Written submissions from the Housing Team at Garden Court Chambers to Lord Justice Jackson's review of fixed recoverable costs

1. This is the submission of the Garden Court Chambers Housing Team to Lord Justice Jackson's review of fixed recoverable costs.

2. Garden Court Chambers has one of the largest specialist housing law teams in the country and has a reputation for excellence in this area. We cover all aspects of housing law including possession claims, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. Our practitioners also have specialist expertise in many of the 'niche' areas within housing law including Romani Gypsy and Traveller Rights, disability issues, welfare benefits, anti-social behaviour, community care, unfair terms in tenancy agreements, general planning matters, grants, licensing of houses in multiple occupation, housing standards, and the housing health and safety rating system. We are particularly committed to representing tenants, other occupiers and homeless people.

3. Set out below are a number of short concerns about the extension of the fixed recoverable costs regime together with suggestions as to how the possible impact might be monitored and mitigated. We hope that these points are of assistance.

Effect on legal aid practitioners

4. Our primary concern is that if legal aid firms are unable to recover *inter partes* costs at commercial hourly rates they will find that it is not financially viable to continue and close so reducing access to justice for those vulnerable groups dependent on legal aid. This is a concern that has been acknowledged by the Courts on a number of occasions, up to the highest level. For example *In re appeals by Governing Body of JFS and other* [2009] UKSC 1, [2009] 1 W.L.R. 2353 per Lord Hope:

> 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 (2000) 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.
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> 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 *2364 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.

5. See further, *R (Sino) v Secretary of State for the Home Department* [2016] EWHC 803 (Admin), [2016] 4 W.L.R. 80 per Hayden J:

> 28 The appellate courts have expressed concern at the prospect that those lawyers who practise in publicly funded work, often taking on challenging points on behalf of individuals to whom neither the profession nor the public would be instinctively sympathetic, might not be able to recover remuneration at inter parties rates in cases where they were essentially successful. The real risk is that publicly funded practises would soon be unsustainable and access to justice compromised more widely. In my judgment, this is a factor which can and ought properly to be taken into account. It is not a subversion of the principles of the CPR , rather it is a reassertion of the principles in rule 44.2(2) , ultimately therefore a restatement of a workable costs regime.

6. See yet further, *Kings Lynn and West Norfolk BC v Bunning* [2016] EWCA Civ 1037, [2017] C.P. Rep. 7 per Irwin LJ:

> 39 I accept also that it is important for costs orders to be made in favour of successful legally-aided parties. We were told that such an order makes a very considerable difference to those acting, who receive a very much reduced rate if paid by the Legal Aid Agency rather than the unsuccessful party.

7. This concern is both real and pressing and any restrictions on the ability of legal aid practitioners to recover their costs at commercial rates should not only take this into consideration, but should also take account of the existing pressures on legal aid work as result of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), among other measures. In this context we note with concern the content of the recent report of the Legal Action Group, *Justice in Freefall*:[1]

[1] Justice in free fall a report on the decline of civil legal aid in England and Wales (Legal Action Group, December 2016) http://www.lag.org.uk/11376.aspx

> The impact of LASPO both on advice agencies and high-street law firms has been profound.
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> The Law Society explained in evidence to the Justice Committee (see above) that although the number of legal aid contracts was not significantly reduced by LASPO, the scope cuts 'have resulted in the downsizing of departments reliant on legal aid work and consequent redundancies. Some firms have closed and others have survived by shifting their focus to privately funded work' (Impact of changes to civil legal aid, page 30, para 75).
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> More recently, the Law Society has mapped the shortage in legal aid advice for housing, which means that people on low incomes facing homelessness and eviction are struggling to get the local face-to-face advice they desperately need and are entitled to by law (see figure 5).
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> In the last quarter of 2015/16, 17 per cent fewer people got legal aid help for a housing matter than in the same period the previous year.
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> However, the most startling revelation is that there are some areas of the country, such as Suffolk and Shropshire, with no housing legal aid supplier operating at all (see also September 2016 Legal Action 5).

8. In our view, a reduction of those doing legal aid work, and doing that work to the highest possible standard, will have serious implications on access to justice. The effect on small firms in particular is likely to be critical.

The need for an impact assessment

9. We would ask that once the proposed form and scope of fixed recoverable costs has taken shape a financial assessment is undertaken of what the regime would mean to legal aid firms and practitioners if these proposals were implemented.

10. But a comprehensive financial assessment cannot be carried out on an informed basis until the nature and detail of the intended reforms have been fleshed out. Only then can a meaningful analysis of the likely impact be carried out by those doing legal aid work. In our view, the current methodology of working from a review of costs budgets and detailed assessments and by hearing from a sample of practitioners will not be sufficient to gauge the impact of further reforms accurately. At the moment, save for raising very general concerns as we have done above, it is not possible for those doing legal aid work, to meaningfully answer the question 'what would this mean for you?'.

11. The need for such a financial assessment arises because there is a public interest that practitioners who do publicly funded work, are not driven out of business. There is inadequate evidence to conclude that access to justice would be so significantly increased by the introduction of fixed recoverable costs where both parties are publicly funded, as to justify the risk that smaller legal aid firms may have to shut up shop. Therefore, in our submission, no decision to extend fixed recoverable costs should be considered before a comprehensive assessment of the financial impact of each of the proposed changes on solicitors firms and practitioners doing largely legal aid work has been carried out.

12. In the event that the financial assessment does expose a risk of there being a reduction in private practitioners doing legal aid work, or in law centres or other voluntary organisations carrying out legal aid work, and assuming that there is a prima facie

correlation between those using legal aid and those with protected characteristics then a legal requirement would arise for an equality analysis under the s149 Equality Act 2010.

The form and scope of a fixed recoverable costs regime

13. Building on the concerns we have voiced above we would ask for there to be an exemption from the regime where both parties are publicly funded. We have in mind disputes between individuals in receipt of legal aid and public authorities (in the case of housing, usually local housing authorities or housing associations). The rationale for this is twofold.

14. Firstly, in such cases the 'David and Goliath' situation of a party of just sufficient means facing the unknown prospect of crippling costs from a much larger potentially multi-national opponent, is unlikely to arise.

15. Secondly, in our experience, legal costs in cases where both parties are publicly funded rarely spiral unpredictably upward in the same was as other litigation. This, we believe, is because the oversight of the Legal Aid Agency (to whom any application for an increase in the cost limit of a legal aid certificate must be made and justified) and the financial constraints on all public bodies in the current economic climate, act as a natural check.

16. Further and in the alternative, turning to specific case types, we believe that possession claims, disrepair cases, unlawful evictions and homelessness matters should not be treated as run of the mill cases and should potentially be exempted from the regime entirely, or at least should have the benefit of a discretion by which the regime might be dis-applied. The reason being that these cases generally concern matters more important to the individual than the recovery of damages: such as the person's right to respect for his or her home, their health and safety at home, or the prospect of being assisted to obtain a home rather than left to sleep rough.

17. The case for an exemption/discretion to dis-apply an extended fixed costs regime is supported by the fact that the financial value of a possession claim or homelessness appeal is awkward to assess and is not a good indicator of its complexity. Even accelerated possession proceedings can be of significant complexity once they have proceeded beyond resolution on paper. Further, landlords or public authorities will not recover against publicly funded tenants (by virtue of s26 LASPO) and so the effect of fixed costs may be little benefit. Therefore if and when in place, the court should be permitted to dis-apply.

18. We hope that these points are of assistance. We would welcome seeing other responses before commenting further and support the submissions made by the Housing Law Practitioners Association (HLPA).

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