Response to the consultation on reform of Judicial Review by the Haldane Society of Socialist Lawyers

1. This is the response of the Haldane Society of Socialist Lawyers to the Government's consultation on further reforms of judicial review.

2. 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 Haldane 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.

3. The Haldane Society is an active member of the European Association of Lawyers for Democracy and Human Rights and the International Association of Democratic Lawyers. We were the initiators and co- organisers of a recent conference "Defending Human Rights Defenders", held in London in February 2012, co-hosted with Amnesty International and the European Association of Lawyers for Democracy and Human Rights. For more information on our work, see www.haldane.org.

The Role of Judicial Review

4. The Haldane Society's response to this consultation must be put in some context. Judicial review is a vital mechanism with which to scrutinise the exercise of executive power. Its importance within our legal system is not easily overstated. This is perhaps best illustrated from the speech of Lord Steyn in *R (Jackson) v Attorney General* [2005] UKHL 56: "In exceptional circumstances involving an attempt to abolish judicial review… the Appellate Committee of the House of Lords… may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish."

5. For many in society, and in particular the vulnerable, judicial review is the only recourse open to them to achieve justice. Good examples of such individuals are prisoners, particularly those with mental health problems or those who have a limited use of the English language and the homeless who want to challenge administrative failures such as gatekeeping (where a local authority refuses to accept a homelessness application and/or provide interim accommodation where they have a duty to do so).

6. We are extremely concerned about the Government introducing further proposals for reform without waiting to properly assess the impact of the changes to judicial review, such as transferring asylum and immigration judicial reviews to the Upper Tribunal, will have. We believe that the proposals contained within this consultation, if implemented, would have a

devastating impact on access to justice for the poorest and most vulnerable in society. We fear that if the proposals were introduced, suppliers would no longer be able to assist those who do not have the financial resources to judicially review decisions of the Government. This would have a devastating impact on access to justice. It appears to us that the proposals are part of a systematic campaign to prevent the public from holding the Government to account.

7. The Haldane Society are also concerned that the Government appears to be pursuing these reforms on the flimsiest justifications. According to the figures quoted in the consultation the number of applications for permission to bring judicial reviews more than doubled between 2007 and 2012. As the consultation also notes, 76% percent of those applications are in relation to the area of immigration, an area that is not the subject of the consultation and proposed reforms. Meanwhile, applications for permissions in other areas of civil and criminal law have largely flat-lined, with a very modest increase in civil applications between 2010 – 2012. This increase, we suggest, is likely to be attributable to the fact that the Government has undertaken a swift and radical programme of reform that has been particularly targeted at the most vulnerable in society. Radical NHS reform, including the closure of A&E departments and devastating cuts to welfare and public services have been controversial and have precipitated a number of legitimate challenges to their lawfulness.

8. In many cases these applications have been of substantial public importance. For example, a recent decision by the Health Secretary to close Lewisham A&E department was successfully challenged, while a judicial review of the new 'Bedroom Tax', although ultimately unsuccessful, produced a judgment in which it was held that the provision was discriminatory. The importance of these issues are unquestionable and the Haldane Society is deeply concerned that the current proposals are part of an attempt to prevent ordinary citizens from questioning the lawfulness of decisions taken by the Executive. However, aside from the more high profile judicial reviews of recent times, the reality is that the majority of applications concern decisions that often have severe impacts on an individual's life. Decisions about the allocation of local authority support to vulnerable children, housing, lack of availability of particular medical treatment and treatment of young people in detention are just some examples of decisions that are taken by different arms of the state every day. The impact of an unlawful decision in such areas can produce irreparable harm to an individual and it is the availability of judicial review, particularly at the early stages, which enables such decisions to be challenged and ensures that those making them are under pressure to act fairly and lawfully.

9.It is a fundamental feature of any functioning democracy that the Government must act according to the law and that an independent judiciary is able to

ensure that is the case. It cannot be forgotten that judicial review only concerns the way in which a decision is taken and its potential impact not the merits of any decision itself. Therefore, proposals such as these, which are expected to produce negligible cost savings but are likely to drastically reduce the availability of judicial review to ordinary citizens and interested groups, suggest that the Government wishes to operate without the burden of lawful and procedurally fair decision making.

