

Director:
Professor Sir Jeffrey Jowell, KCMG, QC

Bingham Centre

Written evidence to the Joint Committee on Human Rights

Inquiry into the implications for access to justice of the government's proposed legal aid reforms

27 September 2013

INTRODUCTION

1. The Bingham Centre for the Rule of Law submits the following written evidence to the Joint Committee on Human Rights Inquiry into the implications for access to justice of the government's proposed legal aid reforms. This evidence was prepared for the Bingham Centre by Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow, Bingham Centre for the Rule of Law), Dr Lawrence McNamara (Deputy Director and Senior Research Fellow, Bingham Centre for the Rule of Law) and Dr Tom Hickman (Barrister, Blackstone Chambers and Fellow, Bingham Centre for the Rule of Law), with contributions from other members of the Centre.
2. 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.
3. Our evidence to the JCHR is divided into two sections:
 - (a) Our views in relation to the proposed legal aid reforms as they stood when the JCHR inquiry was announced on 18 July 2013 ("the Transforming Legal Aid proposals – April 2013").
 - (b) Our views in relation to the further proposals which have been outlined since the JCHR inquiry was announced on 18 July 2013. We refer specifically to the *Transforming Legal Aid: Next Steps* consultation announced on 5 September 2013 ("the Next Steps proposals – September 2013"). In this section we also make some limited observations in relation to the *Judicial Review: Further proposals for reform* (Cm 8703) consultation, again announced in September.



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THE TRANSFORMING LEGAL AID PROPOSALS – APRIL 2013

4. The Bingham Centre’s views on the April 2013 proposals are contained in the response we made to the Ministry of Justice consultation on the legal aid reforms in Consultation Paper CP14/2013 *Transforming Legal Aid: Delivering a more credible and efficient system*. That response was framed around access to justice and rule of law concerns, and it directly addresses three of the four specific matters on which the JCHR is seeking evidence. We have attached that response as an appendix to this document and it should be considered part of our written evidence to the JCHR.
5. The access to justice and rule of law framework issues are addressed in paragraphs 4-7 and 53-54.
6. Of the four points in which the JCHR has expressed particular interest (the residence test, legal aid for prisoners, judicial review, and ‘borderline’ cases) our consultation response addresses the first three of these:
 - The residence test: Paragraphs 13-16
 - Legal aid for prisoners: Paragraphs 8-12
 - Judicial review: Paragraphs 17-39

THE “NEXT STEPS” PROPOSALS – SEPTEMBER 2013

7. The “next steps” consultation document indicates that some modifications will be made to the April 2013 proposals. However, regarding the three issues above our view is that our concerns largely still remain as they were.

The residence test

8. The “next steps” document at 2.11 – 2.17 indicates residence test modifications. While we welcome these changes, they do not adequately address the substance and scope of the matters we raised in our response on this issue.

Legal aid for prisoners

9. The “next steps” document at 2.5 – 2.7 indicates prison law modifications. Although there are adjustments (2.5), the original proposals are to be pursued. Again, the adjustments do not adequately address the substance and scope of the matters we raised in our response on this issue.

Judicial review

10. The “next steps” document at 2.18 – 2.20 states that there will be some limited change to the proposals for legal aid for permission work for judicial review. It forecasts a separate consultation, which is the subject of the *Judicial Review: Further proposals for reform* (Cm 8703) consultation. Chapter seven, in particular, addresses these matters.
11. Time constraints prevent us from, at this point, offering a detailed analysis though we make the following observations.
12. First, the essence of the original rationale and the original proposals remains. As the *Judicial Review: Further Proposals* paper notes at paragraph 20, the proposals “are intended to act as a disincentive to those considering judicial review whose cases have no merit ...”. In this regard, we point to our consultation response at paragraphs 25-30 where we attempt to compare the progress and success of claims that are legally aided and those that are not. As we stated there in summary (para 30), “there is nothing to suggest legally aided judicial review claims are pursued in a reckless way that results in a relatively high number of “weak” cases. On the contrary, there is everything to suggest that legally

aided cases appear to be handled far more cautiously than those which are unfunded, and lawyers in legally-aided applications are far more likely only to pursue cases with merit.”

13. We welcome the more detailed data and analysis provided in the Impact Assessment attached to the *Judicial Review: Further Proposals* paper at paras 15-40. Having said this, we note that there is substantial uncertainty about the impact and effects, including how claimants may choose to respond if legal aid is unavailable, and we note especially the issue of claimants possibly proceeding as litigants in person (para 38 of the Impact Assessment). We also remain concerned that the data is not presented in a way that offers some comparison of how legally aided claims proceed as against non-legally aided claims. Our tentative view is that, even with the further data provided, the methods used to achieve the projected savings are likely to have significant detrimental impacts on access to justice and, in the absence of comparative data, it is unclear that the proposed changes are the best and most appropriate pathway towards achieving the aim of acting as a disincentive to pursue unmeritorious cases. The numerous other concerns we have raised in our original response to the consultation also remain.
14. On these matters, if it would assist the Committee, the Bingham Centre can provide further written evidence and/or oral evidence that addresses the *Judicial Review: Further proposals* in more detail, particularly with regard to: (a) the data and analysis in the Impact Assessment, and (b) the position relating to the proposal at paragraphs 118 - 131 of the paper, including the proposal regarding discretionary payments.
15. Should we be able to assist the Committee further in these or any other matters related to its inquiry, please do not hesitate to contact us.

