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Dear Madam

**Response of Young Legal Aid Lawyers (YLAL) to the LSC and MOJ's
consultation on "Legal Aid: Refocusing on Priority Cases"
Consultation Paper CP12/09**

Introduction

YLAL was formed in April 2005 to represent the views of law students and lawyers up to ten years call in response to growing concerns over the future of legal aid. Since its inception the group has engaged with the LSC and the MOJ in order to put forward the views of the next generation of legal aid lawyers. YLAL is concerned to ensure the sustainability of the legal aid system as a whole, and, in particular, the flow of new entrants into the profession. YLAL's members are motivated to work in legal aid by their commitment to social justice.

Key concerns

YLAL is deeply concerned that the proposals in this paper could risk:

- restricting access to justice for those without the resources to pay privately, and
- the ability for ordinary people to hold public bodies to account.

Consequently, YLAL is concerned that, if implemented, these proposals will undermine the rule of law.

A crucially important consequence of holding public bodies to account through public law litigation and compensation claims is that public bodies are reminded of the need for good decision-making more generally and of the consequences, both in terms of reputation and cost, if they fail to adhere to the law.

Proposed changes for public law

YLAL is concerned that these proposals will result in a clamp down on the ability of ordinary people to challenge the decisions of public bodies in the courts. Instead of courts deciding whether the person has a strong case to argue, the LSC will be required to usurp the role of the Court by funding only cases that it thinks are very likely to be successful. In actively seeking the views of the bodies being challenged before granting funding for public law (and all civil matters), the LSC risks becoming entangled in a huge amount of additional, unnecessary and complex decision making. The removal of an independent person to review decisions not to fund applications exposes the LSC to accusations of not being sufficiently independent. This will inevitably make challenges harder to bring unless the applicant can pay privately. YLAL is concerned that if these proposals go ahead, public law may only be available to the super rich. The ability of the courts to review the legality of State actions - often the best last hope for the ordinary person - could be severely hampered if these proposals are implemented.

The purported basis for the proposals to restrict funding for judicial review cases is the increase in the number of applications for judicial review and the decrease in the number of cases that the courts have granted permission (i.e. have decided are worth hearing). YLAL is concerned that the increase in the number of applications merely reflects the importance of this area of law for an increasing number of people who unfortunately need to challenge decisions of the state. The reduction in the number of cases granted permission to be heard does not necessarily mean that people are bringing poor cases and wasting the legal aid budget. Many cases that are not granted permission are brought by people who are refused legal aid. In many cases, permission is not granted because the courts have acted swiftly by granting interim relief to solve the problem or the relevant public authority has conceded the case shortly after the claim is issued so a decision as to the merits of the argument is no longer needed. Further, the courts have increased the practice of "rolling up" hearings in recent years where the whole case, including permission, is considered at the same time. In these cases, permission would clearly have been granted in the past but is often refused now if the whole claim is dismissed.

Changes affecting low value claims

YLAL is concerned that these proposals plan to cease funding compensation claims against public authorities where the value is likely to be less than £5,000. Although this is on the basis that the financial cost might outweigh the financial benefit, it undermines the important role that compensation claims play in holding public bodies to account.

Changes affecting prisoners' complaints

YLAL is concerned that about the plans to stop funding for solicitors to help prisoners make complaints. Lord Woolf recognised in his report on *Prison Disturbances* that "*a prisoner...is peculiarly vulnerable to arbitrary and unlawful action. ... it is essential that prisoners have a number of avenues of redress open to them whereby the illegal exercise of power may be*

challenged...¹. But prisoners often need professional help as they are vulnerable to abuse and often unable to formulate complaints effectively. The Social Exclusion Unit's report on reducing re-offending amongst prisoners highlighted the vulnerability of the prison population in contrast to the general population: *"Many prisoners' basic skills are very poor. 80 per cent have the writing skills, 65 per cent the numeracy skills and 50 per cent the reading skills at or below the level of an 11-year old child...Over 70 per cent suffer from at least two mental disorders²."* The complaints systems in prisons are notoriously ineffective without professional legal help to navigate them. Removing funding for all prison law matters that are neither disciplinary or related to parole reviews risks leaving a large number of vulnerable people without effective redress for important breaches of their rights.

