



**‘Transforming Legal Aid’
Consultation Paper 14/2013**

**THE RESPONSE OF THE CRIMINAL BAR ASSOCIATION
OF ENGLAND & WALES**

Section A Executive Summary

1. The Criminal Bar Association contends that this consultation paper:
 - i. wrongly asserts that price competitive tendering (PCT) would ensure sustainability and value for money in the legal aid market, and wrongly assumes that PCT will leave sufficient quality within the criminal justice system (Chapter 4);
 - ii. recklessly abandons client choice over representation in criminal courts, and surprisingly undermines the Prime Minister’s own words in setting out the key principles of public services: ‘Wherever possible we are giving people direct control over the services they use’ (Chapter 4);
 - iii. will lead to a loss of public confidence in a Criminal Justice System in which justice would be subordinated to the economic interests of a few providers of defence services whose market would be guaranteed by success in tendering rather than success in the ability to provide a good quality service (Chapter 4);
 - iv. wrongly introduces a financial eligibility threshold for legal aid, and inaccurately calculates disposable income. The only workable

solution must be a presumption that those who are facing a trial that will cost above £5000 will be granted legal aid (Chapter 3);

- v. grossly underestimates the Equalities Impact of the proposed changes. We are deeply concerned that these changes will be socially regressive, will reverse many of the gains in diversity made by the legal profession over the last 25 years, and will have major adverse consequences for social cohesion and the composition of the judiciary in the years to come (Chapter 8);
- vi. is misguided in seeking to restrict criminal legal aid for prison law matters. The effect would be to wrongly prevent prisoners from gaining meaningful redress (Chapter 3);
- vii. proposes dramatic and unwarranted reductions in the professional fees paid to experienced lawyers who have been forced to work harder for less year on year since the time of the last Conservative government in the 1990s. The consultation paper makes flawed assumptions on future expenditure even without any of the proposed reductions (Chapter 5);
- viii. wrongly proposes cuts to fees in Very High Cost Cases, when the introduction of the GFS Plus scheme would be far more efficient and would save money (Chapter 5).

2. The adversarial system, which lies at the heart of the English and Welsh Criminal Justice System, cannot function effectively without advocacy of the highest calibre: all agencies, from the judiciary to the CPS, to prosecution and defence witnesses, to those accused depend on it. Yet the Ministry of Justice in its consultation paper makes no real reference to the *quality of justice*, which will be delivered by this radical and irrevocable transformation of the way in which legal services are provided to the prosecution and to the defence, and thence to the courts. It is assumed without citing any evidence that the legal aid system is bloated and that solicitors and barristers are inappropriately profiting from it. That is not the public perception, as is shown by the

numerous petitions circulating amongst the public to oppose these proposals. Our submission is that whilst the Criminal Justice System must be efficient and cost-effective, where the security and the liberty of the public is at stake 'price tags' must not be the only indicators of value. Moreover, the credibility of the 'price tags' in the consultation paper is dubious at best and could be demolished on cross-examination: for one thing, there is no costing of the increase in appeals which are likely to result from assembly-line legal services in the trial courts. The quality of justice will be strained to breaking point.

Section B General Introduction

The Criminal Bar Association

3. The Criminal Bar Association ('The CBA') represents the views and interests of practising members of the criminal Bar in England and Wales.
4. The CBA's role is to:
 - i. assist with consultation undertaken in connection with the criminal law or the legal profession;
 - ii. provide professional education and training and assist with continuing professional development; and,
 - iii. promote and maintain the highest professional standards in the practice of law.
 - iv. promote and represent the professional interests of its members;
5. The CBA is the largest specialist Bar association ('SBA'), with over 4,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all

persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

The Consultation Process

6. On 9th April 2013, the Ministry of Justice ('The MOJ') published a consultation document entitled, 'Transforming Legal Aid: delivering a more credible and efficient system.' It is aimed at 'providers of publicly funded legal services and others with an interest in the justice system.' In the ministerial forward, the Secretary of State for Justice asserts that the proposals to reform legal aid are, *inter alia*, 'to encourage greater efficiency in the criminal justice system to reduce costs.' The consultation is dense with detailed proposals relating to five main areas:
 - i. Eligibility, scope and merits;
 - ii. Introducing Competition into the Criminal Legal Aid Market;
 - iii. Reforming Fees in Criminal Legal Aid;
 - iv. Reforming fees in Civil Legal Aid; and,
 - v. Expert Fees in Civil, Family and Criminal Proceedings.
7. There is consultation also on the Impact Assessments (IAs) purportedly carried out by the MOJ and responses are invited. In total the consultation paper and IAs extend to some 200 pages.
8. In his foreword, the Secretary of State asserts that "*...over the past decade, the [legal aid] system has lost much of its credibility with the public....*" We do not accept that there is a lack of public confidence in the criminal legal aid system. No evidence is cited for this assertion, and we do not believe that any exists. For example, there have been several recent cases in which the extradition of a British citizen was sought for trial in a foreign jurisdiction, leading to public clamour, in the press and elsewhere, for the person to be tried in England where it was perceived that he or she 'would get a fair trial.' The public perception is that England and Wales has the finest Criminal Justice System in

the world, and the dedication and professionalism of legal aid lawyers is a major factor contributing to that pride.

9. It is our view that the proposed changes, which seek to introduce wholesale changes to the structure of the CJS, will have a devastating effect on the future of the legal profession and that the unintended but entirely foreseeable consequences of the reforms will irrevocably damage the integrity of the Criminal Justice System itself. This belief, shared by practitioners who are deeply committed to working for justice throughout the country, is genuine and deep-rooted. It is also a belief expressed privately by many judges.
10. The deadline for responses is Tuesday 4th June 2013. It is therefore envisaged by the MOJ that those who work full time in the CJS will be able to analyse the detail, assess the merits, consult with members and produce a full response within eight weeks. The CBA habitually replies to consultations published by government, the Law Commission, judicial committees and other professional, regulatory and academic bodies. Since the usual period for consultation responses is a minimum of 12 weeks, the CBA believes that the time allowed to respond in this case is pointedly short. The CBA warns the government against seeking to drive through at such a precipitate pace such fundamental reforms which will have a significant, irreversible, impact on the Criminal Justice System.
11. The consultation paper makes it clear that the decision to introduce price competitive tendering (PCT) for criminal legal aid has already been taken and that the MOJ merely wishes to consult on the proposed model (para 4.5). This is surprising. How, we ask, can such a fundamental decision be taken by a government department without full and proper consultation with those who work within the system? The consultation suggests that the government has decided to resurrect the recommendations of Lord Carter's Review of Legal Aid Procurement, published in 2006, which, it says, 'made a compelling case

for moving to a market-based approach to legal aid procurement.’ We beg to differ. As any advocate knows, a case can only be described as ‘compelling’ if it is based on reliable evidence, the strength of which compels the assessor of that evidence to the conclusion that the proposition is correct. There is no such evidence in Lord Carter’s Review, or in the consultation paper. Moreover, in a case of fundamental reform, for a case to be compelling there is also a requirement that the assessor should be in a position to conclude that the *status quo* can no longer exist and that reasonable alternative solutions have been analysed and should properly be rejected. There is a dearth of analysis of the quality of justice which would be delivered under the new regime. The CBA submits that these proposals are not based on properly tested, reliable evidence of what these ‘reforms’ would actually cost the Criminal Justice System.

‘Service Providers’ - Criminal Barristers

12. Before a detailed analysis of the consultation document, it is worth considering the role of the criminal Barrister as a ‘service provider’ and the purpose of the service provider within the structure of the CJS.
13. Practice at the Criminal Bar is vocational. It should be borne in mind that the vast majority of criminal practice is publicly funded, at rates set by government, which are far below the market for legal services. Great strides have been made in the last quarter-century to attract highly trained people from all backgrounds to enter the least financially rewarding area of practice. The Bar is no longer the preserve of the stereotypical white, public school and Oxbridge educated male. The Criminal Bar, particularly, recruits more women and people from ethnic minority backgrounds than ever before. This progress is slowly translating into more diverse judicial appointments. Much greater financial reward can be found in many other areas of legal practice. Aspiring Barristers begin pupillage already saddled with substantial debt. Whilst the number of available 12 month pupillages in criminal chambers is

reducing, few sets offer more than the minimum pupillage award of £12,000, compared to commercial law sets offering awards up to £60,000, a sum that many well established criminal practitioners would find hard to make, in gross fee receipts never mind taxable income, in a year.

14. Barristers who chose to practise in the field of criminal law do so with a genuine belief in social justice and in promoting and defending the Rule of Law within the criminal justice system. Criminal Barristers in independent practice routinely work late into the night and at weekends to prepare their cases. The hours spent on case preparation are rarely reflected in the fee ultimately paid, with many earning no more than a few pounds an hour actually spent on preparing for the case before and during the trial. It is not unknown for a practitioner, once travel and other expenses are taken into account, to make a loss. That should never be the case in respect of trained and experienced professionals, but it is a fact. Barristers take pride in their work and the fact that they are part of a respected profession with a long tradition of the highest intellectual and ethical standards, representing their clients (the State or the individual) without fear or favour. That commitment is based upon a fundamental belief in the Rule of Law. The consultation paper completely overlooks the essential contribution of the criminal Bar to the functioning of the Criminal Justice System, instead treating advocates as adversaries profiting from a bloated legal aid system.

15. Barristers in independent practice prosecute as well as defend. At present 75% of serious cases are prosecuted by Barristers in independent practice rather than in-house advocates. The proposals in Chapters 4 and 5 threaten the continued existence of the independent criminal Bar, and that should be a matter of concern to not just the Secretary of State, but the public at large, who would wish to see dangerous individuals prosecuted to the highest standards. The independent criminal Bar is a valuable resource at the disposal of the

public. Barristers do not just help to ensure that the innocent are acquitted; they help to keep the streets safe by ensuring that the guilty are convicted.

The Rule of Law

16. No one enjoying democratic freedom would argue about the fundamental importance of the Rule of Law. As defined by Lord Bingham, the Rule of Law is the principle under which:

*'All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made ... and publicly administered in the courts.'*¹

17. In the UK, this is a long established principle. In 1215, Magna Carta began to enshrine many fundamental rights (then described as liberties) in our unwritten constitution:

Chapter 39: *'No free man shall be seized or imprisoned or stripped of his rights....except by the lawful judgment of his equals or by the law of the land.'*

Chapter 40: *'To no one will we sell, to no one deny or delay right or justice.'*

18. The right to a fair trial is, as Lord Bingham states, *'a cardinal requirement of the Rule of Law.'*² It has been described in the Court of Appeal as *'the birthright of every British citizen'*³ and in the Privy Council as *'fundamental and absolute'*⁴ In European jurisprudence, Article 6 of the European Convention on Human Rights, the right to a fair trial, is intended to enshrine *'the fundamental principle of the rule of law.'*⁵

¹ Bingham *The Rule of Law* 2010, Ch 1.

² Bingham *Op Cit*, Ch 9

³ *R v Bentley* decd [2001] 1 Cr App R 307 at 344

⁴ *Brown v Stott* [2003] 1 AC 1

⁵ *Salabiaku v. France* (1988) 13 E.H.R.R. 379

19. The Human Rights Act 1998 gives effect in domestic law to the rights and freedoms guaranteed under the ECHR, article 6 of which states (emphasis added):

- i. In the determination of his civil rights and obligations or of any criminal charge against him, **everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.** Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- ii. **Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.**
- iii. **Everyone charged with a criminal offence has the following minimum rights:**
 - iv. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - v. **to have adequate time and the facilities for the preparation of his defence;**
 - vi. **to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;**
 - vii. **to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**
 - viii. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

20. These fundamental principles of the Rule of Law and the right to a fair trial are safeguarded by the courts. The government as much as the citizen is bound by and entitled to the benefit and protection of the law. Access to justice is guaranteed in this country firstly, by an independent judiciary: Judges (experienced practitioners, usually from the Bar, appointed to the Bench), who on appointment swear to:

'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.'

And, secondly, by representation by a profession of independent, specialist advocates. As Lord Justice Gross, Senior Presiding Judge for England & Wales, has recently stated:

*'An independent Bar guarantees the fearless representation of those who most need it; as with an independent judiciary, it is difficult to conceive of the survival of the Rule of Law, without an independent Bar.'*⁶

Criminal Bar – Experience, Expertise and Competition

21. Barristers may only accept instructions in a case appropriate to their experience and expertise. That experience is forged over many years of training and practice. Following academic success in undergraduate and often post graduate disciplines, professional qualification through the Bar Professional Training Course and professional education provided by membership of one of the Inns of Court, followed by pupillage in a set of chambers (a 12 month apprenticeship with a number of experienced Barristers), the young Barrister gradually gains in experience by taking on small cases in the lower courts, before moving on to accepting more demanding work in the Crown Court and beyond. That experience is daily augmented by being in cases with more experienced practitioners and by

⁶ 'A View Across The System' Sir Peter Gross to London Common Law and Commercial Bar Association, 21st November 2012, para 17

being 'led' by a more senior Barrister or Queen's Counsel. In time, the Barrister will in turn lead more junior Barristers and so learning and experience is passed on.

22. Whilst self-employed and in independent practice, the Barrister typically works from a set of chambers where collegiality fosters learning and best practice. This is underpinned by the continuing professional development required by the Bar Council and Inns of Court. The traditions and courtroom dress of the Bar may seem quaint (though necessary, we maintain, as well as important in maintaining the high public perception of our criminal courts both in this country and worldwide), but anyone observing the white heat of the adversarial system at work in court, whether the case be one involving international terrorism or fraud, child abuse or murder, will have no doubt as to the forensic skill and expertise of the practitioners instructed in the case. It is not by accident that the Bar of England and Wales enjoys such a high reputation across the world for its expertise and ethical standards.
23. Competition – by quality rather than merely by price as the MoJ now intend – has always been a feature of practice at the Bar. Practitioners are 'only as good as their last case'. If they underperform they are unlikely to be instructed again. Moreover, the Barrister's reputation amongst his/her colleagues and the judiciary is damaged if his/her conduct falls below expected standards. Ultimately, the practitioner is regulated and must comply with the profession's Code of Conduct. This stipulates, *inter alia*, that a Barrister:

'must not engage in conduct, whether in pursuit of his profession or otherwise, which is dishonest or otherwise discreditable, prejudicial to the administration of justice, or likely to diminish public confidence in the legal profession or the administration of justice;'

and that he/she:

*'must promote and protect fearlessly and by all proper and lawful means the lay client's best interests - and do so without regard to his/her own interests or to any consequences to him/herself or to any other person (including any colleague, professional client or other intermediary or another Barrister, the Barrister's employer or any authorised body of which the Barrister may be an owner or manager).'*⁷

24. In addition to the demands of daily practice, many Barristers undertake additional areas of work *pro bono*, in other words entirely unpaid. This may range from reviewing cases for appeal where legal aid has not been granted, to working for local advice centres or advising in international death penalty cases; or from in-house advocacy training for pupils in Chambers or for the Inns of Court to educational seminars and conferences. This tradition of taking *pro bono* work on top of daily practice, is typical of such a vocational career. It seems to us that more must be done to bring this to the attention of the general public. We refute the claims in the Ministerial Foreword that 'the system has lost much of its credibility with the public', and the unfair inference within the same paragraph that this is due to 'racking up large fees for a small number of lawyers, far in excess of what senior public servants are paid'. The comparator is completely fallacious as senior civil servants have a secure stream of regular income, are not responsible for their office overheads, are provided handsome pensions and other benefits from the public purse, are not responsible for paying for their continuing education, and, so far as we know, do not have to make daily decisions affecting the liberty of others. Such assertions are unworthy of a Minister embarking upon a supposedly genuine consultation exercise and should be withdrawn.

⁷ www.Barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct; Rs.301&303.

25. The criminal Barrister provides independent, expert advice and advocacy. There is no question about the efficiency or value for money of the independent Bar – if not, City Solicitors involved in commercial litigation would not continue to instruct counsel, they would recruit in-house advocates. However, practitioners, and talented law students, particularly those from diverse and disadvantaged backgrounds, are increasingly anxious that a career at the Criminal Bar is becoming financially impossible. Having experienced cuts in fees of up to 40% in the last 15 years, including 13.5% over the last 3 years alone, many criminal practitioners are leaving the Bar or are diversifying into other, non-publicly funded, work. This brain-drain from publicly funded work should be a genuine cause for concern. Many who remain are struggling financially and an increasing number have become bankrupt. Whilst the effect of the government's proposals is analysed in detail later in this response, it does not overstate our case to predict that the proposed reforms are more than likely to result in the dismantling of the profession. These proposals will wipe out the High Street Solicitor and, together with the promise of further cuts of up to 30% for Crown Court advocacy, sound a death knell for the independent Criminal Bar.

26. Ending his treatise on the Rule of Law, Lord Bingham wrote:

'In a world divided by differences of nationality, race, colour, religion and wealth, [the Rule of Law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for in the interests of good government and peace, at home and in the world at large.'

27. The Criminal Justice System exists to serve the Rule of Law, to protect the innocent and the vulnerable and to punish the wrongdoer. It is not possible, without evidence, to assess the actual cost of the government's proposals; nor is it possible to foresee all the consequences, intended or unintended, that such changes will bring. But, in an age of austerity in which cuts clearly have

to be made across the public sector, the ultimate question is, as Lord Justice Gross has recently identified:

*'How best do we avoid the danger of making short term economies which produce longer term damage to the justice system?'*⁸

28. The CBA issues this simple warning to government: once the expertise and skills honed over many years are lost, they can never be regained, nor replaced by others; and the detrimental effect on the Criminal Justice System will be immeasurable. The politicians responsible will move on and most will be forgotten; but the consequential damage to the Criminal Justice System by their actions will be permanent.

Section C Competitive Tendering and Cuts: General Observations

History of cuts

29. The history of criminal legal aid cuts since 1995 illustrates the background of 'salami slicing,' that has seen the fees for criminal practitioners dramatically reduced in recent years for both those appearing for the defence and, albeit under a separate Crown Prosecution Service ('CPS') scheme, those prosecuting. Whilst over this same period other professions and workers in the public sector (including MPs) have successfully campaigned for pay increases above the rate of inflation, the independent Bar, who, being self-employed, do not receive any benefits such as paid holiday allowance, pension or healthcare, have seen the combined effect of these cuts result in a reduction in income of 30-40%.

30. These cuts coincide with an increase in the amount of work that the practitioner has to do in any single case. These include:

- i. Written skeleton arguments (increasingly required by Judges);
- ii. Considering unused material;

⁸ Gross LJ, Op cit.

- iii. Drafting opening notes, defence statements, bad character notices, hearsay applications, applications for disclosure, admissions;
- iv. Preparing schedules for the presentation of evidence; and,
- v. Preparing jury bundles

31. This extra work that has become routine, though adding considerably to the amount of time required to prepare for a trial, coincides with a sharp reduction in the amount of support for Barristers in court: since the Litigator's Graduated Scheme was introduced in 2008, solicitors more often than not do not send a representative from the firm to attend the trial; and resources at the Crown Prosecution Service are so stretched that it is rare for a prosecutor to have assistance in court. This situation is often deprecated by judges during court hearings and trials, but has become the *status quo*.

32. Against this background, the government announces in this consultation its intention to impose on the bidder competing for a legal aid contract a requirement that any bid must be at least 17.5% below current 2012/13 rates (para 4.24); that Crown Court advocacy rates will be reduced by up to 30%; and that VHCC rates will be reduced by 30%.

33. These proposed cuts are wholly unreasonable. No publicly funded practitioner can absorb such a reduction in income. Barristers' fees are not 'their' income, but the fees that support their business. They have staff to pay, commercial rents and other business expenses to bear. Barristers pay between 15 – 20% of their gross fee income to their chambers to cover these costs. In London, chambers contributions can be even higher. On top of chambers expenses, are their personal business-related expenses, such as travel, professional insurance, etc. The inevitable consequence of such draconian cuts will be that able practitioners will simply give up publicly funded work.

34. The inexorable conclusion of this policy will be that in a very short period of time only those who can afford to pay for representation in criminal proceedings will be able to instruct an experienced advocate. This strikes at the heart of the Criminal Justice System. But it will not only affect criminal defence work. The Crown Prosecution Service and other prosecuting authorities will be similarly affected. Who will apply to become Treasury Counsel in 10 years time? Whom will the Crown Prosecution Service be able to instruct to prosecute the accused terrorists, murderers, rapists and fraudsters of the future? The general public, once they appreciate the reality, will be deeply alarmed, and the evidence shows that they are becoming so. There will be many more appeals arising from mistakes by the prosecution or defence, and more miscarriages of justice.

The Government Case for Reform Analysed

35. The government's starting point is that the legal aid bill is simply too high. We have, they say, one of the highest legal aid bills in the world. That as a sound bite may be politically convenient, but it is misleading in part and does not lead to the conclusion that putting legal aid out to private tender is the solution, nor that fees should be cut further.

Comparison of Legal Aid spending

36. It does appear that England and Wales spends more *per capita* than any other country in the EU (save for N Ireland). However this fails to take account of the different legal systems used in Europe, includes figures for countries whose record on criminal justice does not inspire confidence (notably Russia) and does not incorporate the aggregate costs of administering the judicial system (i.e. the costs of courts and prosecution). When those costs are factored

in, the figure for spending in England and Wales is well below the highest in Europe.⁹

37. Comparisons with other jurisdictions are problematic and require understanding of the proportion of costs that legal aid holds in relation to the aggregate spend on the country's criminal justice trial system. Firstly, they are not like for like systems. Unless England and Wales ('E&W') changes from its adversarial system (which many continental jurisdictions such as Italy and France are now seeking to emulate), the aggregate costs of courts, prosecution and legal aid need to be factored in for a fairer assessment to be made. The E&W adversarial system places more emphasis on the role of the defence (litigators, advocates, experts) and less on the court and prosecution-led inquisitorial approach of civil law jurisdictions, hence the E&W spend on courts and prosecution is lower than most countries in the EU, save for Russia and Denmark. The aggregate spend across the trial system is lower in E&W than it is in The Netherlands, Sweden and Slovenia and only slightly higher than Italy.

38. The CBA does not accept that the driver for criminal legal spend either is, or should be, a figure based upon comparative spend per capita. The true driver of criminal legal aid spend is the ever more complex legal framework within which practitioners must work, but for which legal aid lawyers are not responsible .

39. Looking further afield, it would be useful to have further research into the position in Australia, where the independent Bar has suffered similar threats to its existence (increasing work being undertaken by solicitor advocates and the DPP briefing in-house) and where 'Licensed Access', akin to our 'Direct Access' has been considered. Whether further research into the position in

⁹ See Appendix B, '*Review of empirical evidence on Legal Aid Spending in England and Wales and broader developments*' Professor Roger Bowles, Director of Centre for Criminal Justice, Economics and Psychology, University of York, 2012

New Zealand, with only 850 criminal legal aid lawyers, might be illuminating, is unknown. The position in the US, where the District Attorney versus public defender system cannot be plausibly put forward as a functioning and efficient model, suggests that the fee structure is designed in such a way as to provide a greater incentive for the public defender to encourage an early guilty plea regardless of the merits of the case, so as to relieve the pressure on their workload. A comparison with the United States is considered in greater detail below.

