BINDMANS LLP

[redacted]

Date: 17 September 2020

Government Legal Department

[redacted]

Dear Sirs,

LETTER BEFORE ACTION UNDER THE PRE-ACTION PROTOCOL FOR JUDICIAL REVIEW

Re: Project Moonshot

1. Introduction

1.1 We act for the Good Law Project and EveryDoctor (**"the Claimants"**) in respect of their concerns regarding the lawfulness of the decision(s) of the Prime Minister and the Secretary of State for Health and Social Care and/or other Government Ministers (**"the Defendants"**) in relation to "Project Moonshot". We understand that Project Moonshot is a Central Government initiative involving the intention to spend c. £100 billion of public money on a new, mass population COVID-19 testing programme providing 6-10 million tests a day. The sums of money involved are similar to the entire annual budgets for the National Health Service or the Department of Education.

1.2 The Claimants understand that the Defendants propose to deliver all or part of Project Moonshot by entering into substantial public contracts (or similar arrangements) with third party commercial operators (**"the Contracts"**).

1.3 Media reports (some of which are summarised below) indicate that the Contracts:

Contracted with the Legal Aid Agency

Fraud Panel

(a) are of very substantial value,

(b) have not been advertised by the Defendants or subject to any consultation,

(c) have not been subject to any open, transparent competitive procedure,

(d) have not been published, or subject to publication of a contract award notice, by the Defendants.

1.4 We are also unaware of any confirmation from the Defendants that such consultation or procedures of publication will take place in the future despite an initial letter sent by the Claimants (through their previous representatives, [redacted]) on 10 September 2020. No response has been received to that letter.

1.5 As a result, the Claimants have serious concerns, that they consider may appropriately be addressed by way of judicial review, in respect of:

(a) the lawfulness of the decision-making process leading to the decision to approve and commit £100 billion of public money to Project Moonshot; and

(b) the lawfulness of the decision-making process(es) leading to the award or intended award of the Contracts.

1.6 Based on the limited information currently available, the Claimants understand that the Contracts may constitute public contracts within the meaning of Regulation 2 of the Public Contracts Regulations 2015 (**"the PCR 2015"**) and/or arrangements that are subject to s. 2 of the European Communities Act 1972 (**"the ECA 1972"**) and/or Art. 56 of the Treaty on the Functioning of the European Union (**"the TFEU"**).

1.7 The concerns of the Claimants are necessarily based on the very limited information that is currently publicly available in respect of these matters. The Claimants hope that: (i) the contemporaneous decision-making documents will demonstrate that its concerns are not well-founded, and (ii) prompt disclosure of those documents will avoid the need for legal proceedings. The Claimants therefore respectfully invite the Defendants to respond promptly to the requests for documents and information set out below in a reasonable and constructive manner, in compliance with their duties of candour and transparency, so as to avoid the time and costs

involved in legal proceedings.

1.8 The Claimants wish to make clear that they support the principle of increasing testing capacity and have no desire to unduly divert the Defendants' attention from lawful and proper activity in this field. However, as we set out at paragraph 6 below, leading organisations such as SAGE, the National Screening Committee ("**the NSC**"), the WHO and the Royal Statistical Society have profound concerns about the approach the Defendants are taking which involves 'punting' unprecedented sums of public money on technology that does not exist. These bare facts raise stark and entirely proper concerns about the decision-making processes and public and Parliamentary transparency. Accordingly, in the absence of an adequate response, they may have no option but to file urgent proceedings.

2. **The Defendants**

2.1 The Defendants are:

Minister for the Cabinet Office
[redacted]

Secretary of State for Health and Social Care
[redacted]

2.2 Please confirm if you disagree these are the appropriate defendants or if you consider there are other appropriate defendants.