No more legal aid for non UK residents

The proposals appear to threaten to restrict legal aid for non-UK nationals who are not 'resident' in the UK. It is unclear which groups the Government intends to fall into this category. However, we are deeply concerned that it could include restricting legal redress for many vulnerable people in breach of our human rights obligations.

The risks and disadvantages do not justify the possible benefits

The impact assessment anticipates savings of £16m per annum. The majority of savings are likely to come from the civil fund which is already squeezed. Many of the cases that will be affected concern clients who are law abiding, disadvantaged and/or vulnerable. The Government has repeatedly expressed its commitment to these people. These proposals risk alienating them.

Many of the proposals concerning public law will affect social welfare issues. The MOJ has repeatedly and publicly expressed its commitment to social welfare law, even promising an additional amount of funding in light of the recession. Public law is essential in ensuring best practice in this area and ensuring a remedy of last resort to some of the most vulnerable in need of social welfare assistance. The effect on prison law both through the removal of treatment cases and the restriction on judicial reviews is likely to be extremely damaging at a time when the prisons are overcrowded and abuse is likely to be more widespread than ever. Work that will be affected includes work that is necessary to assist in the release of prisoners who do not need to be in prison any more – thus saving the MOJ from the costs of unnecessary incarceration.

At a time when Government is promoting the importance of the rule of law and the separation of the powers with the opening of the long-awaited Supreme Court, as well as championing social mobility and minority interests, these proposals, which will save a tiny proportion of the costs of such initiatives, are short sighted and risky.

¹ Woolf Report, *Prison Disturbances*: April 1990 (Cm 1456, 1991), para 14.293.

² Social Exclusion Unit, (2002) *Reducing re-offending by ex-prisoners*. Available at: http://www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/reducing_report.pdf. See pages 6 and 7, and Chapter 2.

We strongly urge the LSC and the MOJ to take our submissions into account and to adopt a costs neutral “baseline” position in response to this consultation by not implementing its proposals.

Yours faithfully

Young Legal Aid Lawyers

Encls.

- Responses to consultation questions
- YLAL response to the LSC consultation on prison law funding, 15 July 2009

**Legal Aid: Refocusing on Priority Cases
Consultation Paper CP12/09****List of questions for response**

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: mandy.banks@justice.gsi.gov.uk or fax to: 020 3334 4296. Thank you.

Question 1. (A) Do you agree that the definition of Wider Public Interest should be strengthened to ensure that a case will only qualify if it is a good vehicle on its facts to deliver those benefits? (B) Do you agree that disadvantages to the public from the proceedings should also be taken into account in assessing public interest? (C) What safeguards are appropriate for claims brought by minority interests

(A) No. YLAL does not believe the test should be “strengthened” in this way. These cases already require the applicant to prove that the litigation will have “significant wider public interest , to be of overwhelming importance to the client or to raise significant human rights issues.”

It is unclear how the LSC would be in a position to decide whether a case is a good vehicle on the facts. Such a decision would need to be considered by an experienced lawyer on an informed basis, causing yet more complex and time consuming work for the LSC.

Cases that are strong on their facts will often settle without further litigation. A case that is not obviously strong on the facts may nevertheless establish an important point of principle. Further, if precedent is set only on cases that are perceived as strong on the facts, subsequent cases with ‘weak’ facts may be distinguished on the facts, prompting further litigation. A case that appears initially weak on the facts frequently becomes a strong case in the course of the litigation process, as disclosure is ordered and the true picture revealed. Government bodies will often be reluctant to reveal the extent of their failures until the litigation process forces disclosure. This is unfortunately common in cases involving the most vulnerable members of society such as those relating to those with mental health problems, children and prisoners.

(B) No. Disadvantages to the public from proceedings are already taken into account in the current process. It is not appropriate to add a further level of decision making and expense into the system. Nor is it appropriate to try and remove decision making from the courts by excluding cases at the funding stage. Issues such as the distribution of public resources are already fundamental to the case law before the courts and weighted heavily in favour of Government bodies. In any case it will be possible to find disadvantages and advantages to proceedings, inherent to any dispute. These are factual matters for the courts to judge on their weight in accordance with the law. It is the legal framework that will determine the value of the factual issues.