40. Far from the criminal legal aid budget “spiralling out of control”, in fact, spending in E&W on criminal legal aid in both the lower courts (Magistrates’) and higher courts (Crown and appellate) has in fact fallen in recent years. Significantly, payments to advocates in the Crown Court, under the graduated fees schemes, have been reduced by some 15% (from £284 million to £241 million) and the costs of appellate work have also fallen.
41. In 2009-10, the total criminal legal aid spend was £1.205 billion. This reduced to £1.129 billion in 2010-11, and to £1.08 billion (see Annex F to the consultation at page 124) in 2011-12¹⁰. The statistics for 2012-13 will not be available until July, but it is expected that there will have been a further drop in expenditure. Figures are likely to show that criminal legal aid expenditure will have fallen by more than 20%, in four years. As further cuts in April and October 2012 work through the system, allied to falling crime rates and increasing non-court disposals, the downward trend is inevitable. Accordingly, there is no justification based upon past and present expenditure, for further cuts to criminal legal aid rates, or to structures, such as the introduction of PCT/BVT.
42. Projections for the future level of spending on legal aid are difficult to find, beyond MoJ projected spending figures which indicate that the government’s

¹⁰ Legal Services Commission Annual Report 2011-12

plan is to reduce spending on legal aid by £450 million per year. However, the Government's own impact assessment suggests unquantifiable knock on costs, including (but not limited to) reduced social cohesion, increased criminality and increased costs to other Government departments. The Justice Select Committee has already noted that the scale of these costs has not been estimated.¹¹

43. The Government (Labour in 2009/10, and now the Coalition) has concentrated on the average cost of cases per day in terms of court time and cost and legal aid (in summary, the average unit cost of a case in the magistrates' court: £60 for a summary case involving a guilty plea, £372 for a contested trial, £479 for an either way offence contested trial; in the Crown Court: guilty plea £773, cracked trial £1,096, contested trial £1,700). These figures however do not reveal the true cost, social and economic, of criminal cases coming to court (including time costs to victims, witnesses, police and defendants). Other research from data in the magistrates' court reveals that the largest single component of unit cost is the cost of holding a defendant on remand. The emphasis on analyzing individual stages or unit costs produces an incomplete picture and fails to address the question: if cuts are made to one segment, what effect will that have on another or the whole?

44. When the spend on legal aid is examined as a component of the economic and social cost of crime, a very different picture emerges. The costs of administering justice ought properly to be compared to the other social and economic costs, related to crime: anticipatory costs borne by the State and the citizen (particularly the cost of the police service); the consequential cost of crime for victims; and the cost to the State of keeping defendants on remand

¹¹ Justice Select Committee '*Government proposed reform of legal aid*' House of Commons March 2011.

and convicted criminals in prison. When seen in this context, the spend on legal aid is a small fraction of the overall cost of crime.¹²

Is Price Competitive Tendering the answer?

45. The consultation paper asserts a 'belief' that competitive tendering is 'likely to be the best way to ensure long-term sustainability and value for money in the legal aid market (para 4.3). This is based on the MOJ's 'view' that 'competition is the best way to promote value for money, innovation and efficiency'. A similar view was presumably taken when granting the security contract to G4S in the 2012 London Olympics. This is often the view of government departments, seemingly for two reasons: the government can impose a bidding ceiling, so that a cut in overall expenditure is guaranteed and a belief that a market-based approach to providing services *will* provide similar delivery of services more efficiently and cheaply. However, the Criminal Justice System is not a *service* that is provided and there is no customer, it is a *system*, which incorporates multifarious parts, including police, prosecution, defence, courts, judiciary, probation and prisons.

46. The awarding of the contract for court interpreting services to ALS/Capita in August 2011 as a case study is a sobering reminder to proposers of competitive tendering of what can go wrong. As the Justice Select Committee reported earlier this year¹³:

'The level of concern that arose during the consultation process regarding the potential diminution of quality standards... suggest that the Ministry of Justice was determined to pursue the implementation of the Framework Agreement in the face of evidence that it would reduce the quality of language service available.'

... 'our evidence strongly suggests that the Ministry of Justice did not have a sufficient understanding of the complexities of court interpreting work and failed

¹² See Appendix C Prof Roger Bowles: 'Supporting diagrams for the analysis of the costs of legal aid.' University of York, December 2012.

¹³ HOC Justice Committee: Interpreting and Translation Services... 6th Report of Session 2012-13, published 6th February 2013.

to properly anticipate or address the clear potential for problems with ALS' capacity to deliver on its promises. In our view the evidence shows that ALS failed to deliver on many aspects of the Agreement and did not implement appropriate safeguards to ensure that the interpreters it provided were of sufficient standard. In particular, ALS clearly needed significantly more resources than it had at its disposal to deliver the service levels required.'

... 'ALS and more recently Capita have been unable to recruit qualified and experienced interpreters in sufficient numbers, leading to an inadequate volume and quality of interpreting services being available to courts and tribunals. This has resulted in numerous hearings being adjourned or severely delayed and, in criminal cases, unnecessary remands into custody, with potential implications for the interests of justice.

... 'We are concerned that existing safeguards of quality may not be fit for purpose, and consider it likely that without an independent review and subsequent revision of the tiering system, the confidence of important stakeholders, including the judiciary, magistracy and legal professionals, will continue to be undermined. The existing arrangements may not be financially sustainable as Capita is propping up the continuation of the Agreement, which mean that the Department's savings, originally projected to be £15million, are effectively being secured at the company's expense.'

... 'The Ministry of Justice and its contractor appear to have buried their heads in the sand. Many of the concerns that interpreters raised regarding the nature of the new operating model were realised during implementation, were utterly predictable, and should have been properly considered from the outset.'

47. There are two obvious and fundamental objections to the government's proposals for competitive tendering. Firstly, the competition to provide legal aid work is only a competition to bid *for* the contract; once awarded the contractor has a protected market, with exclusive access to the client who is deprived of choice. Furthermore, if the contract winner manages to avoid a G4S Olympic-style disaster, that company will ultimately have specific knowledge of the market and be in a dominant position when the contract is

up for extension or renewal, so true competition is eliminated. The high street solicitors who currently deliver criminal legal aid services locally will have been driven out of practice, and there will be no-one with a background or expertise in the delivery of criminal legal aid work, in a position to bid against the existing providers in the second round. The government should be very wary of restructuring the delivery of criminal legal aid in this way. Secondly, where there is such seismic structural change, without any proper independent analysis or piloting, there is no basis for concluding that there will be in fact such economic savings; nor for predicting the economic and social consequences.

48. Solicitors provide a 'front line service': police station advice, lower court advocacy (in the main) and litigation support to those with real need from the moment the individual is detained by the State. Criminal Barristers are in turn instructed by solicitors for their independence, expertise and impartiality. They provide high quality, efficient and affordable advocacy. Under MoJ proposals, contract winners will be driven to cut costs to maintain profitability and will necessarily have to recruit in-house advocacy 'services' at low cost (on top of the 17.5% ceiling already required by the proposals). This will certainly have a deleterious effect on quality. Who will take these low paid advocacy service jobs? Those with ambition and ability will be driven into better remunerated areas of legal practice. This is not idle speculation: members of the Criminal Bar are already leaving Chambers or diversifying into other areas of work.

49. Equally foreseeable but unquantifiable consequences of lower quality advocacy include longer trials (an inexperienced advocate is likely to be less discriminating in relation to points taken, with time needed during the trial to prepare them); and more frequent appeals due to inadequate representation. Moreover, Judges rely upon the expertise and professionalism of the Bar for the smooth running of a trial and may count on counsel throughout the trial,

for example to prepare a skeleton argument overnight on a point that has suddenly arisen or to assist in agreeing the legal directions required for the summing up. With less experienced advocates appearing before them, judges, in addition to their already onerous task to ensure a fair trial, will be placed under increased pressure to superintend and intervene. In addition, defendants, deprived of choice or unhappy with their appointed advocate, may increasingly choose to defend themselves. The risk of longer trials and aborted trials inevitably increase with an unrepresented defendant.

Lessons from the USA

50. Although a very different jurisdiction from ours, comparison with the American justice system is illuminating. Despite the constitutional right contained in the 6th Amendment to legal representation, a reluctance to spend public funds on legal aid has led to different States creating a variety of 'indigent' defence systems. Each has serious deficiencies. Traditional 'Public Defender' programs have been shown to be severely underfunded, resulting in excessive workloads, ineffective representation and a push to plea bargain.¹⁴ Assigned Counsel models present a conflict of interest where a judge or court official appoints the advocate and there is criticism of attorneys with inadequate skills and experience being appointed.¹⁵

51. The contract system, where private attorneys contract with the government to represent indigent defendants, is increasingly used and is perhaps the most instructive comparison. Various models are used to contract out such publicly funded work, including Fixed Fee, Flat Fee, Capped Hourly Fee and variants thereof. However criticism centres on two principal areas: a decrease in

¹⁴ See 'State, County and Local Expenditures for indigent Defense Services Fiscal Year 2008', The Pangenburg Project (2010); 'Gideon at 50: Three Reforms to Revive the Right to Counsel', Texas Public Policy Forum (2013); 'Ten Principles of a Public Defense Delivery System 2 (2002) American Bar Association; and 'Broken Justice: An Overview of the American Public Defender System' Hinshaw, University of Iowa (2013).

¹⁵ Thomas H Cohen, 'Who's Better at Defending Criminals', National Bureau of Justice Statistics (2011).

quality of representation – low fees resulting in less time spent on preparation and undue pressure on the defendant to plead guilty (the attorney makes more money the less time spent on a case and particularly where a case pleads rather than goes to trial); and, it is increasingly difficult to attract bids for this work from suitably experienced private attorneys¹⁶

52. The likely implication of a move in this jurisdiction towards a low fee, market-based approach is that the market will behave in a similar way as in the US, i.e. to minimize cost and maximize profit. The potential cost in terms of quality of representation is palpable but immeasurable. The consequential loss to the integrity of our Criminal Justice System is irremediable. A glance at the caseload of NGOs such as Amicus, Reprieve and Amnesty International dealing with US death row cases, where the principal ground of appeal is the quality of representation, should make anyone proposing to dismantle and reconstruct the legal aid system in this country pause. It is ironic that while visiting American jurists frequently express their admiration for our Criminal Justice System, the MoJ is contemplating emulating the American public defence system.

Lessons from Chile

53. In its haste to impose wholesale changes to the UK legal aid system, the Government has failed to undertake any analysis of similar or alternative systems in other jurisdictions. One obvious example would be Chile, which has as recently as 2000 established a new, post-dictatorship system based on a mixed model of public and private practitioners under its democratic constitutions. The model has in-built safeguards against operational abuses by monopolies. Furthermore, in a country where General Pinochet decimated the Bar, the system has had to ensure that individual lawyers are appropriately experienced not only to bid for a contract but also for the type

¹⁶ Schulhofer and Friedman: 'Reforming Indigent Defense: How Free Market Principles Can Help a Broken System' (2010)

of case they wish to conduct. Lawyers are also, unlike their colleagues in the US, incentivised to have a proper balance of casework, in order to insure against the overloading of casework that leads to poor preparation and downward pressure on the accused to plead guilty; and independent assessors monitor increases in guilty pleas and decreases in acquittals. Whilst, Chile is working with the blank canvas that a new democracy allows, they may have seized upon a model which allows for an element of price competition, but have also sought to ensure that it is not purely market driven and to ensure that quality and experience on the one hand and client choice and protection on the other are safeguarded. The UK Government's current proposals have not properly addressed these issues.

Competitive Tendering in the Crown Court

54. Although the government is not minded *at the moment* to subject Crown Court advocacy to the proposed competitive tendering process, it is naïve to believe that competitive tendering will not be the natural next stage in cutting costs. The consultation document acknowledges that the independent Bar is not in a position to compete in such a tendering process (para 2.8), however it is axiomatic that the Bar will be in an even worse position in future years, when successful bidders will be seeking to extend their contracts. Furthermore, it is inconceivable that contract winners will not seek to keep the majority of their work in-house to maximize profits.

Further Cuts

55. The additional cuts proposed to the existing graduated fee and VHCC schemes, coming on top of those already implemented over the last 15 years, are simply unconscionable. The proposals are not only unreasonable in principle but their effect will cause lasting and irreparable damage to the profession and, for the reasons submitted above, consequentially to the Criminal Justice System. Despite the government's assertion that 'the Bar is a well respected part of the legal system in England and Wales and we will

have due regard to the viability of the profession in reaching our final decision on the model for competition', the long term sustainability of the independent publicly funded Bar is impossible to envisage.

Section D Specific responses to questions

56. We now turn to consider the specific questions posed within the consultation paper. The consultation is not limited to criminal legal aid. There are some proposals, for example within Chapter 6 'Reforming fees in civil legal aid' regarding which we, on behalf of the CBA, are not best placed to comment. We therefore defer to others, most notably the Response submitted by the Bar Council of England & Wales.

57. There are some proposals, even within those Chapters directly affecting criminal legal aid, where solicitor representatives are better placed than the criminal Bar to assess and to comment. One such example is Question 22 within Chapter 4, which relates to proposals that applicants be required to include the cost of travel and subsistence disbursements when submitting bids. We defer to solicitor bodies in this regard, and observe again that the MoJ proposals will dismantle the provision of litigation services by experienced and dedicated specialist firms of solicitors throughout the country, and the effect will be irrevocable damage to the Criminal Justice System.

58. To any who might have believed that the CBA would submit a response which went no further than financial self-interest, we say they should think again. As with our solicitor colleagues around the country, we place the Criminal Justice System above narrow self-interest. That much should be clear from the tone and content of this response.

Chapter 3: Eligibility, Scope and Merits

1) Restricting the Scope of Legal Aid for Prison Law: (Paragraphs 3.4 to 3.22)¹⁷

Q1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

59. The proposal is to reduce the scope of criminal legal aid for advice and assistance in prisoner cases to those cases where the length of detention is in issue (parole cases, adjudication cases where Article 6 is engaged and minimum tariff determinations) (para. 3.14).

60. Criminal legal aid will no longer be available in any treatment cases¹⁸ at all (para. 3.17).

61. Matters that are currently designated as ‘sentence cases’ related to issues such as categorisation, segregation, close supervision centre cases and dangerous and severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions would no longer be funded under criminal legal aid. Only sentence matters concerning the length of detention would be in scope (para 3.18). There will be no criminal legal aid for sentence matters within scope unless evidence is supplied that the matter cannot be resolved by the complaints system (3.21)

62. No funding will be provided for adjudications, which do not involve an Independent Adjudicator or meet the *Tarrant* criteria (i.e. appeals or written

¹⁷ There are also proposals for prison law to fall within the ambit of the competitive tendering proposals, albeit that prices will be administratively set and reduced by 17.5 per cent: this will fundamentally alter the solicitor base for this area of work and affect their ability to instruct counsel at reasonable rates.

¹⁸ These are cases involving legal issues relating to a prisoner’s treatment in the prison system, but not issues relating to sentence. Since July 2010, such cases have been subject to prior approval

representations will be excluded). There are no exemptions for children or other vulnerable prisoners.

Rationale

63. The Secretary of State asserts¹⁹ that the relevant principle purporting to underlie these proposals is to “make certain that legal aid is not funding...cases which are better dealt with outside court” and further “Prisoners who wish to challenge their treatment in custody will have recourse to the prisoner complaint procedures rather than accessing a lawyer through legal aid”. The reforms are said to be intended to “both boost public confidence in and reduce the cost of the legal aid system”.
64. The reason for the removal of advice and assistance in treatment cases from the scope of criminal legal aid is said to be because the MoJ considers that “such cases are not a sufficient priority to justify the use of public funds”.
65. The paper asserts that “due regard” has been had “to the impact on individuals sharing protected characteristics, including those with learning disabilities and/or mental health issues” and notes that “The National Offender Management Service is committed to the provision of comprehensive screening to ensure that all prisoners with learning difficulties are provided with reasonable adjustments thereby enabling them to use the prisoner’s complaints system” (3.17). However, the reality is that no such screening programme exists, indeed reasonable adjustments for prisoners with learning disabilities in provision of offending behaviour courses essential to release have to date only been obtained through resort to the courts.

¹⁹ In the Ministerial foreword to the consultation document.

Response

66. The reduction in scope of criminal legal aid for prisoner cases amounts to the wholesale denial of access to the justice system for those amongst society's most marginalised group.
67. What occurs within the prison system necessarily happens "behind closed doors" and is largely hidden from public view. It may not be a popular wing of the state, but it is one which, as the Minister himself acknowledges, must be fair, open and humane (3.10). The courts play a vital protecting role in scrutinising allegations of abuse. This is important, not only in the individual case, but also in ensuring that the system as a whole is accountable and subject to the rule of law.
68. Price competitive tendering for criminal contracts will eradicate specialist prison law providers. At present, a number of well-respected providers have stand-alone contracts with the Legal Aid Agency which allow them to specialise in prison law without undertaking general crime work. The proposals will end this option. Such providers will not be in a position to bid for criminal contracts nor will it be economic for those who win criminal contracts to employ specialist prison lawyers to do the prison law that remains within scope. At present there is no proposal for quality control and the only financial incentive is for such work to be covered as cheaply as possible.
69. These proposals will have a hugely detrimental effect on prisoners, their families and the administration of the prison system in exchange for little if any financial saving. Lord McNally states that the government "believes" that these proposals will make savings of £4m, but the MoJ has repeatedly failed to set out how this figure has been calculated. Further, any purported saving must be offset against the knock on costs if prisoners act as litigants in person both to the courts and the MOJ in escort costs as well as a dramatic

increase in applications for exceptional funding, simply shifting the cost to public funds elsewhere. As Lord Justice Ward recently observed in *Wright v. Wright* [2013] EWCA Civ 234:

*“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 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).**”*

70. Article 6(3) of the European Convention on Human Rights identifies the notional right of a defendant “to defend himself in person ...” Crucially, however, that notional right may well be but illusory.
71. A person who chooses to exercise the right cannot pray in aid the ordinary and anticipated disadvantages of his choice (lack of knowledge of the law, lack of experience of the trial process and lack of forensic skills) in support of

an argument that there was such inequality of arms at trial as to render his conviction unsafe: *R. v. Walton* [2001] 8 Archbold News 2, CA.

72. The right to a fair trial, pursuant to Article 6, has been cited in full earlier in this Response.
73. The adequacy of the internal prison complaints system - which the Secretary of State advances as a sufficient safeguard - has to be seen in the context of a prison population where 20-30% of all offenders have learning disabilities or difficulties that interfere with their ability to cope with the Criminal Justice System²⁰. Therefore, unaided access to the complaints system is not an adequate alternative. This is amply demonstrated by the many successful judicial reviews brought by prisoners following the negative conclusion of the complaints procedure.
74. The Prison and Probation Ombudsman ('PPO'), who has oversight of the complaints system, only has the jurisdiction to make recommendations and cannot make any enforceable decision. Further the period of response for complaints to the PPO makes it inappropriate for resolution of urgent issues and, as the Minister himself acknowledges, "these are not decision-making bodies and are able to make recommendations to establishments only" (3.11).
75. Decisions taken about security categorisation or segregation have profound effects on prisoners. Categorisation decisions are particularly significant for indeterminate sentence prisoners, who are detained indefinitely such as life sentence prisoners or those detained for public protection. An unfavourable decision about categorisation can add years to the period a prisoner will be detained even though the punitive part of the sentence - that attributable to proportionate punishment - has expired.

²⁰ Loucks N (2007) No one knows: Offenders with learning difficulties and learning disabilities. Review of prevalence and associated needs, London: Prison Reform Trust.

76. It is accepted for instance that a Category A prisoner's prospects of being released on parole are "virtually nil" and that decisions concerning the retention of Category A status for indeterminate sentence prisoners directly engage the liberty of the subject. The courts have held that in certain cases fairness requires that an oral hearing be held to determine a prisoners continuing suitability for Category A. The Director of High Security has never held an oral hearing without being ordered to by the courts, which he has been on many occasions. No internal complaint can be pursued against the Director (as his decision cannot be overturned by the prison governor). In none of the successful cases where an oral hearing has been ordered has the court accepted (nor as far as we are aware has it been argued by the Defendant Secretary of State) that the Claimant should have pursued a complaint to the Prison and Probation Ombudsman before taking judicial review proceedings. There is a real danger that the eradication of specialist prison law providers will mean that important cases of this type will not be picked up, even where they remain within scope.

77. Segregation decisions have an even more immediate impact on a prisoner. The conditions in the segregation regime are extremely challenging and can have profoundly deleterious psychological effects. Such decisions are often based on information provided by other prisoners which may be entirely fabricated, or otherwise inaccurate. Ensuring that these difficult decisions are taken fairly is clearly of the utmost importance.

78. Issues concerning prisoners release on temporary and final licence also affect a prisoner's prospects of rehabilitation and prospects of release. Successful completion of a period of release on temporary licence ('ROTL') by a prisoner is in most cases a pre-requisite of release on parole from open conditions and an important step in their rehabilitation into the community to obtain

employment skills and experience and to maintain contact with their family, a recognised factor in reducing recidivism.

79. Referrals to Close Supervision Centres ('CSC') and to the Dangerous & Severe Personality Disorder ('DSPD') Unit are to be excluded from the scope of funding. A prisoner's placement in a CSC is required by the Referral Manual to be a '*final option*' and last resort in attempts to manage a prisoner. It is a highly restricted environment which is clearly incompatible with a view that a prisoner can be progressed to less secure conditions. An inappropriate referral to the CSC or the DSPD Unit can delay a prisoners release by a significant period of years.

80. These are just some examples of how the areas that will be taken out of scope of criminal legal aid can have the most profound effects on the lives of prisoners. There are many, many others. Without access to advice and assistance from lawyers with the necessary specialist knowledge it is very unlikely that prisoners will be able to obtain any meaningful redress.

2) Imposing a financial eligibility threshold in the Crown Court

Q2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court

81. There may be no difficulty in principle with the introduction of a financial eligibility threshold on applications for legal aid, but we consider that this proposal is at best premature. Further changes should not be made to Crown Court eligibility before the impact of the current (but only recently introduced) Crown Court means testing scheme has been assessed. It is poor governance to press ahead with further changes to eligibility when the current eligibility scheme has not been reviewed (para 3.40) and neither the reductions to the cost of legal aid as a result of the Legal Aid, Sentencing and

Punishment of Offenders' Act 2012 (LASPO) nor the lack of any increases to take account of inflation have been properly analysed and costed.

82. It will be crucial that the threshold is set at the correct level. The difficulty here lies in two areas: the first is that the current proposal is premised on the fact that the average case costs £5,000 and that private rates will be "similar to, legal aid rates". The second, is that this measure will only affect the funding for approximately 200 cases a year. The question is whether the administrative burden involved will outweigh the benefit to the taxpayer such that this measure is not proportionate.