2.3 Please also confirm the basis on which you are willing to accept service

3. **The Claimants and their legal advisors**

3.1 The Claimants are:

Good Law Project Limited
[redacted]

EveryDoctor Ltd
[redacted]

[redacted]

3.2 Please direct all correspondence to the Claimants' solicitors whose details are:

[redacted]
Bindmans LLP
[redacted]

3.3 We are willing to accept service and other correspondence by email, provided it is sent to [redacted] with the reference details above.

4. **The details of any Interested Parties**

4.1 At this stage, it is not considered necessary or proportionate to identify any specific third parties as Interested Parties given the paucity of information available. If the Defendants disagree, please indicate which third parties they consider are Interested Parties.

5. **The details of the matter being challenged**

5.1 The matter under challenge is summarised at paragraph 1.5 above.

6. **Factual Background**

6.1 On 27 August 2020, SAGE published a consensus statement on mass testing which stated, *inter alia*:

> *"8. Careful consideration should be given to ensure that any mass testing programme provides additional benefit over investing equivalent resources into improving (i) the speed and coverage of NHSTT for symptomatic cases (the proportion of individuals who report Covid-consistent symptoms in England who go on to request a test through NHSTT could be as low as 10% and (ii) the rate of self-isolation and quarantine for those that test positive (currently estimated to be <20% fully adherent. This is relevant as targeting testing to those with high prior probabilities of infection (e.g. people with symptoms or contact with known case) has a much larger per-test impact on reducing transmission. There is, therefore, a delicate balance to be struck between investing to engage more symptomatic individuals with NHSTT and building alternative methods to reach out to find those who would not*

seek testing spontaneously." (footnotes omitted)

6.2 Despite this warning, and following initial reports by the *British Medical Journal* ("**the BMJ**") on 9 September 2020, a number of newspapers published reports on 10 September 2020 indicating that the Defendants had approved a new programme to spend £100 billion of public money on delivering a new UK mass population COVID-19 testing scheme. It was reported that this scheme: (i) was reliant on currently non-existent technology, and (ii) intended to lead to the UK achieving a COVID-19 testing capacity of c. 10 million tests per day by early 2021.

6.3 The media reports also stated that the Project would be delivered in whole or part by the Defendants entering into very substantial public contracts with a range of third party commercial operators. The Claimants have subsequently obtained sight of certain documents on which the media reports were based. These appear to indicate that the Defendants may already have entered into certain contractual arrangements with third party commercial operators. There is also no indication in the documents as to the procedures or processes that the Government intends to follow in respect of the award of future contracts.

6.4 Subsequently, newspaper reports have stated that the Defendants did not consult or engage with the NSC, the Defendants' own expert body with responsibility for *"all aspects of population screening"*, before taking the decision(s). The NSC's chairman, Professor Robert Steele has publicly stated: *"The NSC has not been involved with this in any way"*.

6.5 Dr Allyson Pollock, the Director of the Centre for Excellence in Regulatory Science, Newcastle University, described this apparent failure by the Defendants as *"incomprehensible"*.

6.6 On 9 September 2020, the BMJ reported that, having reviewed leaked documents relating to the Defendants' decision-making process, Professor Martin McKee, Professor of European Public Health at the London School of Hygiene and Tropical Medicine, stated:

> *"[the Defendants' document] focuses on only one part of the problem, testing, and says nothing about what will happen to those found positive, a particular concern given the low proportion of those who do adhere to advice to isolate—in part because of the lack of support they are offered. What*

parliamentary scrutiny will there be of a programme that would cost almost as much as the annual budget for the NHS [in England]? However, on the basis of what is presented here, this looks less like Apollo 11, which took Neil Armstrong to the moon successfully, and more like Apollo 13."

