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Bingham Centre

Response to Ministry of Justice Consultation
Transforming Legal Aid: Next Steps
and
Supplementary Response to Ministry of Justice Consultation Cm 8703
Judicial Review: Proposals for Further Reform
1 November 2013

Introduction

1. The Bingham Centre for the Rule of Law submits the following response to the Ministry of Justice's Consultation *Transforming Legal Aid: Next Steps* ("the Next Steps Consultation").

This document is also a supplement to our response to the Ministry of Justice's Consultation Paper Cm 8703, *Judicial Review: Proposals for Further Reform* ("the *Judicial Review: Proposals for Further Reform* Consultation"). This response does not duplicate material that is in our main response to the Judicial Review consultation (also dated 1 Nov 2013). Of note, paragraphs 10 - 24 of this document consider matters that were not addressed in our main response.

We address matters relating to the provision of legal aid for Judicial Review which were originally dealt with in the first *Transforming Legal Aid* consultation and which now arise in both the *Next Steps* consultation and in the *Judicial Review Proposals for Further Reform* consultation.

2. This response was prepared for the Bingham Centre by Dr Lawrence McNamara (Deputy Director and Senior Research Fellow, Bingham Centre), Dr Mark Elliott (Reader in Public Law, University of Cambridge and Fellow of the Bingham Centre) and Sir Jeffrey Jowell QC (Director, Bingham Centre), with research assistance provided by Mr Nicholas Reed-Langen.
3. 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.

4. In this response we focus on only one aspect of the proposed legal aid reforms: the reforms to legal aid for judicial review with regard to paying for permission work, focusing particularly on the evidence for the proposed reforms.
5. In our response to the first Legal Aid consultation we addressed (in addition to judicial review) other matters, including prison law and the residence test. We do not address those two issues here but, while we welcome some of the changes proposed in the current consultation – and especially those at paras [125]-[127] of Annex B relating to the residence test – many of the concerns we raised in our response to the first consultation remain. That we do not elaborate on those matters here should not be taken to mean we see the revised proposals as fully satisfactory.

The Bingham Centre’s approach to the legal aid reforms: the centrality of access to justice and the need for evidence-based law reform

6. In his foreword to the first Legal Aid Consultation Paper, the Secretary of State for Justice and Lord Chancellor said 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 agreed with that proposition at the time and still do. We welcome the comments in the foreword to the current consultation that legal aid and the right to a defence go “to the heart of a civilized society and underpin access to justice”.² And, now as then, 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.
7. Our analysis of the *Next Steps* proposals proceeds from the same starting point as our analysis of the proposals at the first Legal Aid consultation:³

We take as our starting-point the right of access to justice, which is a key element of the rule of law⁴ and which is acknowledged both at common law, as a constitutional right,⁵ and by the European Convention on Human Rights.⁶ It is well-recognised that the right of access to justice is capable of being curtailed or infringed not only directly,⁷ but also by placing recourse to litigation beyond individuals’ financial means.⁸ 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.

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.

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 Ministry of Justice, *Transforming legal aid: Next steps*, p 3

³ Bingham Centre for the Rule of Law, ‘Response to *Transforming Legal Aid*’, 4 June 2013, paras 6-7 (http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf)

⁴ See Tom Bingham, *The Rule of Law* (2010), especially chapter 8.

⁵ See, e.g., *R v Lord Chancellor, ex parte Witham* [1998] QB 575.

⁶ Article 6.

⁷ E.g. by means of such devices as statutory ouster clauses.

⁸ 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.

8. The Bingham Centre recognises that the present judicial review system could be improved, and that it should not be unthinkingly assumed that any change to current arrangements would necessarily undermine the courts' capacity to discharge their constitutional functions in this area. Indeed, the Centre has recently established a review, led by Michael Fordham QC, to consider and report on possible ways of improving judicial review procedures in the Administrative Court, to save and protect public funds, in a manner consistent with the rule of law.⁹ At the same time, however, it is necessary – as Lord Neuberger recently put it – to “be very careful about any proposals whose aim is to cut down the right to judicial review” given the need for “abuses and excesses” of executive power to be “brought before an impartial and experienced judge who can deal with them openly, dispassionately and fairly”.¹⁰
9. It is against this background that we assess the permission work proposals advanced in the *Next Steps Consultation* and the *Judicial Review: Proposals for Further Reform Consultation*.

Paying for permission work in judicial review cases – the proposals

10. The proposal in the *Next Steps* consultation remains to a significant extent as it was originally set out in the first consultation: permission work will only be paid for by legal aid if permission is granted.¹¹ This is tempered by the revised proposal “to introduce a discretion to permit the LAA to pay providers in certain cases which conclude prior to a permission decision.”¹² However, no payments will be made where permission is refused.¹³
11. While we welcome the revision of the original proposals with the LAA discretion, it merely tempers – and does not solve – many of the concerns we raised in our response to the first Legal Aid consultation. With its inherent uncertainty and the fact that no payment will be made if permission is refused, the revision does not adequately alleviate what will be the detrimental effects on access to justice. We are particularly concerned that neither the original proposals nor the revisions are based on adequate evidence. We turn now to this matter.

