THE BACH COMMISSION: CALL FOR WRITTEN EVIDENCE

HALDANE SOCIETY OF SOCIALIST LAWYERS

Who we are

1. Since its foundation in 1930, the Haldane Society of Socialist Lawyers (the "Haldane Society") has provided a forum for the discussion and analysis of both national and international law and legal systems from a socialist perspective. The Society is independent of any political party but has trade union and labour affiliates. Its membership consists of qualified lawyers, academics, students, and legal workers.

2. The Haldane Society is an active member of the European Association of Lawyers for Democracy and Human Rights (ELDH) and the International Association of Democratic Lawyers. We regularly host high-profile international conferences on legal issues, the most recent of which in November 2015 was an international women's conference on the subject of Women Fighting Back: International and Legal Perspectives.The key note speakers were Angela Davis and Rashida Manjoo, (former UN Special Rapporteur on Violence Against Women).

3. With Young Legal Aid Lawyers, we organised a Commission of Inquiry Into Legal Aid Cuts in 2011, in advance of the legal aid cuts to social welfare law contained in LASPO. We heard personal testimony from a number of individuals for whom legal aid would not be available once LASPO was passed. We invited comments from a number of organisations, including the Ministry of Justice and conservative think-tanks, in order to ensure that all sides of the debates were heard. The Commission reported in summer 2011 and its report "Unequal Before the Law? The Future of Legal Aid" found the following:

   (1) Legal aid is vital to protecting the rights of vulnerable people;

   (2) Legal aid is vital to upholding the rule of law;

   (3) Legal aid is essential to holding the state to account;

   (4) Cutting legal aid is a false economy;

   (5) A holistic approach is needed in providing legal aid;

(6) Cuts to legal aid will drive out committed lawyers;

(7) Cutting legal aid is not a fair or effective way to reduce unnecessary litigation.

4. The full report can be read at: http://www.younglegalaidlawyers.org/sites/default/files/Unequal_before_the_law_legal_aid_report_june_2011.pdf. Those principles have informed our campaigning work since 2011.

5. The Haldane Society was also a key participant in the recent campaigns against cuts to criminal legal aid. We helped to establish the Justice Alliance and our current Chair, Russell Fraser, was one of its co-founders.

6. For more information on our work, see www.haldane.org.

Topic 1: The current state of access to justice

What are your biggest concerns about access to justice?

7. We have three principal concerns:

(1) The impact of the cuts to social welfare law implemented by LASPO 2012;

(2) The impact of cuts to criminal legal aid;

(3) The impact of other cuts contained in the Transforming Legal Aid Consultation (April 2013), notably the restriction of legal aid in judicial review cases and the proposed residence test.

8. We understand concerns at the costs of litigation, and support the recommendations of the Low Commission and others for well-funded advice at an early stage of a problem. We also support alternatives to litigation, such as alternative dispute resolution. However, we believe that if litigation is inevitable, then all parties to the litigation should be properly funded and receive high quality legal representation, regardless of their ability to pay. A justice system that upholds the rule of law, and equality of arms in court, must receive sufficient investment, so as to enable citizens to protect or extend their rights in court, if necessary. We regard this as a basic tenet of a functioning justice system in a modern democratic society.

The impact of LASPO 2012 cuts

9. All of the cuts to legal aid implemented by LASPO 2012 were unacceptable, and have led to an increase in inequality of arms.

10. First, financial eligibility for legal aid has been restricted, so that legal aid is now only available to those on the very lowest incomes. In our day-to-day practice, we frequently encounter tenants who need to pursue their landlords for breach of covenant, who are not eligible for legal aid, and yet cannot afford pay for legal representation privately. When the civil legal aid scheme was set up in 1950, it provided 80% of the population with a means-tested entitlement to civil legal aid. By 2009, only 36% of the population was financially eligible. The impact of LASPO restricted financial eligibility for civil legal aid to just 20% of the population. This has led to a rise in litigants in person. In most social welfare cases an individual is litigating against an institution with means (such as a corporate landlord) or a public institution. In our experience, those institutions invariably employ lawyers, often at public expense.

