'Transforming Legal Aid'

Consultation Paper CP14/2013

South Eastern Circuit

Consultation Response

The South Eastern Circuit represents 40% of all practising barristers. Our members practise in every area of the law. In this response, we consider various aspects of the MOJ's proposals, but concentrate - as the consultation paper does - on the proposals to reform the system of criminal legal aid through price competitive tendering. A number of our members have contributed to responses prepared on behalf of the Bar Council and the Criminal Bar Association. We do not repeat the detail of those responses here, but try instead to look at some of the most important issues of principle that arise.

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(1) Introduction: Position Statement/

Price Competitive Tendering

1. It is not easy to respond to the government's proposals within the framework of the Consultation Questions. The scope for disagreement is limited by the questions themselves and by the announcement that the MOJ has already decided, in principle, to introduce competitive tendering (para 4.5).

2. Price Competitive Tendering ('PCT') is wrongly described as a logical development of Lord Carter's review in 2006. As we show in this response, it is based upon quite different assumptions. We believe that, in any of the (fundamentally similar) models offered for discussion, PCT would wholly degrade the quality of professional service available and do irreparable damage to the Criminal Justice System.

3. The proposals are said to 'introduce' competition into the criminal legal aid market. In one sense they do: they invite 'providers' to bid for a defined and static share of the market at the lowest price. But in a more

obvious and meaningful sense, the proposals destroy all the reasonable elements of competition that currently exist. The principles of choice and incentive which underlie the provision of other essential services are discarded as irrelevant or, perhaps, unhealthy in this context.

4. These are radical reforms, but in the worst possible sense. They are simplistic, ideological and poorly informed. Almost nobody who works within the Criminal Justice System believes they are realistic; but everyone fears that, in their implementation, overwhelming damage will be done to the system itself.

5. Within the unreasonably short time allowed for 'consultation', we have started to grasp the destructive implications of these proposals. Many of the worst effects flow from the removal of client choice. This is justified by the need to give the 'greatest level of certainty' to providers (para. 4.79): the assumption is that no one would bid under this process without the prospect of a guaranteed share of the market.

6. Various alternative methods of allocating the work are suggested: by rotation, the date of birth, or initial of the client. Each has the common feature that the client is assigned to a service provider at, or shortly after, his arrest and will not be able, in most circumstances, to choose his representation.

7. At a stroke, the proposals remove every practical and humane advantage of a system based upon trust between a client and his lawyer. It will not matter that a solicitor knows a client or his family – nor the history of abuse, addiction, psychiatric illness or other factors which most commonly lead to offending. The client will have the lawyer that the state provides. The provider will have only one incentive: to deliver a service at the lowest possible cost to his business and with the lightest use of his own resources.

8. The term 'provider' is unfortunate and sets the tone of the proposals. No one would describe a doctor or a teacher as a provider. It is axiomatic that they, like other professionals, take pride in their work and in their reputation. They are doing a difficult and important job.

9. These proposals assume that giving advice and representation to those accused of criminal offences is a straightforward service - and that to give that service at anything other than the most basic level is unnecessary or, worse, undesirable.

10. The current system is said to produce 'higher than acceptable' levels of representation. It is difficult to know what the MOJ means by this. If the suggestion is that anything more than a basic level of service can no longer be offered because of the need to cut costs, the answer is relatively simple: equivalent savings can be made in the CJS in other much less

damaging ways. We provide examples in this response - they are as carefully considered as the timetable permits.

11. If the government is truly receptive to alternative proposals for cost reduction in the CJS, as the Secretary of State says, we are confident that we can meet their concerns.

12. However, we like many others who work within the CJS, are concerned that there is a different and more political agenda here. We find it hard to believe that a government genuinely committed to the proper representation of its citizens in criminal proceedings – or to the principles enshrined in Article 6 of the European Convention on Human Rights – could seriously propose a scheme driven only by cost. A clue to the true purpose of these proposals may lie in the language. Clients are described throughout as 'criminals' and 'offenders'. Not even lip service is paid to the presumption of innocence nor to the most fundamental requirements of a system based on the Rule of Law. It is as if ministers believe that all defendants (save for a statistically insignificant minority) are guilty as charged and deserving of punishment. Why should the taxpayer foot the bill for anything more than basic representation?

13. It is disappointing, in a country with such a deep rooted sense of justice and equality before the law, to have to answer this question. We are a mature democracy, which rightly insists on a widening accountability to the criminal law. We prosecute journalists, policemen, celebrities and

politicians who are suspected of abusing their positions. The corollary is that they, like anyone else, must have access to excellent professional representation regardless of their means.

14. Invoking the British spirit of tolerance and fair play may seem trite, but we should all know the importance of ensuring that cases brought by the state are properly scrutinized and tested before criminal conviction and sanctions ensue. Perfunctory representation by state-appointed lawyers is characteristic of the criminal process in all dictatorships.