(C) It is for the LSC and MOJ to continue to strengthen the protection of minority interests by ensuring fair access to justice. YLAL believes the current proposals will

undermine the improved protection that has been achieved for minority groups over the past decade. The proposals could have a serious negative impact on minority groups leaving them exposed to discrimination without redress.

Question 2. (A) Do you agree with the proposed special controls and budgeting for public interest and borderline cases as described above? (B) Do you agree that the existing committees should be replaced by a new committee? (C) Do you agree that the new committee should include non-lawyers? (D) Are there other groups who should be represented on the new committee?

(A) No. It is inappropriate to cap the budget for public interest and borderline public law matters, especially given that they often involve issues that engage fundamental human rights. It cannot be right that a claimant is denied a legal remedy simply because the money has run out. Cases that develop and stretch the law may often begin with an assessment of borderline prospects of success precisely because the law has not yet developed.

(B) No. YLAL is opposed to the plans for a new committee. It is essential decisions about funding important cases are to be ultimately determined by individuals that are informed and independent from Government influence. This is at the heart of the separation of powers. A decision making committee that is not independent will inevitably attract many challenges that may be costly to resolve and delay the progress of the proposed litigation.

(C) and (D) – see (B)

Question 3. (A) Do you agree that we should refocus our resources on higher value damages claims and refuse funding for investigative help and representation where the damages are unlikely to exceed £5000? (B) Should we retain an exemption for low value cases which do attract significant wider public interest? (C) Should we apply this to individual claims, MPAs or both types of claim?

(See also our response to question 18.)

(A) No. YLAL disagrees with the proposal that funding should be refused where the damages are unlikely to exceed £5,000. Section 8 of the funding code only applies to claims that concern: **serious wrongdoing, abuse of position or power or significant breach of human rights** and which do not fall within the scope of judicial review claims. Even so, the proportionality test at section 8 of the Funding Code already takes into account the likely level of damages as part of the assessment of the potential benefits of funding the case. As a consequence, it is already very hard to get funding for low value claims of this nature.

However, damages are not always the only reason why claimants bring civil proceedings. In claims against the State, and in discrimination cases in general, litigation is often the only opportunity for victims of abuses of state power to see justice done and see the perpetrators held to account.

The complaints system is inadequate: there are often excessive delays and rulings cannot be enforced. Further, for many claimants, even low damages are important. The Government acknowledges the role and benefit of small amounts to

compensation in society and often awards small sums, e.g. payments from the Criminal Injuries Compensation Authority. The proposal would exclude funding for low value cases even where there other strong grounds for bringing proceedings.

We disagree strongly that recourse to a complaints body or an ombudsman is an adequate remedy in matters of discrimination. Such bodies do not have the expertise to deal with discrimination, as was recognised by the Commission for Racial Equality.

Contrary to the suggestion in the consultation, where a claim is successful, costs are generally awarded and paid without the need for enforcement proceedings. In such cases, there is therefore only minimal cost to the LSC, or no cost at all. **Therefore, the LSC risks depriving claimants of legal redress and obtains no or little benefit from this measure by way of saving money for the legal aid fund. This is surely contrary to its very purpose.**

We are particularly concerned about the impact on discrimination cases. Due to their complexity, discrimination cases are not always dealt with on the small claims track even where damages of less than £5,000 are anticipated. In fact, the Race Relations Act 1976 (as amended) requires that claims under the Act are heard by a judge sitting with assessors, which is incompatible with the small claims procedures. The LSC and Ministry of Justice are under a duty to have due regard to the need to eliminate unlawful race, sex and disability discrimination. Awards of damages for injuries to feelings in disability discrimination cases are usually below £5,000 – the highest award made outside of employment field is only £6,500. Implementing the proposed change would therefore prevent most disability discrimination matters from being funded. This is inconsistent with the equality duties.

Further, LSC data shows that people from black and ethnic minority groups are more likely to be recipients of public funding, as are people with a disability. Any proposal which cuts public funding therefore has an adverse impact on these groups and needs to be considered carefully. Refusing funding for low value race, sex and disability discrimination claims will of course have an adverse impact on black and ethnic minority groups, people with disabilities and women as it is only these groups who are affected by the respective forms of discrimination. We also note that the findings of the Jackson review will be relevant to this issue and suggest the outcome of that review should be considered before any changes are made.

