Ministry of Justice consultation paper CP14/2013 -
"Transforming legal aid: delivering a more credible and efficient system":

Response from the Law Centres Network

1. The Law Centres Network is the membership body for Law Centres in England, Wales and Northern Ireland, each of which is a not-for-profit legal practice providing legal help and advice in civil law, with a particular focus on social welfare law. There are over 50 Law Centres across the UK represented in the Network, all but 2 of which hold legal aid contracts. Law Centres have practiced in these areas of law since their inception in 1970, and the Law Centres Network (trading name of the Law Centres Federation) has coordinated and represented them collectively since 1978. Below are the Law Centres Network's responses to selected consultation questions, as relate to our work, and some general comments about the Ministry of Justice proposals.

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

2. The Law Centres Network has no professional opinion about the proposals regarding prison law. However, we are extremely concerned that they will remove vital help for people in prison to challenge the conditions in which they are held. We are similarly concerned that no current allowances are made for more vulnerable prisoners, such as people with mental illness, people with a disability or minors. In addition, we fear that the proposals will create a situation in which, in a few years, there will not be expert help for prisoners if they sought it. Prison law is a highly specialist area of civil public law, and loss of experience would lead to loss of expertise in this field, with existing specialists turning to other areas and no new specialists emerging.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No.

3. The Law Centres Network is strongly opposed to this proposal of residence tests. The Ministry of Justice has provided no reasoning to back up this proposal: no evidence is cited to support it and certainly no analysis; no clear linkage is offered between the proposal and the Ministry's professed aims of saving public money or bolstering public confidence in the legal aid system; and the consultation paper offers no meaningful account of the proposal's impact on funding, casework or the public.

4. The proposal as presented is not detailed enough so as to suggest how it might work in practice: how the residence requirement would apply, why the qualifying period was set at twelve months, or what evidence might satisfy the requirement. If adopted, we fear the proposal will put legal aid lawyers in the position of immigration officers, which they neither seek nor are equipped to undertake. It is reasonable to expect that disputes around evidencing residence will be fairly common: these will create added burden on the courts in satellite litigation as well as added burden to the Legal Aid Agency (LAA) in deciding on each contested case. People excluded by the residence test, who would still need to pursue their matters in courts and tribunals, will end up representing themselves, thereby adding to the growing problem of litigants in person created by the recent scope cuts to civil legal aid. Given these likely consequences, it is difficult to see how the residence requirement would lead to cost savings for the public purse.

5. We are particularly concerned about vulnerable people who would slip under the safety net of legal aid because of the proposed residence test. The consultation paper includes no projection of just how many cases would continue to receive legal aid and how many would be excluded by the residence requirement; worse yet, it offers no detail as to which dispensations if any would be extended to vulnerable clients. The proposal would mean that people newly granted refugee status and seeking safety will be denied legal aid altogether, as will children and families with no recourse to public funds, regardless of their plight. Similar exclusions will apply to victims of human trafficking or women fleeing domestic violence. By the nature of their circumstances, it will be very difficult to evidence the required residence of children, homeless people, and certain people with mental illness. Ironically, the residency requirement as proposed will also exclude rightful UK citizens: it is hard to see how people fleeing tormentors or destitute people, or indeed people who have never had a passport, would be able to produce required documentation. Britons returning from life abroad, in particular babies less than a year old, British children born abroad or newly arrived wives suffering domestic abuse – all would be excluded outright.

6. Overall, our impression is that the residency requirement proposal is unjust. We believe this proposal runs contrary to the principle of equality before the law, creating one law for Britons and another for migrants and denying non-UK nationals the right to equal access to the courts and the right to a fair trial. The proposal would make migrants in the UK particularly susceptible to arbitrary decisions and other abuses of power, as they

would be denied help to stand up for their lawful rights. The proposal would also unjustly and disproportionately affect the most vulnerable in society, who are in the greatest need of the protection and remedy of the law: victims of domestic violence, trafficking or forced marriages; children, in particular separated migrant children; new refugees or failed asylum seekers who cannot be deported; people with mental health problems, and others. Other impecunious people demanding justice in English courts – for example, the bereaved family of the slain Brazilian Jean Charles de Menezes – would also be excluded by the proposal.