11. Second, we believe that all the restrictions on scope of legal aid implemented in LASPO should be repealed. The areas of housing law, education, family law, non-asylum immigration, debt, and social security are all specialist and complex areas of law. Problems in these areas – such as living in a damp property, or needing assistance in education tribunals – have a real impact on people's lives. Society should be assisting people to resolve these problems. In addition, we believe that early access to publicly funded legal advice and representation can reduce litigation and its attendant costs.

12. Third, the most egregious cut was the removal of advice on welfare benefit issues from scope. By definition, those seeking such advice cannot afford to pay for it. In addition, they are seeking advice on challenges to decisions made by a public authority – the DWP or local authorities – who should be expected to make a legally correct decision. The means of ensuring that public authorities make correct decisions is to make free legal advice available, at an early stage, so that decisions can be challenged and reviewed. The austerity programme pursued by this government, and the previous Coalition government, has caused great poverty and devastation. Where the DWP or other public decision-makers have made wrong decisions, then the claimant should be funded to challenge that decision early on.

Criminal legal aid

13. We highlight three main issues faced by the criminal legal aid system:

    (1) Cuts to the fees paid under the Litigators Graduated Fee Scheme ("LGFS") make much of criminal legal aid work uneconomical;

    (2) The rate of remuneration for advocates in many hearings often falls below the minimum wage.

    (3) The application of the merits test and means tests to legal aid in the magistrates' court and Crown Court prevents deserving clients receiving representation and causes delay.

14. First, cuts to the LGFS have caused legal advice and representation in the criminal courts to be cut to the bone. Our experience is that a cut in fees of 8.75% in 2014 has been met by the de-skilling of the workforce in some law firms, and in others orienting their practices away from criminal work. Despite the cost of attendance at court by the litigator being included within the LGFS, it has become so uneconomical for solicitors to attend court that counsel almost invariably attend court without the assistance of a representative of their instructing solicitors in all but the most serious cases. There has been a negative impact on the ability of solicitors to give adequate time to all of their clients, and client care has inevitably suffered. This is particularly concerning where vulnerable clients and those with complex cases are concerned.

15. Whilst the decision of the government not to proceed with a second cut of 8.75% in the LGFS is welcomed, the failure to repeal the first cut of 8.75% has left many firms in an uneconomic position, or reliant on supplementing their income with the Advocates Graduated Fee Scheme ("AGFS"). Our experience suggests that this affects the client's choice of advocate, with clients not made aware of their right to an advocate not employed directly by the litigator's firm. This is an inevitable economic consequence of the undervaluing of the essential work carried out by litigators. A further consequence is the impact on trial preparation: with the LGFS being skewed to encouraging solicitors to focus on trials, rather than early resolution of cases, there is little financial incentive to fully prepare cases, or to resolve them, at an early stage.

16. Second, our experience is that for the most junior barristers the level of remuneration in many cases is set at a level lower than minimum wage. The standard fees in London for magistrates' court work are: (i) £50 for first appearances, remands, bail applications, sentences, adjourned trials; (ii) £75 for half day trials, half day contested committals and where a defendant pleads guilty at trial; (iii) £150 for full day trials and full day contested committals.[1] The references to contested committals demonstrate the length of time for which these fees have not increased since they were abolished in 2013. Some chambers are content to allow the most junior barristers to attend court for even lower sums. The closure of courts, leading to the over-listing of cases in magistrates' courts, results in large numbers of cases scheduled to start at 10am not being called on until late in the afternoon. Where the preparation and follow-up work for a case is added to the time spent at court and travelling from chambers to court, fees regularly fall to the level of £5 per hour or less. No legal system can hope to provide adequate representation in court to a defendant at a level far below the minimum wage, let alone the living wage or London living wage.

17. We suggest that this system could be remedied by the creation of a simplified AGFS in the magistrates' court, separating out the payment for advocacy services from the LGFS which applies in the magistrates' court. This need not add to the financial burden on the taxpayer.

