APPENDIX 1

The Public Law Project's response to the proposal to cut funding for judicial reviews that do not get permission to proceed contained in *Transforming Legal Aid: Delivering a more credible and efficient system* is produced below. The points made here remain relevant to the proposal to cut funding for judicial reviews in *Judicial Review: Proposals for further reform.*

Judicial review: the facts

70. Judicial review is the primary means by which public bodies such as the Government can be held accountable to individual citizens of limited means. Restricting individuals' rights to judicial review risks undermining the culture of accountability before the law that has been brought about over centuries by judicial review.

71. The information provided to respondents to this consultation is incomplete and does not support the contention that there is substantial waste or abuse in the existing practice.

72. PLP is concerned that the information provided to respondents to this consultation about the statistical evidence on which the proposal is based does not afford a fair opportunity to respond. PLP has not received a response to its urgent request for further information to the Ministry of Justice, made on 22 May 2013. A copy of that letter is appended to this response. Those statistics that have been disclosed at paragraphs 3.65-3.68 of the consultation document do not support the Government's case that "substantial sums of public money" have been wasted through weak judicial review claims being brought by claimant lawyers. The figures relied upon by the Government are analysed as follows:

    i. The consultation document states at paragraph 3.65 that in 2011-12 "there were 4,074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court". From this it appears that all 2,275 cases were concluded before being issued. From PLP's research on settlement outcomes[28], it is likely that a majority of these 2,275 cases were settled in favour of claimants. Such resolution will have been speedy and cheap, and cannot form part of the group of cases in which the Government considers that there has been waste of public funds. So already at this point, 56% (2,275 of 4,074) of legally aided cases benefit from the efficiency of the judicial review process which encourages early engagement between the parties leading to a high rate of settlement and withdrawal.

    ii. Paragraph 3.66 states that 1,799 cases were considered for permission of which 845 ended after permission was refused. This represents a success rate at permission of 53%, a very respectable[29] success rate in addition to the many cases that had already settled positively at the earlier stage.

[28] See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf)
[29] Particularly if it includes immigration and asylum cases which have a lower than average success rate at permission

iii. Paragraph 3.67 states that of the 845 cases that are known to have been refused permission, 330 were recorded as having had a positive outcome.

iv. This leaves only 515 cases out of the initial 4,074 legally aided cases (i.e. 13%) as having ended at permission without benefit to the client. So as at the end of the permission stage, 87% of the sample of legally aided cases relied upon by the Government had either been settled, had ended following the refusal of permission but with substantive benefit recorded to the client, or had been granted permission.

v. On any reasonable view, therefore, the figures that have been made available do not support the assumption underpinning the consultation document that there is serious waste in the legal aid funding of judicial review claims at the pre-permission stage[30] on account of weak cases being brought by claimant lawyers.

Judicial review and the rule of law

73. A serious fallacy running through the consultation document is to assume that judicial review claims that are unsuccessful have no wider beneficial effect on the rule of law. In practice it is public officials' awareness that they may be subject to challenge, and their consequent practice of careful, fair and reasonable decision-making that makes the United Kingdom a good place to do business in. Some Ministers may feel a natural sense of frustration when the courts uphold challenges to their decisions, but those that recognise the interests of the wider State as distinct from the interests of the Government of the day, will recognise that it is sometimes the "judge over your shoulder" that prevents them and other public officials from acting unlawfully. The importance of judicial review in the promotion of good administration and good practice has long been recognised, for example, in the Cabinet Secretary's foreword to the 2006 edition of *The Judge Over Your Shoulder*. This described judicial review as "a key source of guidance for improving policy development and decision-making in the public service."[31]

74. It is a disappointing and damning feature of the current consultation paper that there is no assessment of the benefit of judicial review claims (including those that are refused) over and above their cost[32], and therefore no true assessment of their value. Such an assessment is particularly important in light of the Lord Chancellor's erroneous statement on the Today Programme on 23 April 2013 (shortly after the consultation opened), that only 144 judicial review claims out of 11,539 issued in 2011 (i.e. approximately 1.5%)

[30] The consultation document is silent as to the number of legally aided cases in which permission was granted that concluded with a substantive benefit to the client, either by post-permission settlement, or by success at substantive hearing. It is likely that a significant number of cases settled favourably to the claimant following the grant of permission. Statistics released by the Ministry of Justice in April 2013 (which are not concerned solely with merits-assessed legal aid cases) indicate that 144 out of 356 judicial review cases succeeded at substantive hearing in 2011, a success rate of more than 40%.

[31] Available at: www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf

[32] Paragraph 3.61 of the consultation document says that claims that are refused permission: "have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme"

were successful: in fact, the figure is more likely to be over 40% in civil non-immigration/asylum judicial reviews[33].