6.7 The 9 September 2020 BMJ article also reported the comments of Professor John Cochrane of Birmingham University in the following terms:

> *"Jon Deeks, professor of biostatistics at the University of Birmingham and leader of the Cochrane Collaboration's covid-19 test evaluation activities, was concerned about a seeming lack of involvement of experts in the plans. He said, "The document lacks insight into how screening works, particularly the need to balance the harms you can create through false positives against the benefits from true positives.*
>
> *"The projected benefits are based on optimistic scenarios as to how well these tests would work, when they would be available to be used, and how easily they could be deployed. I'm horrified that the plans are devoid of any contribution from scientists, clinicians, and public health and testing and screening experts. These are plans from the world of management consultants and show complete ignorance of many essential basic principles of testing, public health, and screening. The authors appear totally oblivious to the harms that universal screening can create—this is frankly dangerous.*
>
> *Deeks said that mass testing could throw up enormous numbers of false positive results. "Even if you have a test which is 99% specific, so only 1% of uninfected people get a false positive result, if you then test 60 million people we will be classifying a group the size of the population of Sheffield as wrongly having covid," he said. In such a scenario, 600 000 people would be told to isolate, along with their close contacts, leading to "substantial economic harm and massive need for further testing."* (emphasis added)

6.8 On 11 September 2020, the Royal Statistical Society published a letter to *The Times* stating, *inter alia*, that the Defendants' decision to approve the Project *"does not seem to take account of fundamental statistical issues"* and risked *"causing personal and economic harm to tens of thousands of people."*

6.9 On 14 September 2020, *The Independent* reported that:

(a) speaking anonymously, a World Health Organisation diagnostics expert stated: *"[some of the technologies under consideration by the government, such as the Oxford Nanopore product, were]* 'untested' *or came from companies* 'without much experience of medical testing at scale'. *"So it would be hard to see these getting you to those Moonshot numbers"*; and

(b) an anonymous source *"close to"* the Project stated that there was *"nowhere near enough"* manufacturing capacity across the UK to supply the amount of tests needed to implement the Project.

6.10 As far as we are aware, no public consultation has been undertaken in respect of this decision to approve and commit £100 billion of public money to Project Moonshot and no documents recording the decision-making process leading to the decision have been published by the Defendants, or otherwise released into the public domain. At present, it is unclear (and there is no transparency) as to what considerations and evidence have, or have not, been taken into account by the Defendants in making the decision(s).

6.11 In the context of a decision of this nature - i.e. one that allocates an enormous amount of public money to an unevidenced and speculative project, which is of potentially critical importance for the UK's response to the COVID-19 pandemic and the UK national interest - the Claimants consider that it must (or should) be a matter of common ground that it is of significant public importance that the Defendants' decision-making process:

(a) complies with all applicable legal obligations;

(b) takes account of all relevant considerations;

(c) disregards irrelevant considerations; and

(d) is conducted with a high degree of transparency.

6.12 At present there is no transparency as to:

(a) whether the Contracts have been entered into by the Defendants; and (if so)

(b) which commercial operators have been awarded the

Contracts;

(c) how or on what basis the Defendants decided which commercial operators should be awarded the Contracts;

(d) what the value, subject-matter and terms of the Contracts comprise; and

(e) what processes are intended to be followed in respect of any future contracts in relation to Project Moonshot.

7. Relevant legal principles

7.1 At present it is unclear: (i) what legal powers are relied on to provide *vires* to approve and commit £100 billion of public money for Project Moonshot, and (ii) what steps have been taken to obtain suitable Parliamentary and/or Her Majesty's Treasury ("**HMT**") approval and consent for these levels of expenditure of public money.

7.2 The Defendants' principal policy document on decision-making processes relating to the expenditure of public monies by Central Government Departments - '*Managing Public Money*' (2015) – states, in relevant part:

> *"The origins of this document trace back through the Bill of Rights to Magna Carta. These events brought the monarchs of their day up against the demands of those they governed that the funds they provided should be used wisely. The principles which emerged also underpin the rule of law, for which the UK gains international respect and trust.*
>
> *In modern times it is the elected government that must account to parliament; but the theory is the same. Integrity is the common thread. Transparency and value for public money are the essential results."*

7.3 It is a fundamental constitutional principle that there must be full Parliamentary control over taxation and public expenditure: see Dicey, *Introduction to the Study of the Law of the Constitution* (10th Ed.), pp. 315-318. Legislation is required to authorise expenditure out of central funds: Erskine May, *Parliamentary Practice*, 22nd Ed., pp. 732-737. Expenditure out of central funds without the sanction of Parliament is unlawful: *Auckland Harbour Board v The King* [1924] AC 318.