83. Dealing firstly with the cost of private representation. The ECHR obliges the government to provide legal assistance in the Crown Court where a person cannot afford to pay for representation him or herself. The current proposal is based on the 'average' case which is said to cost £5,000. Fees charged in the private market are greater than the legal aid rates. For example, all of the fees cited at para 3.30 are in excess of £5,000. A person may be able to afford £5,000 to pay for his legal representation but depending on the length of the trial and the work involved, he may not find legal representation at that rate. If a person is unable to fund representation at the private market rate then it is the duty of the state to provide assistance. This proposal can only function if the government accurately identifies the cost of representation in the private market and correctly, and swiftly, identifies whether or not the applicant for legal aid can truly afford to pay. The cost of funding a private defence outside legal aid has not been properly considered by the MoJ and this proposal risks leaving many people with no choice other than to represent themselves.

84. Self-representation carries with it many problems in Crown Court trials. The most important of these is the greater risk of a miscarriage of justice, either through a failure to understand the law, a failure to appreciate the forensic

importance of a piece of evidence, or an inability to test its reliability adequately. In addition to this, difficulties include the delay caused in proceedings because defendants are unfamiliar with the law and procedure, which necessarily impacts on those complainants and witnesses who are liable to cross-examination at the hands of a litigant in person. In cases involving sexual offences or child witnesses, the court will have to appoint counsel to conduct the cross-examination of such vulnerable witnesses on behalf of a self-represented defendant. Whereas all litigants in person are at a clear disadvantage when compared with the prosecutor supported by the resources of the state, in such circumstances that disparity and inequality is particularly acute. The proposals as currently drafted do not make provision for vulnerable defendants, and the Criminal Justice System at present relies upon defence lawyers to identify them and to bring their plight to the attention of the court so that special measures may be ordered to assist them. Who now will step in?

85. If a person faces a trial which will cost more than the average then that person is likely to be entitled to legal assistance, provided by the state. If that is the case, then procedures must be in place to ensure that there is no delay in providing that person with assistance. Any significant delay could lead to a breach of Article 6 of the European Convention on Human Rights, a re-trial or a claim against the government for compensation.
86. Difficulties may also arise where circumstances change, for example where a trial lasts longer than anticipated. Time can frequently be lost for a number of reasons, including the late production of defendants by prison escort vans, juror illness or as a result of the late service of a large quantity of evidence. If it becomes apparent mid-trial that a person can no longer afford to pay privately for his defence, it is imperative that reviews be undertaken swiftly to ensure that trials are not disrupted. The Legal Services Commission has not had a good track record in the rapid processing of claims for legal aid.

Circumstances may also change should the defendant lose his or her source of income and the Legal Aid Agency must be able to put legal aid in place rapidly in such circumstances in order to avoid costly delays.

87. It is of concern that there are no concrete or considered proposals to deal with any of the above circumstances, nor does the consultation paper contain any detail as to how the hardship review would function in practice, nor for any appeal mechanism. In our view this is imperative.
88. If, this proposal is implemented in our view the only workable solution to the problems of self-representation by defendants satisfying the financial threshold but unable to pay for legal representation and of delays pending adjudication of a legal aid application would be a presumption that those who are facing a trial that will cost above £5,000 will be granted legal aid. That is not to say that that this presumption could not be displaced upon proper analysis of the applicant's income and financial obligations. However, this is the only measure which would both guarantee the applicant's rights under the ECHR and achieve fairness for the taxpayer. If it is concluded that the applicant can in fact fund his or her own defence then any funds expended on his or her defence to date can be refunded.
89. Turning to the second issue, the true benefit to the tax payer, the consultation paper notes that this measure would avoid the tax payer funding only some 200 cases a year. There is no evidence that the administrative complexity and burden of assessing disposable income as well as hardship claims in 200 cases would in fact be outweighed by the savings.
90. The consultation paper does not tell us how many of those 200 cases are likely to involve a trial which will cost more than £5,000. Therefore, the number of cases may be significantly reduced. Furthermore, it makes little difference to the tax payer whether payments from an accused are re-paid to the state over time in the way of contributions (as per the current system) or whether the

accused person pays for his or her own representation from the outset. One system provides protection for the accused person who has dependents to care for or faces a lengthy trial, while ensuring there is no delay in the progress of the case; risks breaching the fundamental right to legal assistance, the principle of equality of arms with the prosecution, and incurring further delay as cases do not progress for lack of a decision on legal aid. Viewed in this way, this proposal simply tinkers with the current system, providing little additional benefit comparatively speaking for the tax payer whilst placing some accused persons at risk.

91. The rationale for preventing those who privately funded their defence in the Crown Court being reimbursed (from 1 October 2012) was that all defendants were eligible for legal aid and thus there was no need for them to incur these costs. Under the current proposal legal aid will not be available to a greater number of defendants and they will be forced to privately fund their defence. We maintain that limitation to reimbursement makes no logical sense save to say “we the State are not funding your costs even though you were acquitted because we do not want to.” For those who, notwithstanding their eligibility for legal aid might have preferred the private market this will be a disincentive, increasing the likelihood that they will simply opt for legal aid.
92. Those who are not eligible for legal aid but are far from wealthy may in certain situations be inclined to raise a loan to fund their defence if there is some prospect of that loan being a burden on them and their families for only a limited time in the event of their acquittal. The government’s proposed restriction on reimbursement will inhibit such a person going to the private market and doubtless increase the number of defendants forced to represent themselves which as referred to above will incur far greater costs than any which might be saved.

93. The Government yet again has ignored the reasoned approach as suggested by the Bar Council last year in their response to the consultation paper on the LASPO Bill, namely that they should allow restrained assets, subject to judicial control and with appropriate capping, as a source of funding for the defence of criminal proceedings.
94. A defendant accused of serious fraud may have £1m on deposit in a bank account, frozen under a restraint order. At present he is unable to access these funds, so legal aid has to fund his defence to criminal charges. An order may, however be made for the funds to be unfrozen to pay his children's private school fees. In contrast, in the civil courts, restrained assets can be used to pay the costs of representation under the supervision of a Judge.
95. The Government's proposal in respect to restrained assets continues to lack any sense of reality but this time the consequences will be grave and far reaching when considered within the context of all other proposed changes. The economy sought to be made by this proposal is a false one. The impact will raise two real and costly problems for the courts and the Government.
96. Even with a grant of legal aid this area of work is wholly unattractive even at current legal aid rates. It is specialized, complex and time consuming. At the proposed reduced legal aid rates no Barrister with the necessary skill set will undertake this work. For those defendants unable to privately fund their defence in these proceedings, they will be left to represent themselves in an area just far too difficult and complex for the layman. A judge will not be able to assist given the nature of these proceedings and these proceedings will become simply unworkable and unlawful, there being inevitably equality of arms and fairness issues with clear breaches of Article 6.
97. The answer is to introduce the current payment regime for restraint proceedings in the Civil courts.

98. The current proposal will be unworkable. How it might be considered that this will enhance public confidence in the Criminal Justice System is difficult to understand.

99. The IA for this section notes that this proposal will have an adverse impact on those who exceed the disposable income threshold. The impact assessment is poorly written and therefore unclear. It must be treated with some caution. A large amount of data is missing as follows:

- The gender of Crown Court legal aid clients has not been recorded in 12% of cases;
- The ethnicity of Crown Court legal aid clients is unknown in 21% of cases;
- It is unknown in 28% of cases whether or not the legal aid client had a disability.

100. The data as it stands (which is significantly incomplete), indicates a higher proportion of BAME people and a higher proportion of men will be affected by this proposal. It is difficult to comment on sparse data. However, any proposal which risks removing legal aid from those who are entitled to it can only have adverse consequences, not only for the accused person but also for the public interest in avoiding injustice and miscarriages of justice and ultimately for the tax payer who must pay to put things right.

Q3: Do you agree that the proposed threshold is set at an appropriate level?

101. It is a cardinal principle, and essential to maintaining the rule of law, that no one facing criminal prosecution should be excluded from the best available legal representation. As with access to healthcare, access to justice should not depend on ability to pay. Legal aid must continue be a safeguard to all who face criminal charges but cannot afford to pay for their own

representation. Legal aid should not just be for the poorest of the poor but also those on low or average incomes. This group should not be left without adequate funds to meet their defence costs.

102. The present proposals will place those with low disposable incomes in the unenviable position of choosing between financial hardship and effective representation to defend criminal charges. A very significant number of people in this country fall within this middle bracket but after their essential living expenses, their actual disposable incomes will be modest. The costs of defending themselves will force them into debt and penury. We say it cannot be seriously suggested that this is a measure that “would further enhance public confidence in the scheme”,²¹ especially when members of the public will no longer be able to reclaim their costs if they are acquitted. The government will create a three-tier Criminal Justice System whereby the poorest of the poor obtain a cheap-rate representation within a market driven by price and not quality, where the emphasis is on adequate as compared with effective representation. Those in the average earning bracket will risk no representation at all and only the rich will be afforded effective quality representation.

103. Self-representing defendants, now rare, will become a common feature in trials. The criminal law is complicated and ever-changing. The best lawyers and judges struggle with often poorly drafted statutes, but by their skill and knowledge they deal quickly and efficiently with difficult points. As Ward LJ warned in *Wright* above, the defendant representing himself will place an enormous burden on the trial process and it is likely that that burden will simply be too much in some cases. Judges increasingly call for written submissions, supported by authorities, on points of law arising before and during the trial. Legal research now regularly includes cases from Strasbourg and other jurisdictions. It would be overwhelmingly difficult for an untrained

²¹ Chapter 3 paragraph 3.32

defendant, even an educated, mentally stable and intelligent one. For instance in a multi-handed case with 'cut-throat' defences, who is going to advise the defendant representing himself on "trial strategy" or when to make bad character applications or the like? Leaving aside whether justice can be done in these circumstances, trials will be delayed in their commencement and proceed much more slowly. Any cost saving in legal aid will be swallowed up by the additional costs of the wasted court time.

104. But this will not be the only added cost. Inevitably the rights of co-defendants are going to be compromised by unrepresented defendants who "don't know the rules". The potential for prejudice to an accused is considerable, appeals and retrials will become more prevalent , with more cost to the taxpayer, from *the MoJ's* own budget.

105. Restrictions on eligibility to legal aid in criminal cases will create a financial disaster and public confidence in the Criminal Justice System will be the casualty.

106. It follows that our response to Question 3 is "No", but to some extent the question entirely depends on the amount the applicant is likely to have to pay in order to fund his or her legal representation. Given the failure to conduct a proper analysis of the cost of private representation, we answer this question in the negative, unless there is a presumption that the applicant is entitled to legal aid where the cost of the trial is likely to exceed £5,000; as to which see above.

107. We have a number of comments to make in relation to the computation of the disposable household income. In terms of this proposal, disposable household income means total income less certain allowable expenses including tax, council tax, childcare, housing, national insurance and maintenance costs. It also includes the weighted annual living allowance of

£5,676. Set in these terms, the computation fails to take into account household bills and dependents who are not children. It also fails to take account of any medical care required for either the accused or his or her dependants or repayments of loans or any other debts (save for a mortgage). The personal living allowance amounts to around £100 per week per family. This is insufficient to take account of household bills and food. Furthermore, where a partner's gross annual income is taken into account for these purposes (a proposal with which we fundamentally disagree), their weighted annual living allowance should also be taken into account. We are concerned that the failure to take into account these expenses will place great financial hardship on average income families, particularly where the applicant is facing a longer than average trial. Squeezing average income families in this way may result in more accused persons choosing to represent themselves, with all the deleterious and costly consequences identified above.

108. It is of the utmost importance that there be a hardship review which thoroughly, fairly and competently takes into account all of an applicant's income and outgoings before coming to a decision in respect of their ability to pay for their own legal representation. We are most concerned to see that no detailed proposals are contained within the consultation paper. Great injustice will be wrought, and delay and expense will be incurred if the hardship review is not thorough, fair or efficient.

109. For all of the above reasons, if despite our objections this proposal were pursued, in order to ensure that defendants have the representation to which they are entitled when they are entitled to it, we invite the MoJ to create a presumption that legal aid will be available to those whose cost of representation is likely to exceed £5,000. That is not to say that such persons should not be required to put their finances before the Legal Aid Agency for scrutiny but legal aid should be granted in the first instance to such persons up until the plea and case management hearing when the trial time estimate

(and thus the likely cost of the case) is known and if subsequently the LAA decides that that person can afford to pay for their trial of whatever estimated duration, then legal aid can be withdrawn. During the Committee Stages of LASPO 2011-12 we repeatedly pressed the Government in relation to the release of restrained assets in order that wealthy defendants pay their own legal bills. This remains a core initiative of the CBA, and one which is to be read alongside – not in substitution for – this response.

3) Introducing a Residence Test: (Paragraphs 3.42 – 3.60)

Q4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

110. No.

111. The Minister proposes to introduce a residence test for legal aid by the use of secondary legislation. He cannot lawfully do so for the following reasons:

(a) It is unclear what provision in primary legislation the Lord Chancellor proposes to use. Neither section 9 nor section 11, LASPO provide the power to remove entire categories of individuals, as opposed to services, from the scope of legal aid. The reason for this is obvious: the removal of entire categories of individuals from the scope of legal aid would be flagrantly discriminatory and would make it impossible in practice for them to access the courts on issues which are of the greatest importance to them, and some of which are of the gravest constitutional importance such as the right to life and freedom from torture, the right to liberty, the right to freedom from slavery and the abuse of executive power. It would therefore create an underclass of individuals in the UK who could not

access the rule of law. No piece of secondary legislation could have this effect without the clearest of words to signal that this was Parliament's intention.

(b) Further, the proposal directly conflicts with those parts of LASPO providing funding for services which can only reasonably be understood as availing those who are not lawfully resident such as immigration detention, proceedings before the Special Immigration Appeals Commission, proceedings brought by victims of trafficking, applications for leave to enter by victims of domestic violence and judicial review of removal directions.

(c) Even if secondary legislation with this effect is within the Minister's powers (as Lord Chancellor) under some provision of primary legislation, its discriminatory purpose and effect would make it contrary to Article 14 of the European Convention on Human Rights (ECHR) when read together with the other Articles of the ECHR which are engaged by the litigation in question. In addition the proposal is likely to lead in many cases to violations of the UK's positive obligations under Articles 2,3 and 4 of the ECHR and to breaches of the right to access the courts under Articles 5 and 6 ECHR.

112. Moreover, it is likely to be incompatible with the following rights:

(d) EU law. EU nationals and their family members who exercise rights of free movement under Directive 2004/38 have an immediate right to equal treatment under Article 24(1). It is possible to derogate from this provision under Article 24(2) during the first three months of residence or while a person is resident only as a job-seeker in the case of social assistance, but not for 12 months, and moreover any derogation would have to be compatible with the general principles of EU law including fundamental rights, the rights of the defence and the principle of proportionality.

(e) The UN Refugee Convention, Article 16 of which guarantees to refugees the right of access to the courts, including (Art 16(2)) a right to equal treatment 'in matters pertaining to access to the courts, including legal assistance'.

(f) The UN Convention on the Rights of the Child.

(g) Articles 10, 12 and 15 of the Council of Europe Convention on Trafficking in Human Beings and the EU Trafficking Directive.

113. Furthermore the difficulties in identifying with certainty those who have had 12 months lawful residence is likely to lead in practice to individuals being wrongly refused funding and/or arbitrarily refused funding on the basis of race. Documents are not always available to prove lawful residence until sometime after it has been acquired.

114. Finally the proposal gives rise to the following, amongst other, serious anomalies and apparently unintended consequences:

i. The lawful residence requirements will give rise to conflict with time limits for judicial review and other limitation periods including claims under the Human Rights Act 1998. Courts will be likely to accede to requests to extend those time limits where there is discretion to do so, either for the period individuals have had to wait until they qualify under the lawful residence requirements, or until they have found alternative methods of funding.

ii. The Home Office is responsible for significant delays, often of many years, in considering the applications for leave to enter or remain made by tens of thousands of applicants, not all of whom are asylum-seekers. Those individuals will be excluded from legal aid throughout this period, including in bringing judicial reviews to challenge the delay.

4) Paying for Permission Work in Judicial Review Cases: (Paragraphs 3.61 to 3.79)

Q5. 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 paid in any event)?

115. No, for the following reasons:

- (a) The grant or refusal of permission is an inappropriate test for whether the claimant's lawyers should be paid or not for the following reasons:
 - i. the test for permission lacks clear definition,²²
 - ii. it is inflexible in its application, and ²³
 - iii. as a test it is inconsistently applied and thus difficult to predict.²⁴

For these reasons it is unfair and arbitrary to use the grant or refusal of permission as the touchstone for whether the claimant's lawyers are paid.

- (b) It is submitted that the proposal is likely to be found unlawful. The proposal is that these lawyers should be deprived of their fees automatically as a result of a decision, or absence of a decision, on a permission application whose function is unrelated to the question of whether the lawyers have acted unreasonably or not. There is no suggestion in the consultation paper that this decision should be fact-sensitive at all or that any appeal could be made.

²² See Le Sueur and Sunkin, *The Requirement of Leave* [1992] PL 102

²³ See *Sharma v Browne-Antoine and others* [2007] 1 WLR 780 at para 14)

²⁴ See the *Dynamics of Judicial Review Litigation*, Vara Bondy and Maurice Sunkin, PLP, 2009 at Section 4

On the contrary even those lawyers who have achieved the very best outcome for their clients, by achieving the remedy sought at minimal cost in the form of a settlement pre-permission, are to be penalized.

- (c) Despite the radical nature of this proposal the consultation paper envisages it will be introduced by secondary legislation. It is unclear how this could be done. The wasted costs jurisdiction, which is also penal, is contained in primary legislation, imposed only by the courts, and subject to very tight conditions. There is no hint of a similar jurisdiction in LASPO. Conditional fee arrangements meanwhile are governed by a different statutory scheme altogether. Such an arrangement in any event would not permit those lawyers who do achieve a benefit for their clients to remain unpaid. For these reasons it is our view that the proposal if implemented is unlikely to be lawful.
- (d) The proposal will undermine the rule of law. Judicial review is the mechanism by which executive government is held to account by members of the public through the courts. It is the rule of law in action. The development of public law in the last half century, given new impetus by the introduction of the Human Rights Act 1998, is to be celebrated as fundamental to a democratic society..
- (e) An essential component of the development of public law has been the availability of legal aid. It has given lawyers motivated by the principle of universal access to justice the confidence to specialise in this essential area of law and to build moderately successful practices in which the next generation of lawyers can be trained. In turn, this has contributed to a culture of transparency and accountability of executive action that is necessary for the rule of law to have any meaning.

- (f) Whatever their commitment to their client's cause or to wider principles of justice and human rights, lawyers must be viable businesses first – otherwise they cannot do the work. These proposals may lead to a drop in the number of claims that are unmeritorious, but also to a drop in the number of claims that would have succeeded; and, in due course, a drop in the numbers of lawyers who are willing and able to do this kind of work.
- (g) While we accept that in some successful cases *inter partes* costs orders will still be available, these proposals will undermine the ability of specialist solicitors and Barristers to continue to do this work, gravely disadvantaging not only the system of public funding but the rule of law itself. There are already whole areas of the country with minimal coverage by specialist solicitors focussed on public law (for example the North East and South West) and this problem is only likely to be exacerbated by this proposal.
- (h) If there are no lawyers to argue the cases, then however vigorous and independent the judges, judicial review will fall once again into disuse. Sooner or later, society will pay the price.
- (i) The proposal is based upon a false premise, namely that there are a disproportionate number of costly and unmeritorious judicial review claims. This premise is derived from misleading statistics. The consultation identifies 500 cases in 2011/12 which received legal aid where there was no settlement, grant of permission or benefit to the client. But this is only 12% of all cases granted legal aid for judicial review (4074): the other 88% were either withdrawn before the application was issued or achieved either a positive settlement, grant of permission or substantive benefit:
- i. 2275 cases ended before applying for permission to the Court. A significant proportion of these ended because a positive settlement had been reached, to the benefit of the client.

- ii. Of the 1799 cases that were issued, 956 were either granted permission or settled between issue and permission. Research by Maurice Sunkin and Varda Bondy provided by the PLP²⁵ reveals that 75% of claims withdrawn between issue and the permission stage are settled in the claimants' favour.
 - iii. Of the 845 cases refused permission, 330 still led to some substantive benefit for the client.
 - iv. These 500 cases also represent less than 4% of all judicial review applications issued (11,200 in 2011/12).
- (j) The proposal is premature as the impact of other reforms is yet to be felt. The current proposals come hard on the heels of the reforms to legal aid and the abolition of success fees in LASPO and the proposals for reform of judicial review announced in April 2013.
- i. Although judicial review remains within scope of legal aid (LASPO, s 9 and Schedule 1, Part 1, para 19) it is subject to a number of restrictions including a prohibition on repeat judicial reviews in certain immigration cases (see paras 19(5)-(7)).
 - ii. Success fees can no longer be obtained on judicial review claims, either on a pre-LASPO basis (which allowed success fees of up to 100%) or on the post-LASPO basis of up to 10% of the damages award made to the Claimant. Judicial review, by its nature, does not result in compensation awards. With no upside in the event of success, many lawyers will avoid taking the risk of bringing cases that are, by their nature, difficult to assess (which is why a market for such claims under CFAs did not really develop even when uplifts were permitted pre-1 April 2013).
 - iii. The Government is to introduce a new rule that a judge on a paper application for permission to apply for judicial review can decide that

²⁵ 'Unpacking JR statistics', 30 April 2013

it is 'totally without merit' ('TWM'), thus precluding a renewal of the application for permission by way of an oral hearing. This rule already operates in the Court of Appeal, so even if the case is not certified TWM while in the Administrative Court, a judge of the High Court or Court of Appeal can certify it as TWM when refusing permission to appeal a refusal of permission to apply for judicial review under CPR 52.15 (CPR 52.3(4A)). So it is no longer the case that an applicant for judicial review automatically has four bites of the cherry, no matter how unmeritorious the claim. If the claim is TWM he will have only one.

Until the impact of these reforms has been felt it would be premature to introduce still further restrictions on the availability of judicial review.

- (k) The proposal is wholly unnecessary given that there is already a stringent merits and cost benefit test that must be passed before legal aid is granted. The system already has ample safeguards against the bringing of over-optimistic or misconceived claims. In addition to strict financial eligibility criteria (contained in the *Civil Legal Aid (Financial Resources and Payment for Services) Regulations* 2013 No 480) there are stringent merits and cost benefit criteria for the grant of public funding post-LASPO set out in the *Civil Legal Aid (Merits Criteria) Regulations* SI 2013 No. 104 ("the Merits Regulations"), which largely mirror those that applied under the preceding regime.

Under Reg. 42 and 43 funding will only be granted for judicial review claims if the Director of the LAA is satisfied that the case has at least 'moderate' (50%+) prospects of success and (in a non-money case such as judicial review) either the 'privately paying client' test in Reg. 7 is satisfied or (in cases raising issues of significant wider public importance (SWPI)) the cost of proceedings is proportionate to the likely benefit, including benefit to the wider public (Reg. 8). (He may also grant funding in a 'borderline' case (no

more than 50% prospects) where there is SWPI, but the consultation also proposes that this power be removed).

