The Haldane Society of Socialist Lawyers

Response to 'Transforming Legal Aid – Next Steps'

1. Introduction and Summary

1.1 This is the response of the Haldane Society of Socialist Lawyers (the **'Haldane Society'**) to the MOJ's second round of consultation in relation to 'Transforming Legal Aid'.

1.2 The Haldane Society notes the changes made by the MOJ in respect of the original proposals. The Haldane Society strongly feels that these changes are woefully insufficient to secure the provision of adequate and high quality legal aid services. We are very concerned that, under the current revised proposals, vulnerable and poorer members of society will continue to be severely disadvantaged and, indeed, are directly being discriminated against by the proposed cuts which are part of a wider assault on the welfare state.

1.3 Many of the points and objections to the original set of proposals raised by the Haldane Society in our respond to the MOJ's first round of consultation still stand as the revised proposals have not addressed these concerns. In this regard, we refer the MOJ to our prior consultation response submitted on 4 June 2013.

1.4 In addition, the Haldane Society has some supplementary points to make on the specific areas of Price Competitive Tendering (PCT) and civil legal aid, detailed further below.

2. Price competitive tendering

2.1 As proposed, the models of cost structuring for legal aid funding under consultation are unsustainable and will result in a severe lowering of quality and an inadequate service being provided. Many existing, experienced providers of specialist legal aid services will be driven out of business and there is a real concern that less qualified and able providers, competing on price alone, will result in more court time being wasted and an increased number of instances of miscarriages of justice engendering further, unnecessary work in the form of appeals and retrials.

2.2 We refer the MOJ to the points raised by Lord Neuberger[1] that, in order to achieve effective representation, lawyers who are committed to effective defence work are required in order to ensure client care. The danger is that these committed individuals will no longer be able to provide services as it will not be economically viable for them to do so.

2.3 Existing legal aid lawyers are also experienced in being able to assess when to litigate and when to appeal, effectively reducing wastage in the system whilst assuring justice and

[1] Judges and Policy: A Delicate Balance, Lord Neuberger of Abbotsbury, Institute for Government, 18 June 2013.

fairness. The concern is that new providers will make such decisions on a cost analysis basis only and that justice will suffer as a result. The risk is that a 'production line' style of justice will emerge with the individual facts and circumstances of cases being subsumed to a common one-size-fits-all approach. An increase in the number of miscarriages of justice will be the inevitable result. The target reduction of the number of complex cases to 17.5% is of particular concern in this regard.

2.4 A further risk is that the specialist and specific knowledge of many existing criminal practices will be lost. This is likely to have a particularly adverse effect on individuals from ethnic minority backgrounds or those with disabilities. The nominal ability of such clients to name their preferred lawyer to represent them under the revised proposals is not likely to have any practical benefit as it precisely such smaller, specialist providers who are unlikely to be able to survive the reduction in rates. The result will be an irreplaceable loss of bespoke legal services which serve the interests of the very types of individuals - namely those with specialist needs such as disabilities or those from ethnic minority backgrounds - which the MOJ, as public authority, has a specific duty under the Equalities Act to protect.

3. Civil legal aid

3.1 Although the Government is not consulting any further on its proposals to cut civil legal, we have commented on the proposals below. The Government has already severely cut legal aid significantly through the measures enacted in the Legal Aid Sentencing and Punishment of Offenders Act 2012. We see these latest proposals as an unnecessary ideologically driven further attack on the poorest and most vulnerable in society.

Restricting the scope of legal aid for prison law

3.2 We acknowledge that the Government has modified its proposals so that legal aid will be retained where the parole board has the power to direct release and where sentencing calculation matters are in dispute. Nevertheless, we remain concerned about the fact that legal aid is going to be withdrawn for treatment and categorisation of prisoners cases. It is our view that the prison complaints system is not adequate to deal with these cases alone without the provision of legal aid. Prisoners will not be able to effectively challenge decisions such as placing them in solitary confinement. We are particularly concerned about children and the mentally ill in the system who may not be able to navigate the prison complaints system without effective legal advice.

3.3 The Haldane Society is extremely concerned that these proposals come at a time when prisons are being privatised and the MOJ is proposing to privatise the probation service. Profit will be the main motive for the private providers of these services and, in those circumstances, there will be an even greater need to safeguard prisoners' rights to challenge decision makers with the assistance of legal aid.

Introducing a residence test

3.4 We acknowledge that there have been some reforms to the initial proposals and that legal aid will be available to asylum-seekers, in child protection cases, to victims of trafficking and domestic violence in certain circumstances. Nevertheless, we remain concerned about the proposals to slash legal aid for those who have not been lawfully resident in the UK for more than twelve months.

3.5 It seems to us that this is an unnecessary attack on migrants and could result in people's human rights being violated without any recourse to challenge decisions that negatively impact upon them. For example, children whose parents are in the UK unlawfully may not

be able to access legal aid to challenge decisions of the local authority not to provide services, such as accommodation, that they may be legally obliged to do.