15. What is the reality of our CJS? All experienced practitioners know what those who have to face the system soon find out: that criminal prosecutions are rarely cut and dried and that accused people are at serious risk of injustice if they do not have access to committed and expert representation. Some will be convicted of crimes they have not committed, others of offences which exaggerate or distort their culpability. Many will be sentenced without an adequate understanding of their personal circumstances. A system said to be based upon access to justice will deny that access to many people.

16. We fear that wholly inadequate consideration has been given to the consequences of the PCT proposals. Some of them are so drastic it is difficult to believe the government actually intends them.

17. The proposals envisage regional contracts - in the nature of shared monopolies. There may be four or five contracts in a particular geographical area, each providing access to an equal share of the work. More contracts will be available in metropolitan areas. It is unclear how the number of available contracts has been calculated or why the areas should correspond to those of the Crown Prosecution Service.

18. No more than 400 contracts will be allocated. Existing solicitors will, for the most part, be required to amalgamate in order to present a viable tender. But they would do this without any sense of whether the bid would succeed : this is commercially unrealistic for obvious reasons. If, as seems likely, there are insufficient bids, the government appears willing to appoint bulk contractors who have no previous experience of providing legal services. By this process , the provision of representation in criminal cases is equated with delivering a basic amenity or supplying a consumer product.

19. Price competition will provide an incentive to contractors to reduce the number and quality of employed staff. To maintain a level of profitability there will be fewer qualified employees and almost no one whose reputation or experience might command a higher salary. Indeed there would be no commercial need for that quality of service. Amongst the most obvious effects of these proposals are:

(i) A market without any incentive to provide excellent service;

(ii) A market without the opportunity to displace existing providers by offering a better service;

(iii) The creation of a system based around a few providers of low quality services; and

(iv) A drain of talent away from any form of publicly paid criminal practice.

20. In theory, the MOJ wish to retain the services of the criminal bar at a reduced price. In practice, these proposals will destroy the independent criminal bar. Providers are given an overwhelming financial incentive to amalgamate the litigator's fee and the advocacy fee. In most cases they would do this by using their own employees for advocacy work. The current incentive, to provide the highest quality of available representation in court to their clients, is entirely removed. The services of the independent bar - or what survives of it – will be available to those who can afford to pay, (but only to some of them – see below).

21. This would be much more than a two–tiered system. It would allow some defendants access to the highest standards of advocacy that are available anywhere and others a level of service that is not remotely comparable. Vivid disparities of representation would occur - sometimes in the same trial.

22. The justification for this 'transformation' is, in our opinion, quite spurious. The system is said 'to have lost much of its credibility with the public' though no worthwhile evidence is offered to support this crude assertion. The bar is depicted as a self-serving and overpaid anachronism – out of step of with the requirements of a modern society. No obvious value is attached to the bar's independence. Throughout these proposals, we find little awareness that anything of real importance would be lost - still less of the constitutional significance of these reforms. Ministers might reflect on the view of Lord Justice Gross, Senior Presiding Judge for England & Wales, who recently said:

'*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.'*[1]

23. In fact, the MOJ appears to have surprisingly little understanding of the structure and disciplines of the modern bar.

24. The bar is sometimes described as a vocational professional. This is particularly true of the contemporary criminal bar. It attracts talented young men and women from backgrounds that are far more socially and

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

ethnically diverse than many people realize. Without that progress, we would not have begun to develop a more representative and credible judiciary.

25. The character and ethos of the bar has been transformed in recent years. It is no longer the profession of a social elite. It has become, for the most part, an authentic meritocracy - based upon high professional and ethical standards - in which practitioners compete to establish a reputation and to develop a practice.

26. Many come to the criminal bar in spite of accumulated debt and in the knowledge that they will face daunting competition. They undertake pupillages that offer no funding or very modest levels of income (few pay more than £12,000 per annum). A high proportion of young entrants have outstanding academic qualifications. Many have exceptional personal qualities and a striking history of individual achievement. Almost all of them could earn far more money in private practice as solicitors or at the commercial bar (where training contracts or pupillages offering £50,000 to £60,000 are available).

27. Anyone who has been involved in the recruitment and training of young criminal barristers in recent years could not fail to be impressed by the quality and commitment of the junior bar. They come to the profession with a strong sense of social justice and a determination to use their

abilities to assist the most vulnerable in society. This is not propaganda. It is the truth.

28. In pupillage and as young members of chambers, they receive a form of practical training and experience that could not be replicated elsewhere. Advocacy is a notoriously difficult skill to learn – even for those with natural aptitude. It takes a lot of practice before anyone can acquire the subtle judgment and precise command of language that an effective advocate needs. The conduct of a criminal trial is a considerable undertaking. Like the work of a specialist surgeon, it can only be learned on the job and through the guidance of more experienced professionals.