75. What is proposed is that where a claimant's lawyer has satisfied the Legal Aid Agency that a claim for judicial review has merit, and should be brought, but does not obtain an order granting permission to apply for judicial review from the court, then the claimant's lawyers should not be paid. For reasons set out below, PLP considers that the proposals will have a chilling effect on claimant lawyers' willingness to bring judicial review claims generally, including those with good and very good prospects of success. The Government also anticipates this, yet fails to recognise that that is a threat to the rule of law.

76. Very few non-legally aided persons can take the risk of bringing a claim for judicial review, so it is publicly funded judicial review claims that provide the rigour to public decision-making referred to above. If lawyers are disincentivised (as they will be if the proposals are implemented) to bring good publicly-funded judicial review claims, judicial review, and the ability to hold the Government and other public body decision-makers to account before the courts, will largely become the preserve of corporations and the very rich. The true costs, including the cost to the rule of law, to good public administration, and to confidence in our system of government have not been considered in the consultation document, let alone assessed. But on any reasonable view, these costs cannot be justified by the proposed saving of £1million. The proposal is flawed in principle, based on incomplete statistics, unsupported by the statistics that have been published, and if implemented will result in fewer publicly funded judicial review claims being brought (including, as the Government envisages, fewer claims with good prospects of success, rather than just fewer weak cases the Government claims the proposal is intended to address). The price of this would be borne by all of us, as citizens, not by lawyers.

The uncertainty in assessing merits at the outset of judicial review cases (including the likelihood of being granted permission to apply), is greater than in any other type of civil litigation.

77. The reasons for this contention are considered below.

Uncertainty about the test that the court will apply at the permission stage

78. The consultation document states:

> "The Court will only grant permission if it thinks the case is "arguable" and merits full investigation by the Court".

79. This is a misleading simplification of the test (in fact, "tests") applied by judges on permission. There are in reality no express criteria by reference to which the court's discretion to grant or refuse permission to apply for judicial review fall to be exercised,

[33] See http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf

whether in the Senior Courts Act 1981, delegated legislation or the Civil Procedure Rules. The courts have held that the test of "arguability" at the permission stage should be applied flexibly depending on the nature and the gravity of the issue. In addition the courts have made it clear that in certain situations the courts should apply a more onerous test than mere arguability.

80. Concern about a lack of clarity in the permission threshold is not new: in its 1994 report on Administrative Law: Judicial Review and Statutory Appeals (LAW COM. No 226), the Law Commission stated at 5.13-5.14:

> "5.14 A large number of consultees, although supporting a filtering requirement, criticised the lack of any clear criteria in the Rules for leave being either granted or refused. Concern was expressed about wide disparities in the rates of granting leave as between different subject matters of applications and as between different judges. In the consultation paper we referred to a survey which found that, although the majority of cases were determined on a "quick look" approach, a sizeable minority were subjected to a what was termed a "good look" with more consideration of the merits of the application [footnote reference to A Le Sueur and M Sunkin, "Applications for Judicial Review: The Requirement of Leave" [1992] PL 102]. Since then the Public Law Project has published the preliminary results of a statistical analysis of applications for judicial review which confirmed the disparities [*footnote reference to M Sunkin, L Bridges and G Meszaros, Judicial Review in Perspective (1993) Public Law Project pp 86-97*]
>
> 5.15 **In their response the nominated judges did not favour having their discretion to refuse leave fettered by legislative prescription**" (emphasis added)."

81. The passage highlighted above is significant because it confirmed that the judges who heard judicial review cases in the Crown Office list considered that they had discretion to operate the test on permission flexibly. Paragraph 5.15 of the report continued as follows:

> "However the majority of the consultees who commented considered that the threshold should be explicitly stated in the Rules. **For example, the Administrative Law Bar Association argued that an explicit formulation would remove any opportunity for suspicion that the stringency if the requirement for leave reflected the current state of the Crown Office List. It would also enable those considering making an application for judicial review to know in advance the threshold which any application (as a matter of principle) was required to pass**. We do not propose to depart from the existing grounds for the refusal to grant leave to apply for judicial review but we do consider that these criteria be explicated clearly in the Rules" (emphasis added).

82. Accordingly the Law Commission recommended that the test on permission should be whether "the application discloses a serious issue which ought to be determined".

However the Law Commission's recommendation that the test to be applied by the court at the permission stage be made explicit was not implemented.

83. The Law Commission's recommendation was considered, and accepted (at paragraph 13 on page 64), by Sir Jeffery Bowman in his Review of the Crown Office List (2000). However, once again the recommendation was not implemented, and a flexible undefined test has continued to be applied to date.