These are stringent criteria which only the LAA may decide are met. As is apparent from the statistics discussed above, most of the time the Claimant lawyers and the LAA get the merits test right and achieve a benefit for their client. Of course, in a small minority of cases both the Claimant lawyers and the LAA get the merits assessment wrong. But that does not mean either of them are doing their jobs badly. There is a large margin of error inherent in the process of assessing the prospects of success in judicial review cases. That is because the law is often new or developing; often only some of the facts are known at the time the assessment is made; and a considerable variance in judgment is evident among the judges of the Administrative Court. One judge's killer point is another's bad point. Just as the LAA gets it wrong sometimes, so do Claimant lawyers. So also do judges, who can be corrected on appeal. Penalising the lawyer is wrong in principle and, quite simply, unfair.

- (l) The Legal Aid Agency has adequate powers to penalise law firms who abuse the system. The LAA also has extensive audit powers under the contractual arrangements it has with law firms. If a law firm consistently makes applications that turn out to be misconceived the reasons can be explored and penalties can be imposed; ultimately, a law firm can lose its contract to do legal aid work.
- (m) The Administrative Court already has power to direct that legal aid funding should be disallowed. The Court may also make a direction that legal aid should not be paid for all or part of a claim. This power is rarely exercised, but its existence provides a salutary reminder to law firms and counsel of the consequences of making applications that are spurious or misconceived.

- (n) The proposal is likely to create perverse incentives for public authorities to refrain from settling claims before issue. Although funding will be available for the investigatory steps of a claim (see para 3.71), public authorities will exploit the fact that funding will end once the claim is ready to be issued. Public authorities faced with a pre-action letter before claim will know that, if they oppose the claim, the claimant's lawyers (both solicitors and counsel) will have to make a choice between abandoning the claim and taking the risk of issuing the claim without funding. Many authorities who might otherwise settle a claim will now 'wait and see' whether a claim is issued, knowing that some claims will be abandoned because the lawyers are not prepared to assume the risk.
- (o) The proposals will inevitably impact upon otherwise meritorious claims which will not now be brought. This prejudices both the individual who is deprived a remedy and the wider public interest in lawful government, undermining the rule of law.
- (p) The availability of "legal help" and "investigative help" for early stages does not meet these concerns. It is no answer that 'legal aid would continue to be paid in the same way as now for the earlier stages of a case' (3.71). We understand this to be a reference to Legal Help and Investigative Help (now Investigative Representation). We recognise that this will allow for solicitors to be compensated in these preliminary stages and in the event the case settles before an application for a certificate for legal representation is necessary.
- (q) The proposal disproportionately impacts upon specialist junior counsel. A significant amount of work is done by the solicitor at this stage, usually in the preparation of witness statements and other evidence in support and the preparation of bundles for lodging. But this is also the stage at which specialist counsel will first become involved in the process, as funding for legal representation (to include representation by counsel or solicitor

advocate) is not generally available until after the exchange of pre-action protocol correspondence. Junior counsel (in rare cases, leading Counsel) will be instructed to advise, often in conference; to draft details of claim and other originating documents (the Claim Form, Application for Urgent Consideration; draft Order); to identify any legislation and case-law to accompany the claim; to make any applications for interim relief by telephone (if very urgent) or orally; and to consider the defendant's Summary Grounds of Defence, to advise upon them and (if so advised) to draft a written response before the consideration of the case on the papers. If permission is refused on the papers he or she will be instructed to attend an oral application for permission; often the amount of preparation necessary for such an application is of the same order as that required for a substantive hearing. The well-prepared Barrister will draft a Skeleton Argument; provide any additional authorities necessary, discuss the case with solicitor and client in advance; and negotiate with their opponent. This is likely to comprise many tens of hours of work, all of which will be unfunded under these proposals unless permission is later granted.

- (r) Existing costs rules do not provide sufficient insurance for lawyers to be compensated where the claim settles between issue and permission. Most judicial review cases settle, and a significant number settle between the issue of proceedings and the permission hearing. As we have observed, above, 75% of these settle in the claimant's favour. A significant minority of cases will also lead to the defendant reversing the decision under challenge, while refusing to concede the claim, but permission cannot be pursued (or is refused) because the challenge has now become academic. In these circumstances the claimants' advisers will not be paid. The consultation document suggests that an award of costs could be made in the claimants' favour. However the award of costs is entirely discretionary - and frequently arbitrary - and is unlikely to be made in a significant number of cases.

Public authorities already resist paying costs orders for as long as they possibly can, which means the matter must go before the Administrative Court for adjudication. This involves further time-consuming work for which the claimants' lawyers will be unpaid unless they are successful in obtaining a costs order. Public authorities will have a greater incentive than ever before to resist paying costs orders in the hope that the claimants' lawyers will decide they cannot afford to continue to press their case.

- (s) The proposal will lead to an increase in costs disputes in the Administrative Court.

There is likely to be a further unintended consequence of this proposal. At present, legally aided claimants do not always pursue defendants for their costs when there has been a successful settlement. The settlement may only have been made on condition that there is no order for costs, or the claimant's lawyers may consider the legal aid funding they have been paid to be adequate. Now, in every such case claimant lawyers will need to pursue costs in order to be paid anything for the case. And while some of these will give up in the face of defendants' intransigence, many more such costs disputes are likely to require resolution by the Administrative Court. That will lead to an increase in cost to the public purse in the long run.

- (t) The proposal does not allow an adequate opportunity to risk assess a case. Although public funding will be available for the early stages, including the exchange of pre-action protocol letters (para 3.71), this does not afford an adequate opportunity for lawyers to risk assess most claims.

It is particularly concerning that the authors of the consultation paper seek to draw a comparison between the permission test in asylum appeals to the Upper Tribunal with an application for permission to apply for judicial review. An application for permission to appeal in a statutory asylum appeal comes at a late stage of appellate proceedings when the position of the

respective parties is clear and the issues have already been fully ventilated before a court. An application for permission to apply for judicial review by contrast is an attempt to bring before the courts an issue of public law so that those courts can, if they deem it appropriate, exercise their discretion to correct wrongs to the general public. Until an application for permission is brought no court will have considered the issue before, and until the summary grounds of defence have been received, it is unusual to have a clear idea of the government's defence.

5) Civil Merits test – removing legal aid for borderline cases

Q6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success? Please give reasons.

116. We do not agree that legal aid should be removed for all cases assessed as having 'borderline' prospects of success for the following reasons:

- i. This proposal will have a particular impact upon public interest cases and will inhibit the taking of novel points of law and thus stunt the development of the law – e.g. cases like *R (C) v SSHD* and *Reilly and Wilson v DWP* which all struggled to get funding because they were classified as borderline.
- ii. The proposal will restrict access to justice in complex cases/cases involving overlapping and intersecting issues, such as human trafficking cases.
- iii. At point of issue many important cases may be borderline due to absence of disclosure or indeed any response from the Defendant. This demonstrates that the point of entry of the proposed test is unrealistic, unfair and likely to lead to injustice in some cases.

- iv. The consultation says borderline cases are to be assessed in the same way as cases assessed as having “poor” prospects of success’ (para 3.88) which is wrongheaded, as they are distinct categories.
- v. The saving the consultation paper predicts is £1m and 100 cases per year – even if these figures are accurate (which is doubted) the financial benefit is minimal and the deleterious impact significant.

Chapter 4: Introducing Competition in the Criminal Legal Aid Market

Scope of the new contract

Q7: Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

117. The CBA does not agree with any proposal for the provision of criminal legal aid services based on cost alone, offered to the lowest bidder with a complete disregard to the quality of the service.
118. The consultation paper asserts a ‘belief’ that competitive tendering is ‘likely to be the best way to ensure long-term sustainability and value for money in the legal aid market (para 4.3). This is based on the MoJ’s ‘view’ that ‘competition is the best way to promote value for money, innovation and efficiency’. A similar view was presumably taken when granting the security contract to G4S in the 2012 London Olympics. This is often the view of government departments, seemingly for two reasons: the government can impose a bidding ceiling, so that a cut in overall expenditure is guaranteed and a belief that a market-based approach to providing services *will* provide similar delivery of services more efficiently and cheaply. However, the Criminal Justice System is not a *service* that is provided and there is no customer, it is a *system*, which incorporates multifarious parts, including police, prosecution, defence, courts, judiciary, probation and prisons.
119. The awarding of the contract for court interpreting services to ALS/Capita in August 2011 as a case study is a sobering reminder to

proposers of competitive tendering of what can go wrong. As the Justice Select Committee reported earlier this year²⁶:

'The level of concern that arose during the consultation process regarding the potential diminution of quality standards... suggest that the Ministry of Justice was determined to pursue the implementation of the Framework Agreement in the face of evidence that it would reduce the quality of language service available.'

... 'our evidence strongly suggests that the Ministry of Justice did not have a sufficient understanding of the complexities of court interpreting work and failed to properly anticipate or address the clear potential for problems with ALS' capacity to deliver on its promises. In our view the evidence shows that ALS failed to deliver on many aspects of the Agreement and did not implement appropriate safeguards to ensure that the interpreters it provided were of sufficient standard. In particular, ALS clearly needed significantly more resources than it had at its disposal to deliver the service levels required.'

... 'ALS and more recently Capita have been unable to recruit qualified and experienced interpreters in sufficient numbers, leading to an inadequate volume and quality of interpreting services being available to courts and tribunals. This has resulted in numerous hearings being adjourned or severely delayed and, in criminal cases, unnecessary remands into custody, with potential implications for the interests of justice.'

... 'We are concerned that existing safeguards of quality may not be fit for purpose, and consider it likely that without an independent review and subsequent revision of the tiering system, the confidence of important stakeholders, including the judiciary, magistracy and legal professionals, will continue to be undermined. The existing arrangements may not be financially sustainable as Capita is propping up the continuation of the Agreement, which mean that the Department's savings, originally projected to be £15million, are effectively being secured at the company's expense.'

... 'The Ministry of Justice and its contractor appear to have buried their heads in the sand. Many of the concerns that interpreters raised regarding the nature of the

²⁶ HOC Justice Committee: Interpreting and Translation Services... 6th Report of Session 2012-13, published 6th February 2013.

new operating model were realised during implementation, were utterly predictable, and should have been properly considered from the outset.'

120. There are two obvious and fundamental objections to the government's proposals for competitive tendering. Firstly, the competition to provide legal aid work is only a competition to bid *for* the contract; once awarded the contractor has a protected market, with exclusive access to the client and where the client is deprived of choice. Furthermore, if the contract winner manages to avoid a G4S Olympic-style disaster, that company will ultimately have specific knowledge of the market and be in a dominant position when the contract is up for extension or renewal, so true competition is eliminated. The high street solicitors who presently deliver criminal legal aid services locally will have been driven out of business, and there will be no-one with a background or expertise in the delivery of criminal legal aid work, in a position to bid against the existing providers in the second round. The government should be very wary of restructuring the delivery of criminal legal aid in this way. Secondly, where there is such seismic structural change, there is no certainty as to whether a) there will be in fact such economic savings; and b) there will be unforeseen or unintended economic and social consequences.

121. Solicitors provide a 'front line service': police station advice, lower court advocacy (in the main) and litigation support to those with real need from the moment the individual is detained by the State. Criminal Barristers are in turn instructed by solicitors for their independence, expertise and impartiality. They provide high quality, efficient and affordable advocacy. Under MoJ proposals, contract winners will be driven to cut costs to maintain profitability and will necessarily have to recruit in-house advocacy 'services' at low cost (on top of the 17.5% ceiling already required by the proposals). This will certainly have an effect on quality. Who will take these low paid advocacy service jobs? Those with ambition and ability will be driven into

better remunerated areas of legal practice. This is not idle speculation: members of the Criminal Bar are already leaving Chambers or diversifying into other areas of work.

122. Equally foreseeable but unquantifiable consequences of lower quality advocacy include longer trials (an inexperienced advocate is likely to be less discriminating in relation to points taken, with time needed during the trial to prepare them); and more frequent appeals due to inadequate representation. Moreover, Judges rely upon the expertise and professionalism of the Bar for the smooth running of a trial and may count on counsel throughout the trial, for example to prepare a skeleton argument overnight or with assistance in agreeing the legal directions required for the summing up. With less experienced advocates appearing before them, judges will, in addition to their already onerous task to ensure a fair trial, be placed under increased pressure to superintend and intervene. In addition, defendants, deprived of choice or unhappy with their appointed advocate, may increasingly choose to defend themselves. The risk of longer trials and aborted trials inevitably increase with an unrepresented defendant.

Lessons from the USA

123. Although a very different jurisdiction from ours, comparison with the American Justice system is illuminating. Despite the constitutional right contained in the 6th Amendment to legal representation, a reluctance to spend public funds on legal aid has led to different States creating a variety of indigent defence systems. Each has serious deficiencies. Traditional 'Public Defender' programs have been shown to be severely underfunded, resulting in excessive workloads, ineffective representation and a push to plea Bargain.²⁷ Assigned Counsel models present a conflict of interest where a

²⁷ See 'State, County and Local Expenditures for indigent Defense Services Fiscal Year 2008', The Pangenburg Project (2010); 'Gideon at 50: Three Reforms to Revive the Right to Counsel', Texas Public Policy Forum (2013); 'Ten Principles of a Public Defense Delivery

judge or court official appoint the advocate and there is criticism of appointing attorneys with inadequate skills and experience.²⁸

124. The contract system, where private attorneys contract with the government to represent indigent defendants, is increasingly used and is perhaps the most instructive comparison. Various models are used to contract out such publicly funded work, including Fixed Fee, Flat Fee, Capped Hourly Fee and variants thereof. However criticism centres on two principal areas: a decrease in quality of representation – low fees resulting in less time spent on preparation and undue pressure on the defendant to plead guilty (the attorney makes more money the less time spent on a case and particularly where a case pleads rather than goes to trial); and, the increasing difficulty to attract bids for this work from suitably experienced private attorneys²⁹

125. The likely implication of a move in this jurisdiction towards a low fee, market-based approach is that the market will behave in a similar way as in the US, i.e. to minimize cost and maximize profit. The potential cost in terms of quality of representation is palpable but immeasurable. The consequential loss to the integrity of our Criminal Justice System is irremediable. A glance at the caseload of NGOs such as Amicus, Reprieve and Amnesty International dealing with US death row cases, where the principal ground of appeal is the quality of representation, should make anyone proposing to dismantle and reform the legal aid system in this country pause. It is ironic that while visiting American jurists frequently express their admiration for our Criminal Justice System, the MOJ is contemplating emulating the American public defence system.

System 2 (2002) American Bar Association; and ‘Broken Justice: An Overview of the American Public Defender System’ Hinshaw, University of Iowa (2013).

²⁸ Thomas H Cohen, ‘Who’s Better at Defending Criminals’, National Bureau of Justice Statistics (2011).

²⁹ Schulhofer and Friedman: ‘Reforming Indigent Defense: How Free Market Principles Can Help a Broken System’ (2010)

Competitive Tendering in the Crown Court

126. Although the government is not minded *at the moment* to subject Crown Court advocacy to the proposed competitive tendering process, it is naïve to believe that competitive tendering will not be the natural next stage in cutting costs. The consultation document acknowledges that the independent Bar is not in a position to compete in such a tendering process (para 2.8), however it is axiomatic that the Bar will be in an even worse position in future years, when successful bidders will be seeking to extend their contracts. Furthermore, it is inconceivable that contract winners will not seek to keep the majority of their work in-house to maximize profits.

Conclusion

127. We cannot improve on what the Bar Council has said; “Competition is only a force for the public good in the context of legal aid if it is conducted under the auspices of administratively set prices, as with Graduated Fees and other Fixed Fee schemes. The concern that this consultation paper, like those before it has completely failed to address, or in the present case even acknowledge, is that competition in terms of price for publicly funded legal services risks quality. Lord Carter said this and sought to address it through the concept of BVT. Previous attempts to make the concept of BVT applicable have floundered on a definition of quality that could be measured and ‘bid’. The reasons for that failure are simple; quality in respect of complex legal services cannot be measured or verified. And so the present proposals simply involve giving up and accepting that the quality of legal service and as a consequence the interests of justice are to be sacrificed to achieving price reductions”.
128. We know, and the MoJ should recognise, that specialist litigation services currently provided by small to medium-sized firms of solicitors will

be entirely lost to the publicly funded Criminal Justice System under these proposals. Save where categorised as VHCCs – cases which are few in number and becoming increasingly rare – all litigation services are to be tendered under PCT. This will prove disastrous. Whilst the MoJ appears oblivious to the fact, it is obvious that PCT contracts will go to large organisations – often not firms of solicitors at all, and certainly not the experienced specialist firms which are currently available – who have no experience beyond the ability to administer such a contract (in the eyes of the MoJ at least) and who are likely to have other areas of business that can finance their profit-hunting foray into the legal aid market. Those whom the Bar support and rely upon for their work will be swept away.

129. What does this mean for specialist casework? Often paid under the GFS for advocacy as well as for litigation, firms of solicitors with real expertise deliver these cases expeditiously and without waste of cost or time. They add value to the Criminal Justice System in these ways. Such firms will demonstrably fail the ‘economies of scale’ test for bidding entities under PCT as envisaged by the MoJ. Moreover, such firms are neither minnows whom the MoJ presumably believe will be swallowed up by successful bidders, nor are they likely to entertain association with the larger bidders, precisely because of their expertise, dedication and independence.

130. What does this mean for prosecution of such cases? Barristers who defend also prosecute and are on specialist prosecution panels. The loss of the ability to find work will mean the loss of CPS panel members and advocates who prosecute for 75% of cases. How is public confidence in the system to be maintained when more guilty defendants are not prosecuted and instead allowed to go free?

131. The criminal Bar is often instructed to carry out disclosure tasks precisely because of their independence. The use by prosecuting authorities

such as the SFO, of junior barristers gives credibility to large scale disclosure exercises. Whilst those particular exercises could be conducted by those who only prosecute, there are other areas where “independence” is critical. The review and disclosure of Social Services files in child abuse and other rape cases is primarily carried out by independent barristers instructed by Social Services, to ensure that extremely sensitive and confidential material is not wrongly disclosed. The use of Special Advocates, is also dependant on their being a pool of “independent” barristers who are available to carry out such work. It is also critical, in respect of material over which Legal Professional Privilege is claimed, that the individual conducting the review is truly independent. If the criminal referral bar is decimated, as it will be by these cuts, there will be nobody suitably qualified and independent to carry out such tasks.

132. This proposal is misguided. We predict that important and difficult cases, across a number of specialisms including but by no means limited to terrorism, will be run with less efficiency than currently. Less efficiency leads to greater delay before and during trial, which leads in turn to the inevitability of greater cost to the CJS. That will be the inheritance of a misguided PCT system which the MoJ purports to introduce in order to save cost, rather than to increase cost.

Q8: 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?

133. No.

134. The government acknowledges that the tender process itself will not produce the ‘savings’ required and therefore intends to impose a requirement that bids are 17.5% below the current rates and a reduction in crown court

advocacy fees of 30% (and 30% for VHCCs). The CBA predicts that the effect of further reduction would be disastrous for the legal profession and would do irreversible damage to the Criminal Justice System.

135. Those coming to the Bar often face considerable debts incurred as a result of university fees and BVC/BPTC fees. It is not unusual for pupils to be in debt to the tune of £50,000. Many will have spent a considerable time undertaking pro bono work in order to boost their pupillage application thereby creating an added difficulty in engaging in paid work whilst studying. Pupillage now tends to be funded with an 'award' paid in the first 6 months (in criminal law sets of chambers such awards are generally in the region of £12,000) and then guaranteed earnings in the second six months of pupillage (generally less than £10,000). The second six fees earned will not necessarily pay within the same period owing to delays in payment by solicitors, and some cases will not be paid at all. Those covering Crown Court work will not be paid until the conclusion of the case, in all likelihood some time after second six. Those completing a third six months have no award, may earn a little more but will experience the same problems with receipt of payment.

136. Many at the junior Bar are already in a position of great financial instability by the time they start on their feet. The proposed cuts will have a devastating effect on the junior Bar alone. The inevitable consequence is that many very able candidates will no longer undertake legal aid work. The increase in diversity which we have seen over the last 20 years will be wholly undermined as only those who can afford to withstand the cuts will come to the Bar.

137. There is grave concern that by reducing the pool of pupillages the diversity of the bar will be affected. Lord Neuberger in his report 'Entry to the Bar' stated, "*it is clear that pupillage will be the first time some students have the*

opportunity to operate consistently in a professional environment. Those from privileged backgrounds are likely to have had greater exposure to professional people over a long period of time within their families and social circles, and in advance of pupillage. This means that if the final selection process takes place, in effect, at the end of a student's university career or the beginning of BVC (at which time pupillage interviews are generally held), many of those who come from less privileged backgrounds could well be disadvantaged.... We therefore believe that anything that can reasonably be done to increase the number of pupillages should be considered".³⁰

138. Those already in practice will be unable to withstand the cuts on top of those already imposed for criminal defence and prosecution work and will no longer undertake legal aid work.

139. The effect will inevitably also be felt in the CPS and in the future recruitment of the judiciary.

Contract Length

Q9: Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination is an appropriate length of contract? Please give reasons.

140. We do not agree with the proposal that a three year contract should be awarded with the right to extend for up to a further two years, with the ability of the Lord Chancellor to terminate the contract with compensation (in certain circumstances) on six months notice.

141. If the contracts are awarded as intended, with only one opportunity to bid, large swathes of both sides of the legal profession will be forced out of the Legal Aid market, as their livelihood will effectively have been removed.

³⁰ Entry to the Bar Report published November 2007.

After three years, if the system does not work as we envisaged it will not, there will not be the providers left in the market to compete and/or deliver the service. The very fabric of the current system will be destroyed. What then will the Government do if providers have failed to deliver and/or are no longer willing to supply the services for the contract fee? The damage will already have irrevocably been done.

142. In relation to PCT, there is no evidence as to its efficacy, practical application or ability to deliver the savings whilst retaining a Criminal Justice System that is fit for purpose.

Geographical areas for the procurement and delivery of service

Q10: Do you agree with the proposal under the competition model that with the exception of London, Warwickshire / West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

143. We do not agree with the proposal. The procurement areas are set by arbitrary geographical lines that fail to take into account the huge number of variables that arise in criminal litigation. For example:
- i. Client access :- On the current proposals whilst a provider may have an office in a central location, its clients will be sourced from a far wider geographical area. A client allocated a solicitor at a police station may find he/she has a considerable journey to that provider's office. In some areas this may be in excess of 50 miles, often in areas where public transport is limited, costly and takes a considerable length of time.
 - ii. Diversity:- many clients will be vulnerable by reason of age, mental health or social demographic. Their ability to travel long distances, afford to pay and establish the level of trust required will be impossible.