Appendix attached:

Bingham Centre response to Transforming Legal Aid Consultation Paper CP14

APPENDIX TO BINGHAM CENTRE WRITTEN EVIDENCE TO JCHR (27 SEP 2013)

Response to Ministry of Justice Consultation Paper CP 14/2013

Transforming legal aid: Delivering a more credible and efficient system

INTRODUCTION: LEGAL AID AND THE CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE

1. The Bingham Centre for the Rule of Law submits the following response to the Ministry of Justice's Consultation Paper CP 14/2013, *Transforming legal aid: Delivering a more credible and efficient system* ("the Consultation Paper"). This response was prepared for the Bingham Centre by Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow, Bingham Centre for the Rule of Law), Dr Lawrence McNamara (Deputy Director and Senior Research Fellow, Bingham Centre for the Rule of Law) and Dr Tom Hickman (Barrister, Blackstone Chambers and Fellow, Bingham Centre for the Rule of Law), with contributions from other members of the Centre.
2. 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.
3. In this response, we comment on the following issues raised in the Consultation Paper:
 - a. the proposed **residence test** (under which it is suggested that those who lack a "strong connection" to the UK should be denied legal aid),
 - b. the suggestion that many **prison matters** should be excluded from the ambit of the legal aid scheme, and
 - c. the proposal that payment for work carried out on **judicial review** permission applications should be covered by legal aid only if permission is granted, and
 - d. the proposal to introduce price competitive tendering in relation to **criminal legal aid**.

4. We approach these matters mindful of the fact that a tension exists, and that a balance may therefore have to be struck, between (on the one hand) the need for effective governance and (on the other hand) individuals' capacity to hold Government to account and to enforce enduring principles and rights by means of judicial review so as to constrain the abuse of power on the part of decision-makers at all levels.
5. In his foreword to the Consultation Paper, the Secretary of State for Justice and Lord Chancellor says that access to justice should not be determined by ability to pay, and that legal aid is the "hallmark of a fair, open justice system".¹ We strongly agree. We also recognise that there are inevitably circumstances in which an individual's claim to publicly-funded legal advice or representation may have to yield to some extent in the face of countervailing considerations, including scarcity of resources. However, the extent to which such considerations can legitimately be permitted to attenuate the legal aid scheme is informed—and severely constrained—by the fundamentality of the values which that scheme serves to uphold.
6. We take as our starting-point the right of access to justice, which is a key element of the rule of law² and which is acknowledged both at common law, as a constitutional right,³ and by the European Convention on Human Rights.⁴ It is well-recognised that the right of access to justice is capable of being curtailed or infringed not only directly,⁵ but also by placing recourse to litigation beyond individuals' financial means.⁶ It is equally axiomatic that whatever other valuable mechanisms may exist for protecting the rights and interests of individuals, it is independent courts of law, in a democracy founded upon the rule of law, that stand as the ultimate guarantors of basic legal rights.
7. Against that background, any proposals to restrict access to justice—whether by limiting the availability of legal aid or otherwise—warrant close scrutiny. The burden upon those seeking to establish a case for constraining access to justice is a substantial one, and is likely to be discharged only by reference to clear and cogent evidence. That is the basis upon which we assess the Government's proposals.

A. PRISON LAW

8. The Consultation Paper proposes that eligibility for legal aid in relation to prison law matters should be restricted, such that legally aided advice and assistance would be unavailable in relation to "treatment matters" and available in relation only to a subset of "sentencing matters".⁷ We are surprised by, and do not share, the Government's view that treatment cases will never be "of sufficient priority to justify the use of public funds",⁸ given that that category includes allegations concerning bullying, discrimination, the separation of mothers and babies, compassionate release on severe health grounds, and prison conditions.⁹ It is equally surprising that such "sentencing matters" as categorization and segregation are considered incapable of warranting legal aid.

¹ Ministry of Justice, *Transforming legal aid: Delivering a more credible and efficient system* (CP 14/2013), p 3 (https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf).

² See Tom Bingham, *The Rule of Law* (2010), especially chapter 8.

³ See, e.g., *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

⁴ Article 6.

⁵ E.g. by means of such devices as statutory ouster clauses.

⁶ See, e.g., *Witham*, n 2 above, in which the court fees regime's inadequate accommodation of impecunious prospective litigants was found to breach the common law right of access to justice.

⁷ *Transforming legal aid*, n 1 above, paras 3.17-18.

⁸ *Transforming legal aid*, n 1 above, para 3.17.

⁹ *Transforming legal aid*, n 1 above, p 111.