7. In our opinion, this proposal as presented is also unlawful because it will discriminate against non-UK nationals as a group, thus contravening the Human Rights Act 1998 as giving force to the European Convention on Human Rights, in particular Article 14 (prohibition of discrimination). The consultation paper's account of proposals' equalities impact considers the 'particular disadvantage' of non-UK nationals as 'justified' and 'proportionate' (annex K, paragraphs 5.3.1, 5.3.3); we beg to differ. We also believe that the proposal, if enacted, will be in breach of Article 21(2) (non-discrimination on grounds of nationality) and Article 47 (right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union. We make this claim on the basis of legal opinion obtained by us, together with other organisations, suggesting that the residence test as proposed would attract a justification test and would not survive its scrutiny.

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an inward permission appeal to the Court of Appeal, if permission granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

No, with one exception.

8. We disagree with the proposal to only pay for judicial review preparation work on grant of permission; however, we agree that in any event reasonable disbursements should be payable. To begin with, we dispute the Ministry's claim that legal aid pays for too many judicial review cases that are without merit. Many, indeed most, judicial review cases are settled in the process of pre-action protocol and certainly before they reach permission and hearing – about 56% in the sample referred to in paragraphs 3.65-3.68 of the consultation paper. With a further 31% settling, gaining permission, or being refused permission but with substantive benefit to the client by the end of permission stage, the emerging picture does not reflect a 'broken' system that squanders public funds.

9. In addition, as things stand the system does have controls in place. The already insufficient current levels of remuneration serve to disincentivise providers from bringing weaker cases. The Legal Aid Agency (LAA) already performs a gate keeping role in scrutinising applications and filtering out cases with insufficient merit, thereby safeguarding public spending. In effect, this proposal would shift the decision on whether a judicial review case attracts legal aid from the fairly consistent LAA to individual judges deciding whether to grant permissions, among which there are known discrepancies in approach. This would result in greater uncertainly to lawyers when taking on a judicial review case, but also to the LAA in trying to project and control casework expenditure.

10. The Law Centres Network has grave concerns about the effects of this proposal, not least because it will change the way that lawyers handle judicial reviews, as the risk to providers of no remuneration at all would increase significantly. With much work done before permission is granted and greatly increased uncertainty as to whether it will be paid for, many providers – especially not-for-profits, such as Law Centres – will be put off pursuing cases even if they have moderately good prospects of succeeding, simply because they would not be able to afford it. This chilling effect will be more apparent with more complex cases, which by their nature would require more preparation. The need to mitigate their risk would also create a perverse incentive for lawyers to litigate in a more uncompromising manner, seeking permission in cases where they would have otherwise sought to settle before it. This shift alone is likely to cost the system more than the £1m that the Ministry projects it would save.

11. Overall, we are concerned that this proposal will lead to judicial review not being available to the vast majority of people, meaning that they would not be able to hold public bodies to account. From families facing homelessness unable to challenge local authority decisions not to house them to victims of state violence, the proposal will mean they will no longer have recourse to legal remedies. Removal of the ability to challenge public bodies will mean significantly less public scrutiny of them. Therefore, this proposal will send out a clear message to public bodies that they can bend and break rules with impunity – resulting in a clear threat to the rule of law.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

No.

12. We disagree with this proposal as we consider it is disproportionate to the problem it ostensibly aims to solve. The doors to legal aid are not wide open as things stand; the Legal Aid Agency performs its gate keeping role consistently and one would think that this, together with an initial merits assessment by the practitioner, is a sufficient

safeguard for public expenditure without need for imposing further restrictions. 'Borderline' cases that are awarded legal aid are fairly rare, but they are of overwhelming importance to the client (concerning as they do life, home and other basic human rights) and of considerable import to developing case law, benefiting justice more broadly.