- iii. Local knowledge: - High Street solicitors have regular contact with local court centres and police. Those relationships allow for the swift administration of justice in cases, especially where the client is well known to the solicitor. Government policy is said to be in favour of localism and devolving power to local interests for exactly these reasons. A 'centralised system' - in other words one in which there are very limited providers covering large geographical areas - runs directly counter to that fundamental policy.
- iv. Cost to the system:- The inability to have access to a 'local solicitor' is likely to have a detrimental impact on the efficient running of the Criminal Justice System, as clients may not have the same or any access to their representative prior to attending at court. The suggestion that clients will have the means to properly engage in a 'centralised' process is simply not realistic. Documents required to be prepared in advance and signed will not have been completed, nor advice given. Currently there are inadequate resources at court available to deal with this situation for example, interview rooms, internet access, copying and printing facilities. Let alone the inevitable cost of delayed and/or adjourned proceedings.

144. The submissions made later in this response concerning client choice are also relevant.

Q11: Do you agree with the proposal under the competition model to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

145. We do not agree with this proposal for the reasons set out in paragraphs 138 and 139 above. The concerns are amplified due to the even larger geographical areas that it is proposed the limited number of providers will cover.

146. For additional concerns specific to the 'new procurement areas', envisaged by this question we defer to and support the views advanced by the Western Circuit and the Midlands Circuit in their respective responses.

Q12: Do you agree with the proposal under the competition model that London should be divided into three procurement areas aligned with the area boundaries used by the Crown Prosecution Service? Give reasons.

147. We do not agree with the proposal that London should be divided into three procurement areas, for the following reasons:

- i. Logistical difficulties are not addressed at all by the consultation paper, but will require a provider to cover a large area comprising multiple police stations, both Magistrates and Crown courts and criminal activity covering a very broad range of classes and types of offence. We also make the obvious point, albeit one not addressed in the consultation paper, that defence representatives unlike CPS personnel have to spend their days and nights attending police stations, clients and witness' home addresses and Magistrates' Courts.
- ii. Specialisation: Importantly, it makes no account for the huge variety of cases and the specialist types of expertise that are required to conduct them. The current system is designed to deal with this and does so, the proposed scheme does not. For example, there are designated court centres that try fraud, serious and organised crime, murder and terrorism cases, irrespective of where the defendant may have been arrested. The cases are transferred to those court centres following either a preliminary hearing or Plea and Case Management Hearing and may then be transferred on to another court if necessary. Especially in London this may well fall outside of the designated procurement area.

iii. The use of CPS administrative divisions fails to take into account the fact, that the CPS has an entirely different tier of organisation comprising specialist divisions for specialist crime. Just as there exist specialist panels for Barristers acting on behalf of for example the Crown Prosecution Service or the Serious Fraud Office, defence Barristers and solicitors firms have developed to provide strength in those particular classes of cases. This highly specialised work is imperative to the proper operation of the Criminal Justice System. It ensures proper advice and representation, which assists all parties not least the court and results in cases being dealt with as swiftly as is possible. This saves money.

148. The submissions made below concerning client choice are also relevant.

Exclusivity

Q13: Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

149. We do not agree with the proposal that contract holders should undertake all of the work available within the applicable procurement area. The proposal will result in a provider having exclusive or privileged access to clients in a given locality. Once granted this access will be difficult to revoke and will reduce the choice that clients have regarding their service provider. PCT is therefore in opposition to the conventional and desirable notion of competition *to* a market, wherein providers seek to earn access to clients through offering appropriate services and developing their reputations, and hence being rewarded with referrals.

150. It is suggested that cases would be allocated equally, two options for the method of allocation are cited:

- Case by case
- Duty slots

Both of the proposals mean that clients would have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients, might be permitted to change their allocated provider (either at the point of requesting advice or during a case). This is irrespective of whether their case is transferred to a court in a different procurement area.

151. Currently there are no geographical restrictions on a provider's access to clients. Currently a defendant is able to select the solicitor of their own choice to represent them. Under the proposals the defendants would be allocated a provider dependent only on either what day or time they were arrested (duty slots), their date of birth, or because a certain provider is next on the list, regardless of any particular expertise the allocated particular professional might have in that type of case.

152. The result is that there is an obvious and immediate erosion of standards as there is no incentive for the contract holder to do any more than provide, the mere minimum by way of service, in representing a client. The provider's professional reputation is irrelevant as allocation of work is ensured under the contract. Currently the Criminal Justice System operates as well as it does, because it relies on highly trained, motivated individuals who are bound by a strong ethical code, any departure from which would damage that solicitors or advocate's reputation with the client, amongst peers but also with those who instruct him or her. Thus the current legal aid system relies on competition on the basis of quality rather than price. Therefore, in spite of the terminology PCT runs counter to the objective of effective

competition in legal services in the public interest. Once a provider has won the contract there is no incentive to operate in the interests of the clients and/or the public interest.

153. Another practical reason in favour of client choice is when clients are arrested away from where they live it makes good sense for them to be represented locally to ensure efficient preparation of a case. This would be impossible on the current proposals, where a London -based client may be charged in Newcastle. In turn, this proposal provides no answer for the frequent scenario in which one client is arrested as a result of different criminal investigations on successive weeks in different areas. Under the current system one solicitor can provide continuity of service, whereas under these proposals there would be a different provider allocated for each offence, whether in the same geographical area or not.

154. Many solicitors firms and barristers have developed expertise in certain areas of criminal law such as fraud, terrorism, and serious sexual offences. Such expertise allows for the efficient management and progression of a case from charge through to trial. Under the current proposals this would not be possible.

155. This is no more than a device to break the market irreversibly. It is evident that the so called 'economies of scale' are far more important than quality and ultimately justice. PCT with price as the only component, places the quality threshold so low, as to be worthless. Experience gained over many years on the current proposals counts for nothing.

Number of Contracts

Q14: Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

156. No.

157. The proposal is that applicants could apply to deliver services in more than one procurement area but have only one share in each area, with the number of contracts to vary by procurement area. An example is given based on 2010/11 LAA data that between 4 and 38 contracts would be granted in each procurement area with the total amount of contracts being approximately 400 in comparison to the current number which is in excess of 1,600.

158. It is suggested by awarding longer and larger contracts with greater certainty of volumes providers would have increased opportunities to grow their businesses and invest in the restructuring required to achieve economies of scale and scope and provide a more efficient service at a price that offers a saving to the public but is also sustainable.

159. No examples are given as how the economies of scale will offer savings. Nor indeed what if any reduction in administration costs there will be for the Government. The practicality of whether providers would actually be able to access sufficient numbers of professionals to service the contract they bid for is not even considered. (e.g. G4S failure to produce trained security personnel in the Olympics and the government's need to turn to the military to provide extra staff)

160. Professional conflicts of interest. The Consultation proposals are based on LAA data for 2010/11 that is said to show that "the vast majority of cases have four defendants or less", which has resulted in the suggestion that there

be at least four contracts in each area. Whilst it may be 'small' number of cases in comparison to the total national case load, our experience is that in urban areas there are frequently Crown Court cases involving four or more defendants and many examples of conflict of interests, meaning that one provider simply cannot continue to act for all.

161. The same difficulties as to the inability to offer the specialism required arises as set out above.

Q15: Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

162. No.

163. The following criteria are suggested:

- i. Sufficient supply to deal with potential conflicts of interest
- ii. Sufficient case volume to allow fixed fee schemes to work
- iii. Market agility
- iv. Sustainable procurement
- v. The role of the Public Defender Service

164. Whilst these may be factors that would need to be taken into consideration, for the reasons we have set out in our response to the questions 7 to 14 above, they do not come close to meeting the multiplicity of issues and challenges that such a contract would need to meet.

Contract Value

Q16: Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

165. We do not agree with the proposal. Experience is all. The tendering process envisaged is to be based solely on ability to manage the contract, not to deliver the legal services in a way which will make the court and the public satisfied. It follows that those who provide defence services should be able to display the qualities and experience we address in our answers to questions 7 to 14 above.

166. This question is also inextricably linked to the next question, concerning client choice. Criminal legal aid is a public service in the same way that education and health care provision are public services. In a speech made in July 2011, the Prime Minister, David Cameron, set out five principles to guide the modernisation of public services³¹. First and foremost among those principles was consumer choice. The following is an extract from the Prime Minister's speech:

"Choice

First, the principle of choice. Wherever possible we are increasing choice by giving people direct control over the services they use. Why? First, because it's a good in itself. You wouldn't pay for a gym membership and then get told you're only allowed to use the running machine or only allowed to come in on a Tuesday...and neither should you pay your taxes then get told you've got to take what you're given. I know what some people say: 'I don't care about choice - I just want a decent school at the end of my road.' I understand. And if I could write a government cheque to guarantee that, I would. But here's

³¹ <https://www.gov.uk/government/speeches/speech-on-open-public-services>

*the thing - government can't just make good schools appear. You can't just pass an edict for standards to improve. You need the right structures in place. And this is where choice is so vital. When you have the power to choose where your child goes to school...and that choice is backed up by state money...schools will start bending over backwards to give you what you want: better discipline, more sports, after-school clubs. **That's how standards rise in public services - when you get the structures right.***

And this isn't some theory - the evidence is already there. A study published by the London School of Economics found hospitals in areas with more choice had lower death rates. So right across our public services we're extending choice. Giving patients the freedom to choose the healthcare they want, where they want. Giving social housing tenants more choice about where they live. Giving parents of children with disabilities their own personal budgets...

so it's them who decides how that money gets spent, not someone who's never met them and doesn't know their lives. Now I know what you might be thinking: 'We've heard politicians talk about choice before and nothing ever changes.' But something very big and different is happening with this white paper.

For the first time ever we are looking at how we can enshrine a general right to choose in law. No ifs, no buts, no more get-what-you're-given...this is get what you choose. A clear, legal right to make the best choice for you. And if anyone tells you that there are no other options on the table...you're going to have powerful people you can go to to take up your case and fight your corner...."

167. Another of the principles enunciated by the Prime Minister in the same speech was fairness:

"The fourth principle of open public services is fairness. It's no good having services that are excellent for a few and unattainable for the many. It's no achievement raising standards if you still leave the poorest behind. That's why across the board we're bringing in new help for those who need it....."

In this world of restricted choice and freedom it's the poorest who lose out. Well, these plans are about creating those opportunities for everyone. On this I am determined: as we push forward with modernising public services, no one will be left behind".

168. In the provision of health and education, the pursuit of higher standards through choice is a principle to be enshrined, and yet in the provision of criminal legal aid, there seems to be a positive policy to do exactly the opposite, resulting (using the Prime Minister's logic) in a concomitant decline in standards . Para. 23 of the Impact Assessment for Chapter 4:

"Client choice may in certain circumstances... give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price. The removal of client choice may reduce the extent to which firms offer services above acceptable levels. We will ensure that quality does not fall below acceptable levels..."

169. The Government's commitment to increasing choice in public services and raising awareness of choice to service users was reiterated as recently as the beginning of 2013 with the publication of 'The Barriers of Choice Review' by David Boyle, published 24 January 2013.

170. There is no justification for treating criminal legal aid, and the wider Criminal Justice System, any differently to any other public service. Quality matters, not just for its own sake, but because lower standards are likely to result not just in miscarriages of justice (including wrongful acquittals) and loss of public confidence in the Criminal Justice System, but in a greater cost to the public purse as well.

Client Choice

Q17: Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

171. No.

Introduction

172. The CBA disagrees with any scheme which prohibits or restricts client choice in his / her representation. The tendering model limits choice both:

- i. As a result of the reduction (75%) in the number of suppliers whose selection would be centrally controlled through a government agency, and
- ii. As to the particular selected supplier within the geographical area in which the offence was committed.

Moreover, the monolithic species of provider which will exist after the draconian reduction in law firms will itself prevent choice; as is common in large service organisations the client is dealt with by a roll call of employees, partly for cost /efficiency reasons and partly through staff turnover. This lack of continuity of service is almost unknown in law firms at the present time.

The current position

173. The relationship between solicitor and client is fundamental to the smooth running of the Criminal Justice System. Trite though it is to observe, an accused person is an unwilling participant in the criminal justice process. He is often, initially at least, being detained in custody, in a stressful situation. A good solicitor /client relationship, predicated on confidence and trust, enhances the likelihood of early identification of issues and problems and, potentially, early resolution of the proceedings. Conversely, a poor

relationship characterised by mistrust and a lack of co-operation is likely to be a factor frustrating the smooth and expeditious disposal of criminal business in the courts. This will be more acutely felt in proceedings which, as for most Crown Court cases, continue over many months.

174. The importance of the relationship is self-evident and was recognised in Lord Carter's Review of Legal Aid procurement . 'Clients need to have confidence in their legal representative in order for justice to be fair and effective' the paper stated (para 5, p94). There are many reasons why an accused person may wish to choose a particular solicitor or firm. Most commonly they include:

- i. An earlier and possibly longstanding association with the solicitor or firm,
- ii. A solicitor or firm possesses particular qualities, experience or personnel rendering it most suitable to deal with his or her case,
- iii. Ethnic, cultural and language reasons,
- iv. Location, and
- v. Other reasons.

Previous association

175. The importance of a co-operative working relationship which has been fostered by previous association cannot be overestimated as a practical benefit to the Criminal Justice System. A solicitor who has previously represented a client is likely to have both knowledge and understanding of the client's past offending history and his or her family, educational, mental health and social background. This is particularly important where the client can be described as being vulnerable, through learning or mental health difficulties or where there may be a history of physical, sexual or psychological abuse. A client with a drug addiction may also often be vulnerable. The solicitor may well have already had dealings with parents or the spouse of the accused, other professionals such as probation officers who have been involved with him or

her, or be familiar with family or immigration litigation concerning the client. These are invaluable tools. The corollary is the confidence of a client in his or her representative which manifests itself in a manner conducive to a productive and efficient working relationship. By contrast, the imposition of a representative with no previous association with the client and ignorant of some of the background features identified above will more probably result in suspicion and recalcitrance which in turn will frustrate the smooth running and resolution of the proceedings. The unwelcome implications are self-evident.

176. Even if it were possible for each lawyer or paralegal to acquire an appropriate level of knowledge and understanding of the client and his or her history, the resource implications will inevitably mean a substantial diminution on the quality of the legal service rendered. This will in turn, and without doubt, lead to injustice in some cases.

Particular qualities of representative

177. There is no doubt that many practitioners or firms possess specialist qualities and skills in dealing with particular types of offences or forms of evidence. This has become increasingly the case over the last 20 years which has seen an avalanche of new statutory offences, laws of evidence and judicial authority interpreting these, often extremely complex, provisions.
178. Such skills are likely to be lost in a tendered market by driving specialists away from legal aid work, by the acknowledged increase in the use of unqualified paralegals resulting in cost inefficiency in proper research and preparation of cases.
179. The consultation refers to the market for legal services. A true market, propelled by consumer choice, rewards excellence. Many firms of solicitors succeed as a result of the particular skills of certain individuals in the firm.

Similarly that is the basis upon which the independent criminal Bar has always operated. Those who excel will be rewarded with work of an increasingly serious nature and with professional success. Those who simply go through the motions will not succeed and, if they survive at all, will carry out only low level work. By contrast, dividing up all the work among large, corporate and faceless providers whose employees' motivation is likely to be limited to adherence to the terms of the contract of employment is a rigged market in which the criterion of quality is absent.

180. Removing from the client the ability to choose does not accordingly incentivise excellence in the market; rather it is a serious and retrograde step in which an absence of competition in quality will *undoubtedly* drive down standards of preparation and advocacy. The only standard will be the achievement of a minimum 'quality assurance' threshold. Corporate entities who face no market choice sanction for the deployment of minimum standards may thrive economically, but at the expense of its clients, the Criminal Justice System and public confidence in it.

181. An example, plainly foreseeable if not a certainty, is the situation of a client who wishes to be represented by counsel at the independent referral Bar (among the few who remain) with substantial experience of complex or serious offences or specialist skill in a particular area. The firm or ABS to whom the client has been allocated may have a policy, (undoubtedly driven by cost efficiency and profit) of routinely or exclusively instructing in-house advocates. The ability to choose a Barrister will be lost, with the consequences highlighted elsewhere in this paper.

182. Even the belief (based on experience, recommendation or research) of an accused person that he or she is not receiving advice and representation from a person with sufficient experience or expertise and that an alternative

possesses such qualities, is likely to have adverse implications for the administration of justice.

Ethnic, cultural and language reasons

183. Clients often and quite reasonably wish to be represented by a person of similar ethnicity or cultural background or who possesses a particular understanding of issues relative to his or own background. Research carried out by Carter revealed that there was 'a demonstrable link between the use of black and minority ethnic firms by black and minority ethnic clients' (para 79, p109). The loss of client choice is likely to cause a lack of confidence and difficulties in the relationship with adverse consequences for the administration of justice highlighted above. Likewise, the inability of a person to select a lawyer with the language skills which would avoid the need for an interpreter during the course of discussions and conferences will increase the cost and delay of the proceedings.

184. The proposals in the consultation paper are in defiance of the intention enunciated in the Carter report 'to create a system within which a diverse choice of quality assured legal representation is procured for clients'. (para 75 p109) As Carter stated:

'All clients should have confidence in the quality of legal advice and assistance provided by lawyers. Changes to the current arrangements for the procurement of legal aid services should recognise the needs of all groups and ensure that there is an appropriate, high quality and diverse supplier base. Diversity is important to the supplier base, but it is equally important that suppliers are able to work effectively with a diverse population in whatever area they might be operating in.'

The abolition of client choice drives a coach and horses through these principles. The consequences of dissatisfaction, disaffection and a structural loss of confidence in the system are all too obvious.

Location

185. There is, presently, widespread geographical coverage by criminal legal aid practices in the United Kingdom. This allows clients to choose a local firm, generally no more than a few miles from their residence. Under the reforms proposed, the choice of this reasonable access will be denied. The few organisations that win contracts in procurement areas will undoubtedly congregate in the largest metropolitan area. Indeed the very proposition underlying the economic argument for the tendering model – economies of scale – militates in favour of concentrating all resources in one centre. The likelihood is that all of the successful providers will be located in the same town or city. The effect is obvious: travel to and from the lawyer's office will become onerous and, for many, unaffordable. The problem will be particularly acute in rural areas with only four or five suppliers. Its effect will reach beyond the damage the client's access to representation; it will be felt in additional strains and costs in the proceedings themselves. For example, in Cumbria, the principal city is Carlisle in the north, but there are police stations and Magistrates' Courts nearly two hours drive away in Barrow-in-Furness.

Other reasons

ABS's

186. Some clients may have real concerns, principled or otherwise, about representation by an organisation which is associated with a company responsible for running prisons or probation services, managing social benefits or other state sponsored activities, or by private commercial bodies with other politically or socially sensitive businesses,. He or she might reasonably seek instead to be represented by a firm whose *raison d'être* is *exclusively professional* in the provision of legal services. The imposition of such an organisation on the client is likely to engender distrust and malaise in the relationship with the consequences already identified above and below.

Further consequences

187. The CBA envisages a dramatic increase in the number of applications to the LAA and courts for a change of representation. Whatever the merits of the applications, the administrative cost and court costs in hearings to determine them will be substantial. Moreover, the hiatus they will cause before they are resolved is likely to cause significant delay in proceedings. The refusal of an application may well leave the client with a grievance that will hinder rather than advance the smooth progress of proceedings.
188. Moreover, the CBA anticipates a significant increase in the number of complaints against legal professionals. One of the advantages of the current system in the experience of the criminal Bar is that, *regardless of outcome*, a client is generally satisfied with the service he or she receives where it has been provided by the lawyer of choice. Carter reported that ‘The client should have confidence in the quality of the legal advice and assistance they receive which will help contribute to their overall sense of trust in the justice system.’ (para 11 p95) By contrast, the imposition of a lawyer or firm in whom the client lacks confidence will without doubt spawn complaints about the adequacy of representation, whether justified or not.
189. The sense of injustice caused by the perception of poor representation will in turn lead to an increase in the number of conviction and sentence appeals to the Crown Court and to the Court of Appeal, from both those whose grounds have merit as well as those who don’t.
190. Most fundamentally, persistent criticism about representation combined with justified complaints about quality will, ultimately, undermine and damage public faith in the Criminal Justice System.

Summary

191. In summary, the CBA firmly believes that the loss of client choice will inevitably cause:
- i. the serious and irreversible lowering of professional standards,
 - ii. loss of confidence by clients in their representatives, their representation and the Criminal Justice System,
 - iii. costly delays in trials,
 - iv. a greater number of complaints, appeals and miscarriages of justice, and
 - v. loss of public confidence in a Criminal Justice System in which justice is identifiably subordinated to the economic interests of a few providers of defence services whose market is guaranteed by success in tendering rather than success in the ability to provide a good quality service.

Case Allocation

Q18: Which of the following police station allocation methods should feature in the competition model?

- **Option 1 (a) cases allocated on a case by case basis**
- **Option 1 (b) cases allocated based on the client's day or month of birth**
- **Option 1 (c) cases allocated based on the client's surname initial**
- **Option 2 cases allocated to the provider on duty**
- **Other**

192. None of the above.

193. For the reasons set out in answers to the questions above, the CBA considers cases should be allocated on the basis of the client's choice of provider.

194. In addition we make the following observation. Under the current system firms of solicitors thrive by their reputation, experience and expertise, and this enables them to have a particular share of the market. Under the proposals the allocation of work by arbitrary or random means cannot be an improvement nor would it promote true competition.

Q19: Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the LAA or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

195. No.

196. For the reasons set out above, the CBA considers cases should be allocated on the basis of the client's choice of provider. This proposal is clearly intended hardly ever to apply. It is arbitrary in its application, which cannot be right where an individual is at peril of loss of liberty. Furthermore, that individual may be perfectly innocent, yet brought into the Criminal Justice System for the first and perhaps the only time in his or her life. This is no way to treat them.

Q20: Do you agree with the proposal under the competition model that client's would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances?

197. For the reasons set out above, the CBA opposes any scheme which removes or restricts the client's choice of representation.

Remuneration

Q21: Do you agree with the following proposed remuneration mechanism under the competition model. Please give reasons.

- **Block payment for all police station attendance work per provider per procurement are based on the historical volume in area and price bid**
- **Fixed fee per provider per procurement area based on their price bid for magistrates' court representation**
- **Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)**
- **Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area**

198. For the reasons set out above, the CBA opposes any scheme and remuneration mechanism based on the lowest bid and not on quality.

199. The consultation paper does not provide any rationale for the use of block payments. There is no proposed correlation between bid price and actual work done. In order to attempt to operate such a contract, the provider would be incentivised to deal with matters by telephone, for instance, rather than attending a police station in person. Non attendance would become the norm. This would be greatly to the prejudice of vulnerable defendants of which there are many categories including the young, the illiterate, those with learning difficulties or mental health problems to name but a few. Greater risk of miscarriage of justice would follow.

200. We also note that there is no lowest declared bid. The effect is to invite bids that are *so* low, that only those privately funded corporate entities, can sustain them. Ordinary small and medium high street firms will be starved out of the system. We repeat our answers that in doing so quality is sacrificed.

201. Therefore, block payment at discounted rates, as proposed will lead to an acute conflict of interest for many, if not all providers. The financial pressure to maximise profit under a contract, which rewards volume alone will place the provider at odds with appropriate and effective client service.