9. It is uncontroversial that prisoners do not, by virtue of their incarceration, surrender their basic rights *en bloc*.¹⁰ However, the retention of certain of their rights is likely to amount to very little if such rights are rendered practically unenforceable. The Consultation Paper argues that adequate alternatives exist, including the prison complaints system and the Prisons and Probation Ombudsman, and that these should be the “first port of call”.¹¹ However, this misses four crucial points. First, courts already normally require alternative remedies to be exhausted before granting permission to seek judicial review. Other modes of redress are therefore *already* the first port of call. Second, the proposals would render non-judicial remedies not merely the first, but (in many situations) the *only* port of call. Third, while such modes of redress may in some circumstances constitute adequate alternatives to litigation, the rule of law requires the possibility, at least as a last resort, of recourse to independent courts capable of issuing legally binding remedies. And, fourth, that rule-of-law imperative is particularly compelling in settings—of which prisons are a paradigm example—in which individuals are subject to the exercise of highly coercive public law powers.
10. The Consultation Paper proposes that legal aid should be available if the criteria laid down in *Tarrant*¹² are satisfied.¹³ The *Tarrant* case was concerned with the circumstances in which legal representation ought to be permitted in order to facilitate the effective participation of a prisoner in an oral hearing. It does not address situations not involving oral hearings in which legal advice or assistance may be appropriate. The apparent assumption in the Consultation Paper that the interests of fairness may require legal representation only when an oral hearing is available is misplaced.
11. Stepping back from the details of the proposals, two broader points—neither of which is adequately acknowledged by the Consultation Paper—fall to be considered. The first is that judicial review has exerted a profound and positive influence upon the prison system in recent decades. The second is that the nature of any state’s prison system—including the extent to which its operation is in practice, not merely in theory, subject to legal scrutiny and control—is a key barometer of the rule of law. It is inevitable that the proposals, if implemented, would substantially undermine the valuable role played by courts in this area. If one of public law’s core functions is to safeguard vulnerable individuals against misuses of state authority, then it is hard to think of a more fundamental assault upon the capacity of public law to perform such a role.
12. For the reasons given above, our answer to Question 1 in the Consultation Paper is “no”.¹⁴

B. RESIDENCE TEST

13. We have significant concerns relating to the proposed residence test.¹⁵ Insofar as the British Government takes action that affects non-residents, they are entitled to challenge the legality of that action in the courts. For three interlocking reasons, the unavailability of legal aid under the proposed residence test would make legal redress practically impossible in many such cases. First, many individuals who are affected by UK Government action of this type will lack the means necessary to fund private legal action. Second, in cases in which damages are not sought no possibility arises of a Conditional Fee Agreement or a Damages Based Agreement. Third, interested third parties cannot be

¹⁰ See, e.g., *R v Board of Visitors of Hull Prison* [1979] 1 QB 425; *Raymond v Honey* [1983] 1 AC 1.

¹¹ *Transforming legal aid*, n 1 above, para 3.15.

¹² *R v Secretary of State for the Home Department, ex parte Tarrant* [1985] QB 251.

¹³ *Transforming legal aid*, n 1 above, para 3.14.

¹⁴ Question 1: “Do you agree that the proposed threshold is set an appropriate level? Please give reasons.”

¹⁵ *Transforming legal aid*, n 1 above, paras 3.48-3.54.

funded to bring claims of this type in the interests of foreigners.¹⁶ This means that many instances of illegal Government action against non-residents would be effectively immune from challenge.

14. There are two levels on which the policy underlying this aspect of the proposals may be questioned. First, viewed from the perspective of prospective litigants, the line drawn by the Consultation Paper between those who would and would not qualify for legal aid is arbitrary. For example, civil legal aid would be unavailable to *British* nationals applying from outside the UK, Crown Dependencies or British Overseas Territories, notwithstanding that such individuals might well (e.g. in respect of property, financial or family connections) be affected by decisions taken by the UK Government. Equally, the requirement of “lawful” residence would also exclude, for example, illegal visa overstayers and failed asylum-seekers. Yet such people—their “unlawful” status notwithstanding—might be significantly affected by executive action that might be wholly unconnected with their legal right to be in the UK. An absolute prohibition on legal aid would inevitably preclude many legal challenges, including to serious alleged abuses of power.¹⁷
15. Second, 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.¹⁸ 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.
16. For the reasons given above, our answer to Question 4 in the Consultation Paper is “no”.¹⁹

C. JUDICIAL REVIEW

Introduction

17. In our response²⁰ to the earlier consultation on judicial review,²¹ we raised concerns about the incompleteness of the evidence, including statistical evidence, upon which the proposals were based. It is unfortunate that the part of the present Consultation Paper which deals with judicial review is similarly deficient. In the light of our view that a clear, evidence-based case needs to be made for restricting legal aid, we identify various evidential deficiencies in the Consultation Paper in this section, before moving on to address the substance of the proposals.

¹⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012, sch 1, para 19(3).

¹⁷ We note that, according to para 3.54 of the Consultation Paper, the power to grant legal aid in exceptional circumstances would apply in cases that failed to satisfy the residence test. We are not, however, satisfied that the Consultation Paper demonstrates that this would constitute an adequate failsafe mechanism.

¹⁸ *Walton v Scottish Ministers* [2012] UKSC 44, [2013] PTSR 51.

¹⁹ Question 4: “Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.”

²⁰ Bingham Centre for the Rule of Law, *Response to Ministry of Justice Consultation Paper CP 25/2012, Judicial Review: Proposals for Reform* (London 2013) (http://www.biicl.org/files/6304_moj_jr_consultation_-_bingham_centre_response_23_1_2013_final_final.pdf).

²¹ Ministry of Justice, *Judicial Review: Proposals for Reform* (London 2012) (https://consult.justice.gov.uk/digital-communications/judicial-review-reform/supporting_documents/judicialreviewreform.pdf).