3.6 We disagree with the proposal that refugees should only be entitled to legal aid once they have been lawfully resident in the UK for twelve months. It is implicit in the fact that they will have been granted status that a refugee will have a strong connection with the UK from the date that they made their application. We believe it is wrong to restrict refugees from accessing legal aid if their status is granted quickly. It will lead to a situation whereby those whose asylum applications are determined after twelve months being eligible for legal aid from the date that their application is submitted whereas those whose case is determined quickly would not be able to access legal aid if they need legal assistance before they have lived in the UK for twelve months.

3.7 The general residence test will impose an unnecessary administrative burden on legal aid solicitors who will have to verify whether someone has been in the UK lawfully for over twelve months. This will not be a simple task as some people may be lawfully resident but their status has not been acknowledged by the UKBA. For example, an EEA national family member may not have a residence permit but may nonetheless be lawfully resident in the UK. This will also place an additional administrative burden on the Legal Aid Agency and it is not clear whether the proposals will actually save any money at all.

Paying for permission work in judicial review cases

3.8 We refer you to the Haldane Society's separate response to the Government's consultation *Judicial Review: proposals for further reform*. The key messages of this response are summarised below.

3.9 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.

3.10 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.

3.11 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.

3.12 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.

3.13 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.

3.14 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.

3.15 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.

3.16 The Haldane Society feels 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.

3.17 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.

Civil merits test – removing legal aid for borderline cases

3.18 We are disappointed that the Government intends to remove legal aid for cases assessed as having “borderline” prospects of success. We repeat what we said in our previous response.

3.19 We support the current merits test applied by the Legal Aid Agency. We agree that most legally aided cases should only receive public funding if their prospects of success are 50% or more and that those where the prospects of success are "poor” should not receive funding. There is no funding for “borderline” cases where the only issue is damages, those claims have to have at least “moderate” prospects of success. We support the retention of the current merits test.

3.20 However both regimes recognised that there are certain cases where: it cannot be said on the information available at the time that the prospects are poor; and the issues at stake are of overwhelming importance to the individual or have significant wider public interest. In other words, something more than damages must be at stake and the prospects of success must not be less than 50%. In these circumstances legal aid should continue to be provided until such time as a more definitive analysis of the prospects of success can be given.

3.21 Cases with “borderline” prospects of success which currently receive funding are only:

- those with significant wider public interest or of overwhelming importance to the individual (Regulation 43 Civil Legal Aid (Merits) Regulations 2013); or
- investigative help for public law claims (Regulation 56);
- immigration cases, where the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of Convention rights (Regulation 60);
- cases relating to the possession of an individual's home (Regulation 61);
- public law cases involving children (Regulation 66);
- family cases where domestic violence is an issue (Regulation 67);
- private law children's cases or cases involving a breach of international treaties relating to children (Regulation 68); and

- other family cases with significant wider public interest, or those of overwhelming importance to the individual or those which relate to a breach of Convention rights (Regulation 69).

3.22 In each of those cases, something more than money is at stake. The issue might be a person's right to remain in the UK, or potential loss of his or her home, whether or not children should be removed from their parents, or family disputes where domestic violence is at stake or a parent has abducted the child. We believe that it would be wrong for legal aid not to be available at an early stage until a definitive assessment of merits can be undertaken.

3.23 We note that the impact assessment predicts that £1 million per annum would be saved by this proposal. It notes that there would be some administration costs for the Legal Aid Agency including costs incurred as a result of increase in requests for review to the LAA and appeals to the Independent Funding Adjudicator. It is our view that there will be a considerable increase in requests for review and appeals and the assumption under-estimates this impact.

3.24 We also note that it is assumed that there will be a decrease in civil cases going to courts/tribunals. We believe that this assumption is wrong. It is our view that there is likely to be an increase in litigants in person taking, defending or pursuing cases where lawyers have advised that the prospects of success are borderline and legal aid is refused. In those circumstances, the applicant has not been advised that his or her case should not be pursued, or that an early settlement should be sought. Instead, he or she will have been told that the merits cannot be assessed. We would expect many individuals – who want to defend their home, pursue their immigration claim or retain residence of their children – to start or continue with their claims. Courts are already experiencing a significant increase in the number of litigants in person, who take up a disproportionate amount of court time and resources. Removing legal aid for borderline cases – where the cases concern such important issues – is likely to increase the number of litigants in person. The Impact Assessment has failed to take account of the potential increase in costs as a result.

3.25 Finally, we note that the Impact Assessment assumes that this proposal will lead to an increase in public confidence in the legal aid system. We believe that the opposite is the case. It is our view that any individual, told by a lawyer that his or her case was important and that the prospects of success could not be accurately predicted at this stage, but that legal aid was not available, would have very little confidence in the legal aid system.