18. Third, the test for legal aid in both the magistrates' courts and the Crown Court prevents deserving clients receiving representation and causes delay. In respect of the merits test in the magistrates' court, the experience of our members indicates that many deserving clients are rejected, at least on the first application, when the prospect of custody is not involved. Failure to approve cases for legal aid where the assistance of a solicitor would be of real assistance to individuals facing what is an intimidating and formal experience leads to the prospect of genuine injustices being suffered by those who come before the courts. More commonly though, late approval of applications, or failure to approve applications before the first trial listing, causes avoidable stress and inconvenience to clients and witnesses when cases have to be adjourned, and results in a deplorable waste of court resources. Issues with the merits test could be resolved by allowing magistrates to grant a certificate for legal aid subject only to a means test.

[1] London Criminal Courts Solicitors' Association, Criminal Bar Association, and Young Barristers Committee of the Bar Council, *Protocol for the Instruction of Counsel, Annex A*.

19. The means test causes further problems. The level at which a defendant satisfies the means test in the magistrates' court is set at such a low level as to result in an increasing number of unrepresented defendants, who can neither satisfy the means test nor afford their own representation, coming before the courts. There is no reason why the means test in the magistrates' court should be set at any different level to the Crown Court.

20. A further obstacle to justice in respect of the means test arises out of contributions towards legal aid in the Crown Court. Where an individual receives a certificate for legal aid they may be required to provide contributions. This leads to genuine hardship for many clients, who are often required to sell their family homes to afford the contributions. Many clients find that they can obtain representation more cheaply when paying privately than when paying contributions to legal aid. Where legal aid has been granted to but then rejected by a defendant, the private costs of that defendant cannot be recovered from central funds in the event that the defendant is successful at trial. If legal aid was applied for but not granted by the Legal Aid Agency the successful defendant would be entitled to recover at least some of their costs. This position is inherently unjust.

21. Where an individual is investigated by the state, prosecuted by the state, judged by the state, and punished by the state we believe that the provision of quality representation for that individual by the state should be guaranteed, and should not be dependent on the state's assessment of the merits of the particular case or the state's assessment of whether the individual can afford their own representatives. At the time of receiving representation defendants are presumed innocent until found guilty. Therefore, insofar as any means test is imposed by the state it should apply equally in all criminal courts and be set at such a level that no one is forced to make a choice between continuing their normal lives or receiving proper representation.

<u>2013 Transforming Legal Aid Consultation: Judicial review and the restrictions on payment</u>

22. Judicial review is the remedy of last resort against public authorities. We have extensive experience of acting in housing, immigration, and other cases against public authorities.

23. In our experience, it is extremely difficult to persuade a local authority to reconsider its refusal to act, or its otherwise unlawful decision. It is only when judicial review

proceedings are contemplated – or sometimes actually issued - that a local authority may agree to reconsider. It would, of course, be far cheaper if public authorities had an open mind when challenged on unlawful decisions, but in our experience, this is not the case.

24. We refer the Commission to the evidence put before the Administrative Court in *R (Ben Hoare Bell Solicitors & others v Lord Chancellor*2, summarised by Beatson LJ at [39]:

> "*The evidence by and on behalf of the claimants was relied on by Mr Westgate to show that it is particularly hard to predict the outcome of the permission stage of an application for judicial review. Karen Ashton, of Public Law Solicitors, stated that estimating the prospects of success is difficult because of "the imprecision of the test applied by the courts at the permission stage"* [22] *, and Polly Glynn, of Deighton Pierce Glynn, referred to the fact that there is no "rigid definition of the test for permission"* [23] *. But any predictive assessment involves a risk of error. Litigation is notoriously risky. Even if the data relied on by the claimants* [24] *as to the variation in permission grant rates between different judges is out of date, it is inherent in the nature of judicial decision-making that there will be a variation in how judges apply a test such as "arguability". Some of this is a reflection of the nature and complexity of the case, some may reflect the experience of the judge, but in general the variation follows a normal distribution. The main focus of the evidence on behalf of the claimants concerns matters such as the marginal profitability of legal aid work, the front-loaded nature of judicial review proceedings, the way in which the amount of work done "at risk" may increase by circumstances out of the control of the provider. Reliance was also placed on the fact that the reason for refusing permission may not impugn the provider's assessment of the merits at the time of issue as illustrating the difficulty of predicting whether permission will be granted or refused. Some of the evidence, however, indicates an ability to predict decisions on permission with considerable success: see Karen Ashton para 13, Polly Glynn, para 3, and Simon Garlick, of Ben Hoare Bell, para 7 and second statement, para 14.*"