18. The Consultation Paper proposes that legal aid should cover work carried out on an application for permission to seek judicial review only if the application is successful.²² The stated intention is to incentivise providers to think more carefully before applying for permission.²³ The implication is that there is a tendency on the part of providers to pursue inappropriate applications and that, in the absence of adequate self-restraint, this tendency needs to be checked in some other way. The legal aid scheme, it is said, should be addressed “in order to preserve valuable court and judicial time, drive greater efficiency and focus legal aid resources on cases that really require it.”²⁴
19. While we welcome the fact that the Ministry of Justice has recently published statistical information on judicial review applications in the period 2007-11,²⁵ we note that the Consultation Paper provides information about *legally aided* judicial review cases only for 2011-12.²⁶ It is inappropriate for such significant proposals to be based upon evidence relating to a single year, without contextualizing the data presented against judicial review applications generally, and without providing a breakdown of data so that detailed analysis can be undertaken.
20. As it stands, where the Consultation Paper purports to provide evidence on which the permission proposals rest, that evidence is, at best, inadequate. In our view it can be appropriately characterised as providing an incomplete and arguably even misleading picture of the position regarding judicial review applications which are legally aided.

The evidence presented in the Consultation Paper

21. The Consultation Paper says that of the 4,074 legally aided judicial review cases in which applications were lodged in 2011-12, 2,275 (56 per cent) ended before permission was sought.²⁷ This figure (given that it appears in the part of the Paper which seeks to make the case for change) is presented in an implicitly critical manner, inviting the assumption that many or most of these claims were hopeless or totally without merit. The Consultation Paper goes on to note that of the 1,799 legally aided cases in which permission was sought in 2011-12, permission was refused in 845.²⁸ We have two criticisms of this data and its presentation.
22. First, the Consultation Paper conflates cases in which permission is sought and refused with cases that are found to be “unarguable”.²⁹ This overlooks the fact that a more stringent hurdle than mere arguability may be applied at the permission stage and that, in any event, permission may be denied irrespective of arguability. For example, permission may be denied in arguable cases on the grounds that the claimant lacks standing, that there was a failure to exhaust alternative remedies, and that an issue which has become academic does not raise sufficient issues of general importance to warrant the

²² *Transforming legal aid*, n 1 above, para 3.69.

²³ *Transforming legal aid*, n 1 above, para 3.61.

²⁴ *Transforming legal aid*, n 1 above, para 3.62.

²⁵ Ministry of Justice, *Judicial Review Statistics 2007-11* (London 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190991/jr-adhoc.pdf).

²⁶ *Transforming legal aid*, n 1 above, paras 3.65-3.68

²⁷ *Transforming legal aid*, n 1 above, para 3.65.

²⁸ *Transforming legal aid*, n 1 above, para 3.67. In addition to the points we raise now, we note that the draft submission of Public Law Project includes an analysis that is critical of the Consultation Paper’s use of LAA permission statistics at 3.65 – 3.68: http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf (Accessed: June 2013).

²⁹ *Transforming legal aid*, n 1 above, para 3.68.

case being heard.³⁰ Equally, denial of permission may be preceded by valuable judicial consideration of serious and substantial issues and/or concession by the Government of some parts of the claim.

23. Take, for example, *R (Fawcett Society) v Chancellor of the Exchequer*, in which the 2010 budget was challenged on the ground that the public sector equality duty had been breached.³¹ Although permission was refused, Ouseley J noted that the claimant had put forward “important and interesting arguments”,³² which he considered in a detailed judgment. Indeed, the Government conceded some breaches of the duty, thereby avoiding permission being granted on the ground that the claim had become academic.³³ A similar point can be made about *R (Diedrick) v Chief Constable of Hampshire Constabulary*, in which the court’s decision to refuse permission was accompanied by a detailed judgment in which the issues were subjected to careful and thorough consideration.³⁴ It is inappropriate, therefore, to assume that cases which fail to attract a grant of permission are hopeless applications for which permission should never have been sought or funding granted.
24. Second, the Consultation Paper only presents figures relating to legally aided claims. In its failure to place those figures in a comparative context, the paper provides only a partial picture of what is happening and, consequently, is misleading. We now attempt to remedy that failure by piecing together the limited data contained in both the current consultation and the earlier judicial review consultation.

Some doubts and concerns about the evidence

25. The Consultation Paper is not accompanied by data which enables a full analysis. Of particular importance, and somewhat astoundingly, there appears to be no data which compares the progress of applications that are legally aided with those that are not legally aided. The Consultation Paper makes no attempt to provide any such analysis. However, using the best available data, when the Legal Aid Agency statistics in the Consultation Paper are read in conjunction with the Ministry of Justice judicial review statistics published in April 2013, it is possible to discern some contrasts between legally-aided and other applications, even taking account of the uncertainty and variation of reasons why applications may end prior to permission. The following table shows raw figures and percentages for total applications, and also shows the breakdown by those which were legally aided and those which were not.³⁵

³⁰ *Transforming legal aid*, n 1 above, para 3.66.

³¹ [2010] EWHC 3522 (Admin).

³² *Fawcett Society*, n **Error! Bookmark not defined.** above, para 4.

³³ See further Hickman, “Too hot, too cold or just right? The development of the public sector equality duties in administrative law” [2013] PL 325 at 333.

³⁴ [2012] EWHC 2144 (Admin).