(B) Yes - If these plans are implemented then we do think that there should be an exemption for such claims. However, we do not consider that retaining an exemption for cases of significant wider public interest would be sufficient to deal with the problems outlined at (A) as the test of significant wider public interest is very narrow (and we see that you propose narrowing it further).

(C) N/A. We do not think it is appropriate to restrict funding simply because claims are of a low value.

Question 4. (A) Do you agree that where an out of scope matter is brought back into scope because there is significant wider public interest this should only be for damages cases where the damages are at least £5000? (B) Should we apply this to individual claims, MPAs or both types of claim?

(A) No. If there is a significant wider public interest funding should be granted regardless of the level of damages that are likely to be achieved.

This is an inappropriate way to reduce legal aid spending.

(B) N/A. See 3(C).

Question 5. (A) Do you agree that we should add a specific reference to the prison and probation complaints procedures and the Prisons and Probation Ombudsman in section 8 of the Funding Code? (B) Are there other complaints systems or ombudsman schemes which should be explicitly mentioned?

(A) No. We do not understand why this needs to be explicitly stated given that it is sold as a clarification of the current position. We are also concerned that the only reason for including it in the consultation is to justify refusing funding in cases where funding is currently granted. We note that the Ombudsman procedures do not provide adequate or timely redress for the majority of cases. In addition, the system is already significantly delayed and would be overwhelmed if utilised as an additional layer of complaint. There would be significant cost implications that have not been examined at all in the consultation.

(B) No.

Question 6. Do you agree that we should include a specific reference to potential *inter partes* costs in assessing the cost / benefit of appeals in section 8 public damages claims?

No. YLAL understands that this proposal would only really apply to appeals of first instance decisions. However, in such circumstances, the LSC may also recover full costs in some cases where the appeal is successful. In accordance with the 'swings and roundabouts' principle with which the LSC is familiar, it is difficult to ascertain how much this would save the fund. Further, a thorough assessment of the potential *inter partes* costs would require additional work from LSC staff.

Question 7. Do you agree that we should remove the presumption of funding and have a single test for granting funding in judicial review cases?

No. Where the Court has given permission, it is difficult to see how the LSC could justify refusing funding, provided the claimant is eligible. In such a case, the claimant is likely to be in a strong position to challenge the decision. The estimated savings that would be generated by this are minimal and the risk that the LSC would be seen to be restricting access to justice in such cases is high.

Question 8. Do you agree that we should clarify the requirements around personal interest, so it is clearer that applicants for funding must have a personal benefit in the proceedings?

No. The funding code is already very clear on this. YLAL sees no reason for an additional personal benefit requirement.

Question 9. (A) Do you agree that further funding should not be granted until the receipt of acknowledgement and response, unless the court has granted permission? (B) Do you think that the legal representatives or the LSC should carry this out?

(A) No. This could be a disaster both administratively for the LSC and the courts, and also for the claimant. Solicitors are under a duty of continuing review and are required to reconsider the merits when they receive the AOS. However, even if the merits are not reviewed, according to this paper, many cases will be refused permission at that stage and funding will then cease or need to be applied for in respect of an appeal. Therefore, a review of the merits by the LSC could be a complete waste of time and resources in many cases. Further, often the claimant must act quickly to reply to the AOS and ensure the judge has all arguments in front of her when making her decision on permission. The quicker the claimant is able to put in a reply the more likely the court is to actually consider it before deciding to grant permission. If the claimant must make an additional application to the LSC before filing its reply precious time could be lost, and this could prove prejudicial to the claimant's claim.

The LSC should already have received the defendant's initial response to the claimant's potential claim, on the application for funding for the issue of the claim. It will already have considered the merits of the potential claim, alongside the defendant's response (if any). The re-consideration of the claimant's case once the acknowledgement of service (AOS) has been received is likely to be a re-hashing of the same arguments that were raised pre-issue. This would lead to more LSC time being spent on the same issues, adding another layer of decision-making and bureaucracy to an already-stretched organisation, whilst adding no discernible/clear benefit to the protection of public funds.

In urgent applications, the courts often grant interim relief and set a very tight and fast timetable, which can include "rolled up" hearings: this would put undue pressure on the LSC to process the reconsideration so as not to cause unnecessary delays to the courts.