25. We appreciate that Reg 5A was amended after the Administrative Court's decision, but the basic principle that providers will not be paid if permission for judicial review is refused has remained. We remind the Commission that the availability of legal aid for judicial review is subject to the merits criteria (Regs 39 & 53 Civil Legal Aid (Merits) Criteria Regulations 2013, SI 2013/104). It is our view that legal aid providers take that responsibility seriously and that the merits criteria should be the only criteria (along with financial eligibility) regarding legal aid for judicial review.

[2] [2015] EWHC 523 (Admin), [2015] 1 WLR 4175, Admin Ct

26. We make the point that the impact of Regulation 5A cannot be measured solely in relation to judicial review claims that are brought, whether or not they are granted or refused permission. Providers have referred to the "chilling effect" of the Regulation. In other words, that providers will become overly-cautious in their risk assessment, and will prioritise the risk of not being paid over the objective assessment of the merits of the client's case. This reflects our experience of the impact of Regulation 5A.

2013 Transforming Legal Aid Consultation: the proposed residence test

27. At the time of writing, the Supreme Court has declared that the proposed residence test would be ultra vires, but has not yet published any judgment and so the reasons are unknown. We agree with the Public Law Project, which brought the case, Young Legal Aid Lawyers and others who have all commented that the residence test is discriminatory and that access to legal aid should not be dependent upon residence. If, as Moses LJ said in the Divisional Court, there is a need for legal aid to be granted to a particular individual in order to assist with her or his legal dispute, it is not appropriate for legal aid to be subject to further additional thresholds.

Topic 2: Transforming our justice system

28. We believe the following:

    (1) That legal aid should be restored to all areas of social welfare law, subject only to a merits test, and insofar as financial eligibility rules are imposed they should be considerably more generous than at present.

    (2) We are unsure of the final merits of the "polluter pays" principle but believe that further consideration should be given to whether this would be an effective means of raising funds for legal representation;

    (3) As per the recommendations of the Low Commission, that resources be put into an effective national system of advice, including legal representation, because early, good quality advice can resolve many issues and avoid the need for and cost of litigation.

Restoration of legal aid for social welfare law

29. The Low Commission's final Report (Getting in Right in Social Welfare Law, March 2015) noted the following concerns about the LASPO cuts to legal aid:

> "*some of the current statistics cause us concern such as:–*
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> - *the sudden collapse of welfare appeal volumes after consistent year on year rises, combined with additional complications over mandatory reconsideration and medical assessment backlogs;*
> - *the rise in arrears, eviction and possession proceedings and enforcements the decline in judicial review volumes in the context of ongoing reforms in this area which may restrict access to public law claims;*
> - *the rise in litigant in person volumes in the Family Courts;*
> - *the decline in the number of people able to access specialist advice through CABx and other non-profit providers.*"

30. We also note that, even in areas of law where legal aid remains available, such as some areas of housing law, there has been a significant decline in the numbers of legal help and legal representation certificates (Legal Aid statistics in England and Wales, Legal Aid Agency, 2010 – 2014). This is thought to be as a result of the publicity over the LASPO cuts, so that the public believe that legal aid is no longer available at all. Legal Action Group has launched a "use it or lose it" campaign.