³⁵ We proceed cautiously here because of the paucity of data available. We would much prefer to see comprehensive data and analysis from the MoJ (and we have requested that). However, without that, we rely here on the best available data. Our table is based on two sets of figures that have been made publicly available: (a) the statistics for 2011 -12 legally aided judicial review cases contained in the *Transforming legal aid* consultation paper (“the LAA statistics”); (b) the statistics for 2011 judicial review cases published in April 2013 (“the MoJ statistics”) (see the tables accompanying *Judicial Review Statistics*, n **Error! Bookmark not defined.** above). We have presumed that the statistics have been compiled in a comparable way, with the LAA figures being case progression in the same way the MoJ figures are, and it appears from para 3.65 of *Transforming Legal Aid* that this is so. We have treated each of these sets of figures as a fair approximation of a single one-year period, primarily because there is not a great percentage change in applications terminated prior to permission from 2007 through to 2011 in table 1 of the judicial review statistics, and especially so in 2010 (41%) and 2011 (43%). As we are concerned with the larger patterns, any difference between the judicial review statistics for 2011 and the legal aid statistics for 2011-12 is unlikely to be significant. In the absence of more comprehensive data these figures provide a guide. We also note that it is, in any event, dangerous to attempt to draw inferences from bald pre-permission termination figures, given the diversity of reasons for not applying for permission (e.g., a case in which the defendant concedes following a grant of interim relief would fall into this category).

	All applications (Source: MoJ, 2011)	Legally aided applications (Source: LAA, 2011-12)	Thus:	Non-legally aided applications
Applications lodged	11,359 total ³⁶	4,074 ³⁷	⇒	7,285
Applications <u>terminated prior to permission</u>	4,828 ³⁸ (43% of total)	2,275 ³⁹ (56% of legally aided applications)	⇒	2,553 (35% of non-legally-aided applications)
Applications where <u>permission sought</u>	6,531 ⁴⁰ (57% of total)	1799 ⁴¹ (44% of legally aided applications)	⇒	4732 (65% of non-legally-aided applications)
Applications where <u>permission granted</u> (either at first stage or after oral renewal)	1,268 ⁴² (19% of all applications where permission sought) (11% of total applications)	864 ⁴³ (48% of legally aided applications where permission is sought) (21% of all legally aided applications)	⇒	404 (9% of non-legally aided applications where permission is sought) (6% of all non-legally aided applications)
Applications where <u>permission refused</u>	4,479 ⁴⁴ (69% of applications where permission is sought)	845 ⁴⁵ (47% of legally aided applications where permission is sought)	⇒	3,634 (77% of non-legally aided applications where permission is sought)

³⁶ MoJ JR statistics, Table 1: figure stated.

³⁷ *Transforming Legal Aid*, para 3.65: figure stated.

³⁸ MoJ JR statistics, Table 1: 11,359 total applications less 6,531 applications where permission sought

³⁹ *Transforming Legal Aid*, para 3.65: figure stated.

⁴⁰ MoJ JR statistics, Table 1: 945 granted at first stage plus 5,586 refused at first stage = 6531 applications where permission sought.

⁴¹ *Transforming Legal Aid*, para 3.66: figure stated.

⁴² MoJ JR statistics, Table 1: figure stated.

⁴³ *Transforming Legal Aid*, para 3.66: Estimated. 1,799 sought permission, less 845 that received permission = 954 remaining. Presuming around 90 cases were withdrawn or similar before an oral renewal decision, that leaves 864. The estimate of 90 follows the proportions of withdrawals at the oral renewal stage shown in MoJ 2011 statistics, Table 6: where the MoJ was the defendant, 721 refused at first stage, and 79 withdrawn in oral renewal stage; where local authorities were the defendant, 314 refused and 41 withdrawn in oral renewal.

⁴⁴ MoJ JR statistics, Table 1: figures stated: 5,586 refused at first stage less 323 granted on renewal less 784 where renewal withdrawn = 4,479.

⁴⁵ *Transforming Legal Aid*, para 3.66: figure stated.

26. We make three observations about these figures and their significance.
27. First, the Consultation Paper focuses on 56% of legally-aided applications ending before permission was sought, citing this as a reason for removing legal aid funding unless permission is granted. Yet the comparative data shows that 35% of non-legally-aided applications end before permission. To put it the other way around, permission is sought in only 44% of legally aided applications but, by contrast, it is sought in 65% of non-legally-aided applications.
28. Second, can any inference be drawn about whether the availability of legal aid significantly incentivises (one way or the other) decisions whether to take cases forward to the permission stage? The fact that permission is sought in a much higher proportion of unfunded cases than in funded cases suggests that the provision of legal aid does not at all provide an incentive to pursue an unarguable claim. On the contrary, the comparative statistics suggest that it is privately funded matters which are more readily pursued and less likely to succeed. Viewed as a proportion of total applications lodged, 21% of legally-aided applications receive permission whereas a mere 6% of privately funded applications receive permission. Perhaps more relevantly, given the variation in reasons for termination prior to permission, when viewed as a proportion of applications where permission is sought, permission is granted to 48% of legally aided applications and to just 9% of non-legally aided applications. Therefore, a legally aided application is over five times more likely to receive permission than an application which is not legally aided.
29. Third, there needs to be much more data made available before it can be said that the proposals rest on adequate evidence. We would hope that data will be provided that enables a breakdown of legally-aided claims and non-legally aided claims so that the picture on these matters is clearer. However, as our table shows, the best available data suggests that legally aided and non legally aided applications progress in startlingly different ways.
30. Put simply, there is nothing to suggest legally aided judicial review claims are pursued in a reckless way that results in a relatively high number of “weak” cases. On the contrary, there is everything to suggest that legally aided cases appear to be handled far more cautiously than those which are unfunded, and lawyers in legally-aided applications are far more likely only to pursue cases with merit. Of course, it would be helpful to know more about the claims that are not legally-aided. In particular, to what extent does representation make a difference to claims? It would be helpful to know the comparative success rates of oral as against paper permissions for legally aided and non legally aided applications. It would be helpful to know comparative costs across different categories of legally aided judicial review claims. Certainly, before any reforms proceed, there needs to be an evidence base that underpins them. The evidence that has so far been made available provides little, if any, support for the proposed reforms. If there is a need for reform it may well be found only in a closer analysis of the pursuit of unarguable claims generally, especially in those which are *not* legally aided. This is especially so given the aims are to preserve court and judicial time, and drive greater efficiency. However, even taking account of the difficulties in interpreting the data and limited availability of data, it seems an almost inescapable conclusion from the comparative statistics that reducing access to legal aid in this area will have the consequence of reducing access to justice for the poor and disadvantaged in our community without any adequate justification.