Paying for permission work in judicial review cases – the evidence

12. The *Next Steps Consultation Paper* summarises the key issues raised in responses to the original proposal, identifying the many concerns raised in response to the first consultation.¹⁴ We note in particular that many respondents raised concerns about the lack of data and the inadequacy of evidence that was provided in support of the proposals.¹⁵ The Government's summary notes that arguments in responses included the following:

‘... the data presented did not provide evidence of a problem and in particular when compared to data on judicial reviews as a whole, legally-aided judicial reviews have a higher ‘success rate’ than non legally-aided cases and that this suggests providers are already assessing carefully whether to issue proceedings ...’

The *Next Steps Consultation Paper* does not assert in any way that this argument is incorrect. It also does not provide data which would suggest it is incorrect.

⁹ Further information is on the Review's website at: <http://www.binghamcentre.biicl.org/JRInquiry>.

¹⁰ Lord Neuberger, ‘Justice in an Age of Austerity’, 2013 Tom Sargant Memorial Lecture, para 37 (<http://www.supremecourt.gov.uk/docs/speech-131015.pdf>).

¹¹ *Next Steps Consultation Paper*, Annex B, para 135.

¹² *Next Steps Consultation Paper*, Annex B, para 156; *Judicial Review: Proposals for Further Reform Consultation Paper*, paras 118-129.

¹³ *Judicial Review: Proposals for Further Reform Consultation Paper*, paras 130-131.

¹⁴ *Next Steps Consultation Paper*, Annex B, paras 137-152.

¹⁵ *Next Steps Consultation Paper*, Annex B, see especially para 148.

13. Our response to the first consultation provided a detailed analysis of the available evidence.¹⁶ We reached the following conclusions, and given that the position is not contested, we re-state some of the key points, which will also help show the extent to which the further data provided makes a difference.

First, ... permission is sought in only 44% of legally aided applications but, by contrast, it is sought in 65% of non-legally-aided applications.

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. ... [W]hen 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.

... 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.

The further data that has been provided

14. The current consultations have provided some further data about legally aided judicial review claims. This is provided in the *Judicial Review: Further Proposals for Reform* consultation paper and the accompanying Impact Assessment.¹⁷ This data is helpful in forming a more accurate picture of how judicial review claims proceed. Accordingly, the table below is a revised version of the analysis we presented in our response to the first consultation, amended to take account of the more accurate data provided for the number of legally aid cases which were granted permission in 2011/12.
15. We have not presented a table for 2012/13 data and the varying and sometimes uncertain nature of the available data means that an exact comparison is not possible. However, the data does mean that a general picture can be discerned sufficiently clearly, and more clearly than was possible when we prepared the table for the first consultation.
16. The table shows our original analysis and the effects of the further data which has been provided, using strike-through and underline to show what is different. Put simply, the further data reveals that where we had estimated that 845 cases were granted permission, the more accurate figure is 663 cases. As a result, the position now appears that over one year:
- permission was sought in only 44% of legally aided applications but, by contrast, it was sought in 65% of non-legally-aided applications. (The additional data makes no difference.)
 - when viewed as a proportion of applications where permission is sought, permission is granted to 36% of legally aided applications and to just 13% of non-legally aided applications. Therefore, **a legally aided application is three times more likely to receive permission than an application which is not legally aided.** (The additional data has made a difference here; the previous estimate was that it was five times more likely to receive permission.)

¹⁶ Bingham Centre for the Rule of Law, 'Response to *Transforming Legal Aid*', 4 June 2013, paras 25-30
http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf

¹⁷ *Judicial Review: Proposals for Further Reform* Consultation Paper, para 132-143; Impact Assessment MoJ 215, Evidence Base, paras 15-21.

	All applications (Source: MoJ, 2011)	Legally aided applications (Source: LAA, 2011-12; IA MoJ 215)	Thus:	Non-legally aided applications
Applications lodged	11,359 total ¹⁸	4,074 ¹⁹	⇒	7,285
Applications <u>terminated prior to permission</u>	4,828 ²⁰ (43% of total)	2,275 ²¹ (56% of legally aided applications)	⇒	2,553 (35% of non-legally-aided applications)
Applications where <u>permission sought</u>	6,531 ²² (57% of total)	1799 ²³ (44% of legally aided applications)	⇒	4732 (65% of non-legally-aided applications)
Applications where <u>permission granted (either at first stage or after oral renewal)</u>	1,268 ²⁴ (19% of all applications where permission sought) (11% of total applications)	864 ²⁵ <u>663</u> ²⁶ (48% <u>36%</u> of legally aided applications where permission is sought) (21% <u>16%</u> of all legally aided applications)	⇒	404 <u>605</u> (9% <u>13%</u> of non-legally aided applications where permission is sought) (6% <u>8%</u> of all non-legally aided applications)
Applications where <u>permission refused</u>	4,479 ²⁷ (69% of applications where permission is sought)	845 ²⁸ (47% of legally aided applications where permission is sought)	⇒	3,634 (77% of non-legally aided applications where permission is sought)

¹⁸ MoJ JR statistics, Table 1: figure stated.