29. This process produces, not always perfectly, advocates of real sophistication and skill. This is of incalculable value to the administration of the Criminal Justice System itself. The criminal bar has adapted in the last twenty years to handling far more complex cases with far greater economy of presentation.

30. Many forms of evidence that are commonly used in criminal trials today were unknown until quite recently – DNA profiling; computer and mobile phone analysis; establishing individual movement patterns through phone cell siting; modern techniques of intrusive surveillance; the complex processes of modern banking, commerce and international money movement and exchange. All of these developments require forensic expertise of different kinds and produce trials that can only be

managed efficiently by specialist advocates prepared to work long hours out of court.

31. All modern judges expect high standards of preparation from advocates for the prosecution and defence. They also demand efficient use of court time. Points of admissibility and law, once argued orally, are now addressed in written skeleton arguments that advocates produce overnight. Concise and structured submissions are required to meet evolving issues of disclosure. During any trial, the modern advocate is required to deal with the increasingly detailed procedural requirements of recent legislation. They must draft applications relating to bad character, hearsay, disclosure and invariably, reduce large bodies of evidence to intelligible schedules. Jury bundles, both for the prosecution and defence are now commonly prepared by the advocates themselves.

32. None of this is unreasonable. However, it is fanciful to suppose that the level of professional skill and commitment required to sustain the smooth running of modern criminal trials could be supplied under the systems the MOJ now propose. It is not only publicly funded defendants who will suffer. The system itself will become far less efficient and productive. More work will be created for appellate courts and the public will gradually lose confidence in a system that produces many more errors and miscarriages of justice. A criminal conviction in the UK carries real social stigma because it is widely assumed to be fair. When that assumption disappears – as it has done in other countries with low

standards of public representation – confidence in the legal system itself is damaged in a fundamental way.

33. It is ironic that the criminal bar has a long and creditable history of providing 'pro bono' representation to those who have been left without an effective defence in other jurisdictions. Many barristers regularly give their services to those who cannot pay – some individually, others through voluntary organisations set up for the purpose. Many of these organisations are inundated by requests to assist those who can plausibly claim to have been wrongly convicted in countries which do not value the right to an expert defence.

34. There is no reference to any of this in the government's consultation paper: only selective and distorted emphasis of the incomes of a small fraction of criminal practitioners. This subject is dealt with in more detail in the specific responses but the MOJ's paper takes no account of the real levels of income of most of those who practice at the criminal bar. It ignores cuts of up to 40% that have been made to the fees of most criminal barristers in the last fifteen years. It proposes further cuts of up to 30% (in VHCC work) now without any regard for the large number of practitioners who are already struggling to survive.

35. In spite of this reality, we are told only that it is publicly unacceptable for some barristers to earn more than the prime minister. This is a travesty of the true position. The income of most criminal barristers has fallen

sharply in recent years whilst their professional responsibilities have increased. Most can earn nothing approaching that of other equivalent professionals when the expenses of practice are taken into account. They work for rates of pay which are in no way comparable with those available in the private sector but do so with the same level of professional commitment.

36. This is not a complacent or self- serving view. It is widely acknowledged that the criminal bar provides high standards of specialist representation. These standards are rare in the public sector. They should not be taken for granted.

37. The government's case for reform is summarized in three short paragraphs (4.8 to 4.10). Paragraph 4.8 refers to Lord Carter's Review of legal Aid Procurement in 2006.

38. Paragraph 4.9 says:

"It is our view that the same conclusions presented by Lord Carter still apply. We believe a competitive tendering approach, which allows providers to offer their services at a price that reflects the cost of delivery in the local area and represents a fair market price for the work carried out, is the way forward for criminal legal aid."

39. However, Lord Carter's proposals for best value tendering, which have lain dormant for seven years, were based upon a much more sophisticated understanding of the reality of the legal aid market.

40. Lord Carter was concerned to retain both quality and choice. His stated aim was to "*save money without compromising on quality and access"* to legal advice and representation. He thought that *"...Legal Aid is there to ensure that vulnerable and disadvantaged people are not denied access to justice because of their inability to pay"* (Ch. 4.9).

41. He also said:

"*Clients need to have confidence in their legal representative in order for justice to be fair and effective. Clients may want to choose a specific lawyer or firm for a number of reasons*" (Ch. 4. 5)

42. Ultimately, Lord Carter recommended a form of competitive procurement, initially for VHCC cases and then intended to roll out to cover all cases; but his 'best value tendering' scheme concentrated upon three key elements – quality, capacity and price (in that order).

43. This was not a PCT scheme in which contracts would be awarded based upon capacity and price alone. Lord Carter rejected that type of scheme in the clearest terms in each of its three guises:

Option 1– immediate move to price competition

"There are significant risks associated with purely price-based competition. Some suppliers might set unrealistic prices for their services so as to gain market share and subsequently have to breach their contract and leave the market. This could lead to supply problems."