84. Lord Bingham explained the need for flexibility in *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)* [2006] UKPC 57 at paragraph 14, as follows:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. **But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application**" (emphasis added).

85. What "arguability" means in any particular case is therefore a matter on which the claimant cannot be clear at the outset. To complicate matters further, the "ordinary rule" referred to by Lord Bingham is itself subject to exceptions. Lightman J considered this issue in *R (Federation of Technological Industries and Others) v The Commissioners of Customs and Excise* [2004] EWHC 254 (Admin) at paragraph 8, as follows:

> "The orthodox approach is to give permission to apply for judicial review if the claimant shows an arguable case. But the court in the exercise of its discretion whether to give permission may impose a higher hurdle if the circumstances require this. Factors of substantial importance in this context may include the nature of the issue, the urgency of resolution of the dispute and how detailed and complete is the argument before the court on the application for permission."

86. So where the court, in the exercise of its case management powers, orders that a permission hearing be listed for a lengthy oral hearing (or even as frequently happens in cases considered urgent, for a rolled up permission/substantive hearing, where the substantive hearing follows immediately if permission is granted), the claimant may be faced with a more demanding threshold to meet to obtain permission. This difficulty is manifest at the outset of the case when the claimant cannot know what case management decisions the court will take (as these will be informed by matters outside the claimant's knowledge such as the state of the court list, the existence in the list of other cases raises the same or similar issues, and the stance taken by the defendant in the Acknowledgement of Service).

87. A "significantly higher" threshold than arguability has been held to apply in cases where a grant of leave may cause expense and delay to an interested party[34]. Again this is a matter that is likely to be set out clearly for the first time at the Acknowledgement of Service stage, and about which the evidence is highly unlikely to be in the claimant's possession when the claim is issued.

Uncertainty caused by disparity in different judges' approaches to permission

88. As stated above, the claimant is faced with uncertainty concerning precisely the test that will be applied by the court on permission, particularly (for reasons stated at paragraphs 22 and 23) at the time that the claim is issued. The uncertain and varying tests applied by the court to permission applications may explain or partially explain the widely different grant rates at the permission stage of individual judges. As the Law Commission noted with concern in 1994 (see paragraph 17 above), PLP research showed that there was at that time an observed disparity in the permission grant rates as between different judges. Further research carried out by PLP and the University of Essex showed that as at 2005, the disparity in grant rates continued. The results were reported in *The Dynamics of Judicial Review*[35].

89. At page 2 of *Dynamics*, the research found that concerns about the permission stage identified by the Law Commission in 1994 remained:

> "The permission stage has raised concerns of principle and practice. The main issue of principle is whether it can be right to require claimants in public law to obtain permission to gain access to courts, especially when this is not required in other types of proceedings, including those against public bodies. The main practical concerns relate to the clarity of the criteria used by judges when filtering claims, the consistency of their decisions and the fear that meritorious cases may be prematurely filtered from the system".

90. Judicial inconsistency was considered in detail at page 67 of the report, as follows:

> "*Consistency: decision outcomes: statistical findings*
>
> Perceptions of judicial inconsistency are compatible with our statistical findings. For the purpose of this aspect of the study, we recorded the names of judges against their permission decisions wherever possible and calculated the permission and refusal rates for each judge. Fifty-nine judges were included in our sample of civil claims (excluding immigration and asylum) during the period April–December 2005; although for the purposes of the

[34] See for example, *R(Grierson) v Office of Communications (OFCOM)* [2005] EWHC 1899 (Admin) at paragraph 27

[35] http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf

current exercise we eliminated those with very small caseloads and only analysed the records of judges who dealt with more 25 or more paper claims for permission.

An overview of our results is shown in Table 4.6. As the table shows, there was a wide variation in the permission grant rates. The judge (A) with the highest grant rate on the papers granted 46 per cent of his claims, whereas the judge (H) with the lowest rate only granted permission in 11 per cent of the claims dealt with. In other words, claimants whose claims came before judge H had less than a quarter the chance of being granted permission than those whose claim came before judge A. There were no obvious factors to do with the nature or type of cases involved that would readily explain this wide variation."

…

Table 4.6: Grant rates by judge: paper considerations: civil non-immigration/asylum (April-December 2005)

Judge	**No. of cases**	**Percentage of grants**
A	26	46%
B	38	42%
C	26	42%
D	61	38%
E	52	35%
F	31	26%
G	29	14%
H	27	11%

A similarly wide spread of grant rates was observed in immigration and asylum cases.