7.4 In *Steele Ford and Newton v CPS* (1994) 1 AC 22 at 33d-g, Lord Bridge said:

> *"… Important, in the present context, is the special constitutional convention which jealously safeguards the exclusive control exercised by Parliament over both the levying and the expenditure of the public revenue. It is trite law that nothing less than clear, express and unambiguous language is effective to levy a tax. Scarcely less stringent is the requirement of clear statutory authority for public expenditure."* (emphasis added)

7.5 As to procurement decisions, reg. 32 of the PCR 2015 governs the use of the negotiated procedure without prior publication, the procurement procedure that, exceptionally, permits the award of a public contract without the need for advertisement or a competitive tender process. Reg. 32 of the PCR 2015 provides, in relevant part:

> *"(1) In the specific cases and circumstances laid down in this regulation, contracting authorities may award public contracts by a negotiated procedure without prior publication.*
>
> *(2) General grounds The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:—*
>
> *(..)*
>
> *(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with."*

7.6 Guidance issued by the Cabinet Office in March 2020 in relation to reg. 32 of the PCR 2015 and the COVID-19 pandemic (PPN 01/20) informs contracting authorities that: *"You should ensure you keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If you make a direct award, you should publish a contract award notice (regulation 50) within 30 days of awarding the contract."*

7.7 The matters referred to above, which arise from the very limited

information that is currently publicly available in respect of this matter, give rise to serious and legitimate grounds for concern regarding the lawfulness of the Defendants' decision-making processes and acts relating to Project Moonshot.

8. **Summary of grounds**

8.1 Pending the Defendants' response to this letter, the Claimants are concerned that the decision(s) to approve and allocate £100 billion of public money to Project Moonshot may be unlawful on a number of grounds.

8.2 First, it is, at present, unclear what legislative authority is relied upon to provide lawful authority for the decision(s) and the actions taken by the Defendants, including the decisions to commit £100 billion of public money to the Project and award the Contracts.

8.3 The Defendants are respectfully invited to provide in their pre-action response a clear, candid, explanation of:

(a) what *vires* were relied on for by the Defendants for the decisions to: (i) approve the Project, (ii) commit £100 billion of public money to the Project, (iii) award the Contracts; and

(b) what Parliamentary and HMT approvals and consents were obtained.

8.4 Secondly, the limited information currently available in the public domain suggests that the decision to approve the Project and commit £100 billion of public money may have been flawed and vitiated due to:

(a) procedural failings, including, without limitation, the failure to consult or engage with the NSC or other material stakeholders; and

(b) the failure to have any (or any sufficient) regard to relevant considerations and evidence, including, without limitation, the matters referred to in paragraphs 6.1 to 6.9 above.

8.5 Thirdly, pending the Defendants' response to this letter, it appears that if the Defendants have already awarded the Contracts then these awards constitute the unlawful direct award of a public contract or similar arrangement contrary to the PCR 2015 and/or s. 2 of the ECA 1972 and/or Art. 56 TFEU.

8.6 Based on the information currently available we do not consider that the awards would fall within the circumstances set out in reg. 32 of the PCR 2015. In particular, there was no "*strict necessity*" to use the negotiated procedure without prior publication for the Contracts: there was no "*extreme urgency*" for the award of contracts for these services and/or goods; any need for these services and/or goods was foreseeable; and the responsible contacting authority could have complied with the time limits for the open/restricted/other procedures under the PCR 2015 (including, if necessary and justified, by using the "*accelerated*" procedure).