"There is also a significant risk associated with quality…contracts would need to be awarded on the basis of price and capacity only. There is also the potential for ***a significant negative impact on the wider justice system as quality is undermined and suppliers left in the legal aid market fail to perform effectively. This could have a particularly negative impact on the running of the courts".***

Option 2 – price competition with a restriction on choice

"*Moving to a price competitive market, whilst completely restricting client choice…. has short-term drawbacks In addition to the risks described in option 1 above, this approach …… could result in an administratively complex system and may have a high impact on suppliers within a limited transition period..* ***The limitation on client choice and the removal of a significant proportion of the supply base could jeopardise parts of the justice system. The benefits of continuation, reputation and confidence of representation, e.g. for vulnerable or black and minority ethnic clients, may be lost and some rural areas could lose supply altogether****."*

Option 3 – progressive administratively set price

"*This administrative option could lead to unmitigated and rapid change for suppliers,* ***posing significant risks to both quality and access if rates are forced too low too quickly*** *as described for option 2. Furthermore,*

continuous administratively set rate reductions would perpetuate long-term conflict and mistrust between the government and suppliers of legal services."

44. Lord Carter acknowledged that a scheme based on price, but not on quality is one in which quality will inevitably suffer. He said this of the Criminal Justice System in 2006:

"At present, suppliers do not compete on price, but firms compete with one another to gain new clients or retain existing ones, and therefore the income generated by clients. Competition tends to be on the basis of reputation. Similarly, barristers compete with one another to demonstrate to those firms, and their clients, that by instructing them they will receive the best advocacy service."

45. These proposals reveal that the guarantee of a set amount of work, secured because a provider has offered to do it all for the cheapest cost, provides no incentive at all to improve or even maintain standards.

46. Lord Carter was against the 'guarantee' of a set amount of work for a particular supplier. He stated repeatedly that work should not be allocated so as to deprive the client of choice. Some restriction of choice might flow from the tendering process and the concentration of more work in the hands of fewer providers, but that is a long way from the present proposals.

47. Lord Carter favoured a move away from a market where prices were not market-driven, but artificially set administratively. The MOJ's current proposals which require bidding to start at 17.5% below current rates and then be driven lower by price competition alone is exactly the sort of approach Lord Carter warned against when he rejected option 3 (above).

48. Besides anything, there is an overall lack of coherence in these proposals. At one level, there is said to be a public interest in requiring those who can pay for their own representation to do so. We do not disagree. The recent system of making legal aid available to all defendants regardless of their means - subject to the recovery of defence costs in the event of conviction–was, in our view, a needless primary drain on public resources.

49. Under these proposals, those whose assets have been restrained will still need representation at public expense (see para 3.38). The rationale for this is unclear. If restrained assets must be preserved 'to prevent them from being unnecessarily dissipated', why are they available to those who face civil recovery proceedings under part 5 of POCA – proceedings that are designed to identify and confiscate the proceeds of criminal conduct?

50. In fact, the statutory mechanisms that apply to defence costs in civil recovery proceedings create sensible safeguards to control payment. This occurs by way of an exclusion to a property freezing order under Part 5 and payment, at fixed but realistic rates, is regulated by the party who

obtains the order (usually SOCA) in the first instance and then by the court in the event of disagreement. The process is similar to that available under a civil freezing or Mareva injunction.

51. There is no reason why similar provisions could not apply to those who face prosecution. There is no evidence to suggest it would lead to the unreasonable dissipation of assets and there is an obvious and tested way of ensuring that it does not.

52. Increasing numbers of defendants who are accused of financial offences have their assets retrained – often at the stage of investigation. We see no continuing justification for treating these defendants as if their assets did not exist. This change could be affected quite simply – by subordinate legislation.

53. Above and beyond the detail of these discussions, we believe that PCT – in anything like the form that the MOJ propose – just will not work. We think that the attempt to implement it would be an expensive disaster and that this, or a subsequent government, would struggle to undo the damage without incurring levels of expense well beyond the suggested savings. It would, in the meantime, undermine public confidence in the Criminal Justice System and create a raft of problems for the judiciary, court administrators, the prison service, the CCRC and the appellate courts.

54. We urge the MOJ to set aside these badly conceived proposals and to think again.

55. There is a recent and compelling example of what happens if ideas of this kind are pursued in the teeth of all logic. For years properly qualified interpreters (and their professional body the SPSI) argued against the government's proposals to award a contract based on price competition for court and police station interpreting to a single supplier. These warnings were brushed aside and poorly informed assurances were given about the maintenance of standards.

56. The outcome was a well-documented fiasco. In August 2011, the contract was awarded to ALS/Capita. Earlier this year, the Justice Select Committee reported in these terms:

"*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 new operating model were realised during implementation, were* ***utterly predictable, and should have been properly considered from the start****"*

(2) Cost Cutting

1. The MOJ depict legal aid, in its current form, as a luxury we can no longer afford. 'In the past decade' they say, 'our legal aid bill has risen dramatically' (para 2.1).