91. Not only have this phenomenon been objectively observed, but so has the perception amongst claimant lawyers that permission criteria are vague (see *Dynamics* at page 64, section 4.5). This is relevant to the chilling effect of the proposal on claimants' solicitors' willingness to bear the financial risk that would be inherent in bringing every publicly funded claim (see paragraphs 41-51 below).

Uncertainty caused by claimant lawyers lack of access to relevant information

92. It is incorrect, and betrays a fundamental misunderstanding of judicial review, to assert, as the consultation paper does at para 3.72, that:

> "We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client's case and the likelihood of it being granted permission" (emphasis added).

93. This is because (1) there is a duty of full disclosure on the claimant at the time the claim is issued; and (2) the claimant will very frequently not be in possession of all relevant documents. The disparity in access to information is reflected, in relation to judicial review claims brought against Government departments, in the Treasury Solicitor's January 2010 document, *Guidance on discharging the duty of candour and disclosure in judicial review proceedings*[36] which sets out a detailed procedure for discharge of the defendant's duty of candour and disclosure of relevant documents. While the guidance states that the duty is triggered when responding to a letter before claim, PLP's experience is that this does not happen in practice, either because the Government department concerned chooses not to give disclosure or because it is impracticable for it to do so in the 14 (or in urgent cases, fewer) days within which a response to the letter before claim must be sent. PLP's experience is that refusal and/or inability to provide timely disclosure is even more common on the part of other public body defendants such as local authorities.

94. This means that in practice, disclosure is given with the defendant's Acknowledgement of Service, or, frequently, with the defendant's evidence following the grant of permission. This reality is reflected in the Legal Aid Agency's standard limitations on funding certificates, which require the merits of a claim to be addressed by the claimant's lawyers in a further application to the Agency following the refusal of permission on the papers or, if permission is granted, following service of the defendant's evidence.

95. As a result of the disparity in information available to claimant and defendant, judicial review claimant lawyers are routinely unable to accurately assess the merits of a claim at the outset of a case. All that they can do is to give an assessment of the merits of a claim based on the information in their possession.

Uncertainty caused by the judicial review court's flexible approach to promptness and other matters

96. Other features of judicial review litigation that increase uncertainty in initial merits assessments include:

    (1) The need to sacrifice certainty in merits assessment for speed in order to comply with the duty on claimants to bring claims for judicial review promptly and in any

36 http://www.tsol.gov.uk/Publications/Scheme_Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf

event within 3 months (soon, in some cases, to be reduced to 4 weeks) of the decision, act or omission under challenge;

(2) Lack of certainty as to the meaning of "promptly" in any given case. Whether a claim has been brought with sufficient promptness is frequently the subject of argument at the permission stage, and such argument is frequently raised for the first time with the Acknowledgement of Service.

(3) The discretionary nature of judicial review remedies.

(4) The defendant's ability to "shift the goalposts" by reconsidering decisions under challenge or taking further related decisions once proceedings have been issued.

97. By section 31(6) of the Senior Courts Act 1981, the court can refuse permission to apply for judicial review if it considers that there has been undue delay, and that granting the relief sought "would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration".

98. Whether or not a claim has been brought sufficiently promptly or whether granting the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person, or would be detrimental to good administration are matters on which it is frequently impossible to form a clear view without sight of the defendant's Acknowledgement of Service or, following the grant of permission, the defendant's detailed grounds and evidence. It is rare for evidence of the hardship that a defendant contends would result if the remedy sought by the claimant were to be granted, to be set out in full in response to the letter before claim. Similarly, claimant lawyers are likely to be confronted with full evidence of the detriment allowing the claim would cause to public administration for the first time on receipt of the Acknowledgement of Service.

Uncertainty caused by the need to issue promptly

99. The promptness requirement adds to claimant lawyers' uncertainty over merits assessment at the outset because it gives them less time to assess the merits of a prospective claim than other civil litigators, who may have years to pursue disclosure and to seek counsel's opinion.

100. Where the consultation document states that:

> "Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings"

101. It should be born in mind that there are considerable limitations already in existence for funding investigation of the merits of a claim. The most common form of funding available pre-issue is Legal Help, which is limited at present to 15 matter starts per year

for each public law contract holder (and so may not be available if all 15 matter starts have been used up), and which anyway does not generally fund legal research. A grant of Investigative Representation (pursuant to which counsel's opinion could in principle be funded) is frequently inappropriate in judicial review cases because there is insufficient time to apply for it to the legal aid authorities, wait for a decision on the application, (once a decision has been reached and communicated) take counsel's opinion, and thereafter prepare and submit a further application for Full Representation, wait for the result of that application, and only then issue the claim. Many (in PLP's experience, most) publicly funded judicial review cases therefore proceed straight from Legal Help, which in the vast majority of cases does not permit counsel's opinion to be taken, to Full Representation.