202. Moreover, providers would be committing themselves to offer a service for three or five years not knowing whether they could make a profit, or indeed whether they will actually get any profitable work at all. The 'equal share' of work as a guarantee of volume is in fact illusory. Whatever method of allocation of clients is adopted – day of the week, initial letter of surname, etc – a contractor is actually bidding for an equal **chance** of work, not an equal **share** of it. A successful bidder might on his 'turn on duty' pick up a murder case, or he might get nothing at all, or his allocated client might be cautioned, earning him next to nothing.

Q22: Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and graduated fee when submitting their bids? Please give reasons.

203. No.

204. Whilst the CBA will defer to solicitor organisations, we repeat our concerns expressed above in relation to large geographical areas over which contracts are to be operated. Few if any current solicitors provide such a service. To that extent, the 'market based' service the consultation intends to create is artificial. Even established current providers will not have the historic data to understand the potential cost accordingly it must be unfair to expect applicants to be responsible for covering the cost of this element within their bid.

Procurement Process

Pre Qualification Questionnaire [PQQ]

Q23: Are there any other factors to be taken into consideration in designing the technical criteria for Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

205. No.
206. The “technical criteria” or test appears to be an evaluation of an applicant’s
- (a) suitability to contract with a public body, and
 - (b) their experience and capability to deliver services of similar type of volume in the procurement area for which they have tendered.
207. Conditions of tender:
- i. Regulated by one of the Legal Sector Regulators
 - ii. Hold a quality standard (either LAA’S Specialist Quality Mark or Law Society’s Lexcel standard or equivalent) or intend to get one
 - iii. Peer review rating of at least 3 or intend to get one
 - iv. Have premises accessible for clients and are compliant with Equality Act 2010, or intend to get them
 - v. Have a CJSM account or intend to get one.
208. An applicant is expected to deliver the following:
- (a) Investigations:- includes all work undertaken for a client during the criminal investigation of a matter up to the point at which a client is charged, discharged or summonsed for the matter under investigation (e.g. police station work – subject to price competition).
 - (b) Proceedings:- includes all work undertaken for a client during the magistrates’ court criminal proceedings in a matter or vase from the

date of charge or summons (e.g. Magistrates' Court work – subject to price competition)

- (c) Appeals and reviews:- advice and assistance on appeals against conviction or sentences (where newly instructed representative is not covered by an existing Representation Order) or applications to the Criminal Cases Review Commission (CCRC) (e.g. appeals from the Magistrates to the Crown Court, or CCRC but only if not the holder of the RO – rates administratively reduced by 17.5%).
- (d) Prison Law:- (rates administratively reduced by 17.5%)
- (e) Associated Civil Work:- legal advice and representation for matters concerning public law challenges arising from any criminal case (e.g. Judicial Review proceedings – rates reduced administratively by 17.5%)
- (f) Crown Court (non-VHCC) litigation:- (excluding confiscation proceedings), (e.g. 95% of Crown Court advocacy – subject to price competition) and
- (g) Representation for appeals heard by the Court of Appeal or Supreme Court:- (e.g. Appellate work – rates reduced administratively by 17.5%).

209. The criteria to assess whether they can deliver is as follows:

- i. Experience of staff
- ii. Experience of the management team in managing a comparable service; and
- iii. Experience of having delivered comparable volumes of work (not necessarily legal services work)

210. Experience of Staff: The only applicants with the “experience” and “capability” to deliver the advocacy service in the Crown Court are the Bar. By the same token the only applicants with litigation experience in the Magistrates’ and Crown Court are existing solicitors. None the less, the

Government proposes that litigation contracts, which will include all Crown Court work save for VHCCs, will fall within the contracts and are to be paid by way of a fixed fee, per provider, per procurement area based on the providers bid price. As the consultation conceded at paragraph 4.113 *“the fixed fee would apply to the majority of Crown Court cases”*.

211. The result will be to place all Crown Court cases, with the exception of VHCCs into the hands of the lowest bidder. Whilst the advocacy element in the Crown Court alone would not fall within the contract, the provision of the work to the Bar would be entirely in the gift of the provider, who will have financial profit as their sole incentive and not quality. This will provide for a natural ‘next step’ by which the providers would bring all advocacy in house and thereby destroy entirely the Bar as an independent referral profession, notwithstanding the consultation paper’s hollow words at para 4.36 that *‘the Bar is a well respected part of the legal system in England and Wales, and we will have due regard to the viability of the profession in reaching our final decision on the model for competition.’*

212. Furthermore, it is expressly declared in the consultation paper that the Bar is not in a position to participate in a process of competitive tendering. Yet even on the Government’s figures 75% of Crown Court advocacy is delivered by self-employed advocates. The reasons why the Bar would not be in a position to bid are set out at para 4.35 (i) *“To include Crown Court advocacy in the scope of the competition would require self employed advocates to be in a position to apply for the full range of competed work; not just Crown Court advocacy:*

“...They are not part of an organisational structure not do they have the experience of managing an organisation to deliver the full range of criminal legal aid services or to understand their costs so as to enable them to bid. We do not

consider that they are likely to be in such a position by the time we award contracts....

Publicly funded clients cannot, at present, access self employed Barristers directly and self employed Barristers cannot deliver litigation services to publicly funded clients ...Self employed Barristers would not be on an equal footing as solicitors' organisations when applying for a contract to deliver the full range of services (both litigation and advocacy).....The Bar Standards Board is looking to amend the Bar Code of Conduct to enable publicly funded clients to access Barristers directly, without having to first instruct a solicitor. However, this development will not have been implemented in time to fit in with our indicative competition timetable".

213. Experience of the management team in managing a comparable service and Experience of having delivered comparable volumes of work: In many areas no provider exists that can fulfil such criteria who is currently a legal service provider. The consultation paper acknowledges that such providers would need to increase by at least 250% to cope with such a contract. This has a direct impact on competition, any organisation that does develop to fill this void will quickly establish specific knowledge of the tendering process, will establish a unique ability to secure service provision and will thus in effect monopolise the market. This is again a risk to effective competition and runs counter to achieving value for money.

214. Who at the LAA would assess an applicant's assertions as to its capabilities and experience. Any due diligence on applications appears to be restricted to the LAA reserving the right to carry out due diligence, but on what basis is not spelt out. The experience of granting contracts in the limited field of interpreting services to ALS/Capita and the excoriating criticisms of the Justice Select Committee, must surely sound alarm bells to anyone contemplating awarding such large-scale Legal Aid services contracts as these.

215. There is no model of PCT, so determining what criteria may or not work is purely hypothetical and has no evidence base. It prevents respondents from having a genuine opportunity to respond effectively.

Invitation to Tender [ITT]

Q24: Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

216. It is proposed that the Invitation to Tender stage will be split into two parts:
- i. evaluating the provider's quality and capacity to deliver the specific service in the procurement area, and
 - ii. evaluating the bid price.

A. *Quality and Capacity Assessment: The Delivery Plan*

217. At this stage it is proposed that an evaluation would be undertaken as to the
- i. Quality,
 - ii. Capacity, and
 - iii. Price of an applicant's tender.

This it is suggested would be achieved by evaluation of an applicant's Delivery Plan.

218. The factors currently suggested that would be taken into consideration are:
- i. Recruitment, premises and other aspects of mobilisation.
 - ii. Financial plan, showing how they intended to finance any expansion or robustly manage the financial implications of running the service.

iii. Ability to deliver services

219. Quality: PCT applied to legal services will focus on providers achieving the lowest price, irrespective of quality. Save for a condition of tendering being that a provider holds a quality standard (either LAA'S Specialist Quality Mark or Law Society's Lexcel standard or equivalent) or intends to get one. Absent from the consultation paper, is any consideration as to the very real concerns regarding degrading of the quality of service. The requirement to ensure that a provider of services is quality assured confuses the quality of a supplier with the quality of the services they provide. Reference is made at para 4.149 to the fact that "*there would also be certain ongoing service standards. The details of these requirements would be made available when the competition opened*". What these are and how they would be enforced remains a mystery.

220. If accreditation is all that is required to guarantee 'quality' there would never have been any concern regarding the Mid-Staffordshire NHS Trust; all medical staff were suitably qualified and accredited. Patients nonetheless died unnecessarily. The quality of a supplier and the quality of services supplied are different things. What is at risk under the current proposals is the quality of services. No mechanism has been suggested by which the quality of service provided will be assessed. By way of comparison, again in health care, where the risk to quality is considered so great that price competition is forbidden and where there has been substantial investment in measuring patient's experiences, there has been little or no consideration of how to measure quality of legal service provision. Moreover, no provision is made as to how quality will be assessed, nor how the use of agents or sub-contracting will be managed.

221. Capacity: It is acknowledged that the business and organisational structures necessary to 'compete' to contract for legal services do not

currently exist. It is proposed that PCT would result in efficiency savings; reference is made to 'economies of scale' or 'economies of scope' and that those savings will flow into public funds through lower prices. This is in fact a rationale for restructuring the way legal services are delivered. A rationale unsupported by the evidence and about which there is real doubt as to the validity of. PCT would result in an added layer of administrative management which in turn costs more.

222. We cannot improve on what the Bar Council has said, "if economies of scale would result in or indeed have the ability to offer substantial savings whilst maintaining a fit and proper service (17.5% or more on current fee structures as is proposed), given the extensive cuts already imposed you would expect to see large chambers and firms of solicitors dominating the market for legal services. That simply is not the case and is not borne out by the evidence. In its survey of Criminal Firms conducted for Lord Carter's Review, Otterburn Legal Consulting found only "very weak" evidence of economies of scale and the impact of those on costs was negligible. The evidence therefore that does exist does not support the existence of any economies of scale, to the contrary it indicated that there could in fact be efficiency advantages to being small. In turn, the cost of restructuring/reorganising a business entity involves substantial costs. Such costs would have to be met out of what is expected ultimately to be recovered."

223. Economies of scope, are the perceived advantages of operating over a range of activities. There is no evidence as to how in practice such advantages would be achieved. To deal with the huge variety of cases such a contract may encompass a supplier would need to have not only general experience but specialist experience across a number of offence types.

224. Thus the restructuring required by PCT will result in questionable and as yet completely un-evidenced benefits but must result in substantial costs of

reorganisation and pose severe risks to quality of service at a time when a top priority is saving money and when service provision is already at breaking point. The reality is the system will be irrevocably damaged.

225. Financial Plan: The case load of the CJS has been in consistent decline in recent years, with reported crime falling significantly. Determining what volume of work that would be available to a bidder under a contract is uncertain. Producing a robust financial plan is unrealistic. Unlike other Government departments where significant growth in “demand” is inevitable such as the Healthcare System, the trend in the criminal justice case load is declining or at any rate not increasing; this points against the implementation of cost savings, which would dramatically undermine the efficacy of the system.

226. In turn, the cost of re-organising into an entity that could bid for a contract will be expensive. In the context of legal aid the margins are already so tight, that there is a very real risk that providers who have had to shoulder re-organisation costs may well fail. Likewise, new forms of legal service business organisations are untried and untested. There are risks that they will fail and thus that the delivery of services will be compromised. Instances of such failure exist and are evidenced when new entrants are awarded franchises for rail services, for example.

227. Nor does the model have any way of accounting for the complexity of all the different types of work a contract holder would have to cover. It is very difficult to commoditise a case. A one case fits all approach does not work in criminal law, unlike other areas of legal provision referred to in the consultation, such as conveyancing.

228. Moreover, there is no specific reference in this consultation question to Equality and Diversity requirements. The Code of Conduct to which

Barristers are bound, clearly expresses and defines the importance of Equality and Diversity.

Q25: Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

B. *Competition on Price*

229. No.

230. The proposal is to invite applicants to submit price bids at 17.5% below the rates paid in 2012/13 for each class of work in each procurement area. Inevitably given that the “lowest price bid” wins the contract, the aim must be to achieve greater savings still.

231. The MoJ is well aware that in contract to all other public service providers and employees, the legal profession alone has been forced to sustain significant cuts in fees in recent years. The system already requires a huge amount of work to be done for very low or no fees. There is a very real risk that providers who bid with the highest discount will bid at a rate at which they cannot operate.

232. Service providers who bid low in terms of price must then economise on quality in order to sustain their promise of delivery. Quality of representation is currently determined by fierce peer competition for work, based on ability and reputation. The proposal to award the contract to the lowest bidder, replaces competition on quality with preparedness to fulfil the task at the lowest price. The right kind of competition is that which raises standards, which is vitally important to the public interest. Proposals based

on achieving rock bottom prices will risk prejudice to the whole Criminal Justice System.

233. In the context of legal services degradation of quality also ultimately leads to increased costs because in an effort to reduce the direct costs of service provision there are many potential externalities upon courts and the broader Criminal Justice System – externalities that will generate costs to the public purse.

234. The impact will be measured in a sharp decline in standards, incalculable problems for the judiciary, miscarriages of justice (with the accompanying costs of appeals/re-trials) and a rapid lowering of public confidence. This is not scaremongering out of self-interest. These are genuine concerns of experienced ‘service providers’ and shared by many Judges.

235. Similar concerns have been raised in the provision of health services and have led to an insistence on fixed, administratively set prices, for hospital services in the NHS. The proposals are ultimately based on price not ‘best value’, the result will be the degrading of quality and through damaging competition price competitive tendering will ultimately increase the costs, to public funds, of criminal defence legal services. The flow of cause and effect, from monopoly to higher prices and costs, is well evidenced in other areas.

Chapter 5: Reforming Fees in Criminal Legal Aid

Introduction

236. The CBA considers that the assumptions underpinning the introduction to Chapter 5 are flawed and operate against the public interest. The CBA acknowledges the continued pressures on the public purse and wishes to engage with the MoJ in constructive debate which would permit the system to run more efficiently. The proposals currently advanced will serve only to break the system without any real prospect that what emerges will be more “efficient”. What emerges is likely to lead to higher costs elsewhere to the public purse and significant damage to a vital component of a just and equal society.

237. The costs of criminal cases in the Crown Court have fallen significantly in recent years already. The Executive is able to control the costs by refining policy as to those cases which are prosecuted and sent to the Crown Court at all.

238. We consider that the most effective way in which the Government could achieve its “right first time” principle is by ensuring the police and the Crown Prosecution Service prepare their cases in a timely way and ensure adequate and prompt disclosure.

General Observations about Paucity/ Inadequacy of Figures Provided

239. The LSC (now renamed LAA) business plan for 2012/13 provides essential financial information. In truth the ‘Transforming Legal Aid’ proposed reductions are even more dramatic when considered in the context of the reductions which have already been implemented over the past 3 years. This section is of relevance to all the questions in chapter 5.

240. The following headline points are derived from the LSC's Business Plan.

- i. The overall legal aid budget (Civil and Crime) was reduced from £2.144 billion in 2011/12, to £1.966 billion in 2012/13, approximately 8%. But the Crown Court element was hit twice as hard.
- ii. The budget for Crime Higher (i.e. Crown Court litigation, advocacy, experts and interpreters) fell from £721million in 2011/12 to £602million in 2012/13. **This is a reduction of 16.5% in a year** (see page 27) – the 2012/13 figure is a projection, the LAA may now have the final outcome for the last financial year. No step should be taken by Government without making public these figures to permit an objective assessment of how far costs have already fallen in recent years.
- iii. The Government should publish the LAA's projections/business plan for the current year (2013/14). The final tranche of reductions in the graduated fee scheme came into force in October 2011 and April 2012, which made more radical changes than just the 4.5% fee cuts that were originally planned. We are entitled to the fullest public information about the true figures for what Government has spent, and expects to spend, in the coming year before any further cuts are implemented.
- iv. Despite the assertions within the consultation paper, the effect of Government policy in relation to legal aid in recent years has already resulted in falling costs to the public purse and will continue to do so as the changes, which have already been implemented, take effect. The consultation paper fails to acknowledge the scale of these fee reductions. The result is significant downward pressure on fees still working through the system. The full impact of these more recent cuts to advocacy fees will not be fully revealed, until the end of the current financial year. Many of

the payments at the new rates won't be made until then, particularly in the most substantial graduated fee cases.

- v. The relevance of this is obvious. The MoJ state that they envisage making £220million in savings by 2018-19. The CBA does not accept that this figure has any legitimacy, any more than it accepts that there is any demonstrated necessity to cut criminal legal aid rates further in order to continue the downward trend in spending. It is impossible to identify within the consultation paper what the headline figure is which 'needs' to be reduced, or what baseline is being taken. We would suggest that, if any baseline is to be taken, it should be no later than 2009-10, the last year before the first of the 4.5% cuts took effect in April 2010. On that basis, as we have demonstrated, the Government has already saved more than £220million through a combination of the fee cuts imposed since 2010, and falling volumes, the latter being a trend which looks set to continue. There is, we submit, neither the necessity, not the justification, for any further cuts to criminal legal aid rates
- vi. The clear view of the MoJ is revealed by the argument within the consultation paper about excessively high fees from legal aid to criminal Barristers, because the figures they rely on have to go back as far as 2010/11 to support their case(see 5.34 page 79). This income must have derived in large part if not entirely from fees earned pre-2010. This seems designed deliberately to give a misleading impression. These figures are now completely unrealistic. The most recent figures for 2012/13 must already be available but have not been provided.
- vii. Other figures which are included in the consultation paper paint a very different picture; 65% of criminal Barristers now receive £50,000 or less in legal aid payments (which equates to less than £42,000 **gross** once VAT is discounted). These are the real fee levels which will be further reduced.

Even these figures are prior to any professional expenses being taken into consideration.

Criminal Fees Impact Assessment paper, dated 09/04/13.

241. The Impact Assessment paper wholly lacks the financial information which might allow a robust challenge to the savings claimed. There is no explanation of how the figures asserted are calculated, or table setting out the historical data.

i. The proposal to reduce the use of more than one advocate:

'the savings estimates assume that the restrictions.....lead to a 50% reduction...'

This can be no more than a guess.

ii. *'For those which are assumed to be reduced to a single counsel we have assumed the more senior counsel remains on the case.'* (See page 4 of the Impact Assessment document).

Of course we know that if a representation order for two juniors is changed to sole junior counsel, the junior alone is paid at a lower rate than the leading junior would have been. The VHCC tables set this out. The MoJ appear not to know this. The savings that will result from this change therefore will be greater than anticipated if there is the expected reduction in two junior representation orders.

iii. At page 7, paragraph 12, the various assumptions which underlie the proposals are set out. These include an assumption that advocates and litigators will supply sufficient quantity of services to meet demand (12 (1)), and that advocates and litigators will supply the same quality of service at the new fee levels (12 (2)).

We cannot speak for the quality of what litigators (solicitors) produce or will produce, but we seriously doubt that a supply of advocates of sufficient quality will be available to provide services at the new levels.

- iv. According to the impact assessment the 'do nothing' option will produce no costs or benefits. This is just wrong. Costs have been falling and will continue to fall as the cuts already implemented continue to feed in to the system (see section above).
- v. At pages 10 and 11 there is brief mention of the risk that *'the market for legally aided advocacy might not be able to sustain the reduction in criminal legal aid fees.'* The risks are identified as the number and type of suppliers and the quality of advice. However the impact assessment suggests that there is no evidence of any impact on the quality of advice or supplier numbers. We suggest that our response (and similar documents from others) to the consultation provide such evidence.
- vi. The consultation paper claims *'70% of the self-employed Bar doing some publicly funded work have experienced either an increase or no change to their income from publicly funded work in 2011'*. This is not just surprising it is completely false and is either so careless as to be alarming or simply intentionally misleading.
 - The source for this claim is the BSB 2011 survey, 'Barristers Working Lives - a Biennial Survey of the Bar 2011'. The data is not scientifically representative, more of a guide, and obviously depends entirely upon those who respond. Fed up criminal practitioners may be doubt less inclined to commit time to such a survey. The questions in the current survey do not necessarily differentiate between privately fees and legally aided fees and allows for those surveyed not to disclose their income.

- As usual the figures can be looked at in many ways but the relevant data is surely this - *'amongst those Barristers where more than 90% of their work is publicly funded more than half (52%) have experienced a reduction in gross fees billed in the last two years'* and more specifically the survey reported that *'49% of all Barristers working mainly in criminal practice indicated that their gross billed income has decreased in last two years...'*
- Since the survey was conducted in 2011, fee income has fallen significantly across the board for criminal practitioners. The MoJ must know this as they have all the accurate figures available to them. It is deplorable that the Impact Paper does not make reference to up to date figures.

vii. We cannot leave without referring to this passage at page 11 of the consultation paper:

'We believe that the levels of remuneration will remain comparatively high, both within the Bar and when compared to other publicly funded professions'.

They have not told us which professions they compare the Bar to. No doubt, because to do so would reveal the misleading nature of the alleged comparison. It would of course be risible to suggest that rates of remuneration compare favourably within other practice areas of the Bar, and this is no doubt why the MoJ declines so to do. All the evidence available to us suggests that the numbers of talented applicants aspiring to come to the criminal Bar is plummeting due to the financial risks entailed.

Q26 - Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- **introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;**
- **reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and**
- **taper rates so that a decreased fee would be payable for every additional day of trial?**

242. The CBA strongly disagrees with these proposals. Across the membership of the CBA there is unprecedented and universal objection to the proposals in Chapter 5 of the consultation paper.

243. As explained below, we consider that rates paid under the Graduated Fee Scheme remained unaltered from 1997 – 2007, a period during which inflation and the cost of living rose by 26%. In 2007 adjustments were made which moved resources from longer and more complex cases to shorter cases. The overall increase in the fees payable as a result of the changes made in 2007 was approximately 18%, a figure well below the rate of inflation in the preceding period.

244. That 18% “increase” in fees has already been reversed by the 13.5% cuts that took place in April 2010 (staged over three years) and by the changes that were brought in unilaterally with the imposition of the new Funding Order in October 2011. In the period 2007 – 2013 the rate of inflation has further eroded the rates at which advocates are paid. This means that rates of remuneration are already at historic lows, below those imposed by the Government in 1997.

245. **The further cuts proposed in Chapter 5 of the consultation paper are therefore in effect cuts to the base line fees that were imposed in 1997.** This will irreparably damage the Criminal Justice System. There will be very significant additional costs elsewhere.

246. The proposals in Chapter 5 of the consultation paper claim they are intended to provide incentives for efficiency. However, those proposals are not supported by evidence and are based on the false premise that advocates are solely, or even mainly, responsible for substantial delay. For example changes to criminal procedure rules, mean in 2013, courts no longer tolerate delays and counsel are often required to work evenings and weekends to ensure that arguments are put in writing, to avoid keeping juries waiting during legal submissions.

247. The proposals take no proper account of the fact that most delay is caused by poor case preparation and late service of cases by those responsible for bringing prosecutions, as well as the endemic disclosure problems. Further the proposals create perverse incentives which will adversely damage the public interest.

248. The proposals in Chapter 5 of the consultation paper are disproportionate.

- i. The proposal in Chapter 4 is that the litigator's fee for cases over 500 pages is to be cut by 17.5%, but the cuts proposed for trial advocates are far higher..
- ii. The proposal in Chapter 5 to increase the fees paid for guilty pleas, while cutting the fees paid for trials, would have the bizarre effect of paying more money for less work and less money for more, and more demanding, work. That cannot be right.

iii. Currently the self-employed Bar conduct the vast majority of serious and complex trials in the Crown Court. Our experience is that these trials are briefed by prosecution and defence alike to the independent Bar due to our experience and ability to conduct difficult and complicated trials. This high level of expertise would therefore result in a reduction on remuneration. There is no incentive for the self-employed Bar to continue to conduct such trials if they receive less remuneration for complex trials and more remuneration for simpler trials.