2. We were surprised by this statement and by the associated references to increases in expenditure on criminal legal aid. We found them difficult to reconcile with our recent experience. We have tried, with some difficulty, to examine these propositions by reference to the best publicly available information. It is unfortunate that the financial information provided by the MOJ in their discussion paper is so vague.

3. The product of our research is set out at Table 1 (page 28 below). It relies to a substantial extent on the LSC Business Plan 2012/13 and the LSC Annual Report 2011/12. It suggests that overall spending on legal aid **has fallen significantly in the last ten years**.

4. If these figures are wrong, we are not to blame. They are published by the relevant government departments and we are wholly unable to see beyond them in the time allowed for consultation. But the thrust of the figures bears out the recent experience of legal aid practitioners on this circuit.

5. We all feel that legal aid spending has fallen in recent years.

6. We are also quite sure that the figures relied on in relation to criminal legal aid are both out of date and misleading.

7. There is no doubt that the MOJ's baseline figure for criminal legal aid is the amount spent in the year 2011/12. This is the figure against which parts of the budget are set off for effect. So, for example, £92 million spent on VHCC work is said to be 8% of the overall budget (para 5.3 - where £592 million is clearly a misprint).

8. This treats the relevant figure for criminal legal aid, from which it is said that savings need to made, as £ 1.1 billion or thereabouts (the 2011/12 figure). It may be significant that the savings target of 220 million is exactly 20% of this figure.

9. But, as the figures in Table 1 show, the criminal legal aid budget has been reduced by £198m in two years (17.4%). 'Crime higher' (a term used to describe all Crown Court litigation, advocacy, expert and interpreter fees)

fell from £721m in 2011/12 to £602m in 2012/13. This represented a reduction of £119m or 16.5% in a single year.

10. The 'crime lower" budget increased during the same period by £5m. Therefore, on the face of it, all of the criminal legal aid budget reduction between 2011/12 and 2012/13 came from the Crown Court ('crime higher') budget.

11. We have been unable to establish the 'crime higher' figure as a separate component of the overall criminal legal aid budget for 2013/14. So we cannot identify what proportion of the £84m reduction has come from the 'crime higher' budget. However, we are not aware of any changes to the funding regime in magistrates' court fees ('crime lower'), which would have made any significant difference to the annual level of spend to this part of the criminal legal aid budget.

12. It would appear, therefore, based on the ongoing and significant changes to the funding arrangements relating to Crown Court advocacy and litigation that the overwhelming majority of the reductions in projected legal aid spend in the current year (2013/14) will come from the crime higher budget.

13. If 80% of the projected £84million savings for this year (£67m) come from the crime higher budget then the 'crime higher' budget will have fallen from £721m to £535m in 2 years, a reduction of more than 25%.

14. This is consistent with our experience and with the real effect of cuts in criminal legal aid that have been made in recent years.

15. It is unfortunate, to say the least, that overall legal aid spending is said to have risen 'dramatically' in the last decade when, on the face of published figures, it has fallen. It is equally disappointing to see that no account whatsoever has been taken of the significant recent reductions in spending on criminal legal aid.

16. The MOJ has now acknowledged (in various public discussions) that the starting point for the proposal to save £220m was the sum spent in 2011/12. If that is right, the proposals originally aimed to reduce the level of spending on the criminal legal aid budget from £1.139bn to around £920m by 2018/19. That budget has, however, already been reduced by £198m in just 2 years. On the original plan the MOJ only needs to save £22m over the next 5 years. This will be achieved with no further changes long before 2018/9.

17. In spite of this, Paragraph 2.4 of the consultation paper says:

"Where our previous reforms were mainly focused on legal aid for civil matters, our primary focus this time is in relation to crime"

18. This is utterly misleading. It suggests that steps must be taken to deal with a part of the budget that has until now escaped control. A brief review of the headline figures (to say nothing of our own daily experience) shows this to be false. Very substantial cuts have been implemented over the past three years. Both sides of the profession are already struggling to deal with these reductions. Further cuts on the scale envisaged are unreasonable and completely unsustainable.

19. We are wholly opposed to PCT in principle. We are told that it is an appropriate response to recession and pressing financial concerns. In recent weeks we have listened to ministers and senior officials from the MOJ repeating the message that legal aid spending is spiraling out of control. We find it shocking that the financial justification for these destructive reforms bears so little relation to the facts.

