Response by Sir Henry Brooke to Questions 1-8 of the "Transforming Legal Aid" Consultation Paper

Submitted on 1st June 2013

1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?.
No.

Please give your reasons:
This proposal would, it is said, reduce spending by £4 million a year. In view of the steady increase in overall spend set out in para 3.12, it needs to be considered carefully. But apart from a vague reference to "treatment cases" no examples are given of the type of case that would be excluded, which a fair process of consultation would have provided.

I leave it to those who have expertise in this area to comment on what will be excluded, and I hope their comments will be scrutinised carefully because the proposals may exclude from scope some very vulnerable prisoners who need and deserve skilled legal assistance.

2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court?

No

Please give your reasons:
My concerns are twofold:

1. That the proposal will require anyone who is acquitted after a contested trial and wishes to recover a contribution towards their costs to go through the expensive (to everyone including the state) rigmarole of having to apply for criminal legal aid at the outset, because unless an application is refused he/she will have failed the threshold test for reimbursement.

2. That the likely disparity between criminal legal aid rates and rates that are reasonable for a private practitioner to charge for his/her services for a contested trial to charge is likely to be so substantial that very significant injustice will be done to acquitted defendants who have to make up the shortfall out of their own pockets.

3. Do you agree that the proposed threshold is set an appropriate level?

No

Please give your reasons:
I am not qualified to express an opinion on the level suggested. But I am really worried that this proposal will create yet another pressure on defendants to plead guilty (and save themselves the risk of incurring irrecoverable heavy expenditure, even if acquitted) - or to defend themselves without legal representation, which always adds to the costs of a trial and to the risks of unfairnesses and/or miscarriages of justice being perpetrated.

This happened in the Second Guinness Trial which eventually had to be aborted when the highly intelligent banker defendant found the experience of defending himself so utterly overwhelming that he suffered such a breakdown in his mental health that Mr Justice Henry had to stop the trial. I would myself probably have faced the challenges posed by the presence of at least two unrepresented defendants as trial judge in the second Blue Arrow criminal fraud trial (estimated to last 4 months) if the defendants in the first trial had not all won their appeals against conviction with the result that the second trial did not take place at all..

4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

No

Please give your reasons:
I leave it to those with specialist knowledge to explain the totality of the damaging injustices that will flow from these proposals, if they are allowed to stand unamended. A vague reference to a power for legal aid to be granted in exceptional circumstances where a case would be otherwise excluded from scope is totally inadequate to remedy the likely injustice.

I see that Professor Conor Gearty has referred to the consequence that "UK forces acting abroad in the sure knowledge none of their alleged victims will be able to secure justice". Now that it is established that this country has jurisdiction over human rights violations committed by those forces in the circumstances identified by the Al-Skeini case (on which I delivered the main judgment in the Court of Appeal), it seems incomprehensible to me that this consultation paper should omit all reference to the inevitable consequence of this proposal in cases of ECHR Article 2 and 3 violations committed by occupying forces overseas.

I also see that ILPA is concerned with the following categories of case:

- Trafficked persons who do not have a claim for asylum (which is about risk on return, not what has been suffered in the past), separated children, survivors of domestic violence and detainees ;

• Those whose claims for asylum have failed, but who cannot be removed. There will be no Legal Aid to assist such persons to make further representations (including a fresh claim for asylum), a claim for damages for false imprisonment, and/or challenge decisions denying support and accommodation;
• Those facing removal or deportation whose challenges are based on rights to private and family life, rather than asylum claims.

I am sure that there are many other comparable cases. This proposal needs to be taken away and replaced by properly thought out and reasoned proposals (subject to proper Parliamentary scrutiny) for excluding from scope many people whose circumstances cry out for legal advice and/or representation from the legal aid scheme.

5. 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 onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)?

No

Please give your reasons::
No, no, no (as Mrs Thatcher once said). I had nearly 20 years' experience of handling these claims as a judge, first at High Court and then at appellate level. Immigration and asylum JR cases should be considered as a separate issue. There are certainly some providers who submit JR applications in those cases which are not properly arguable, and they then often obtained from the legal aid authorities an extension of their legal aid to argue the case again on renewal despite a very clear, very well-reasoned decision by a judge explaining why the case was not properly arguable.

This always seemed to me to be a problem that the legal aid authorities should have been capable of curing long ago, and I am unimpressed by the bureaucratic excuse given in the third sentence of para 3.72.

These cases apart, the problem about the proposal lies in what I wrote in my response to Q15 of the last Consultation Paper:

> "No. I am sorry to say that there are even more judges with inadequate experience in public law matters who are assigned to handle these cases than there were in the early 1990s when the Law Commission, under my chairmanship, published a Table in its Report on Administrative Law which

revealed very wide inconsistences in the grant of permission as between different judges. Nobody applies the very low threshold suggested by Lord Diplock which is quoted in the Consultation Paper. Sadly, in the absence of codified guidance in the Rules as to the criteria according to which permission should be granted, different judges, with differing experience, apply different tests. It would therefore be wrong to impose a large financial cost for seeking a renewal of the application..."

This well-considered response from a very experienced former public law judge (and former Chairman of the Law Commission) was totally ignored in the Ministry of Justice's Summary of the Responses to that paper, but I repeat it now, because it is so very important that the Ministry should understand it if it is to avoid perpetrating a very significant and damaging injustice.