RESPONSE

Standing

10. The Haldane Society is strongly opposed to the proposals contained within the section on standing. According to the consultation, the purpose behind changing the rules on standing would be to prevent approximately 50 judicial review challenges being brought by campaigning NGOs and activists each year. We do not see the need for any change given that this amounts to only 0.4% of the 12,400 challenges that are brought annually.

11. It is our view that challenges brought by activists and campaigning NGOs are a fundamental part of our democracy. The consultation says that Parliament and the elected Government are best placed to determine what is in the public interest. Judicial review cannot be used to challenge acts of Parliament except where an Act is incompatible with human rights. It can only be used to challenge acts of the executive and these are acts that Parliament does not necessarily have a say over. The types of challenges mentioned in the consultation relate to potential human rights abuses by the armed forces and the effective spending of overseas aid. These are issues that are of a fundamental concern to the public at large. Given that nearly half of those that make it to a substantive judicial review hearing are successful, it is clear that the Government is not always the best placed to determine what is in the public interest.

Paying for permission work in judicial review cases

12. The only difference between the proposals contained in this consultation and in the Transforming Legal Aid consultation is that suppliers will be able to claim for the work that they have done if the case settles before a permission hearing and the LAA would have a discretion to reimburse them where they have not been able to obtain costs. This does not satisfy the concerns that we raised in our response to the Transforming Legal Aid consultation which we have repeated below. It is our view that the proposals as they stand will prevent meritorious cases being brought against public bodies and will have a damaging impact on access to justice.

13. We do not agree with the MOJ's proposals to remove legal aid for the permission stages of judicial review, where permission is not granted because 28% of cases are not successful or are not settled at the permission stage. It follows that around 70% of cases have resulted in some substantial benefit to the client or have been granted permission and proceeded to full hearing. By their very nature, legal proceedings are uncertain. Legal aid providers have to advise clients on the prospects of success before any claim in judicial review can be issued, and cases will only be granted legal aid where the provider believes that the case has moderate prospects of success (or borderline prospects in some very specific circumstances). Legal advice is not an exact science. The result of any permission application will depend on several factors and cannot always be definitively predicted in advance. Our experienced practitioners can all testify to cases where they have advised that one outcome is probable, but the Judge makes a different decision.

14. The Haldane Society does not believe that providers should the carry the risk so that they would not be paid for preparation for and representation at hearings if permission is not granted, especially as it is only just over a quarter of cases that do not have a positive outcome at the permission stage. This is not a point made on lawyers' behalf: the danger is that there will be meritorious claims that do not get taken up because providers will refuse to take the risk. Many legal aid practitioners already do a huge number of pro bono hours. The proposals could mean that some, or even all, of the best practitioners may not take on legal aid work and this will restrict access to justice to vulnerable clients. The proposals could also mean that providers are very reluctant to advise positively where there might be risks involved such as a novel point of law or an important point of law where these are based on unattractive facts.

15. Permission hearings are often the first time that the public body in question will begin to engage with the case and look at the merits of it. The responsibility for that delay lies not with the claimant, or his or her legal representatives, but with the public body itself. Judicial review is only brought as a last resort and public bodies will have been notified well in advance that the decision under scrutiny is said to be wrong in law and will have been asked to reconsider the decision without the need to issue judicial review proceedings. This is a requirement of the pre-action protocol on judicial review. In our experience, the pre-action protocol provides the bare minimum of notification and most public bodies will have received numerous requests to reconsider the relevant decision even before the pre-action protocol letter is sent. If the need to issue judicial review proceedings has resulted from the inactivity of the public body under scrutiny that is not the fault of the legally-aided claimant.

16. Often public bodies will argue at permission stage that a claimant should not

be granted permission even where the case is clearly arguable. If public bodies did not challenge cases where they are clearly arguable, the amount of fees that the Legal Aid Agency would have to pay to barristers at those hearings would be reduced significantly.