The impact assessment suggests that if this proposal were implemented 5 per cent of judicial review permission cases would be refused funding at this stage. However, it is unclear how the LSC came to this estimate. The impact assessment also suggests there will be no additional burden on the solicitors. This ignores the process which the solicitor must go through to persuade the LSC that funding should continue if funding is refused. This proposal appears to duplicate much of the sentiment behind the proposal at section 3.1 (question 7) - taking control away from solicitors when making funding decisions and adding further layers of LSC decision-making. YLAL questions how this fits with the LSC's Delivery Transformation programme, which states that providers should have devolved powers to make more decisions themselves.

(B) Neither. YLAL disagrees with this proposal in its entirety (although we note in A the solicitor's continuing duty of review).

Question 10. (A) Do you agree with extending the referral criteria for SCU case management? (B) If yes, which cases would benefit from SCU case management? If no, please give reasons.

(A) No. The motivation for the referral of lower cost cases to the Special Cases Unit (SCU) on the basis that they are complex or raise important legal issues is perplexing. There is no benefit to the fund unless the SCU is to reduce funding through the case plan process. However, if it does cut funding for these cases, the fact that they are complex makes such cuts unfair and illogical. Once more cases are in the jurisdiction of the SCU and the SCU has increased powers to refuse funding to providers, there is a real risk that practitioners will be further diverted from representing clients by having to focus on funding decisions. Coupled with the extraordinary proposal to remove the independent funding adjudicator (see below), this proposal risks simply raising costs for the LSC and providers by increasing administrative scrutiny and reducing fair access to justice.

(B) N/A

Question 11. (A) Do you agree that LSC should seek representations before funding is granted? (B) Do you think the 14 day period is too long or too short? (C) Should this be a discretion for LSC to seek representations in particular categories of law or specific financial circumstances of applicants? (D) In which categories of law or circumstances would pre-grant representations be more or less useful?

(A) No. YLAL strongly disagree with the proposal that before civil legal aid is granted the LSC should first notify the other side and any “relevant third parties” that a public funding application has been made and ask for representations as to why funding should not be granted. This suggestion is one of the most misplaced proposals in the consultation. It is hard to imagine an opposing party that would not raise objections. It is easy to envisage an authority claiming that that the issue can be diverted to alternative resolution and then failing again to provide the promised solutions, only for the matter to return to court with prolonged delays and expense incurred. This is a proposal that blurs the boundaries between the legal system and the Executive to an unacceptable extent.

The existing system provides adequate opportunity for those with concerns about a funded party’s eligibility for funding to put forward representations to the LSC. We consider that to invite representations prior to the grant of funding will lead to unnecessary and potentially prejudicial delay for clients; whether as a result of waiting for the expiry of the proposed 14 day response period, or as a result of the LSC having to investigate representations put forward at this early stage.

We also consider it very likely that the active invitation of representations by the LSC will result in opponents making unjustified representations in an attempt to thwart claims being brought against them. It is unclear from the consultation who the proposed “relevant third parties” would be and this needs to be clarified. In any event, it will fall to the LSC to investigate these challenges; thereby placing an increased administrative and financial burden on its already limited resources. It is by no means certain that the £3.9m projected savings (from which the estimated

£800,000 in the LSC's administrative costs would be deducted) would in fact materialise. The results of the scheme operated by the Scottish Legal Aid Board are unclear. Where objections to funding are made on the merits, solicitors firms will incur non-recoverable costs in responding to these challenges. Claimants in actions against state bodies already suffer from an inequality of arms. This proposal risks exacerbating the inequality further.

Numerous checks and balances are already available to ensure that if the grant of funding is properly administered in accordance with the code there will not be a loss of public funds. Proper use of public funds will be further ensured if the LSC contracts with providers on the basis of quality rather than high output tendering. This has been underlined by YLAL on numerous previous occasions. Savings should be made by ensuring quality first.

(B) – (D) N/A. In light of the negative answer to the first in the series of questions above, no comment is made in relation to the other matters.

Question 12. (A) Do you agree that final determinations should be with Special Cases Unit for the cases they manage? (B) Should this change be limited to the Special Cases Unit?