249. The consultation paper is correct when it states that it should not impose further significant cuts on the majority of advocates who received modest amounts from legal aid work. However the proposals advanced will achieve precisely the opposite of what is intended. The creation of incentives for “cherry picking” would be likely to lead to huge reductions in the income of Barrister advocates, making it likely that many of them would leave practice. The effect is bound to be most pronounced on women who will be far less likely to return from maternity leave or career breaks. Currently many women do not see a future at the criminal Bar, as the work is both stressful and demanding with unsociable and unduly long hours. The remuneration no longer allows for full time child care to be affordable.

250. The problem is only increased by the picture faced by prospective entrants to the profession. The high levels of personal debt carried by graduates entering pupillage has been addressed above. Further reductions to remuneration will make entrance to the profession unsustainable for anyone without a private income or family support.

251. In the short to medium term there will no longer be a body of experienced, specialist advocates able to present serious and complex criminal cases to the required standard. These skills once lost will not be replaced as

Barristers will have moved on to seek work elsewhere. If remuneration reduces further, those advocates will be unable to conduct legally aided work. That work will then fall to be dealt with by less experienced advocates which may result in an initial cost saving but a cost expense where inexperience leads to failings in serious and non-serious trials.

252. The long-term sustainability of the Bar as a profession will be damaged. We are deeply concerned that these changes will be socially regressive and reverse many of the gains in diversity made by the profession over the last 25 years. This will have major adverse consequences for social cohesion, respect for the administration of justice, and the composition of the Judiciary in the years to come.

253. The proposals in Chapter 5 of the consultation paper focus on the rates at which advocates are paid, rather than the wider picture, which includes that:

- i. Significant savings in criminal legal aid spend have already been achieved by virtue of the reduction in the number of criminal cases.
- ii. Savings can also be achieved by introducing efficiencies in the operation of the Criminal Justice System.

The AGFS: 16 Years of Reductions in Rates

254. The history of changes to fee rates since 1997 shows repeated cuts to rates that have not increased since 1995. The proposed changes are iniquitous. We venture to suggest that there is no other area of public service where rates of payments are less than they were 20 years ago, even before factoring in the rate of inflation which has resulted in a real erosion of 30% since 1995. It is therefore clear that cost increases over this period are the result of actions by the Government rather than defence practitioners.

255. The paragraphs below may be common to other responses. This is no doubt because they are beyond dispute and well known to the Bar Council and practitioners.

- i. The Graduated Fees Scheme was first introduced in 1997, for cases where the trial was expected to last up to 10 days. The rates paid were based on 1995 fees. They were not increased until 2007, and therefore fell in real terms.
- ii. In 2001, the Graduated Fees Scheme was extended to cover trials up to 25 days in length. In 2004 the Government accepted that these changes had not been cost neutral, but had resulted in a reduction in fees. The rates were increased to restore them to cost neutrality (but not to make up for the effects of inflation). The Scheme was also extended cover cases up to 40 days in length.
- iii. In November 2005 the Government cut all Queen's Counsel payments by 12.5% and removed from all advocates the length of trial uplift in cases over 10 days in length.
- iv. In April 2007, following Lord Carter's review, a revised Advocates' Graduated Fee Scheme was introduced. The scheme was radically restructured, with cuts to fees paid in longer cases and increases to the fees paid in shorter cases and fees for guilty pleas. Overall, rates were increased by roughly 18%, which was less than the 26% rate of inflation between 1997 and 2006.
- v. In April 2010 rates were cut by a further 13.5%, staged over three years: 4.5% in each of 2010, 2011 and 2012.³² In addition, the AGFS was extended to cover 40-60 day cases, but at reduced daily attendance rates. The Ministry of Justice calculated that taking 40-60 day cases out

³² *The Criminal Defence Service (Funding) (Amendment No.2) Order 2010*. S.I.1181 and *The Criminal Defence Service (Funding) (Amendment No.3) Order 2010*. S.I.1358.

of the VHCC scheme and putting them into the extended Graduated Fee Scheme was equivalent to a 39.5% fee cut for those cases.³³

vi. In October 2011 more cuts were introduced:³⁴

- (a) fees for murder cases (Category A) were reduced to the level of those for serious sexual offences (Category J);
- (b) fees for high value fraud cases (Category G) were reduced to those for low value fraud (Category F);
- (c) fees for trials that crack in the second or final third were reduced by 11%;
- (d) for trials that crack in the final third the pages of prosecution evidence uplift was made the same as for trials that crack in the second third; and
- (e) fees for sentencing hearings were reduced by treating them as standard appearances.

vii. Fees were reduced to a fixed fee of £203 where the client elects Crown Court trial and the case does not proceed to trial.

256. The repeated reductions in rates over the last 16 years have achieved significant savings for the Ministry. As we have already noted, it is likely to be shown, when the figures for 2012-13 are published in June, that there has been a reduction in Criminal legal aid spend since 2009-10 of at least 20%.

257. Paragraph 5.5 of the consultation paper acknowledges the most recent of these reductions (**but not the fact that rates have fallen in real terms since 1997**), but then dismisses them by the simple assertion that “we need to bear down further on the cost”. This is no basis for proposing additional and disproportionately large reductions in AGFS rates.

³³ “Legal Aid: Reforming Advocates Graduated Fees and Very High Cost (Crime) Cases 2010” Ministry of Justice and Legal Services Commission, 5 April 2010, paragraph 185.

³⁴ Criminal Defence Service (Funding) (Amendment) Order 2011

258. These repeated reductions in AGFS rates have led to a situation where **the level of remuneration for the majority of Barristers practising in criminal advocacy is so low that there is no more scope for reductions without prompting significant numbers of practitioners to give up criminal advocacy as economically unviable.**

259. Thus, for example, according to paragraph 5.34 of the consultation paper, 85% of advocates receive less than £100,000 per annum from legal aid, including 65% who receive less than £50,000 per annum. These are gross figures, including VAT, from which expenses have to be paid and pensions have to be funded. In addition, young Barristers will have entered the profession with substantial debts, which need to be serviced. More senior Barristers increasingly question whether the ever-diminishing rewards justify the hard work and time commitment required of high quality advocate at the expense of a family life; the poor work life balance is ultimately not worthwhile if there is no financial reward.

Administration of the AGFS

260. The assertion in paragraph 5.10 of the consultation paper that the AGFS fee structure *“has become complex and cumbersome to administer”* is a misleading conflation of two separate matters.

261. The AGFS scheme is not “complex”. It remains a simple system, which enables fees to be calculated by reference to a single formula which, with only 6 variables,³⁵ applies to thousands of cases ranging from the smallest and simplest cases to the most complex cases, lasting up to 60 days in Court.

262. Recently, the administration has become unnecessarily cumbersome as a result of the decision to do away with the arrangements whereby page

³⁵ i.e. category of offence, level of advocate, number of days, number of pages of prosecution evidence and number of witnesses.

counts were agreed by the court clerks and fees paid locally. This change was an ill thought out and hasty decision by the MoJ which has caused delay and uncertainty. It is quite wrong to now suggest that advocates should bear the consequences of mistakes made by the State. A return to the old system would be welcome.

The Proposal to Harmonise the Basic Fee and Remove the Witness Uplift in Trials

263. The CBA strongly disagrees with this proposal. Harmonising' the basic fee for all three disposal outcomes, and tapering the trial fee, embeds into remuneration structures a conflict of interest between the client's best interests and his lawyers' financial interests that can only lead to appeals and professional complaints, and, ultimately, expense.

264. In addition to the amount of work required, it is also necessary to consider the levels of skill required. Trials are much more demanding than guilty pleas. They involve examining and cross-examining witnesses; the advocate usually has to make more and more complex legal submissions; the advocate has to address a jury as well as a judge; and trials inevitably create more opportunities for unexpected issues to arise which require the swift application of sound judgement.

265. The recent consultation on the Quality Assurance Scheme for Advocates revealed that there are a number of (mostly solicitor) advocates who wish to be authorised as "plea-only advocates", so that they could conduct guilty pleas in a certain level in the Crown Court, despite the fact that they would not be authorised as competent to conduct the same cases if they resulted in trials. There could be no better illustration of the point that trials are more demanding and require greater skill than guilty pleas.

266. The differentials between the basic fees and uplifts for guilty pleas, cracked trials and trials were intended to reflect the differential in the amount

of work required on average. The consultation paper certainly contains no evidence (nor are we aware of any) that these differentials in rates are out of line with the differentials in work.

267. Instead, paragraph 5.12 of the consultation paper contains the bare and unsupported assertion that the differences in the basic fees and uplifts for guilty pleas, cracked trials and trials *“do not necessarily reflect the amount of work done on a particular case.”*

268. The propositions underpinning this language in the consultation paper are unclear:

- (a) The qualification of this sentence by the word “necessarily” suggests that all that is being said is that individual cases vary, with some guilty pleas being more demanding than others and some trials being less demanding than others. If that is right, then it seems that the Government does not dispute the proposition that the differential in basic fees and uplifts does reflect a differential in work required on average in guilty pleas, cracked trials and trials.
- (b) If, however, the Government does mean to dispute that proposition, the consultation paper contains no evidence to support the Government’s position.

269. On the basis, however, (which we repeat is not challenged by any evidence in the consultation paper) that there is a differential in the work required on average in guilty pleas, cracked trials and trials, then the proposal to “harmonise” the basic fee and remove the witness uplift currently payable in trials would have the bizarre result of:

- (a) Increasing by a modest amount, the fees paid in the cases which require the least work and are the least demanding; while

- (b) substantially decreasing the fees paid in the cases which require the most work and are the most demanding.

270. There is no justification for treating these two categories of cases in such radically different ways. It would be a radical departure from the principle that the rates paid under the AGFS should broadly reflect the work done and the demands on the advocate. It would simply be unfair.

271. The unfairness would be compounded by the proposal to introduce further swingeing reductions in daily attendance fees for trial advocates.

Proposed Reductions in the Daily Attendance Fee

272. It is claimed in paragraph 5.17 of the consultation paper that:

- (a) The proposed reduction in daily attendance fees (excluding tapering) is between 20% and 30%.
- (b) The proposed reduction in daily attendance fees (including tapering) is around 35%.

In fact, in longer cases, the reduction in the daily attendance fee would be significantly more. This would be on top of the huge reductions proposed in the basic fee. Cases with long trial estimates are necessarily more complex. It is perverse to pay lower daily rates in such cases.

273. Cases that last longer than one week will often (but of course not always) be more serious and complex. Multi-defendant trials come with a host of complexities in evidential rules and substantive law with which an inexperienced advocate will flounder. They also require an ability to master a large volume of information over a lengthy period of time; there should not be a reduction in fees which would penalise the experienced advocate in such cases.

274. Below are four worked examples of what the cuts mean in real terms when compared with the 2007 rates that Carter deemed 'sustainable':

Example 1: Domestic Burglary

Class E offence

Single junior advocate

3 day trial plus all pre and post trial hearings

12 Witnesses

60 Pages of evidence

Adjusting for inflation, a 38.6% cut in real terms from fees payable in 2007 to those under the proposed new rates.

Example 2: Conspiracy to Supply Class A Drugs

Class B offence

Single junior advocate

15 day trial plus all pre and post trial hearings

80 witnesses

2500 pages of evidence

Adjusting for inflation, a 44.4% cut in real terms from fees payable in 2007 to those under the proposed new rates.

Example 3: Rape

Class J offence

Leading junior advocate

15 day trial plus all pre and post trial hearings

30 witnesses

900 pages of evidence

Adjusting for inflation, a 46.7% cut in real terms from fees payable in 2007 to those under the proposed new rates.

Example 4: Murder

Class A offence

Queens Counsel

25 day trial plus all pre and post trial hearings

100 witnesses

7000 pages of evidence

Adjusting for inflation, a 50.1% cut in real terms from fees payable in 2007 to those under the proposed new rates.

Incentives

275. The justification offered in the consultation paper for the structure of the proposed changes to AGFS rates is that they would provide incentives for efficiency. This argument, however, is not supported by any evidence or any analysis of the true causes of inefficiency in the Criminal Justice System. We cannot stress strongly enough that the appropriate place to improve the operation of the Criminal Justice System is in preparation and presentation of cases by the Police and Crown Prosecution Service. Properly prepared cases brought in a timely fashion are the key to speedier and more efficient resolution in the system.

276. For example, paragraph 5.2 of the consultation paper contains the assertion that:

"the current fee structure does not do enough to support efficient resolution of cases."

This is pure assertion, with no evidence or analysis to support it. A defendant who pleads not guilty and fights a trial receives the same legal aid assistance as one who chooses to plead guilty – there is no cost incentive on the defendant to plead, rather than fight a case beyond a reduction in their sentence by up to one third. Ultimately it is only the defendant who can enter a plea, however robust the advice they are given. There are already incentives for defendants to plead guilty at an early stage by reductions in sentences.

The fact is that some defendants will never choose to plead guilty, however strong the evidence against them. Proper representation for all defendants means that even those who dig their heels in and fight an overwhelming case have trials that are as shorter, more focussed, and better managed, their victims are cross-examined professionally and respectfully, and they are unlikely to have arguable grounds of appeal when they are convicted. This fosters public confidence in the justice system and reduces costs elsewhere.

277. It is stated in paragraph 5.7 of the consultation paper that: *“The current system of daily attendance fees also does little to encourage early resolution.”* Again, there is no evidence or analysis to support this assertion.

278. Paragraph 5.18 of the consultation paper then states as follows in relation to the proposal to harmonise basic fees: *“Harmonisation is intended to ensure that the fee scheme does not inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in the proceedings, because fees no longer rise the later a case is resolved.”*

279. There is no evidence offered to support the contention that the fee scheme leads to delay, or discourages defence teams from doing their duty and considering plea with the defendant, early in the proceedings. Indeed, the language of paragraph 5.18 seems carefully couched so as not to allege that this is in fact happening, but merely that it is a potential inadvertent consequence of the fee scheme. For example, defendants may choose to plead guilty at a later stage because they want to see the strength of the evidence first and the reduction in sentence does not avoid a custodial sentence. If there is the possibility of an acquittal due to insufficient evidence or a key witness failing to come up to proof, then they will, in all likelihood, not choose to plead guilty at an early stage. This simply reinforces the key point that the way for the state to promote “early resolution” is by properly preparing

criminal cases. The responsibility for this lies with the Crown Prosecution Service and the Police.

280. We are not surprised that the consultation paper should shrink from asserting that defence lawyers are in fact preferring their own financial interest to the interests of their clients.

281. The only “evidence” offered in the consultation paper is in paragraphs 5.13 and 5.14, which concern the case of defendants who elect Crown Court trial and then plead guilty. This is a specific issue, which has no bearing on cases which actually proceed to trial, and where, as the consultation paper recognises, there may be a number of different reasons why fewer either way offences are going to the Crown Court. Without further analysis, this provides no evidential basis for the proposals in the consultation paper.

282. In any event, if the aim is to encourage earlier guilty pleas, reducing the fees for trials is irrelevant, since trials are cases in which the defendant has pleaded not guilty.

283. In relation to the proposal to reduce daily attendance fees, paragraph 5.18 of the consultation paper states as follows *“Tapering is intended to ensure that there is an incentive to complete trials in a timely manner.”*

284. No evidence is offered that advocates are responsible for delay in the conduct of trials. By contrast, it is well known that delays are caused by a host of factors which are either under the control of the State or are outside the control of defence advocates. In the first category we have, for example: late disclosure by the prosecution; failure to warn witnesses; the frequent late production of prisoners to and at Court by the Government’s preferred suppliers SERCO; and the failure by Capita to provide interpreters. Why should the advocate be penalised for the length of time a jury may choose to

deliberate in a case? In the second category we have illness or non-attendance of witnesses or jurors and unexpected developments in the evidence. In many courts the cause of delay is often the pattern of listing short hearings in other cases each day when trials are taking place. This can mean the trial courts lose several hours a week. It is grotesquely unfair to suggest that the defence advocates should have to bear the costs of these factors over which the advocate has no control and which are often the failings of the State, particularly where they are unable to conduct other work at the same time.

285. Moreover, tapering can have no proper incentive effect if it starts before the end of the trial estimate. If a case is expected, without undue delays, to last 40 days, then using a taper to reducing the fees on days 3 to 40 will simply be a fee cut, since it cannot act as an incentive to the advocates to avoid undue delay. Cases lasting 40 days undoubtedly require significant preparation and work during the trial in order to avoid delay. This work is invariably conducted when the court is not sitting i.e. early mornings, evenings, and weekends. There should not be a penalising of advocates for trials which last longer when they work hard both in court and out of court.

286. We strongly assert that all substantial criminal trials – not merely those lasting 40 days – require and receive significant preparation by dedicated Barristers. The consultation paper utterly fails to demonstrate awareness of this fact, and seeks instead to introduce arbitrary changes by tapering fees in such a way that bears no comparison with the reality of the hard work undertaken by criminal Barristers.

287. While there is no evidence to suggest that the proposals would have any beneficial incentive effect, it is clear that the proposals would create perverse incentives:

- i. The most obvious effect will be to create a conflict of interest in that a provider or its agent will either directly or indirectly come under pressure

to give advice and assistance, which is in the financial interest of the provider rather than the best interests of the client. One consequence would be the cost of dissatisfaction by way of appeal or complaint.

- ii. By singling out trials for reductions in fees, the proposals would create a great incentive for experienced and skilled advocates to move out of criminal advocacy, and a great disincentive for young advocates to start a career as criminal trial advocates. (see two speeches made by two young advocates at the CBA dinner in May 2013 posted on the CBA website) [<https://www.criminalBar.com/latest-updates/news/q/date/2013/05/13/monday-message-13-05-13/>]
- iii. The result would be that trials would be conducted by less able and less experienced advocates. Those advocates who have honed their skill for twenty years would almost certainly seek work elsewhere thereby resulting in a skills gap.

The Likely Effect of the Proposed Changes to the AGFS

288. For these reasons, the likely effect of the proposed changes to the AGFS would lead to an increase in the use of “plea-only advocates”, with the reductions in fees falling disproportionately on trial advocates, i.e. predominantly the Bar. The Government may claim that it wishes the independent Bar to survive. Such claims are hollow, as the independent Bar will not survive these proposals.

289. Reductions at these levels would undermine the financial viability of most sets of chambers and the attraction of a career at the criminal Bar both for new entrants and established practitioners. Within a short time, the body of experienced, able, specialist criminal advocates on which the criminal justice system relies so heavily would disappear.

290. The effects for the criminal justice system would be considerable, since reductions in the standards of advocacy would lead, amongst other things, to:

more delay, rather than less; more ineffective trials; more appeals; and a substantial risk of injustice arising from poor representation.

291. Furthermore there will be a diminution of the pool of skilled and experienced advocates from which the judiciary is drawn.

Q27 - Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give your reasons

292. No, for the reasons given below.

VHCC - General Observations

293. The consultation paper proposes an across the board **30% reduction** to all payments for VHCC work i.e. advocacy, preparation, travel etc. The MoJ suggests that this will lead to a saving of **£20 million** annually. Assuming this figure is accurate, this in all probability means that **the actual spend** on VHCCs is closer to **£60 million** and **not £92 million** set out in the consultation paper. This is an example of misleading and inaccurate figures being advanced as a basis for these proposals. We urge the MoJ to release up to date figures about expenditure so that a well-founded and fair assessment of the extent of further cuts can be made against an objective set of figures rather than the morass that are currently being advanced.

294. This lower figure is perhaps not surprising as the rates for VHCCs were reduced in July 2010 by 5% and the qualifying criteria were modified to reduce the number of cases which come within the VHCC scheme. Contract managers have also applied a much more restrictive approach to the hours they will allow for case preparation. These significant changes, were not retrospective or immediate, and so will have had a limited impact upon VHCC spend in the financial year the consultation paper cites (2011/12) to

illustrate its argument. The £20million savings figure may therefore reveal the extent to which significant savings have already been made to the VHCC scheme. If this analysis is broadly accurate then actual expenditure is already much lower than is being suggested in the consultation paper. No further steps should be taken by the MoJ without releasing full and up to date figures.

295. As the CBA and the Bar Council have contended before, the contracting and payment processes for cases currently falling into the VHCC regime are unnecessary, inefficient, administratively consuming (of time and resources) and full of perverse incentives. The cumbersome and complex nature of these processes has been created by Government and the Civil Service. The whole scheme has proved itself to be barely fit for purpose. The added layer of management by the Legal Services Commission has cost far more than paying advocates a fair fee to conduct a VHCC case. It cannot be right that Barristers have to argue with a contract manager for hours in order to conduct what is required to prepare a case for trial, sometimes taking up an inordinate length of time for both sides.

296. In 2009, just before the detailed proposal (GFS+), which had been worked up between a Bar Council team (which included Prof. Martin Chalkley, Paul Mendelle QC, Abbas Lakha QC, Alexander Cameron QC, Neil Hawes (now QC), Alexandra Healy (now QC)) and a Ministry of Justice team (which included Matt Shelley – now part of the Ministry of Justice Consultation team) was to have been finally been considered, we were told that ‘the Minister’ had decided he was no longer interested and shortly afterwards the general election was called.

297. GFS+ was a worked up scheme. It was costed, in so far as the surprisingly meagre Ministry of Justice records allowed, but was considered to be nevertheless robust. One of the many advantages of it, particularly to

the Ministry of Justice, was the control that it gave to the Ministry of Justice to set the relevant rates (which control is so aptly demonstrated in the proposals the subject of Chapter 4 in this consultation paper).

298. The CBA consider that the introduction of GFS+ would save money and would still be able to take into account the volume of paperwork served as evidence.

299. The advantages of this scheme are as follows:

- i. No (or minimal) administrative staff / cost required;
- ii. Positive incentives (no hourly rates) are restored;
- iii. Cost certainty (or significantly greater cost certainty) both for the Ministry of Justice and the Bar is obtained;
- iv. Duplication of work will be avoided (as demonstrated by the existing graduated fee scheme);
- v. Trials will progress more swiftly as days will not be lost for 'preparation' as now because no 'preparation' will be paid for once the trial has started.
- vi. A taper relative to the detailed trial estimate will further ensure this (any taper not relative to the detailed trial estimate is unconscionable and irrational).

300. As to the proposal in the consultation and the reasons put forward to justify it:

- i. The analysis upon which the Ministry of Justice relies (paras 5.34 - 5.38) for the effect of a 30% cut is flawed. The effect will not fall upon the highest paid advocates, but upon the junior Bar, whose work will be taken by those senior juniors fleeing from a 30% cut;
- ii. The figure of 30% is plucked out of thin air. There is no evidence that a 30% cut will improve the credibility of the system. There is also a

danger of a tipping point after which the level of fees paid to defenders becomes so low that confidence in the system is damaged;

- iii. There is no evidence that the Ministry of Justice has considered whether a reduction by 30% would have an effect upon the number of 'providers' prepared to make themselves available for VHCC work;
- iv. The daily rate and hourly rate in serious fraud is low e.g. for an experienced junior on a category two fraud the rate includes two hours of preparation. A reduction in rates would result in advocates choosing not to conduct more difficult and complex work because its rate of pay is so poor compared with the time invested;
- v. The number of 'providers' has already been restricted by the tendering process and length of contracts, (para 5.25). Whilst new providers could be accredited at any point, there is no evidence that they would wish to do so at the new rates.