Table 1:

Year	Total Legal Aid	Total crime	Crime Higher	Crime Lower	Source
2013/14	£1,828m	£941	n/a	n/a	LAA Business plan (p23)
2012/13	£1,966m	£1,025m (budget)	£602m	£423	LSC Business Plan 2012/13 (p27)
2011/12	£2,144(budget) /£2078 (actual)	£1,139m (budget)[2], £1,100.7 (actual)[3]	£721m (budget), £673.3m (actual)	£418m (budget), £431.1m (actual)	LSC Business Plan 2012/13 (p27)
2010/11	£2,115m (+ £99.2m LSC admin)	£1,129m	£688.2m (nb p10 figure given is	£443.4m	LSC Annual Report 20010/11

[2] LSC Business Plan 2012/13

[3] LSC Annual Report 2011/12

			£702.9m)		(p6)
2009/10	£2,237m (+ £120m LSC admin)	£1,122m	£659m (nb p9 figure given is £733m)	£463m (nb p9 figures add up to £473m)	LSC Annual Report 2009/10. (p9/56)
2008/9	£2,186m	£1,176m	£677m	£498	LSC Annual report 2008/9 (p60)
2007/8	£2,180m	£1,151m	£675m	£464	
2006/7	£2,136	£1,189m			LSC corp plan 2007/8 (p19)
2005/6	£2,186	£1,196m nb Carter review figure was £1,206m			LSC Corp plan 2006/7 (p17)
2004/5	£2,038 (+ LSC admin £102.7m)	£1,192m	£682m	£510.2m	LSC Annual report

					2004/5 (p6/46)
2003/4	£2,238m	£1,166m	£638m	£527m	LSC Annual report 2004/5 (p108)
2002/3	£2,381				Press report

(3) Public Confidence

1. The Government says there is a need to restore public confidence in the legal aid system.

2. They offer no worthwhile evidence to support this suggestion.

3. Public confidence is an important, but elusive quality. It depends, in some circumstances, upon the public being given accurate information. If the public are told that money is being wasted by allowing career criminals or bogus asylum seekers to bring artificial cases, at the taxpayer's expense, they will have little confidence in the system. If they are told that lawyers get rich through this process, they will be angry.

4. If the public is told the truth – that there are very limited circumstances in which some vulnerable or isolated people can seek to challenge the legality of their treatment and that they could not effectively do so

without the assistance of specialist lawyers, who will be paid very modestly for the service, they may look at legal aid in a different way.

5. A responsible government has a duty to tell the public the truth about the legal aid system – not to use anomalies for political advantage.

6. We fear that this consultation paper does not give an authentic picture of our legal aid system. In chapter 3, the MOJ give scattered impressions, using examples that excite public distaste – legal aid for prisoners, for foreigner nationals, for the rich.

7. The public may not like the idea of legal aid being given to multi – millionaires. They would, in our opinion, be right. This anomaly was a deliberate creation of government – born of the misguided idea that, if we allowed rich people to pay for their own representation, they would dissipate their assets to solicitors in an attempt to defeat confiscation proceedings. That is the reason that means tested legal aid was abandoned. If we are not to restore it – even though we should – the government must be honest about the true rationale.

8. Against that background we look at some of the issues in chapter 3 and the questions that are asked.

(4) Eligibility, scope and merits

(Prison Law)

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.

1. No.

2. The MOJ proposes to reduce the scope of legal aid for people who are in prison. This, it is said, will 'boost confidence in and reduce the cost of the legal aid system'.

3. In essence, the proposals will remove from the scope of criminal legal aid advice and assistance in relation to what the MOJ describe as "treatment" cases. These cases "are not a sufficient priority to justify the use of public funds".

4. Anyone who read these proposals and the press releases that foreshadowed them would think that taxpayer's money is currently being spent on assisting prisoners who would prefer to be in one cell rather than another or wish to litigate minor grievances about what occurs within the system.

5. In fact, there was a fundamental review of funding for prison law cases in 2009/10. Substantial reductions were made and various issues, which affect the lives of prisoners were taken out of the scope of legal aid altogether. The intention was to retain funding only for important matters which should properly attract legal aid.

6. We are told that prison law has risen as a proportion of the overall legal aid spending since 2001. It now represents just over 1% of the total budget. The MOJ gives no context to these figures. In fact, they are, in large part, explained by:

   (i) An overall rise in the prison population;

   (ii) The effect of various pieces of legislation – particularly the Crime Sentences Act 1997 and the Criminal Justice Act 2003 – and the problems of interpretation that arose;

(iii) A large increase in the number of people serving indeterminate sentences;

(iv) Challenges – many successful – to the legality of these provisions and their implementation.

7. The MOJ's proposals will remove the right to advice and representation unless there is an issue which engages Articles 5 or 6 of the ECHR. There is no explanation (not any reasonable justification) for excluding cases which involve violations of other parts of the Convention or of other legal rights. Article 3 is of particular importance to people who are detained.

8. There is a wider problem. Prison law has become a specialist discipline. It may have done so in part because of the complexity of recent legislation and the need for real practical experience of issues such as release, resettlement and categorization. Some very skilled practitioners operate in this area and they have contracts with the Legal Aid Agency, which enables them to specialize in prison law work without holding a general crime contract.

