultation at §3.84(iv)

refused legal aid funding. Therefore it is already a principle of the current scheme that all cases, even those which concern issues of great importance, must be sufficiently meritorious to warrant funding. [11]

29. It makes no sense to treat 'borderline' cases as if they have 'poor' prospects of success. They do not – by definition. By that logic, they might just as well be treated as having 'moderate' chances of success and granted funding for that reason. Again, as recognised in the definition, such cases are borderline because they arise in the context of significant unresolved disputes in the law, facts or expert evidence. These disputes need to be settled through the litigation process. It is not because their merits have been identified as being between 50% and 49%, which is how it seems to be viewed in the Consultation.

30. Indeed, it is in cases where the law is unclear or unsettled that the court's intervention is most needed. Further, as the Consultation recognises, these cases generally involve issues of utmost importance such as "*holding the State to account, public interest cases, or cases concerning housing".* Thus the argument that public funding for these cases should be removed on the basis that they are not sufficiently meritorious is simply unsustainable.

31. In our opinion, the importance of this type of case – which we understand to be far from frequent – outweighs the cost of funding them.

Responses to 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.

32. We are conscious that as barristers, this proposal directly affects our interests and any response we give to it may be seen as self-interested (although only a proportion of our work will be affected by it). We therefore limit our response to the following.

33. As a Chambers many of whose members routinely act for the Government, we are concerned that the proposal offends the principle of equality of arms. It means that whilst the public decision-maker will always be able to afford to hire a specialist and more expensive barrister, the claimant will often not have the same ability. There is of course an inherent inequality between the resources of individual claimants and of public bodies, but one that will be aggravated by the proposed fee changes.

34. We believe many barristers will simply stop doing legal aid work, or will do less of it, with the result that there will be a smaller pool of specialist junior counsel available

[11] The Consultation at §3.87

to claimants. The changes are generally likely to result in a greater move towards the representation of claimants by non-specialist representatives who will face the public-body's specialist barristers.

35. We are concerned that an adequate assessment of the impact of these changes on equality of arms and access to justice has not been carried out. Further, we are concerned that this change is being introduced without a proper assessment of the impact of significant recent changes in fees.

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

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

36. We do not agree. The uplift exists to mitigate the impact of a rule that denies legal aid for work done at the permission stage if permission to appeal is refused (i.e. the equivalent of the rule that this proposal introduces for judicial review claims, albeit in a less diverse jurisdiction). For the reasons we set out above in answer to question 5, we do not accept the proposition that 100% of the risk should be held by the provider. In our view the currently operated scheme strikes an appropriate balance of risk. If work at the permission stage is "at risk", there is a need for mitigation such as this uplift, which supports the preparation of good claims.

37. We note the absence of an evidential case that this uplift, as currently operated, undermines public confidence or is wasteful. We suggest that if it is thought that even with an incentivised 'at risk' stage, poor claims are still being pursued, the MOJ must take some responsibility for ensuring it gatekeeps access to funding more carefully.

Response to 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.

38. Rates payable to experts have recently been reduced. We do not agree that there is a basis for further reduction of rates for judicial review cases in which claimant firms are unlikely to be able to command the economies of scale that might secure the agreement of appropriately skilled experts to work at further reduced rates.

39. We are concerned, therefore, that the principle of equality of arms will be eroded rather than protected by this proposal.

Response to 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?

40. These changes by their very nature are likely to have a disproportionate impact on those with very limited financial means – a group in which persons protected under the Equality Act 2010 are in turn disproportionately represented.

41. The proposed changes will have a very significant impact on people and warrant the most anxious assessment of equality issues. We are not convinced that this has been done. In particular, we are concerned that the impacts identified have not been sufficiently assessed. For instance, we are not convinced that impacts on providers and on claimants can be divorced from each other in the way that the Impact Assessment appears to do.[12] We also note that the impact of certain key proposals has not been quantified and believe that more should be done to assess them.[13]

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[12] For instance, Equalities Impact, Annex K, §5.2.2, 5.3.2, 5.8.3, 5.10.2 and 5.12.1.
[13] For instance, the impact on clients in respect of changes to payment for permission work in JR cases (Equalities Impact, Annex K, §5.4.1).