17. In our experience, since public bodies tend only to engage with the issue in a judicial review claim after the issue of proceedings (instead of responding to the pre-action protocol notification), by the time that permission is considered, the claim has frequently become academic and permission is refused for that reason. Recent case-law has held that in those circumstances the defendant should normally pay the claimant's costs, thus compensating the Legal Aid Agency. However, public bodies will resist costs order against them and Judges are often reluctant to review the merits and make costs orders where the claim has become academic. If this proposal were to be implemented, there should be concurrent amendment of the Civil Procedure Rules to create a presumption that the defendant will pay the claimant's costs where the claim has become academic.

18. We do not agree with the criteria by which it is proposed that the LAA will exercise its discretion as we believe they are unrealistic and complex. The LAA will be required to undertake an in depth investigation into the merits and conduct of every applicable case, going beyond reliance on the advice of specialist counsel which is currently provided to assess merits. For example, under the fifth criterion set out at paragraph 125 of the consultation, the LAA will be required to analyse correspondence and pleadings etc that were produced by both sides prior to the permission application being decided in order to make its own assessment of the likelihood that permission would have been granted. Under another of the criteria the LAA will also have to use its own judgment and discretion to decide to what extent a public body which re-made a decision following the threat of a judicial review application did so because of points raised by the claimant.

19. The Haldane Society feel strongly that such a complex discretionary system of funding is both unfair and impractical. Solicitors and counsel will still have to undertake even potentially strong claims with no guarantee of payment for the work they do in preparing the permission application. If they are unable to secure a costs order from the defendant public body then they will be at the mercy of the LAA's discretion as to whether a potentially substantial and costly piece of work will be paid. Not only must they bear this financial risk, but all the work in preparing an application to LAA itself to apply for such discretionary funding will not be paid, regardless of the outcome. In reality therefore, the likelihood is that providers will see judicial review as simply too big a financial risk and work done in this area will decline. The tiny number of exceptional funding applications that have been granted in

other areas since the Legal Aid Sentencing and Punishment of Offenders Act 2012 came in provide further evidence for our fears.

20. According to the consultation the new discretionary payment system could apply to around 1739 applications for judicial review a year. This will mean a potentially enormous increase in the workload of the LAA who will be required to deal with assessing the applications from providers and properly applying the criteria. Undoubtedly the financial cost of carrying out such additional work will be high and will have to be borne by the Ministry of Justice. Little if any consideration of this fact appears to have been given. In addition, the added pressure on claimants to obtain costs from defendants in cases which settle is somewhat perverse when one considers that the defendants are, by their nature, likely to be Government departments or public bodies. All this proposal will do is shift the cost of successfully challenging unlawful decision making from one section of the public purse to another.

Wasted Costs

21. The Haldane Society strongly disagrees with any attempt to increase the use of wasted costs orders by widening the circumstances in which they may be awarded. At present wasted costs orders are quite rightly reserved for a very small number of situations where it is shown that a legal representative acted unreasonably, improperly or negligently. According to the consultation only 50 were made in judicial review proceedings last year. Rather than calling for greater use of such orders, this statistic shows that judges are not routinely coming across improper conduct on the part of advocates and solicitors in this field.

22. As we have reiterated throughout this response, legal advice and legal argument are not an exact science. Equally skilled lawyers may disagree over the merits of particular points and thus it is only right that those acting in judicial review applications should only be personally penalised where they have done something that is improper or negligent by ordinary professional standards. In our experience claimant lawyers in this field are largely specialist, conscientious and mindful of the cost to the public purse at every turn. The Government's proposal appears purposely designed to place further personal financial pressure on lawyers who are already working for modest financial return. Again, this proposal is likely to have a prohibitive effect on meritorious judicial reviews being pursued by legally aided lawyers as lawyers shy away from such risky work.

23. In a common law system such as ours which relies on the adversarial process, the proper development of the law and protection of the client requires that

lawyers are able to put forward well reasoned but often novel or unusual arguments. What may have seemed a bad argument at one point in time may very quickly become the basis of the law as it develops through the consideration and reconsideration of issues. The strength and reputation of our legal system comes from the skilled and fearless advocacy of those working within it. This in turn leads to an expert and well-respected judiciary. However, the increased threat of personal liability on well-trained and skilled lawyers is likely to encourage timidity in the conduct of judicial review applications and harm the development of the law and the interests of those seeking justice.