13. The Law Centres Network is concerned that this proposal will lead to most cases that are currently funded to lose legal aid funding – to the detriment of clients, to whom the matters in contention will continue to be of overwhelming importance. These would be, for example, cases involving children, or County Court possession cases where imminent homelessness is at stake. We are also worried that the proposals will hinder vital strategic casework, such as test cases, which by its nature involves trickier and more controversial matters whose initial prospects are uncertain. With fewer test cases attracting legal aid funding, more individual cases will need to be brought to challenge public policies, at additional cost to the system. Overall, the proposals will have a chilling effect on providers, who would shy away from such cases from the outset or, in some cases, might be tempted to overstate the merits of a case for it to be approved by LAA.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

No.

14. The Law Centres Network holds that true access to justice includes the right to have a choice of legal representative, once it is known that a charge is to proceed. A client's ability to exercise choice is crucial for building trust in the client-lawyer relationship, which in turn prompts realistic and effective decisions by the client. However, this consultation paper fails to address the issue of client trust altogether. In many Law Centre cases, clients must establish a civil claim, and in some cases the claim is against them; for example, an employer complains about fraud or wrongdoing by the client, or a Magistrate's summons for wrongful claiming of social security benefits. Law Centre lawyers can discuss matters with clients and counsel and persuade them where they have limited defence arguments to accept the reality of the claim and to present their best defence in that light. Without this established trust in the client-lawyer relationship defendants will take longer to accept a summons or case against them where some part of the complaint is valid, and will tend to concentrate on the part they know they can defend. Clients are less likely to address a complaint or accept 'bad news' from a lawyer until this trust relationship has been established. For this reason, we consider that no time or money will be saved by the current proposal, in court or elsewhere.

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

No.

15. We disagree with this proposal because it makes no sense, seeking as it does to cut remuneration for the most intricate and advanced casework, which is rightly at a higher rate and proportionately so, given the fewer cases reaching the Upper Tribunal. We also disagree with this proposal in principle, as we regard it as a blatant attempt to move the goal posts by redrawing the contractual terms of the current legal aid contracts considerably and without negotiation. Our practitioners have bid for the (already pared down) three-year immigration and asylum legal aid contracts based on certain terms offered, including remuneration. To commence with a contract on 1st April on certain terms and then to open a consultation on revising these terms eight days later seems disingenuous. These proposals show the Ministry of Justice setting very bad example for public procurement which, inasmuch as it involves Law Centres and other not-for-profit providers, also falls foul of the terms of the Compact, to which Government had committed.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

No.

16. The Law Centres Network disagrees with the proposal to cut expert fees, because we consider that lower fees will serve as a disincentive to experts to appear in legal aid cases, and will likely adversely affect the quality of reports from those experts who will still participate for lower pay. The consultation paper seems to offer no indication that the feasibility of this proposal was tested, and we have serious doubts that there would be enough experts left who would be willing to work for the reduced level of remuneration. The kind of cases likely to be affected – such that involve mental illness, issues of mental capacity, vulnerable clients and children (in particular child care proceedings) – require expertise that is already in short supply that is also uneven nationwide.

17. We also disagree with the proposals because they run contrary to the principle of equality of arms. Government knows the value of good legal services and will continue to pay handsomely for senior and expert practitioners to render services it requires for itself. We would expect it to extend a similar standard of service to citizens of modest means: firstly, as equality of arms would serve justice more broadly, and secondly, because, as the Justice Secretary acknowledges in his ministerial foreword to the consultation paper, “access to justice should not be determined by your ability to pay”.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

No.

18. The Law Centres Network is worried that the range of impacts of the proposals as set out is understated. While the impact statement does admit to identifying "the potential for disproportionate impacts on some persons with protected characteristics" (annex K, paragraph 4.4), it still considers this justified. We believe that proposals limiting the remuneration for legal assistance, such as the judicial reviews proposal, the borderline cases proposal and the expert fee and asylum Upper Tribunal proposal, will have a disproportionate impact on women and BAME groups, as they are more disadvantaged than white men and would need to fend for themselves based on their lower earnings. We also believe that a residency test will have adverse impact on various protected equality groups (for example, women, for being the vast majority of victims of domestic violence) in a way that was insufficiently considered in the equalities impact assessment.