9. Under the PCT proposals this will no longer be possible. These practitioners will not be in a position to bid for contracts and their services will be of little interest to providers driven by cost.

10. By way of reassurance, we are told that there is a 'robust' system of internal complaints and potential recourse to the Prison and Probation Ombudsman.

11. This overlooks a number of important factors:

    (i) A high proportion of serving prisoners (20-30%) have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system[4];

    (ii) Many successful judicial review applications arise from issues that have not been resolved by the internal complaints procedure; and

    (iii) The Prison and Probation Ombudsman can make recommendations only and not binding decisions.

12. Decisions as to categorization are of fundamental importance: they will affect, often substantially, the real length of indeterminate sentences. The process for making these decisions is notoriously opaque and has consistently involved the use of false, unreliable or irrelevant considerations. Internal complaint procedures are wholly inadequate for those whose interests are affected in a way that is unfair or unlawful.

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

13. The courts have held that an oral hearing is often required to determine a prisoners continuing suitability for Category A status. The status effectively precludes release on parole. We understand that The Director of High Security has never held an oral hearing without being ordered to do so by the court.

14. An internal complaint against the Director is not possible. A prison governor cannot overturn his decision. In cases where the court has ordered an oral hearing, it has never been suggested that the claimant should have pursued an internal complaint before commencing judicial review proceedings.

15. Referrals to Close Supervision Centres and to the Dangerous & Severe Personality Disorder Unit are also to be excluded from the scope of funding.

16. In summary, these proposals will remove the ability of a significant number of prisoners to challenge aspects of their treatment which are unfair, unlawful and genuinely damaging to their prospects of rehabilitation. It will engender a wider and justified sense of grievance amongst prisoners that what occurs in prison is beyond the scope of public scrutiny through the courts. Deprived of their liberty they will be deprived of the ability to enforce important human rights.

17. This is not an attractive prospect. It is suggested in order to save, as we understand the statements of ministers, £1 million by 2014 and £4 million by 2016/17. This smacks of cheap politics.

(2) Eligibility, scope and merits

(Means)

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

1. Yes.

2. There is no reason why the taxpayer should pay for the representation of those who can genuinely afford to pay for themselves.

3. Acquitted defendants should be able to recover their costs from central funds, unless they have very clearly brought the prosecution on themselves by their conduct.

4. They should be able to recover their costs at a level that is deemed

appropriate on *ex post facto* taxation. This would take into all relevant factors, including an assessment of whether, having regard to the nature and complexity of the case, the level of representation they chose was reasonably necessary. So, for example, a defendant who chose to be represented by a QC on a relatively minor charge might only recover the reasonable costs of employing a junior barrister, but this may be different in a case of unusually high public profile.

5. We have never opposed the principle of means tested legal aid. It was an earlier government that introduced a system in which all defendants in the Crown Court were entitled to criminal legal aid subject to subsequent recovery against them through a defendant's costs order.

6. This was never a good or efficient system and should have been scrapped earlier.

7. It appeared to be based upon a combination of administrative convenience and the belief that privately paying defendants would incur costs that were unnecessary, or which removed assets that should remain available for confiscation in the event of conviction.

8. Some of that muddled thinking has carried over into these proposals.

9. Those whose assets have been restrained will still need

representation at public expense (see para 3.38). They will have to use the services of a PCT supplier even if they have substantial resources of their own. It is quite unclear what this will do to restore public confidence in the system.

10. As we say in our introduction, there is a striking lack of coherence in these proposals. We are told that restrained assets must be preserved "to prevent them from being unnecessarily dissipated". Frozen assets are and will continue to be available however to those who face civil recovery proceedings under part 5 of POCA. These proceedings are designed to identify and confiscate the proceeds of criminal conduct. They are now used (primarily by SOCA) as a remedy of first choice in some serious cases, as they avoid the need to obtain a conviction before the proceeds of criminal property can be recovered.

11. There is a well-structured statutory regime that applies to defence costs in civil recovery proceedings. It contains realistic safeguards to control payment by way of an exclusion to a property freezing order under Part 5. Payment is at reasonable fixed rates. The release of frozen assets is controlled by the party who obtains the order in the first instance (the applicant) and then by the court in the event of disagreement. The process is modeled on the civil freezing or Mareva injunction – a developed jurisdiction that commands international recognition and respect.

12. In our opinion, similar provisions should apply to those who face criminal prosecution. This used to occur under the confiscation regimes of the Criminal Justice Act 1988 and the Drug Trafficking Act of 1995. There is no evidence it led to the unreasonable dissipation of assets.

13. As we say above, an increasing number of defendants have their assets restrained – often at early stage of the case and before charge. We do not see any continuing justification for requiring the exclusion of these assets when considering eligibility for legal aid on financial grounds. This change could be affected by secondary legislation, modeled on the provisions that apply in Part 5 POCA proceedings.

Q3. Do you agree that the proposed threshold is set at an appropriate level? Please give reasons.