Further concerns about the relationship of the evidence to the proposals

31. For reasons that will be apparent from the previous section, we are not satisfied that the proposals demonstrably rest upon a cogent evidence base. We also have a number of more particular concerns.

32. First, the Consultation Paper notes that of the 845 cases in which permission was refused in 2011-12, 330 were recorded by the provider as having been of “substantive benefit to the claimant”.⁴⁶ The Paper acknowledges that the proposals would “affect” such cases, but asserts that any value there might be in funding that large minority (39 per cent) of cases is outweighed by the argument for ceasing to fund the majority not recorded as having been of “substantive benefit”.⁴⁷ We find this unpersuasive, not least because no attempt is made to articulate—in either qualitative or financial terms—how the implicit cost-benefit analysis was carried out. We also note that the possibility of continuing to fund *only* cases that are of “substantive benefit” is summarily dismissed in the Consultation Paper on the ground that a system of self-certification by providers might be insufficiently robust. Yet no attempt is made either to quantify that risk or to consider how any such risk might be managed.⁴⁸
33. Second, the fact that 56% of the legally aided judicial review applications which are lodged do not proceed as far as seeking permission suggests that a good deal of screening is already carried out by providers. When compared to the 35% of non-legally-aided applications that do not proceed as far as seeking permission, it appears to suggest that lawyers in legally aided matters are acting *responsibly* by not applying where (e.g. because of a change of circumstances) permission would be unlikely to be granted. The proposal to make payment conditional upon success at the permission stage therefore appears to be based upon an unfounded assumption that providers take legally-aided cases forward in a cavalier fashion. The absence of clear evidence justifying that assumption casts doubt upon the extent of any need to disincentivise such behaviour. This, in turn, creates a real risk that the proposal amounts to the use of a sledgehammer to crack a nut which may or may not exist.

Lack of appreciation of the practical aspects of judicial review work

34. In addition, the Consultation Paper fails to take sufficiently into account the way in which the practice of judicial review is carried out. Normally, judicial review work is front-loaded, with most work having to be done before permission is granted. This is because the court requires a full bundle at permission stage, including the grounds of review, witness evidence and supporting documents, including relevant authorities. The proposals take no account of rolled-up hearings, meaning that providers would have to prepare not only for the permission application but also for the substantive hearing at the risk of being paid for none of that work. The distinction drawn by the Consultation Paper⁴⁹ between work involved in preparing for permission and prior work is therefore likely to be a highly unstable one that would result in difficult if not impossible demarcation disputes.
35. It should also be noted that the Consultation Paper fails to acknowledge the highly precarious financial position of many solicitors who undertake legally aided public law work—yet the existence of lawyers willing and able to take on such work is a prerequisite of an effectively functioning system of judicial review.⁵⁰
36. Nor does the Consultation Paper address the behaviour of defendants in relation to permission. Defendants very rarely concede permission because there is no incentive for them to do so. If there are concerns about the consumption of public resources—including judicial resources—in deciding unmeritorious permission issues, then consideration should be given to removing from judges’ workload cases in which the defendant ought to concede permission and proceed directly to a substantive hearing. For example, costs might be awarded against the defendant if permission were

⁴⁶ *Transforming legal aid*, n 1 above, para 3.67.

⁴⁷ *Transforming legal aid*, n 1 above, para 3.73.

⁴⁸ *Transforming legal aid*, n 1 above, para 3.74.

⁴⁹ *Transforming legal aid*, n 1 above, para 3.71.

⁵⁰ See, e.g., the comments of Lord Hope in *In re appeals by Governing Body of JFS* [2009] UKSC 1, [2009] 1 WLR 2353, paras 24-25.

unreasonably opposed. It is unfortunate that such matters are obscured by the Consultation Paper's exclusive focus on *applicants* (and especially legally aided applicants) as a putative drain on resources.