(A) No. Final determinations must be made by an independent body. In order to guarantee appropriate independence and adhere to the principle of the separation of powers the Independent Funding Adjudicator position must be retained.

(B) The change should not occur.

Question 13. Do you agree that, in community actions, in considering the proportion of costs that the community should contribute, the proportion of the population eligible for civil legal aid should be the starting point? If not, what alternative would you suggest?

No. This is an ill thought out and misconceived proposal. The current system works well. Increasing community contributions would simply add yet another layer of bureaucracy to the process. Interest groups that work on such cases are concerned that this proposal would make community actions extremely difficult to bring. The ability for the community to bring legal actions is a key aspect of a healthy civil society in a democracy.

Question 14. Do you agree with the proposal to remove advice on treatment from the scope of the CDS? Please provide supporting reasons for your answer. Are there any circumstances in which you believe prisoners should be able to seek advice on treatment issues and which would not be captured within the scope for civil legal aid funding? Please provide supporting information.

No. YLAL strongly opposes the removal of advice on treatment from the scope of CDS. We are extremely concerned that the paper does not identify what is meant by treatment cases and that the impact assessment simply classes these matters as those that are not discipline or parole related matters. Treatment cases are typically not about food complaints; they often include important issues that affect the basic rights and dignities of the prisoner. The courts have recognised the importance of

these cases (see YLAL's response to the prison law consultation, which is attached).

The existence of this category as part of the civil contract demonstrates that the LSC must consider this area worthy of public funds. Therefore removing it from scope for those who are experienced practitioners in the field does not make sense.

The LSC has already proposed to implement a raft of measures that will significantly reduce the number of firms that do prison law. Combined with a new "strengthened sufficient benefit test", this should ensure that public funds are not spent on trivial cases. The blanket removal of public funding from the CDS for all treatment cases means that prisoners will be unable to get advice and assistance for even "legitimate and serious" grievances. The suggestion that such cases will qualify for full representation for a judicial review or damages claim ignores the impetus in the rest of this paper to reduce the ability for poor people to use these avenues, which should be used in any event as an avenue of last resort. The proposal ignores the importance of advice and assistance work to resolve complaints so as to avoid the need to issue a claim.

As with other suggestions that the use of complaints and ombudsman schemes be used as an alternative to publicly funded legal advice and assistance, no reference is made in the paper to the limited resources of the ombudsmen or the limits to their jurisdiction (for example, they cannot deal with challenges to policy decisions or disputes about the legal interpretation of policy). Many prisoners are unlikely to be able to access these systems without legal assistance given high rates of illiteracy and mental health problems (see covering letter).

Question 15. (A) Do you agree that we should remove the delegated powers of civil and crime providers to self-grant funding for judicial review cases, and that these funding decisions should be made by the LSC instead? (B) Do you agree with the alternative proposal to grant delegated powers to individual approved providers? (C) Are there particular types of judicial review for which delegated powers should be retained?

(A) No, delegated powers are an important and effective way of producing fair and effective decision making that can already be properly regulated by the LSC. They also allow cases to be brought on an urgent basis so that eligible claimants can utilise the rigor of the law when it is actually needed rather than when the funding decision has been processed which may be too late.

(B) Yes – provided that powers are granted in a fair and transparent way. Granting delegated powers to individual approved providers on the basis of appropriate criteria is a reasonable approach. Delegated powers enable experienced providers to take immediate action and achieve the outcomes that can be essential for clients. Although housing cases have been removed from these proposals, other areas where immediate delegated power is necessary, such as community care actions in which local authorities' failures to provide essential services to the most vulnerable in society, are not. The link that this made in the consultation document between refusal of permission and the increased use of delegated powers is not backed up with evidence. The use of delegated powers is often to secure interim relief and the

defendant will often back down so proceedings do not even reach the permission stage (hence the reduction in grants of permission). The defendant will often only take steps to comply with their duties when threatened with judicial review. Any removal of delegated powers (as well as the other restriction proposed) could turn this into an empty threat.

(C) Delegated powers should not be excluded from further areas of judicial review.

Question 16. (A) Do you agree that there should be restrictions on legal aid for non-residents? (B) What exceptions or safeguards should apply? (C) Do you agree that funding should continue to be available for the proceedings listed? (D) Are there other areas of law for which funding should remain available?