I see that the Public Law Project [PLP] (although I am its patron I made no contribution to its response) is to respond in these terms:

" *Uncertainty caused by disparity in different judges' approaches to permission*

17. 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 15* and 16*) 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 9* 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.

18. 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 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".

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

> "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 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 order words, claimants whose claims came before judge H had less then 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."

Judge	Cases	Percentage of grants
A	26	46%
B	38	42%
C	26	38%
D	61	36%
E	52	35%
F	31	26%
G	29	14%
H	27	11%

These figures totally support what I wrote. Given this unevenness of approach, it would be utterly wrong and unfair for legal aid public law practitioners to have to depend on the capriciousness of this judicial lottery to determine whether they are to be paid anything at all for their services.

I know that many will go out of business unless this proposal is changed. They have to pay their bills as and when they arise like every other professional man or woman. The fact that ALL JR legal aid practitioners are to be put at risk in this way just because PTA was refused without identified benefit in those cases mentioned in the Consultation Paper simply adds to the injustice and inherent danger of this proposal.

I also draw attention to what the PLP has written in paras 13 and 16 of its response, with reference to judicial case-law. These paragraphs describe what happens in practice in the absence of codified criteria for granting leave, a matter not apparently understood by the authors of this Consultation Paper.

I would add that I consider that in paras 3.75 and 3.76 the authors of the Consultation Paper have no conception at all of the real world in which judges do their jobs. Ancillary litigation in costs-only cases was already well out of control when I stopped being a judge and these proposals would simply aggravate that lamentable trend.

How on earth, unless the defendants' liability for costs is conceded (which according to the PLP's response, para 36, "very rarely happens"), in any apart from the most obvious cases a judge is expected to determine whether the claimant should recover costs inter partes from the public authority defendant in the cases discussed in those paragraphs, is left largely to the imagination.

On the basis of my very long experience as a public law judge, I can say with confidence that PLP's response is more strongly founded in the real world:

> 36.... "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 Appeal's decision in *Bahta*, 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 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.
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> 37. 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.

38. 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%."

If this analysis is correct (and I believe it is) the scale of the peril now unfairly faced by all legal aid practitioners in the field of judicial review becomes blindingly obvious. For an estimated annual saving of £1 million, to be set against the risk (not mentioned at all in para 33 of the Civil Credibility Impact Assessment) that praiseworthy small providers (particularly niche providers) may go out of business altogether, the game seems hardly worth the candle.

6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?
No

Please provide your response in this text box:
I am agnostic about this, but if this proposal were implemented, I am sure that many practitioners would simply write "moderate (50% or more)" in cases where they currently tick the "borderline" tick-box because it is made available to them. It is a proposal that appears to prejudice the scrupulous practitioner in those

cases where the public authority has been evasive or not properly forthcoming in its response to the protocol letter.

7. **Do you agree with the proposed scope of criminal legal aid services to be competed?**
   No

Please give your reasons:
I am very deeply worried about these proposals about price competition, but I have read the views attributed to Sir Anthony Hooper, a former judicial colleague who has had infinitely more experience of criminal justice than I ever had, and I agree with him. For this reason I am confining my response to the main proposals on civil legal aid.

I quote:
Speaking publicly for the first time since he retired in September, Sir Anthony said: “It is very difficult for serving judges to be critical of Government policies but I can tell you I have spoken with them and they are extremely concerned.”

“The purpose of our criminal justice system is to acquit the innocent and convict the guilty. This requires a competent prosecutor, competent defence advocate and competent judge. If you take any of these elements away, the results will be costly and potentially disastrous, with innocent people being convicted and potentially dangerous individuals wrongly acquitted."

“Now specialist solicitor firms who deal with complex baby-shaking cases and fraud cases will no longer be available to serve a client on legal aid because he will be bound to one of a handful of providers in his area who may have no experience of this kind of sophisticated criminal work.”

He also criticised the “conflict of interest” arising between the financial interests of the company in obtaining a cheap and speedy result and those of the client “which are quite different”.

He added: “We have a huge number of rules in our society which govern conflicts of interest. Ministers have to sell certain shares, MPs have to declare special associations. But here this Government is saying there can be these conflicts of interest.”

Sir Anthony ... rejected Ministry of Justice comparisons to legal aid fees in Europe. “By the time a case comes to court on the Continent it is much more likely that the person is guilty because the case has been fully investigated by an investigating judge who weighed up both sides. Our system is different. There is still a huge amount of work that needs to be done by the defence.”

Sir Anthony added: “These reforms will be absolutely devastating for the justice system as we know it. They will lead to many problems, certainly to miscarriages of justice. You will see more appeals in the longer term.”

I would add to Sir Anthony's remarks that our criminal justice system is the envy of the world, as I have found in all my work overseas whether as President of the Slynn Foundation or otherwise. Our common law system of precedent-based justice is bound to be more expensive than any codified system (although such systems require many hundreds more professional salaried judges to administer them), but the authors of this Consultation Paper show no signs of wishing to dismantle that, too.

8. **Do you agree that given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable?**
   No

Please give your reasons:
I leave it to those with far greater experience than mine to explain why a still further reduction in fees that have stood still, or been subject to reductions, for more years than I can remember, would be inimical to the need to maintain high standards of competence and integrity where the liberty of clients may be at risk.