37. In the light of the foregoing, our view is that the proposals, if implemented, would produce one (or some combination) of two outcomes. The first possibility is that there would be a significant reduction in the number of cases in which permission was sought. It is very likely that amongst the cases deterred by the proposals would be cases in which permission would have been granted and cases which, even in the absence of permission, would have substantially benefitted the claimant. This would occur in large part through the chilling effect that the proposals would likely exert, by incentivising providers to seek permission only in cases where the likelihood of success was high or very high. This effect would be compounded by the fact that for some practitioners it will not be a choice of whether to refuse to take on such work, but rather that it will be financially unviable for them to do. We note that the impact assessment appears to move in the language of choice, referring to practitioners who would “refuse” to take on work.⁵¹ The unpredictability of the permission stage would only exacerbate the problem.⁵²
38. The second possibility, however, is that courts might seek to ameliorate the effects of the changes, so as to reduce the extent to which the first scenario, sketched above, would eventuate. For instance, judges might grant permission more readily—by adopting a more lenient conception of arguability—in order to reduce the number of cases that would be caught by the proposed legal aid arrangements. In addition, in line with our suggestion above, courts might develop the costs consequences for defendants who inappropriately resist permission applications, as a means of levelling the playing field. Such judicial responses to the proposals, if implemented, would be entirely appropriate given the fundamental importance of the constitutional right of access to justice, and the associated public interest in the maintenance of a cadre of professionals for whom the conduct of publicly-funded public law work remains a financially viable proposition.⁵³
39. For the reasons given above, our answer to Question 5 of the Consultation Paper is “no”.⁵⁴

D. CRIMINAL LEGAL AID

40. We have already noted that the rule of law is clearly engaged when the state exercises authority over individuals, such that adequate means of redress and accountability must exist—including by way of judicial review. But there can be few, if any, exercises of power more significant or serious than subjecting an individual to criminal proceedings. By prosecuting those suspected of having committed criminal offences, the state undoubtedly protects the interests of victims and advances the public interest in tackling criminality. But this must be balanced against the rights of individual defendants and the public interest in a fair, high-quality and even-handed criminal justice system.
41. Few propositions, then, are as axiomatic as that which holds the right to a fair trial to be a core aspect of the rule of law—and it is self-evident that fair trials are impossible in the absence of effective representation. Against that background, we make the following responses to the criminal aspects of the legal aid proposals. The conciseness of our comments reflects our recognition that others—including individuals and groups that are particularly well-placed to do so—will be responding in detail

⁵¹ ‘Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid)’, 9 April 2013 [‘Civil Credibility Impact Assessment’], paragraph 31

⁵² See Bondy and Sunkin, “Accessing judicial review” [2008] PL 647.

⁵³ See Lord Hope in the *JFS* case, n **Error! Bookmark not defined.** above.

⁵⁴ 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)? Please give reasons.”

to these strands of the proposals. Succinctness should not, however, be taken to signal ambivalence in relation to the proposals in this area, in relation to which we entertain profound concerns.

42. From a rule-of-law perspective, the central question can be stated very simply: if the proposals were implemented, would those facing criminal prosecution continue to be able to secure sound legal advice and effective representation? We believe that there is a very serious risk that the answer to that question will turn out to be “no”. This is so for several interconnected reasons relating to *access* to legal aid, *choice* of lawyer, and *quality* of advice and representation.
43. It is self-evident that however high (or low) the quality of advice and representation available under the legal aid scheme, those who cannot access the scheme will be unable to benefit from it. The consultation paper proposes that the present practice, whereby all defendants in Crown Court cases are automatically granted legal aid upfront, should cease. Instead, any defendant with a household disposable income of £37,500 or more would become ineligible for legal aid, subject to the possibility of a hardship review.⁵⁵
44. We do not doubt the appropriateness of at least considering requiring those with substantial financial means to contribute to or meet the costs of their defence; at present this is achieved by way of a means based contribution to defence costs in the Crown Court. However, the Consultation Paper contains no evidence-based justification for the particular eligibility threshold that is proposed. In particular, what constitutes an appropriate threshold cannot meaningfully be determined in isolation from the potential costs of defence. On this point, the Consultation Paper is very vague: it asserts that “private rates will be the same as, or similar to, legal aid rates”⁵⁶ but then goes on to concede that “private rates vary and that in many cases they will be higher than legal aid rates”.⁵⁷ The paper also acknowledges that “the cost of cases in the Crown Court can vary considerably, for example between murder or serious fraud and a more routine case such as a theft”,⁵⁸ but rejects offence-based eligibility thresholds for reasons, *inter alia*, of administrative convenience. The possibility of a hardship review is presented as a panacea, but there is little attempt to substantiate the claim that hardship funding will be an adequate safety net. Nor is any adequate attempt made to demonstrate why the hardship funding model is preferable to other options, such as offence-based eligibility thresholds.
45. There is, therefore, a real prospect that individuals who are unable to pay for a good standard of legal advice and representation will nevertheless be denied legal aid. Such individuals will have to settle for poor quality advice and representation, or none at all. That an individual who finds himself or herself in such circumstances will be denied a genuinely fair trial is so obvious that it need hardly be stated.
46. What of those who are not denied access to legal aid? Implementation of the proposals would make it very unlikely that legal aid would continue to unlock the door to a good or even adequate standard of advice and representation. The central reason for this consists of the elimination of defendants’ capacity to choose who should advise and represent them—a radical change that is likely to play out on two levels.
47. In the first place, there is an array of reasons why a defendant may wish—and why it might make eminently good sense for—a given lawyer to represent him or her. The most obvious reason is a pre-existing lawyer-client relationship which, as well as potentially yielding trust and confidence on the part of the defendant, gives the lawyer immediate access both to relevant information about the defendant and to key contacts such as social workers, drug and alcohol counselors, and family members. Choice also means that a defendant can select a given firm on the basis of its particular

⁵⁵ *Transforming legal aid*, n **Error! Bookmark not defined.** above, para 3.27.