(A) No. A refusal to grant legal aid to non-residents clearly has the potential to cause discrimination. The proposals need to be set out in far more detail than in the present consultation. This issue is so significant and has such a potentially huge discriminatory impact that it must be the subject of a fully fleshed out set of proposals.

Since the proposals were published YLAL has received clarification that when the Ministry of Justice refers to "non-residents" of the UK they in fact mean people who are not "lawfully resident" in the UK. However, this still leaves considerable uncertainty. For instance, does this term include or exclude those who are "lawfully present" in the UK? These terms have in themselves been the subject of much litigation.

Restrictions of this nature are totally inappropriate and likely to violate Article 14 of the European Convention on Human Rights, where another Convention right is engaged, even where the other Convention right is not violated on its own. In other cases, sections 19B(1) and 20(1) of the Race Relations Act 1976 may be violated as a result of this provision.

The proposals suggest funding will still be available to those who are not lawfully resident in the UK for certain types of case. However, the exemptions do not include the following:

- proceedings under community care legislation for accommodation under s21 of the National Assistance Act 1948 (often the last resort for physically and mentally disabled single adults with no recourse to public funds),
- proceedings under Children Act 1989 for accommodation and support under s17 of the Act (often the last resort for families with no recourse to public funds), and
- welfare benefits cases which involve arguments about a client's "right to reside" in the UK.

As other groups have pointed out, the proposals as currently set out would leave a person able to pursue an application for leave to remain in the UK, whilst not having any way of enforcing her rights to shelter and financial assistance.

(B) Again in order to address exceptions and safeguards this aspect of the consultation needs to be fully developed.

(C) At this stage is it not agreed that funding should be restricted at all.

(D) As above.

Question 17. Do you agree with the initial impact assessment? Do you have any evidence of impacts we have not considered?

YLAL is concerned that the savings to the fund would not be as significant as set out in the impact assessment (IA). The IA appears to have cumulatively drawn together all of the potential savings from the proposals. However, many of the proposals duplicate other suggestions in the document. For instance, the removal of presumption of funding when permission has been granted; the reconsidering of merits when the AOS is received; the invitation to potential defendants to make representations before funding is granted and so on. At each stage the LSC would be responsible for "weeding out" the so-called weaker cases, so that if any part of the system worked properly there would be fewer weak cases for the LSC to "weed out" at each stage. Therefore the estimated savings to the fund set out in the IA cannot be relied upon. Further, these figures are gross and do not appear to take into account occasions where the fund is replenished by costs. Almost every single proposal will involve additional work by the LSC which may be subject to challenge by claimants.

However, most importantly of all, the disadvantages of the proposals as set against the modest savings have not been fully considered. Although the IA sets out the "baseline" cost neutral position, this does not appear to have been fully considered throughout the assessment. At a time when the LSC, along with all other government bodies, is required to make cuts, requiring it to undertake additional work that is contrary to its very *raison d'être* of ensuring access to justice is counterproductive.

The only way that cases could be genuinely prioritised in the way suggested by the paper and without risking serious damage to the constitutional role of the law as a check and balance on government would be for every case to be considered in detail on its facts. This would require representations by claimants as to funding to be funded and an independent review process where applications were refused. This would effectively duplicate the role of the court and be extremely costly.

Question 18. Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals with a have a disproportionate adverse impact on any group? How could any impact be mitigated?

Yes. YLAL is extremely concerned about the impact of these proposals on minority groups, as highlighted throughout this paper.

In particular, there are serious concerns about the impact on claimants bringing comparatively low level race and disability discrimination claims of £5,000 or less. It is essential both to the claimants themselves, and to society as a whole, that such claims can be brought to enforce accountability and provide redress to those who have been wronged. When creating race and disability discrimination legislation, Parliament provided for claims to be brought as a way of enforcing the premise that

individuals should not be discriminated against on the basis of their race or disability. The proposals risk subverting the will of Parliament by making these sorts of claims impossible to bring.

Low value claims are of disproportionate, and often overwhelming, importance to people with very limited financial resources. Limiting low value claims will consequently impact disproportionately on people and communities that are marginalised or vulnerable. Were the undesirability of this not obvious, it is highlighted by clause 1(1) of the Equality Bill, which provides that public authorities must "have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage".

(See also Question 3).