31. It may also be related to the decline in the number of legal aid providers. We frequently hear from our clients of the huge difficulties they have had in finding a solicitor who does legal aid work, and the difficulty that the client may have in getting the solicitors' office because it can be so far to travel. These are the clients who have managed to overcome those difficulties. There must be very many people who are not able to overcome the geographical and logistical difficulties in finding a legal aid solicitor.

32. The growing impact of welfare reform and cuts to legal aid on defending possession cases is described in the following extracts taken from surveys of representatives of Housing Possession Court Duty Schemes (HPCDS) in England:

> "[I]*t is now very difficult to make referrals from HPCDS to agencies with the specialist expertise to resolve debt and benefit issues in particular, meaning that it is less likely that a long-term solution can be found to the presenting housing problem. Also, as contracted housing advice providers*

> *can no longer tackle housing benefit problems the capacity of the sector to provide an effective response to our clients' multi-faceted legal problems has been significantly reduced. The legal aid scheme is now focussed on emergency and complex housing issues. We have almost entirely lost the ability to do 'preventative' work by resolving the legal issues that lead to housing crises. This undermines the ability of HPCDSs to act both as a safety net and as a gateway to specialist advice services."* (HPCDSQ Update 3)
>
> *"Many housing advice providers can, through legal aid or other funding, help to raise a defence to a possession claim, but they do not have the resources to resolve the underlying problems. Some judges are therefore becoming frustrated by repeat adjournments, by an increase in litigants in person, and by the inability of defendants to access help before they attend court.*" (HPCDSQ Update 3)[3]

Polluter pays

33. Many areas of social welfare law concern decisions made by public authorities, which are then subject to challenge. The challenges are either by way of litigation (appeals to tribunals, or judicial review claims) or by way of complaint to the relevant Ombudsman service. It is striking how high the success rate of those challenges or complaints can be. We note that, in 2013, the success rate of tribunal appeals against DWP decision was 42%. It goes without saying that public authorities should get decisions right first time; it is their responsibility to make the correct decision.

34. Given the withdrawal of legal help for advice on welfare benefits, and the significant cuts to the advice sector, we wonder how many other claimants have received wrongful decisions and not appealed to a tribunal. We observe that there appears to be insufficient incentive built into the system to get decisions right and this may be a means of introducing one.

35. We believe that consideration could be given to all public authorities being subject to a levy, which applies if the number of complaints or appeals to tribunals determined against them is more than a specified proportion, say 10%. That levy could be used to fund legal services and advice services. We appreciate that this could be seen as merely moving money from one public service to another; however we believe that there are no

1. *Information, Advice & Representation in Housing Possession Cases* by Prof S Bright (Oxford University) and Dr L Whitehouse (Hull University), published in April 2014, at pages 66 and 67.

other incentives to emphasise the importance of public authorities getting decisions right first time.

National Strategy for Advice and Legal Support

36. We support the recommendations of the Low Commission for a Ten Year Plan for a National Strategy for Advice and Legal Support. We believe that early, good quality, properly funded legal advice and assistance can produce considerable financial savings. Early advice can help to prevent litigation, in that a potential defendant or wrong-doer recognises the validity of a claim. Equally, early advice can help potential claimants recognise whether or not their grievance can be subject to litigation. It follows that early advice, widely-available, can help ensure that litigation is genuinely only a last resort, and that unmeritorious claims are less likely to be brought.

37. We also support the Low Commission's point that advice should be funded, not just in the traditional area of welfare benefits and housing advice, but also in the areas of education, social care, and health care. All of these public services are subject to complex statutory regulation. The best way to ensure that high quality public services are delivered is if users of those services are able to access advice about their rights in relation to them.

38. However, there are times when early advice does not resolve problems, and so we repeat that legal aid should be restored for representation in litigation in all social welfare law areas. Sometimes an adviser cannot prevent a claim being brought (for example, local housing authorities routinely issue possession claims and fail to negotiate any terms until the first court date). Other times, there may genuinely be a dispute over the law or the facts that can only be resolved by a court and cannot be negotiated. In addition, there are always areas of law that are unclear and need resolution, usually by the higher courts in test-case litigation.