⁵⁶ *Transforming legal aid*, n **Error! Bookmark not defined.** above, para 3.29.

⁵⁷ *Transforming legal aid*, n **Error! Bookmark not defined.** above, para 3.30.

⁵⁸ *Transforming legal aid*, n **Error! Bookmark not defined.** above, para 3.31.

expertise or reputation, or for reasons—e.g. cultural or linguistic—that may influence the confidence the client is willing to repose in the lawyer. The existence of such trust is likely to be essential to an effective working relationship, the efficacy of the representation and the progress of the proceedings.

48. The prospect of defendants who are “repeat players” within the criminal justice system being represented—successively or even simultaneously—by several different lawyers is absurd, yet it is difficult to see how such absurdity would be avoided if the proposals were implemented in their present form. That the proposals create this possibility is symptomatic of the Consultation Paper’s tendency to presuppose that the provision of legal advice and representation can be reduced to the status of a commodity. That reflects an impoverished conception of the role of criminal defence lawyers.
49. As well as being relevant to the immediate relationship between lawyer and client, the elimination of choice would play out on a much bigger stage. It is self-evident that choice is a prerequisite of competition—and that competition is an important means by which standards can be maintained and driven up. We recognise that, in some spheres, standards can be safeguarded through means, such as regulation, other than competition and choice. We note, however, that choice has been increasingly favoured by successive governments, including the present one: it is noteworthy that the Consultation Paper offers no reasoned case for excluding legal services from the choice agenda.
50. In addition, it is clear that the selection of bids would be driven by financial considerations, and that quality-related factors would play only a residual role in the tendering process, being applied at a preliminary, screening stage. Nor is reassurance provided by the statement in the consultation paper that “there would also be certain ongoing service standards”—not least because neither those standards nor the means by which they would be enforced are articulated.⁵⁹
51. The proposals, if implemented, would yield a seismic change in the criminal justice landscape. The relationship between defendant and lawyer would change, in many instances beyond recognition. The diversity of the criminal legal aid provider sector would reduce dramatically. Little if any space would remain, in the publicly-funded sector, for specialist providers. And the consultation paper signally fails to displace the overwhelming weight of evidence which suggests that quality would be driven down. It would be dogmatic to suggest that the present legal aid system is uniquely capable of delivering a good standard of publicly-funded legal advice and representation. There is, however, a chasm between, on the one hand, the possibility that some other model may be satisfactory and, on the other hand, the reality of the proposals contained in the consultation paper. 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 current proposals were implemented.
52. Our responses to questions relating to the criminal legal aid in the Consultation Paper are as follows:
 - a. Question 2: for reasons given above, we do not consider that the case for the proposed model involving a financial eligibility threshold has been made out.⁶⁰
 - b. Question 3: for reasons given above, we are not satisfied that an adequate case has been made.⁶¹
 - c. Question 7: for reasons given above, our answer is “no”.⁶²

⁵⁹ *Transforming legal aid*, n **Error! Bookmark not defined.** above, para 4.149.

⁶⁰ Question 2: “Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.”

⁶¹ Question 3: “Do you agree that the proposed threshold is set an appropriate level? Please give reasons.”

⁶² Question 7: “Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.”

- d. Question 8: we are not satisfied that a case has been made demonstrating that the proposed reduction in rates can be delivered in a way that does not unacceptably compromise quality.⁶³
- e. Questions 9-12, 14-16, 18-20 and 23-25 concern the implementation of the overarching proposal concerning price competitive tendering that we have already rejected. We therefore make no response to those questions.
- f. Question 13: a similar point arises in relation to Question 13, but for the avoidance of doubt we underline here our objection to exclusivity given the implications of this proposal for choice.⁶⁴
- g. Question 17: for reasons given above, our answer is “no”.⁶⁵
- h. Question 21: our answer to this question is “no”.⁶⁶ In particular, we consider that there are serious risks concerning the quality and extent of provision that will be made available by providers, given the possibility that block payments may incentivise reduced involvement by providers in the handling of work.
- i. We make no response to any other questions in the consultation paper concerning criminal legal aid.

CONCLUDING REMARKS

53. The proposed changes to the legal aid system 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 the light of that, the burden on the Government to demonstrate an evidence-based case for the proposed changes is a substantial one. Our clear view is that the Consultation Paper fails to discharge that burden. In particular, the Consultation Paper underestimates the value of judicial review proceedings that do not ultimately clear the permission stage, wrongly assumes that cases in which 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. In addition, 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.
54. In our constitution, which is characterised by ill-defined demarcations of authority, self-restraint on the part of each branch of Government is a necessity. Among other things, this requires that the other branches should not merely tolerate but actively support, including financially, a legal system that is equipped to subject the executive and all public officials to critical 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 that government is subject to adequate legal control. The system is thus 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 those proposals to be wanting in terms of the rule of law. wanting in terms of the rule of law.

⁶³ Question 8: “Do you agree that given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.”

⁶⁴ Question 13: “Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.”

⁶⁵ Question 17: “Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.”

⁶⁶ Question 21 concerns the remuneration mechanisms that would apply under the competition model, and includes a proposal for block payments for all police station attendance work.