¹⁹ *Transforming Legal Aid*, para 3.65: figure stated.

²⁰ MoJ JR statistics, Table 1: 11,359 total applications less 6,531 applications where permission sought

²¹ *Transforming Legal Aid*, para 3.65: figure stated.

²² MoJ JR statistics, Table 1: 945 granted at first stage plus 5,586 refused at first stage = 6531 applications where permission sought.

²³ *Transforming Legal Aid*, para 3.66: figure stated.

²⁴ MoJ JR statistics, Table 1: figure stated.

²⁵ *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.

²⁶ *Judicial Review: Proposals for Further Reform Consultation*, Impact Assessment MoJ 215, Evidence Base, para 20.

²⁷ 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.

²⁸ *Transforming Legal Aid*, para 3.66: figure stated.

17. The additional data is to be welcomed. However, even taking account of that data, it is still clear that:
- (a) **The general picture remains the same: privately funded claims are far less likely to be granted permission than legally aided claims.** Even with the updated data, and taking account of various uncertainties about how comparisons can be made, the evidence still suggests that a legally aided application is around three times more likely to be granted permission than a non-legally aided claim.
 - (b) **The available evidence still suggests that it is not legally aided claimants or their representatives who are failing to consider or handle matters appropriately; rather, the evidence suggests is privately funded litigants who are proceeding with less care.**²⁹ This is directly relevant to the *Judicial Review: Proposals for Further Reform* Consultation which seeks views as to how the costs for judicial review “can be adjusted to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings”.³⁰
 - (c) **There is no comparative data provided by the government – even though the best available evidence suggests that legally aided claims are far more likely to receive permission – and thus there is still no adequate evidence base for the proposed reforms.** Without comparative data, the Impact Assessment does not provide an adequate evidence base on which to make judgments about whether the stated policy objective of “ensur[ing] public confidence in the civil legal aid system” can be achieved, because such confidence can surely only be achieved if reforms to the system is based on evidence.
18. These conclusions have a particular resonance in light of the rationale provided by the Lord Chancellor and Secretary of State in the foreword to the current *Next Steps* Consultation where he states that the case for restricting payments for permission work is that “if a private individual would not likely fund the case, the taxpayer should not either”. Based on this rationale, and the fact that the best available evidence suggests that private litigants are far more inclined than legally aided litigants to pursue permission cases that are less likely to succeed, the conclusion that should follow from the available evidence is that the current legal aid arrangements for permission work are entirely appropriate. Certainly, there has been no case made that there is any evidence which supports the reforms based on the stated rationale.
19. Moreover, there has been no attempt at undertaking a comparative analysis. The Bingham Centre raised these concerns and put the following questions to the Ministry of Justice in the MoJ ‘web chat’ consultation on 29 October 2013:
- “(1) Has the MoJ undertaken a comparison of the success of privately funded as against legally aided claims? (2) If yes, what are the figures and what do they reveal about comparative progress?”
- The response was:
- “The data on the number of legally aided JR cases is drawn from the LAA and includes JR work undertaken at the pre-action stage. As such, these volumes are not directly comparable to the data on the overall volumes of JR applications i.e. cases that are formally lodged at the Admin Court. We’re not able to drill down further into the Admin Court data.”³¹
20. While we accept, of course, that there are resource and technical limits to the MoJ’s ability to access data, and, again of course, the data needs to have been collected in order to be analysed, it nevertheless seems remarkable that the Government has not published or, it appears, even undertaken a comparison of the data that is available in order to get at least an indicative picture. This is especially concerning

²⁹ Of course, the question of whether representation makes a difference needs to be considered as well, though no data has been provided in any of the consultations in this regard. See further our response to the first Legal Aid consultation, Bingham Centre for the Rule of Law, ‘Response to *Transforming Legal Aid*’, 4 June 2013, para 30 http://www.biicl.org/files/6419_bingham_centre_legal_aid_response_june_2013.pdf

³⁰ *Judicial Review: Proposals for Further Reform* Consultation Paper, para 113.

³¹ Ministry of Justice Web Chats, 29 October 2013, Questions and Reply at 14:09 <http://www.justice.gov.uk/ministry-of-justice-webchats> (1 Nov 2013).

given that the Government has not contested the analyses that are available and that the approach of the private litigant is the stated basis for comparison.

21. As such, the position remains as it did at the time of the first consultation: 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.
22. Accordingly, we recommend that the proposed changes to paying for permission work should not be pursued.

Responses to specific questions – Legal Aid Next Steps Consultation

23. The *Next Steps* Legal Aid Consultation states the proposed judicial review reforms³² but does not ask questions about them in the Schedule of Questions³³, instead moving those questions to the Judicial Review: Proposals for Further Reform consultation.

Responses to specific questions - Judicial Review Proposals for Further Reform Consultation

24. Question 19: Do you agree that providers should only be paid for work carried out on an application for judicial review in cases either where permission is granted, or where the LAA exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision? Please give reasons.

Answer: No, for the reasons stated above.

³² *Next Steps* Consultation Paper, Annex B, paras 156 and preceding.

³³ *Next Steps* Consultation Paper, page 24.