301. All the indications are that CBA members would not be willing to work at further reduced rates. Furthermore, the examples supplied at paragraph 5.29 take into account the fees paid to litigators (solicitors) which are over and above any fee which the advocate receives and by whom the majority of the work may well be undertaken. It would be quite wrong for the government to take any steps to alter the system without a proper analysis that separates out the fees paid to the advocates from the litigators. The advocates are of course at the front line in terms of preparation and being able to keep a lengthy case properly focussed and on the road so a verdict is eventually reached.

Q28 - Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give your reasons

302. No, for the reasons given below.

303. The word 'contract' is important, both as to its legal meaning and as to the understanding of the general public whose interests criminal Barristers serve. The Ministry of Justice has made contracts with individual Barristers to conduct approved work at agreed rates. The Ministry of Justice cannot unilaterally change a fundamental term of the contract – the price of it – in the course of the contract without being in breach of the contract.

304. Paragraph 5.11 of the '2010 VHCC Contract' reads: *"Following assessment we will calculate payment using the applicable payment rates."* Paragraph 7 sets out the 'Payment Rates'.

305. The dire state of the public finances is not a new phenomenon. The Ministry of Justice should have negotiated different contracts with different paragraphs (lowering rates) over the course of the last three years if that is what it wanted to do. It chose not to. That does not permit it simply to renege on an agreement which it has entered into. The MoJ set rates as low as it was thought feasible at that time:- a lower rate will undoubtedly result in a skills exodus.

306. In the event of the MoJ unilaterally breaching its contract with any provider, the CBA anticipates that the vast majority of those individuals currently undertaking such work are likely to withdraw from the case. In those circumstances:

- i. any work completed under the contract would have to be re-done by a new 'provider' (assuming that there would be one to take up the case);

- ii. there would thereby be an element of double payment;
- iii. any trial date would have to be put back;
- iv. any victims giving evidence, or families of victims, would find justice delayed;
- v. credibility in the system would not be increased; quite the reverse;
- vi. in any event the Ministry of Justice should not enter any more contracts but should introduce GFS+ with an increase in the upper page count so as to take account of exceptionally large cases.

Q 29 – Do you agree with the proposals:

- **to tighten the current criteria which inform the decision on allowing the use of multiple advocates;**
- **to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and**
- **to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?**

Please give your reasons

307. In response to these contentions.

- i. No. The current criteria do not require “tightening”. The award of silk is a mark of excellence. The quest to attain preferment and recognition creates an environment where advocates seek to improve their skills to the benefit of the whole system. It must be a “given” that the most serious cases are dealt with by the most experienced and able Barristers.
- ii. The CBA welcome any steps that ensure that all litigation teams provide the service for which they are paid, just as it expects all advocates to provide the service for which they are paid.

iii. Judges already apply the criteria robustly and consistently.

308. In the vast majority of cases only one advocate is instructed. The current process is tightly administered by those best placed to make such decisions. The CBA is dismayed to think that the MoJ does not trust Resident and Trial Judges at Courts such as the Central Criminal Court and Southwark Crown Court to make the appropriate decisions in such cases. There are no reasons given to support the MoJ's assertion that "*we*" "still consider that multiple defence advocates are being allowed by judges in cases where they are not needed" (para 5.43). The MoJ deems itself wiser than the judges actually acquainted with the facts of such cases.

309. The current criteria again reflect the cases that the Crown chooses to bring and the resources the Crown elects to put in to its cases. The criteria operate fairly and do not require change.

310. We are not aware of any **evidence** that there is a significant problem with the current system. If the MoJ has any such evidence then it must be possible to ensure that the Judiciary is reminded of the criteria that currently exist and to takes such steps as it thinks appropriate to ensure these criteria are robustly and fairly applied.

311. The CBA does not accept that there should be any reduction in the availability of two counsel that results in the exclusion of Queen's Counsel from the most serious and demanding cases. The consequent diminution in skill and experience available to the court, defendant and Criminal Justice System would be entirely disproportionate to the marginal savings in cost. Furthermore, the savings that are currently in existence with two advocates saving court time by sharing work and responsibilities would falter if one advocate was required to conduct all the work alone. Those cases where solicitor advocates attend court and do not provide assistance to leading

counsel cannot be dealt with by simply reducing the number of advocates. Far better would be to trust the trial Judge to review robustly those cases where such certificates have been granted. The consultation paper appears to accept that there will always be cases where the instruction of two counsel is merited. We do not therefore seek to detail the obvious advantages over and above the fairness of the proceedings from the defendant's perspective.

312. We observe however that the necessity for two counsel to provide adequate intellectual and/or logistical management of a case has if anything increased in recent times because of changing workloads at major Court centres. The reduced case load at major courts and the lesser times before available trial dates mean that cases are already being brought to trial more quickly and more often within Custody Time Limits. In the more complex and difficult cases the police and CPS have often been engaged in investigating and preparing cases for several years before charges are brought. The instruction of two counsel means that trials can be ready more swiftly with the obvious benefits to complainants and other witnesses, and to society as a whole.

Current criteria

313. The existing criteria are already applied stringently. Since the current regulations for the extension of legal aid are sufficiently stringent the Bar already conducts cases with one advocate where two advocates were previously common place. There is therefore no further room for reduction on this basis.

314. It is facile to suggest that there will ever be universal consistency in every court centre. No system reliant upon human judgement could ever achieve that. The CBA of course accepts, however, as set out at para. 5.46 that 'the use of more than one prosecution advocate does not necessarily mean that each and every defendant also needs two advocates as well'. Our

experience is that this is already what happens in many cases. The current system requires that Judges are in possession of a Defence Statement from the party applying for two counsel and so are well placed to assess whether or not a particular applicant's application is merited. Our experience is that Judges are extremely sensitive to the burdens on the public purse and look to apply the criteria rigorously; the extension of legal aid to two counsel is already rare and is not easy to secure.

315. Cases of sufficient weight and complexity which currently meet the criteria are often those where substantial quantities of used and unused material are served in the immediate run up to and during trial. Persistent shortcomings by the prosecuting authorities to achieve timely service and disclosure mean there are unconscionable burdens on trial counsel to maintain effective trials. The taking of instructions at court is often shared between advocates with one advocate preparing the case whilst the other conducts matters in court. These burdens are only increased by the effective disappearance from the process of proper litigation support in recent years. It is frequently only because two counsel are instructed for a defendant that such trials can remain in the list and be tried on the appointed date. To alter this, will cause significant damage to public confidence in the system and produce additional costs in lost days, recalled witnesses and appeals. A jury subjected to regular waiting out of court for no apparent good reason quickly becomes disenchanted with the whole system.

316. We note that responses to the 2010 consultation indicated that the benefits of raising the number of pages of evidence ('PPE') needed for multiple advocates to be instructed from 1,000 to 1,500 was likely to be limited. That fact has not changed. The difficulties identified in expecting one counsel to act in such cases outweigh such limited benefits.

Chapter 6: Reforming Fees in Civil Legal Aid

1) Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme:

Q30: Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

317. We do not have expertise in this field; we defer to and support the comments in the Family Law Bar Association response.

2) Harmonising fees paid to self-employed Barristers with those paid to other advocates appearing in civil (non-family) proceedings

Q31: Do you agree with the proposal that fees for self-employed Barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

318. No, for the reasons given below.

319. The proposals will have a substantial impact on the availability of Barristers to work on civil (non-family) cases, impeding access to justice and the efficiency with which cases are dealt with.

320. The proposed changes to Barristers' hourly rates in civil (non-family) cases amount to a cut of 36.4% at the lowest end of the scale and 53.3% at the highest end. Most of the cuts are clustered in the 40-50% range. Although these cuts are subject to certain fee enhancements, these enhancements will be limited to "exceptional" cases.

321. Given the scale of the cuts it will be unsustainable for many Barristers to continue to dedicate existing time and resources to this type of work. The availability of specialist Barristers to act in these cases will fall markedly as a result of these proposals, taken alone or together with the other reforms in the consultation paper. Indeed it is envisaged by the MoJ that such work will be undertaken by solicitor advocates instead of Barristers (see Impact Assessment, Evidence Base, paragraph 32(b)).

322. This will have a major adverse impact on the efficiency with which such cases are conducted through the courts and on access to justice for clients with meritorious cases remaining within the scope of civil legal aid. The involvement of specialist Barristers in these cases produces significant efficiency savings and benefits to clients and the courts. Indeed the consultation paper itself characterises the Bar as a “well respected part of the legal system in England and Wales” and acknowledges the need to “have due regard to the viability of the profession” (paragraph 2.8). Among the benefits provided by specialist Barristers are the following:

- i. It is far more cost effective for legal services to be provided by Barristers who can be called upon on a case-by-case basis to provide specialist advice and representation;
- ii. Clients benefit from the level and efficiency of advice and representation offered by Barristers with expertise in a given legal field;
- iii. The courts gain from the costs and time savings of cases advised on, prepared and argued by specialist counsel.

None of these lost benefits have been taken into account by the MoJ in its Impact Assessment. It is likely that the additional costs consequent on the move away from specialist Barristers will markedly diminish if not eliminate the £3million saving identified as a result of these proposed changes.

323. In this context the Ministry of Justice's assumption that "the supply of advocates will be sufficient to meet demand for legal aid work" (Impact Assessment, Summary: Analysis & Evidence, Policy Option 2) is unwarranted. This assumption appears to rest on the basis that "The latest LSC (now LAA) tender suggests there is currently still some appetite to undertake publicly funded work despite previous fee cuts" (Impact Assessment, Evidence Base, paragraph 32). However the MoJ accepts that this historic evidence "does not tell us anything about the impact of future cuts on sustainability".

324. The MoJ's concession is entirely correct. Current levels of "appetite" for this type of work can demonstrate nothing about the impact of significant further funding cuts in the future. In fact it is likely that the consequence of the proposed fee changes would be to drive Barristers away from these areas of law, to diminish the levels of specialism in these areas and to reduce to unacceptable levels the availability of advocates able to provide expert and cost-effective legal services.

325. Moreover there is no evidence offered in support of the MoJ's assumption that if the proposed fees changes are implemented, "the same quality of services will be supplied by advocates". This cannot be the case. It is unrealistic to expect lawyers who do not specialise in a particular area of law to provide the same level of services, at the same levels of efficiency, as those with expertise in particular legal fields.

The proposals do not provide true "harmonisation":

326. In justification of its proposals the consultation paper posits "harmonisation" of hourly rates for advocates conducting similar work. In fact true harmonisation is notably absent from these proposals.

327. The hourly rates for Barristers representing defendants in these types of cases are as follows:

Hourly rates for Barristers on the Treasury Panel (London)

- A Panel - £120
- B Panel - £100
- C Panel - £80 (if over 5 years call); £60 per hour (if under 5 years call)
- Off-panel
- QCs: £180 - £250
- £45 per hour

328. Subject to the enhancements, the rates payable to an advocate acting for a claimant will be less (indeed, in some cases, dramatically less) than those paid to an advocate acting for the defendant in the same case. In some cases claimant advocates in receipt of the maximum enhancement will still be paid significantly less than those for the defendant.

329. This differential is magnified in the light of the MoJ's proposals to all but eradicate legal aid payments to advocates in judicial review claims where permission is not granted. Given that only advocates acting for claimants would be acting on this "at risk" basis, the substantial disparity in base rates is wholly unfair on advocates and their clients. It is irrational for advocates who face greater risks also to operate under adverse fee arrangements. Moreover equality of arms between claimants and defendants will necessarily be harmed if significantly greater funds are available for defendants' advocates but not claimants'.

Uncertainty as to the operation of the enhancements:

330. The operation of the fee enhancements will necessarily subject advocates to considerable uncertainty. The current regime provides for a discretion on the part of the LAA or the Court to allow enhanced fees in certain "exceptional" circumstances. The exercise of this discretion across all

the work undertaken by advocates in this field will no doubt lead to considerable challenges in the form of satellite litigation. The costs to the court and to the LAA of addressing and adjudicating upon these challenges have not been taken into account in the Impact Assessment. No doubt these will further reduce the costs savings purportedly identified as flowing from the proposals.

3) Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Q32: Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons

331. No, for the reasons given below.

332. We adopt the comments of the Immigration Lawyers Practitioners' Association in their April 2013 note on this question. In particular we endorse the point that the level at which fixed fees are set in immigration and asylum First-Tier Tribunal cases is very low: hourly rates for travel stand at between £25.50 and £26.50 and those for preparation and attendance are at between £51 and £55. For Barristers, rent payments to chambers, tax, national insurance and expenses will come out of these fees. Against this background the loss of the uplift for Upper Tribunal cases will pose a real risk to the sustainability of practice in immigration and asylum cases which remain within the scope of legal aid.

333. We also strongly object to the assertion at paragraph 6.30 of the consultation paper that the continued payment of the uplift may "incentivise applications to appeal in weaker cases". This is unsustainable as a matter of logic and when the role of the Upper Tribunal and advocates are taken into

account. It would be contrary to Barristers' own interests to seek to appeal unmeritorious cases even if it is assumed that they would act in breach of their professional obligations in so doing. As the consultation paper itself observes, Barristers will not be paid where any such unmeritorious case is refused permission by the Upper Tribunal.

Chapter 7: Expert Fees in Civil, Family and Criminal Proceedings

Q33: Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons

Experts in Criminal Proceedings

334. No.

335. The need for expert evidence in proceedings in criminal proceedings currently requires the provision of three quotes for expert evidence to be provided to the Legal Services Commission in advance of instruction of an expert. Currently many experts refuse to accept instructions at the level or rate the Legal Services Commission is willingly to fund. This causes delay in the bringing of cases to trial whilst the defence seek alternative experts willing to work at a reduced rate. If good quality experts are not willing to act in criminal cases then there is an inequality of arms as the Prosecution may have more resources at their disposal. Some cases rely heavily on expert evidence. If choice is restricted by price then quality in this area suffers as well.

Chapter 8: Equalities Impact

Impact Assessments

Q34: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

336. For reasons given elsewhere in this response, it is no exaggeration to state that the independent criminal Bar will suffer a massacre. The ramifications for the Criminal Justice System and society are incalculable. The CBA believes that the MoJ have failed to appreciate the irreparable damage and loss of confidence that the introduction of PCT will have on the professional and effective delivery of legal representation in criminal cases.

337. Little or no reference is made to the impact the proposed changes would have upon mentally disordered suspects and defendants, save in the context of the proposed changes to prison law. It is estimated that mentally ill offenders account for approximately 20% of those within the Criminal Justice System. No effort has been made by the Government to consult with the Probation Services or Mental Health charities and organisations in order to assess the potential impact of the proposals on this group. These individuals are least equipped to cope with Criminal Justice System. There are significant advantages to allowing a choice of representative, local to the client who will be familiar with their forensic and personal history and have the requisite skills. This ensures the efficient and cost effective disposal of often complex and sensitive cases.

Q35: Do you agree that we have correctly identified the extent of impacts under the proposals set out in this consultation paper?

338. No, for the reasons given below.

339. The destruction of small legal aid practises will have a gravely disproportionate impact on black and ethnic minority lawyers. The CBA believes that unlike legal practices reliant on private, commercial and corporate work where BAME are overwhelmingly under represented (see Carter Review, on barriers and glass ceilings within large firms – para 76, p109), there is a fair and representative ratio of BAME in local, community based law firms. Most, if not all, of these firms will disappear under the proposals and with them, the opportunity for small practises to start up. Indeed it would be inconceivable that, post reform, any small firm could enter the proposed legal aid market. The Carter recommendation (5.4) that the state should ‘help to sustain a diverse supply base for legal aid services’ has become, under the current proposals, an expendable folly.

Q36: Are there forms of mitigation in relation to impacts that we have not considered?

340. No. The changes proposed are so fundamentally far reaching and damaging, that for the reasons set out in many other parts of this response, the CBA do not believe that the outcome can be mitigated or avoided. The damage will be irremediable.

341. With regard to equalities impact in general and therefore to questions 34, 35 and 36 we defer to and support the responses submitted by the Society of Asian Lawyers (SAL), and the Equality and Diversity response by the Bar

Council of England and Wales as well as by the Young Barristers Committee of the Bar Council.

Conclusion

342. The CBA's response to the government's proposed changes to legal aid procurement is not intended in any way to be scaremongering. The response reflects the genuine concern that the CBA has about the government's proposals. Those concerns are expressed not out of self-interest but out of a deep-rooted belief in the integrity of the Criminal Justice System. They are shared by senior Judges, academics and many others who have long experience in promoting and defending the Rule of Law. They are real concerns that are shared by Parliamentarians and, increasingly, by commentators in the media. The following extracts from speeches (made by Parliamentarians who are not members of the CBA and who have no brief to promote or defend the interests of criminal practitioners) in the recent debate on the Queen's Speech in the House of Lords, provide a timely echo to our fundamental concerns about the proposals contained in the Government's consultation document.

343. Lord Philips of Sudbury on the process of consultation itself:
"Consultation today is too often superficial, if not insincere. Too often Governments of all persuasions make their minds up and at the last toss of the dice say, "We'll consult". They do and vast numbers of people reply, but nothing changes and the legislation goes on. We have consulted ha, ha."

344. Lord Thomas of Gresford:
"I very much regret that there is nothing in the gracious Speech that would permit parliamentary scrutiny of proposals which seem to be designed to destroy access to justice in criminal cases. The Ministry of Justice's current consultation is for a scheme of "competitive tendering" for criminal legal aid, which will not require primary legislation. The consultation is a sham, as

Ministers have already decided that they are in favour of such a scheme in principle and, regardless of the consultation, competitive tendering will be introduced within months. The only question posed in the consultation is the precise model. The model proposed by the Government could have been brought forward only by Ministers and their advisers, who have not the slightest experience of the way criminal courts operate or of the professional values, ethics and practices of the legal profession.

... [Re Chapter 4] Those proposals will be the death of the high street solicitor. The intention is to remove competition on quality and replace it with competition on price alone.

... If the Government's proposed model is adopted, quality is to be driven down to minimum standards. The single determining factor for success will be price. Practitioners will be valued and rewarded for producing the highest turnover of work at the lowest cost. Literally and intentionally, no value will be attached to quality of representation. If the professions are dumbed down, it will impact ultimately on the judiciary. Someone has already said that, if you have Tesco-grade lawyers, within 10 years you will have to start appointing Tesco-grade judges because they will be the only people to have experience in this field.

... [Re Chapter 5] The intention is presumably to add to the incentives to defendants to plead guilty. The effect of that is to create conflicts of interest between the advocate and his/her client. The advocate is punished financially if the client pleads not guilty and goes to trial. Not only is that wrong in principle, it is counterproductive: if defendants know that the advocate has a conflicting financial incentive, they will not listen to him when he tells them to plead guilty, because it will be in his financial interest to do precisely that. Hence, there will be more trials, at greater expense.

... [Concluding remarks] I have to say that no one with experience of the criminal courts could ever advise a young person starting his career to take up the role of a criminal advocate. Centuries of experience have created the system

in which a team of solicitor and counsel work to high ethical standards to ensure that justice is done. I shall be sad if liberals of any political party or none in this House assist in its destruction".

345. And finally, Baroness Deech, Chairman of the Bar Standards Board, the Bar's independent regulator:

"It is self-evident that there cannot be a bottomless fund for legal aid but the wrong impression has been given in the media in relation to the sums and how they are allocated. The large sums said to be spent on legal representation do not take into account the overheads of the self-employed or that the fees may represent several years work. Only a very small number of cases dealing with the most serious crimes – terrorism and the like – command large resources. Many young Barristers practising publicly funded criminal law are earning around £25,000 a year or less. Not only will they abandon it, depriving the courts of good judges in future years, but the way in which the legal system is now being treated is putting an end to the goal of social mobility and diversity in the profession that the Government alleged was so important.

... I would feel hypocritical going to visit schools, or encouraging other lawyers to go to schools, to encourage children from underprivileged backgrounds, where no one in the family has ever qualified as a lawyer, to take up criminal law or family law, which is also largely publicly funded. It is misleading to draw a picture of possibilities when not only will they incur debt at university but will find after qualification that there are no jobs open to them at the starting line of the criminal Bar, in the magistrates' courts and so on, where formerly a newly qualified young Barrister could expect to earn a modest amount.

... Price-competitive tendering may sound reasonable in criminal representation but it will not be genuine under the proposals, as the market is not to be left to itself: a new price cap will be set at 17.5% below current fees. The new system seems to favour tendering only by new commercial outfits

and large firms, as the noble Lord, Lord Thomas, said, leaving high street solicitors to go to the wall. The client will not be able to choose who represents them and the relationship built up by advocates and their clients over the years will count for naught. There will be a two-tier system: a choice of good advocates for those who pay themselves and take what comes for those who need to be funded.

... The cuts in aid and in fees are such as to endanger the future of the profession. They also offend against each and every one of the objectives of Section 1 of the Legal Services Act 2007, which include, "improving access to justice ... protecting the interests of consumers ... encouraging an independent, strong, diverse and effective legal profession", and supporting "the rule of law".'

... Finally, one should get the extent of legal aid savings into perspective. Great damage is about to be done to the court system, litigants, the legal profession, diversity and the rule of law to effect a saving of £220 million a year. We have just spent £10 billion on the Olympics, with so far not much legacy. The Government have recently committed to spending £60 million on converting the Olympic stadium into a football ground for West Ham. We have lost our moral compass if we think that it is preferable to spend on the Olympic stadium rather than on legal aid, to give tax relief on wind turbines rather than spend sums on access to justice, and when we send overseas aid to Argentina rather than supporting the rule of law at home. ... I am sure that everyone in this House has a taxpayer-funded project in mind that is unnecessary and less significant than cutting access to justice. If the legal system and the citizen's ability to use it are damaged, then the fine words of a new legislative programme will never be any more than that".

346. The CBA has many times in the past engaged with - and will continue to engage with - the Government in finding appropriate measures to make the Criminal Justice System more efficient and cost-effective. The CBA will continue to promote and defend fearlessly a Criminal Justice System which is accessible to all and in which the State and the individual have equal access to representation of the highest standards. However, we cannot accept the Government's current proposals. The proposals to 'transform legal aid' are misjudged, flawed and are not evidence-based. They represent a direct threat to fundamental rights of the individual and to the integrity of the Criminal Justice System as a whole. We again warn the Government that the proposals will have entirely foreseeable consequences that will not only lead to miscarriages of justice and long-term damage to the Criminal Justice System, but which will also be out of all proportion to the savings sought. We cannot improve upon the words of Sir Anthony Hooper in his response to these proposals,

"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..."

Criminal Bar Association of England and Wales
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