Uncertainty caused by the prospect of good claims being rendered academic through no fault of the claimant

102. Claims can also be rendered academic through the actions of the defendant to reconsider the decision under challenge and lawfully taking a new decision[37]. Claimant lawyers are in no position to weigh in the balance the risk that a further decision by the defendant will render a claim academic, and therefore liable to be refused at either the permission or substantive hearing stages. This is because claimant lawyers – like the courts – lack the expertise or the information to enable the risk that a further decision will render the claim academic to be properly assessed. All the claimant lawyer can do is to proceed on the basis that defendant decision makers will make any additional decision(s) following the issue of the judicial review proceedings, on a fair, reasonable and lawful basis.

103. In addition, judicial review claims are uniquely vulnerable to good claims being overtaken by events (including through the actions of third parties) and thereby rendered academic (for example, UKBA may take a decision to remove a migrant from the UK, thereby rendering academic a good claim for judicial review that had already been lodged by the migrant to challenge a local authority's unlawful refusal to provide support).

The risk that practitioners would be required to bear will have a chilling effect on claims with good prospects of success

<u>The chilling effect is enhanced by low existing remuneration rates</u>

104. Remuneration rates for judicial review have fallen in real terms since 1994 (see Annex 2). Practitioners are already incentivised against bringing cases without merit because the rates that they receive from legal aid are insufficient to make their practice financially viable.

[37] See *R(EHRC) v SSJ and SSHD* [2010] EWHC 147 (Admin) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2010/147.html&query=equality+and+human+rights+commission&method=phrase

105. This was recognised by Lord Hope in *Re Appeals by Governing Body of JFS* [2009] 1 W.L.R. 2353:

> "24. As has already been noted, Ms Rose declined to seek an order that each side should be liable for its own costs in any event on the ground that to do so would be wrong in principle. As Scott Baker J observed in *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258, para 12, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the public sector. Mr Reddin has indicated that, as they are defending a win, E's solicitors would not be expected to be paid at risk rates. Nevertheless the rate of remuneration that is likely to be agreed for this appeal will be considerably lower than that which would be reasonable if costs were to be determined inter partes.
>
> 25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council* Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it".

106. Remuneration rates for lawyers bringing publicly funded claims for judicial review are relevant for the following reasons:

i. They help to explain why there is so little room for further reductions to claimant lawyers' fees. Given the uncertainty inherent in assessing at the outset of a judicial review claim whether the case will be granted permission or will obtain an inter

partes costs order, the proposal to make payment of lawyers' fees conditional on the grant of permission is tantamount to a significant reduction in fees.

ii. They show that claimant lawyers are already incentivised not to bring weak cases, since they already rely on inter partes costs orders in order to make publicly funded litigation viable. A further cut to claimant lawyers' fees will not provide a further incentive not to bring weak cases – on the contrary it will provide an incentive not to bring cases at all.

iii. They highlight a concern, articulated in greater detail at paragraphs 92-95, that by further cutting remuneration for claimant lawyers, including counsel, damage is being done to the principle of equality of arms, a key feature of our adversarial system of justice.

<u>The chilling effect is enhanced by the knowledge that some cases will settle without permission being granted</u>

107. The consultation document acknowledges at paragraphs 3.75 and 3.76 that good claims (in practice, many of the strongest claims) will be settled favourably to the claimant pre-permission or before or after permission is refused. In such cases, the consultation document acknowledges that the claimants' lawyers will not receive legal aid to cover their costs, but states that:

> "[D]epending on the circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court".

108. This smacks of complacency. It does not follow that a case settled on favourable terms to the claimant will necessarily attract an award of costs. In PLP's experience, notwithstanding the Court of Appeals' decision in *Bahta*[38], central Government departments, local authorities and other public bodies continue to argue that the default position is that there should be no order for costs where claims for judicial review are settled, even where that is on terms favourable to claimants. This is especially true in cases where permission has not yet been granted, and where the merits of the case may have not crystallised and will not have been subject to any judicial scrutiny. They very rarely agree to an order for costs, and routinely and aggressively resist orders made by the court. Further, our experience, and the experience of other claimant lawyers we have spoken to, is that high court and deputy high court judges decline to award costs in favour of the claimant in a significant number of such cases, even where recognising that the claimant has achieved the relief sought in the claim. For the present, at least, it cannot be said that, even where judicial review claims are settled on favourable terms, costs routinely follow the event. PLP's experience has been that, in reality, inter partes costs orders in cases settled on terms favourable to the claimant are often successfully disputed by defendants (as the consultation document recognises) "depending on the

[38] [2011] EWCA Civ 895 (http://www.bailii.org/ew/cases/EWCA/Civ/2011/895.html)

circumstances". The cohort of cases that would be affected by a failure to recover inter partes costs (and therefore the cases highly susceptible to a chilling effect on claimant lawyers' willingness to bring them) are the strongest claims, as these are far more likely to be settled pre-permission.