Protective Cost Orders ("PCO") and Costs at the permission stage

24. In relation to the proposal to reform the use of protective costs orders the Haldane Society are deeply concerned about the effect this will have on litigants. The proposal seems to be primarily aimed at the same minute number of applications (50) a year that are brought by interest groups or others without a direct stake in the outcome. Having created the system, the judiciary are perfectly capable of applying the criteria for making such orders in a proportionate and sufficiently flexible way. It is they, who after hearing argument, can make a decision about the public interest in hearing an application and the likelihood that it would not be pursued were the applicant to be at risk of excessive costs. The orders serve a very important purpose in enabling issues to be brought to the attention of the courts which are of the utmost importance but which may never be considered if there was full exposure to costs.

25. In its proposal to create parity between the amount at which costs are capped for claimants and defendants the Government has completely ignored the fundamental imbalance between the state and individuals which judicial review seeks to remedy. The state deploys vast resources in its attempts to defend decisions that are challenged by way of judicial review and there is no suggestion within this consultation that this will change, even in relation to decisions that are often clearly flawed. In contrast, applicants who are eligible for protective costs orders are usually of very limited resources, whether they are groups of individuals or small organisations. In bringing important issues to the attention of the courts and public, even where in the end an application is unsuccessful, those who obtain PCO's are performing an important democratic function. It seems clear to the Haldane Society that the combination of this proposal and that relating to standing form part of a concerted effort by the Government to stifle challenges to its own and future Government policies.

<u>Leapfrogging to the Supreme Court</u>

26. While we do not have a particularly strong view on this proposal we do not believe the change is justified. The primary persons whom should decide on the necessity of this measure are the judges themselves. However, the Supreme Court has no shortage of work and deals with many more cases than equivalent courts in other countries. Its purpose must be to handle the most difficult and significant cases for the general public. Therefore it should always remain the absolute last resort in order to maintain its authority and quality of decision making. In any event, it is virtually always of assistance to the Supreme Court when deciding a case to have a judgment from the Court of Appeal. This helps to resolve the difficult issues in the most considered way but also serves in most cases to dramatically narrow the issue in question by the time it gets to the Court. This saves time and expense and enables the Court to consider only the most fundamental questions. This particular proposal in the consultation appears implicitly to be driven by annoyance at a tiny handful of high profile cases where the appeal process has frustrated the deportation of certain individuals. This in itself is surely not a sufficient reason to increase the general workload of the country's highest court.

Conclusion

27. This consultation response has not sought to address every proposal contained in the consultation in minute detail. Other organisations will be better placed to provide detailed responses on the finer points of the proposed changes. We have dealt with the primary issues that we believe need careful attention by the Ministry of Justice before any reform along the lines proposed is undertaken. It is the view of the Haldane Society that overall the proposals appear to be designed to limit access to justice. We are deeply concerned that one of the most vital checks on the unlawful and unfair exercise of state power will be eroded by these proposals.

28. As committed and specialist lawyers are driven out of this area by the financial risks attached, we fear that those most vulnerable in society are likely to suffer significantly. The statistics in relation to those areas that are the subject of this consultation do not support the need for urgent and radical reform. In light of the limited cost savings that are expected to result from these reforms, we are driven to the view that they form part of a concerted effort by this Government to prevent challenges to its own policy decisions or those it sees as suiting its current agenda. In an era of financial austerity there are likely to be many decisions taken by the executive that have damaging consequences for certain groups. Yet it is primarily poor and vulnerable individuals who will suffer most if access to judicial review is curtailed in the way suggested in the consultation. Potentially unlawful decisions that are routinely taken by local authorities and state bodies that

have a dramatic on people's access to housing, support and health will go unchallenged leaving individuals to suffer the consequences.

29. Finally, we believe that access to judicial review for all regardless of their means is a fundamental feature of maintaining the rule of law and democratic values. Without sufficient means to ensure that an independent judiciary can examine the legality of decisions involving the use of executive power then respect for the rule of law diminishes. If the unlawful exercise of state power goes unchecked then it is society as a whole that suffers and the reputation our system has developed around the world along with it.