19. We are also concerned that, in the current depressed and destabilised economic situation, the proposals will affect clients in ways not accounted for in the consultation paper. With job security weakened, many people in the UK are only one pay check away from falling into unplanned debt, losing their homes (through rent arrears or mortgage defaults), and consequently facing displacement (certainly in London) as local authorities struggle to accommodate them. With vital access to legal assistance further restricted by the current proposals, clients will be denied opportunities to prevent problems escalating and will struggle to get their lives back in order. We feel that these likely consequences of the combined effect of the current proposals, as well as their economic and exchequer ramifications, have not been sufficiently accounted for.

20. Another likely outcome not addressed in the impact assessment is market failure, affecting both clients and providers. Taking into consideration the wider context of previous and current cuts to legal aid, the financial pressure created by the cuts is forcing firms to shut and practitioners to leave their areas of specialism or the profession as a whole. In the short term this is already creating mounting unmet need. In the longer term it is likely to create shortages of expertise in areas, such as public law or prison law, which would widen the gulf between demand and supply of legal services – especially ones targeted at disadvantaged and vulnerable people.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

No.

21. We consider that the extent of the cumulative impact of these proposals is understated. Rather than taking these proposals in isolation, they need to be considered against the immediate backdrop of other recent cuts, such as the 10% civil legal aid fee reduction of October 2011 and the scope, eligibility and other changes imposed from April 2013 in implementing the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). These rapid and recent changes make it difficult to assess even what the baseline position looks like currently, as this consultation was launched only several days after the LASPO cuts came into effect. Put simply, it is unclear whether savings were achieved and, if so, where they occurred; where recent cuts have failed to deliver the desired effect and why; and, most importantly for the current proposals, it is impossible to isolate and quantify the savings that such proposals can or will deliver.

22. Furthermore, across the options considered, the attendant Civil Fees Impact Assessment takes is as given that supply will meet demand and that quality (of legal services) will not suffer even as fees are reduced. Given some of the phenomena already familiar in public contracting, such as cherry-picking and paralegalisation (work performed by more junior staff due to cost considerations), and the point made above (paragraph 19) about market failure, both assumptions seem far-fetched and so might skew the impact assessment to understate the adverse impact.

GENERAL POINTS

23. The present consultation paper makes some sweeping claims about the state of affairs that have but a loose connection to supporting evidence and to the proposals made. The Ministry of Justice produces no evidence, for example, that the public does not have confidence in the legal aid scheme or its scope. In fact, a recent ComRes poll for the Bar Council shows that 68% of the public agree that legal aid is a worthwhile investment in our basic freedoms, and 75% think that legal aid cuts would hit the poorest members of society hardest.[1] The notion that "the cost of the system spiralled out of control" (ministerial foreword, p. 3) is similarly unfounded, whereas in fact the cost of legal aid has been decreasing for some years and is expected to decrease further considerably following the LASPO cuts.[2]

24. Where required, the proposals set out in the consultation paper are intended to be approved by Parliament as secondary legislation. As things stand, the House of Commons

[1] Source: http://www.barcouncil.org.uk/media/210826/headline_findings_-_comres_poll_-_may_2013.pdf
[2] Cf. http://www.asauk.org.uk/fileLibrary/pdf/The_rise_and_fall_of_civil_legal_aid001.pdf

Justice Select Committee is set to hold only a single session relating to the proposals, and even that will take place only after the consultation closes. This means that some substantial changes to the British justice system will be enacted with hardly any parliamentary scrutiny or debate. We object to this way of proceeding and feel that it indicates that the present consultation is merely a nominal exercise.

25. While the Ministry's need to manage down the cost of legal aid is understandable, the proposals it is making in pursuit of this aim reflect a jaundiced view of citizens' right to hold the state to account by challenging the actions and decisions of public bodies. As such, we consider that these proposals run contrary to the principles of the rule of law and accountable public administration. The withdrawal of effective remedy to public actions will hit people of modest means hard and vulnerable people harder. The ease with which this scenario is considered suggests to us that, despite the Justice Secretary's claim, effective access to justice and equality of arms at court do depend on an individual's ability to pay. The Law Centres Network strongly believes that justice is ill served by the proposals in the present consultation and urges the Ministry of Justice not to adopt them.

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