109. Furthermore, it is PLP's experience that some offers of settlement are made by public authorities on the condition that no order for costs is sought. At present, this does not create a conflict between the client and his/her representative because the representative will still be paid for the work on the case, albeit not at inter partes rates. However, the pernicious effect of the proposal to remove funding for cases that settle prior to permission will be to give public bodies who concede wrongdoing the power to make settlement conditional on the claimant's lawyers not seeking costs. This will put the interests of the lawyers in direct conflict with the best interests of the client. In terms of the regulation of the legal profession and the ethics that govern it, this conflict could only be resolved by the representatives agreeing to the settlement if it was in the best interests of their client. This will allow public bodies to go un-punished for their wrongdoing and will have a serious chilling effect on the ability of claimant lawyers to bring the strongest cases.

110. There will also be a significant number of cases in which lawyers will have brought a strong, or even very strong, claim, but where matters will have developed, unforeseeably, by the time of the permission hearing so as to make the claim academic (other than by reason of a concession by the defendant). Though the logic of the government's position is that lawyers will have acted properly in bringing such cases, and should be entitled to payment, it will be very difficult if not impossible to obtain a costs order in this class of case. The combination of this class of case with the general uncertainty about whether costs orders will be granted by the court even in cases where relief has been conceded means that there will be significant numbers of cases, including the most meritorious and straightforward cases, in which lawyers will have no possibility of being paid for the work which they undertake, or at best face uncertainty in each and every case.

111. This problem is further exacerbated because, once a claim is conceded, and though this may be on terms which are highly favourable to a claimant, the only opportunity for lawyers to be paid will be by obtaining a costs order. They may itself require significant work on their part, for example in the preparation of costs submissions, which will be paid only if they are successful. Thus, every claim will, in practice, involve running not a single risk (that the claim may or may not succeed on the merits), but a series of cumulative risks (whether or not the case will persuade a judge on the (flexible) permission test, whether or not it will become academic or be conceded pre-permission, whether or not the defendant will agree to pay costs, whether or not the court will be persuaded to order costs). The result will be that the likelihood of being paid even for a straightforward case, with very good merits, may well be considerably less than 50%.

112. All of this is, in turn, likely to distort the negotiating position of the parties to judicial review. Defendant lawyers will run no risk of not being paid for their work on a case. In negotiating with claimant lawyers, they will be aware of their very different position. They may well be able to force claimants into unsatisfactory compromises, for example that

the claimants should receive a partial costs order for 50% of the costs, even though principle would appear to dictate a full costs order. Claimant lawyers will feel unable to run the risk of contesting costs before a judge because of the uncertainties involved, and because, if they are unsuccessful, they will have undertaken yet further unpaid work on the costs submissions. Thus, the effect of the Government's proposals is likely to be to further exacerbate the (already existing) difficulties which claimants face in obtaining costs orders, which, as recognised by the Supreme Court in the JFS case (see paragraph 42 above), risks making publicly funded claimant work unviable, and would gravely disadvantage the system of public funding.

<u>The chilling effect is enhanced because costs in judicial review cases are front loaded</u>

113. Judicial review is intended to be a flexible practical remedy capable of resolving complex legal disputes quickly and at low cost. Disclosure is usually given voluntarily by the defendant (i.e. without compulsion by the court), and although there are frequently disputes about whether adequate disclosure has been given, there is no need for disclosure and inspection of documents to be included as a routine stage in the litigation. Accordingly, a higher proportion of the claimant's costs is front-loaded to the initial stage of a judicial review claim than is the case in other types of civil litigation.

114. This means that claimant lawyers have proportionately more costs at stake at the time judicial review claims are issued, yet for reasons given above[39] do not have the information necessary to enable a clear analysis of the merits. The risk that claimant lawyers would be expected to bear if the proposal is implemented – uncompensated by any success fee - would cover a larger proportion of the overall costs than other types of claim that are typically brought under a Conditional Fee Agreement. PLP has no doubt that risk of this sort – uncompensated by any success fee following the reforms under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 - would represent an overwhelming chilling factor on claimant lawyers' ability to bring judicial review claims.

The proposal is unprecedented, and disproportionate to the problem that the Government claims it is intended to solve

115. The Government's proposal that funding for judicial review be provided at risk to the grant of permission without any compensating success fee is both:

(1) Ill-suited to judicial review (because of the uncertainties inherent in judicial review litigation referred to above); and

(2) Unique to judicial review litigation.