8.7 In these circumstances, the direct awards would breach (*inter alia*):

(a) the requirements of equal treatment and transparency, both under the TFEU, and under reg. 18 of the PCR 2015;

(b) the requirement under reg. 26(2) of the PCR 2015 to publish a 'call for competition' for the Contracts; and

(c) the requirement under reg. 26(1) of the PCR 2015 to apply a procedure confirming to Part 2 of PCR 2015.

9. **Reservation of right to add further grounds upon the Defendants' compliance with duty of candour**

9.1 The Claimants reserve the right to amend and/or expand on the grounds set out above following provision of the information and documentation sought below.

9.2 In the context of the subject matter and nature of the decision, and the magnitude of the sums of public money involved, the Claimants respectfully emphasise the importance of compliance with the duty of candour in this case by disclosure of the essential decision-making documents at an early stage. As the Court has recognised, in the context of challenges to decisions governed by the PCR 2015 and/or the principle of transparency, there is a pressing need for disclosure at a very early stage in the proceedings of the key decision-making documents: see e.g. *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC).

9.3 The Claimants have no wish or desire to pursue legal proceedings if the contemporaneous documents demonstrate the serious and legitimate concerns that arise from the matters referred to above are not well-founded.

10. **Standing**

10.1 This claim for judicial review is a public interest challenge to decisions of significant public importance, involving the allocation of unprecedented sums of public money and the lawfulness of potential direct awards of public contracts of substantial value. As expressly provided in Recital (13) to Directive 2007/66/EC ('the Remedies Directive'), direct awards of public contracts constitute *"the most serious breach of Community law in the field of public procurement on the part of a contracting authority…"*.. In *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] 1 CMLR 16 at §77, the Court of Appeal stated:

> *"…The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47, and thus a paradigm situation in which a public body should be subject to review by the court. We incline to the view that an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg 47, can bring judicial review proceedings to prevent non-compliance with the regulations or the obligations derived from the Treaty, especially before any infringement takes…He may have such an interest if he can show that performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event."*

10.2 We note that both limbs of this test are satisfied in the present case: (i) the Second Claimant and those it represents will be directly affected by the decisions relating to the award of the Contracts in their ongoing activities delivering healthcare services, and (ii) the gravity of the breach of the PCR 2015 which is at issue is the most serious which exists.

10.3 In the circumstances, the Claimants have sufficient interest to challenge the decisions in accordance with the ordinary principles of standing, both to complain of breach of public law and to complain of breach of PCR 2015.

11. **Limitation**

11.1 This pre-action letter has been sent as soon as possible following the media reports of 10 September 2020, particularly taking into account the letter sent on 10 September 2020 and the Defendants' failure to respond to that letter.

11.2 Pursuant to CPR r. 54.5(6), where an application for judicial review relates to a decision governed by the PCR 2015, the claim form must be filed within the time required by reg. 92(2) of those Regulations, that being within 30 days beginning with the date when the Claimants *"first knew or ought to have known that grounds for starting the proceedings had arisen."*. The Claimants note, pending the Defendants' response to this letter, that this may require action by the Claimants to issue proceedings on a protective basis on or before 8 October 2020. The Claimants very much hope this can be avoided by the Defendants responding to this letter in a reasonable, candid and transparent manner.

12. **The details of the action that the Defendants are expected to take**

12.1 The Claimants respectfully submit that this is a case where the Defendants can, and should, take prompt action to address the concerns raised by this letter in an open and transparent manner, including by: (i) providing direct, candid responses to the questions raised below, and (ii) providing disclosure of the essential documents requested below.

12.2 If this is done, the Claimants hope that the need for legal proceedings may be avoided, or that any potential challenge can be narrowed so far as is practicable. The Claimants respectfully invite the Defendants to engage in a reasonable and constructive manner.

