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Director:
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Bingham Centre

Transforming Legal Aid Proposals

House of Commons Backbench Business Debates, 27 June 2013

BRIEFING

This briefing summarises and provides key points from the Bingham Centre's **full response** to the *Transforming Legal Aid* Consultation Paper. The full response is available at <http://goo.gl/LI0UB>.

THE BINGHAM CENTRE'S ANALYSIS - A SUMMARY

The proposed reforms would have a major impact on access to justice for the purpose of holding public authorities to account and securing legal protection of basic rights and interests. In that light there is a substantial burden on the Government to demonstrate an evidence-based case for the proposed changes. Our clear view is that the Consultation Paper fails to discharge that burden.

- The Consultation underestimates the value of judicial review proceedings that do not ultimately clear the permission stage, wrongly assumes that cases where permission is not granted are necessarily unmeritorious, and creates a significant risk that cases which would clear the permission hurdle may never get that far in the first place. The proposals are based on inadequate and arguably misleading evidence.
- The proposals concerning prison law and a residence test reflect an impoverished conception of the purposes of public law, which encompass both the protection of individuals vulnerable to exercises of coercive state power and the protection of the public interest in government according to law.
- Even-handedness, equality of arms and the facilitation of effective participation by defendants in criminal proceedings are deeply embedded within the right to a fair trial. They form key benchmarks by reference to which commitment to the rule of law may be judged. There is a grave risk that the criminal justice system would fail to measure up to those standards if the proposals were implemented

Our constitution requires that each branch of Government should not merely tolerate the others but should actively support, including financially, a legal system equipped to subject the executive and all public officials to scrutiny. The value of such a system consists not only in the benefits it yields to individual litigants, but in the wider public interest in ensuring government is subject to adequate legal control.

The legal aid system is a public good whose worth cannot satisfactorily be measured in purely financial terms. It is against that background that the legal aid proposals fall to be assessed—and it is in the light of such considerations that we find the justifications offered in support of the proposals to be wanting in terms of the rule of law.



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KEY POINTS

The rule of law and the reform proposals

- In a democracy based on the rule of law, an **effective legal system** is imperative.
- **Equality before the law** requires that people should be able to enforce their rights, hold government to account and defend themselves against criminal charges irrespective of their financial means.
- The proposals, if implemented, would **undermine the rule of law generally and equality before the law in particular**.

The evidence provided for the proposals *(Full response: paragraphs 7, 17-33, 44, 51, 53)*

- The evidence contained in the consultation in support of many of the key proposals is **inadequate** at best, and **misleading** at worst. The full response contains a detailed analysis of the evidence on judicial review.

Residence test *(Full response: paragraphs 13-16)*

- Under the proposed residence test, legal aid would be unavailable both to **British nationals** not resident in the UK and to **foreign nationals** not lawfully present in the UK.
- However, it does not follow that an individual should be denied legal aid **solely on the ground** that they fall into one of these categories.
- The rights and interests of a British national who is not resident may nevertheless be **profoundly affected** by the actions of Government or other public bodies.
- Equally, a non-national who is not lawfully resident may be the **victim of egregiously unlawful official action**, and in such circumstances should not be left without any practical means of legal recourse.
- The rule of law requires that when the Government or other public bodies act unlawfully, it should be possible to **hold them to account** for such action through judicial review.
- The effect of the proposals would be to **insulate some instances of Government action, however wrongful, from legal scrutiny**.
- **Previous cases provide examples of whowould be affected**. They include British citizens living abroad seeking to enforce statutory rights, persons interned or wrongfully killed by British forces abroad, persons not lawfully resident in the UK denied urgent medical attention.

Prison matters *(Full response: paragraphs 8-12)*

- The way in which prisoners are treated is a key index of a society's **commitment to the rule of law**, and legal accountability plays a crucial role in this area.
- The consultation paper proposes that legally aided advice and assistance would be unavailable in relation to several matters, including alleged **bullying or discrimination**, the **separation of mothers and babies**, **compassionate release** on severe health grounds, **prison conditions**, **categorisation** and **segregation**.
- The consultation paper asserts that other remedies, including internal complaints systems and complaints to the ombudsman, are sufficient. But those avenues are no substitute for the longstop possibility of **scrutiny by an independent court of law**.

Judicial review (Full response: paragraphs 17-39)

- Judicial review claims may proceed only with the **permission** of the court. It is proposed that legal aid payments for work on applications for permission should be **withheld** if permission is not actually granted.
- The intention is to incentivise legal aid providers to be more discerning in deciding when to proceed with permission applications. This argument is put forward in the consultation paper on the basis of figures that paint only a **partial and misleading picture**.
- Our analysis of a broader range of official data shows that a legally aided application is **over five times more likely to receive permission than an application which is not legally aided**. This suggests that legal aid providers already act responsibly by weeding out weaker cases.
- The proposals would likely have a **chilling effect**, inducing providers to be even more (and unnecessarily) cautious. This difficulty is exacerbated by the **highly precarious financial position** of many solicitors who undertake legally aided public law work, and by the fact that the workload in judicial review cases is **frontloaded**, with much of the work falling to be done prior to the permission decision.
- This strongly suggests that reducing access to legal aid in this area would **restrict access to justice for the poor and disadvantaged** in our community **without any adequate justification**.

Price competitive tendering (Full response: paragraphs 40-52)

- The **right to a fair trial** is a key requirement of the rule of law. That right can have **practical effect** only if criminal defendants can secure sound legal advice and effective representation, irrespective of means.
- The proposals, if implemented, would yield a **seismic change** in the criminal justice landscape by denying legally aided criminal defendants any opportunity to **choose** who should advise and represent them.
- Instead, defendants would be **assigned a lawyer** drawn from those who had won contracts under PCT.
- There are many legitimate reasons why a given defendant may wish a given lawyer to represent him or her. There may be a **pre-existing relationship** of trust and confidence, a given lawyer may have particularly **pertinent expertise**, while **cultural or linguistic considerations** may play a part.
- Many criminal defendants are “**repeat players**”, yet they could end up being represented successively—or even simultaneously—by different lawyers. This is as **absurd** as it is **inefficient**.
- **Non-price competition** would be driven out of the system: contracts would be awarded on financial grounds only (subject to a quality-related threshold that would play only a residual role).
- The consultation paper provides wholly unsatisfactory reassurance that **quality** could be maintained in other ways.

ABOUT THE BINGHAM CENTRE FOR THE RULE OF LAW

The Bingham Centre for the Rule of Law was launched in December 2010 and is an independent research institute devoted to the study and promotion of the rule of law worldwide. Its focus is on understanding and promoting the rule of law; considering the challenges it faces; providing an intellectual framework within which it can operate; and fashioning the practical tools to support it. The Centre is named after Lord Bingham of Cornhill KG, the pre-eminent judge of his generation and a passionate advocate of the rule of law. It is part of the British Institute for International and Comparative Law, a registered charity based in London.

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