116. PLP is unaware of any other area of law in which publicly funded litigation is carried out at risk without any potential success fee to compensate for that risk[40].

[39] Including defendants' routine failure to make full disclosure in response to letters before claim – see paragraphs 30-32 above.

[40] The proposal to remove the success fee for work in the Immigration and Asylum Chamber of the Upper Tribunal, objectionable in itself, is not comparable to this proposal. That is because much of the preparatory work will have been done on the appeal to the First-tier Tribunal, so that a provider

117. The Government has recognised that the chilling effect on providers may result in providers not bringing judicial review claims with good (as opposed to poor) prospects of success (see paragraphs 35 and 36 of the civil credibility impact assessment, which states:

> "35. We think that the risk of providers refusing to take on judicial review cases more generally will be mitigated by providers carefully assessing the risk of permission being granted and therefore no longer taking forward weaker cases only.
>
> 36. If this risk were to materialise, individuals may choose to address their disputes in different ways. They may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all."

118. This makes no sense. If claims for judicial review with good prospects of success are not brought because providers cannot bear the financial risk of bringing them, the result will be that public bodies' unlawful acts will go unchallenged. This is because the alternatives posited in the impact assessment, that:

> "[individuals affected by unlawful acts] may represent themselves in court, seek to resolve issues by themselves, pay for services which support self-resolution, pay for private representation or decide not to tackle the issue at all"

119. The consultation paper thus accepts that claimants will either not be available to those eligible for legal aid (paying for services which support self-resolution or paying for private representation), or else will not provide any or any adequate remedy (representing themselves in court, seeking to resolve issues by themselves, or deciding not to tackle the issue at all).

120. As it has not considered or measured them, the Government has not shown that the adverse consequences for claimants affected by unlawfulness, for good public administration, and for the rule of law can be adequately mitigated by the predicted reduction in weaker cases (whose number was assessed at "just over 500 cases" in 2011-12[41]).

There are different measures, already or easily implemented, that will reduce the scale of the problem the proposal claims to address in a proportionate manner

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representing an immigration appellant will be familiar with the case and better able to assess the prospects of success. In addition, the provider's longstanding professional relationship with the client may make the provider readier to bear the financial risk of acting on the appeal (which will anyway be less in financial terms than on a typically far more expensive claim for judicial review).

[41] See paragraph 3.68 of the consultation document https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

121. As stated at paragraphs 30-32 above, it is uncontroversial that the party best placed assess the merits of the claim is the defendant. Yet it is routinely the case that permission is opposed by defendants even in cases that are clearly arguable and which go on to succeed. Defendants very rarely concede permission because there is no incentive for them to do so.

122. This represents a significant waste of public resources which has not been addressed in the consultation document. If saving money and improving efficiency are the aims of the consultation, it is surprising that no consideration appears to have been given to incentivising defendants to consent to permission in appropriate cases, so that such cases could proceed to a substantive hearing with reduced judicial resources being engaged.

123. Further, claims for judicial review are already subject to a certification procedure, whereby claims can be certified as "totally without merit", the effect of which is to require the claimant's legal representative to certify that he or she has considered the reasons for refusal of the paper permission application, but nevertheless considers the claim to be arguable. The Government has recently announced that this certification procedure will be implemented in all cases, and that the effect of such a certificate will be to deprive a claimant of the right to renew his or her permission application at an oral hearing. It is unknown whether how often the courts have certified claims as totally without merit, but in preventing such cases from going further, the cost of oral renewals of weak cases will be saved together with associated court time. This saving does not appear to have been factored into the Government's assessment of the proportionality of the proposal.

If implemented, the proposals will increase as yet unassessed costs, and may therefore fail to reduce – and may increase - overall costs to the public purse

124. The Government's impact assessment recognises that the proposal, if implemented, may result in an increase in litigants in person. This will drive up the costs to the court service and to defendants. These additional costs will tend to be unrecoverable (court time lost due to inefficiently conducted litigation cannot be compensated for, and it would be very rare for successful defendants to be able to recover their costs from claimants who were eligible for legal aid but who driven to become litigants in person by the absence of lawyers willing to take the financial risk of acting for them).

125. Concern at the additional costs to the court service caused by an increased number of litigants in person have recently been expressed by the Court of Appeal. In *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234[42], Lord Justice Ward stated, at paragraph 2:

> "What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and

[42] http://www.bailii.org/ew/cases/EWCA/Civ/2013/234.html

defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. **It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented.** With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid" (emphasis added).