13. **ADR proposals**

13.1 The Claimants would be amenable to any alternative means of resolving this matter consensually such as would avoid the need to commence a claim for judicial review. The Claimants are therefore willing to consider any proposed ADR made by the Defendants.

14. **The details of any information sought**

14.1 References below to "the Contracts" include any letters of intent, letters of comfort or heads of terms or any other documents recording arrangements relating to the provision of goods or services

for, or relating to, Project Moonshot.

14.2 The Defendants are urgently requested to provide the following information:

(a) What *vires* are relied upon to approve and implement the Project, appropriate £100 billion of public money to the Project and award the Contracts?

(b) Which individuals or bodies were responsible for the decision to approve the Project, appropriate £100 billion of public money to the Project and award the Contracts?

(c) Which bodies and/or individuals were consulted by the Defendants before making the decisions to approve the Project and appropriate £100 billion of public money to the Project?

(d) What approvals, authorisations or consents were obtained by the Defendants from Parliament, HMT and/or other public bodies before making the decisions to approve the Project and appropriate £100 billion of public money to the Project?

(e) Was the opportunity to tender for the Contracts publicly, transparently advertised anywhere, and, if so, how long was that opportunity accessible to the public/tenderers?

(f) When do the Defendants contend that they became aware of the need to source the relevant supplies of goods and services relating to Project Moonshot?

(g) Did the commercial operators who have been awarded the Contracts approach the Defendants first (and if so when) or did the Defendants approach the commercial operators first (and if so, when) in relation to the Contracts? If the commercial operators were the only suppliers to submit an expression of interest, why did the Potential Defendants not seek to have discussions with any other suppliers before entering into the Contracts?

(h) If the Defendants did have any discussions with any other commercial operators in relation to the proposed supply of goods or services relating to Project Moonshot, please identify: with whom those discussions took place; when they took place; and why they did not come to fruition and/or why the Defendants opted to contract with the counterparties

notwithstanding that discussions with other undertakings were ongoing.

(i) What consideration, if any, was given to the running of an accelerated competition in respect of the supply of goods and services relating to Project Moonshot? In that regard, please explain when (if at all) that possibility was first raised, the reasons why it was decided that an accelerated competition would not be run, and the date on which that decision was taken.

(j) What sums have been paid to date to commercial operators in relation to Project Moonshot since 3 March 2020?

(k) What services have the commercial operators provided under the Contracts?

(l) What is the value of each of the Contracts?

15. **The details of documents to be disclosed**

15.1 Please disclose with your response to this letter in accordance with your duty of candour:

(a) the essential decision-making documents relating to the decisions to approve Project Moonshot and appropriate £100 billion of public money to the Project. These should include any ministerial briefing or similar document on which the decisions rely and any third party advice or analysis taken into account by the decision-maker(s).

(b) copies of any information publicly posted about the Contracts, including any information about how providers could tender for the Contracts.

(c) the written justification that Notice PPN 01/20 requires contracting authorities to keep to support its use of the procedure under reg. 32(2)(c) of the PCR 2015.

(d) any documentation demonstrating that a "*separate assessment*" of each of the tests of urgency and foreseeability set out in Notice PPN 01/20 was carried out such as to support the decision to use the emergency procedure both at all, and in the context of the decisions to award the Contracts.

(e) any documentation of consideration as to whether, and the

decision(s), to award the Contracts to the commercial operators, along with any communications from the commercial operators by which they sought the Contracts.

(f) copies of the Contracts and any documentation by which the terms of the Contracts were negotiated or agreed.

16. **Date of response**

16.1 Given the urgency of the matter, we request a full substantive reply and disclosure of the essential documents requested above **by 4pm on Tuesday 22 September 2020**.

16.2 Should we wish to discuss this matter, please do not hesitate to contact [redacted] on the details given above.

16.3 We look forward to hearing from you

Yours faithfully

[redacted]

Bindmans LLP