**Government's proposed restrictions on the rule of law disguised as a costs saving**

Read PLP's draft consultation response to the Ministry of Justice's proposal for public funding for judicial review in full, here: http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf.

A summary is set out below:

- Judicial review is an important mechanism by which the rule of law is upheld and public decision-makers are held accountable. The consultation paper contains no assessment of the benefit of judicial review claims, including the many that do not proceed to consideration of permission, and those where permission is refused.

- 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. PLP considers that the proposals will have a chilling effect on claimant lawyers' willingness to bring judicial review claims generally, including those with good prospects of success. The Government also anticipates this, yet fails to recognise that that is a threat to the rule of law.

- Very few people can afford to bring a judicial review claim without the assistance of legal aid. Penalising lawyers who act for legal aid claimants if permission (for whatever reason) is not granted, will lead to far fewer meritorious and important judicial review cases being brought, to the disadvantage of society as a whole and the most vulnerable in particular.

- The Government seeks to justify the proposal by claiming that too many weak cases are being brought that waste substantial amounts of public money. The saving to public funds estimated by the Government is £1million (rounded to the nearest million). However, the consultation paper does not demonstrate that substantial amounts of public funds are being wasted. On the evidence relied upon in the consultation paper, only 515 cases out of the 4,074 legally aided cases in the sample (i.e.13%) were recorded as having ended at permission without benefit to the client. That means that 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. It does not appear, therefore, from the evidence the Government relies upon, that what is primarily driving the proposed change is concern at waste of public money.

- The Government has a history of misusing statistics on this topic (see http://www.publiclawproject.org.uk/documents/PLPResponseChrisGrayling.pdf). The consultation proposals are based on a misreading of incomplete statistics.

- The flexible nature of the test for the grant of permission, and the court's discretion as to whether to grant permission in any event, means that claimant's lawyers will very often have difficulty in predicting whether permission will be granted.

- Further, PLP's research shows wide discrepancies between judges as to whether permission is granted, with some judges four times more likely to grant permission that others.

- It is wrong for the government to say that claimants' lawyers should take "all of the financial risk" at the permission stage because they are the best placed to know the strength of the claimant's case. In fact it is defendant public bodies, including, frequently, the Government itself that is in the best position to assess the strength of the case, because they (not the claimant's lawyers) are in possession of all the documents. Lack of disclosure by public bodies (either deliberate or otherwise) means that very often it is impossible for the claimant's lawyers know the strength of a case from the outset..

- Shorter time limits than in any other area of litigation accentuate this problem. In other areas it is possible to wait months or years for the necessary disclosure before pre-issue litigation risk assessments need to be carried out.

- Judicial review cases need to be "front-loaded" with significant work carried out at the start of the case rather than after the grant of permission. Often, high quality work at the outset will mean that a case is settled before being granted permission usually (as per the PLP's research) to the benefit of the claimant. This means that the gamble lawyers would have to take on not getting paid if they don't get permission is proportionately higher than it would be in other types of case. It would also penalise sensible work often undertaken to get early resolution and save the state costs in court.

- In additional to penalising lawyers where permission is not granted, slashing remuneration rates for lawyers will lead to an inequality of arms as the legal advisers of public bodies will continue to be properly paid (from public funds), and a chilling effect on the ability for lawyers to take on meritorious judicial review cases. This will mean that even where an individual has a good case that the Government has acted unlawfully, they may struggle to find a lawyer to bring it for them. The Government, though, will continue to have access to the best lawyers.

- The inadequate level of the current legal aid funding for unsuccessful cases is already a major incentive for lawyers to avoid bringing weak cases.

- The government is wrong to say that claimants will be able to get costs orders against defendants if cases settle before a permission hearing. The law here is uncertain and defendants are routinely unwilling to agree to costs orders when setting cases. Lawyers for defendants will not face the same risk of non-payment if they are unsuccessful in defending a judicial review claim.

- The proposals will save little, but have the potential to increase court time and costs because of a rise in litigants in person, fewer cases being settled before the permission stage, and the prospect of more judges applying a lower threshold at the permission stage.

- 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.

- The proposal is inconsistent with upholding the rights of individual claimants of modest means, good public administration, and rule of law. It has not been

shown to be a proportionate response to the £1 million of public money it claims it will save.