126. In addition, the proposals would result in the court being reluctant to apply a flexible (let alone enhanced) arguability test (see paragraphs 16-24 above), as to do so would lead to manifest unfairness to claimant lawyers. The resulting lowering of the permission threshold would be bound to result – paradoxically - in an increase in the number of cases granted permission that would be destined to fail. For similar reasons the proposal would lead to fewer rolled up permission/substantive hearings, even though in appropriate cases, these aid the quick resolution of claims in the parties' and the public interest.

127. The Government has not produced any assessment of these additional costs to the court and to defendants, and has failed by some degree to show that they will be offset by the legal aid savings (which are estimated at £1 million per annum – see paragraph 33 of the civil credibility impact assessment). The Government has also failed to recognise – let alone assess - the prejudice to the fundamental rights of individual claimants of modest means, to good public administration and to the rule of law that has been identified above.

Conclusion

128. The proposal will not meet the Government's stated purpose as:

(1) the nature of judicial review litigation and the way it is funded means that a significant proportion of good cases will not to be funded, either because they are refused permission by the court applying a higher than arguable test (depending on the circumstances of the case) or because they are settled without getting permission in circumstances where the claimant does not succeed in getting an award of inter partes costs.

(2) In truth, as the consultation document appears to accept, the proposal is likely to reduce the number of judicial review claims generally - including successful challenges to the exercise of Government power.

129. The proposal is inconsistent with upholding the rights of individual claimants of modest means, good public administration, and rule of law. Imposing costs consequences on Defendants who unsuccessfully oppose permission, together with recently announced changes to the totally without merit certification procedure would significantly reduce the scale of the stated problem, without the serious adverse consequences identified above. Accordingly, the proposal has not been shown to be proportionate.

130. The Ministry of Justice is reminded of the words of Lord Justice Laws *In R (Evans) v Lord Chancellor* [2012] 1 WLR 838:

> "25.....For the state to inhibit litigation by the denial of legal aid because the court's judgement might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be highly inimical to the rule of law."

131. It follows from the analysis set out above that PLP does not agree with the proposal set out in chapter 3 of the consultation paper 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 onward permission appeal to the Court of Appeal, if permission is granted by the Court (question 4).

APPENDIX 2

Table showing breakdown of all JRs in 2012 by individual categories.

Civil		Criminal		Immigration / Asylum	
Age Assessment (of which 12 were transferred)	39	Anti-Social Behaviour Order	3	Asylum Fresh Claim	567
Agriculture & Fisheries	3	Bail	21	Cart - Immigration	138
Animals	8	Cautions	1	Fresh Claim NOT Mandatory Transfer	253
Armed Forces	8	Contempt	1	Human Rights Fresh Claim	122
Asylum Support	28	Committal for Trial and for Sentence	6	Immigration Asylum Only	2519
Broadcasting	5	Costs and Legal aid (Criminal)	17	Immigration Not Asylum	6269
Bye-Laws (?)	1	Criminal Cases Review Commission	26		
Caravans and Gypsies	4	Criminal Fine Enforcement	1		
Care Standards	29				
Cart - Other	7	Criminal Law (General)	93		
		Crown Court	43		
Child Support	11	Custody Time Limits	8		
Community Care	76	Decision as to Prosecution	1		
Companies	2				
Consumer Protection	4	Evidence	4		
Coroners	14	Extradition	18		
Costs and Legal aid (Civil)	28	Extradition Part 1, 2	8		
		Financial Penalties – Enforcement	14		
County Court	50	Firearms	4		
CICA	4				
Disciplinary Bodies	115	Jurisdiction (Crown Office)	7		
E.C.	4	Magistrates Courts Procedure	68		
Education	99	PACE	26		
		Pollution	6		
Elections	3	Proceeds of Crime Act	4		
Employment	17	Public Order Act	1		
FCYP	117	Sentencing	13		
		Statutory Nuisance	2		
Food and Drugs	2	Terrorism	10		
FOIA	9				
Health and Safety	7				

Highways	5				
Homelessness	112				
Housing	141				
Housing Benefit	12				
Immigration Detention	13				
Inquiries	7				
Land	29				
Licensing	29				
Local Government	42				
Mental Health	28				
Naturalisation and Citizenship	47				
Parole	11				
Police (Civil)	119				
Prisons	436				
Prisons (not parole)	30				
Public Funding and Grants	12				
Public Health (Not Disciplinary matters)	12				
Public Utilities (include OFTEL etc)	11				
Rates/Community Charge/Council Tax	26				
Road Traffic	29				
Social Security	35				
Solicitors Regulation Authority	3				
Tax	54				
Town and Country Planning	188				
Trade and Industry	14				
Transport - Not RTA	14				
VAT	7				
TOTAL civil	**2160**	**TOTAL criminal**	**406**	**TOTAL I and A**	**9868**