14. The level of the financial threshold is, primarily, a political choice. We do not comment on it directly.

15. High quality representation should be available to those who cannot afford it. We do not believe that this will occur under the proposals for PCT.

16. We also believe that entitlement should not be based upon regular recourse to exceptional funding or hardship provisions. If the financial

threshold that is suggested has that effect, it should be reconsidered.

17. There are obvious difficulties in a system which takes account of the means or income of people other than the defendant.

18. Some relationships are transitory. The assumption that a partner can assist financially may be wrong in certain cases. The idea that a partner or cohabitee should be put at a financial disadvantage because the person they live with is accused of a crime is, at least, questionable.

19. It would require flexible and sensitive administration to avoid hardship or injustice in a range of easily imaginable cases. It is difficult to have confidence in that process.

(3) Eligibility, scope and merits

(other factors)

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

1. No.

2. The proposal is unnecessarily discriminatory towards foreigners and we anticipate that it has been formulated by reference to a political, rather than a cost-saving, agenda. The proposals leave a number of questions unanswered. For example, does the limitation apply notwithstanding the fact that the foreign person has been charged with a criminal offence? If the foreign person comes from an EU Member State and is denied legal aid, will this proposal infringe EU

law? The Impact Assessment does not deal with this latter point in sufficient detail.

3. In any event, we note from the Impact Assessment that no data is available to substantiate the assertion that a saving will be made. Any saving, if it is not outweighed by the cost of administering the proposal, is likely to be negligible.

4. In family cases, we have particular concerns about:

   (i) children who may need to make applications, or are parties to applications, but will not meet the criteria for eligibility – it is unclear whether they would have the right to public funding;

   (ii) the impact on foreign parents of children wrongfully removed from their homes to England & Wales;

   (iii) the impact on foreign spouses who have not met the 12 month residence criteria or have not yet established legal status here, but would otherwise be eligible e.g. as a result of domestic violence;

5. The difficulties encountered in cases like these are not exceptional. They are quite common.

6. The scope of eligibility in family cases has already been dramatically narrowed by LASPO. Anyone who is eligible will necessarily be vulnerable e.g. as a victim of domestic abuse. Any delay, to satisfy a residence requirement, may put them at significant risk of harm by forcing them to stay in an abusive relationship

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 payable in any event)? Please give reasons.

7. As the Consultation Paper rightly states, judicial review is an important mechanism by which individuals can hold the executive and other public authorities to account. Any proposal which has the effect of restricting access to such a mechanism ought to be considered with the utmost caution.

8. The premise of this proposal is that cases in which permission for judicial review is not granted are unarguable. The argument being that because permission to proceed with judicial review is only granted where there has been an "*arguable*" breach of public law principles, it follows that permission for judicial review is not granted in cases

which are "*unarguable*". As a matter of logic, this makes sense. However, this overlooks the reality of the way in which the test is applied.

9. The true aim of this proposal is to avoid unnecessary expenditure on unmeritorious cases. As a general principle, we agree with that aim. However, a ruling that a case is not "*arguable*" does not mean that it is unmeritorious. In our experience, the High Court does not apply the arguability test literally. Indeed, permission hearings which are contested and which take a considerable amount of time to argue on both sides can still nevertheless fail to cross the threshold for permission. By definition, these cases are arguable because of the length of time which it has taken to deploy the arguments and the complexity of the arguments that are deployed. However, the fact that the Judge has refused permission does not mean that the claim is, literally, "*unarguable*".

10. We consider that the proposal should in fact be directed towards cases where the Court considers the claim to be truly unmeritorious. The Civil Procedure Rules currently provide the Court with the power to record an application or claim as "*totally without merit*", but only when:-

(i) The Court, *of its own initiative*, dismisses an application (CPR 3.3(7));or

(ii) The Court strikes out a statement of case (CPR 3.4(6)).

11. We propose the Court's power to record an application or claim, as totally without merit, be extended to circumstances beyond those where the Court acts of its own motion, or is hearing a strike-out application. The Court should be given the power to record that an application for judicial review is totally without merit after oral argument.

12. Where a Court certifies that an application is totally without merit, funding ought not to be granted. Due to a misunderstanding, of the way the Court applies the arguability threshold, the scope for funding cuts has been drawn too widely and in a manner which has the potential to cause injustice to a large number of people.

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.

13. In a great number of cases it is not possible to predict the prospects of success. Lawyers assessing prospects of success, if exercising their duty of maintaining the utmost honesty, will continue to assess prospects of success as "borderline" if that is indeed their view.

14. Often, however, this is because the case requires further investigation. It would be unfair to withdraw funding because further investigation is required, which could reveal that the prospects of success are higher (or indeed, lower). Recourse to the Independent Funding Adjudicator is an insufficient safeguard to prevent injustices. We query whether enough research has been done into the impact of this proposal. In particular, we would be interested to see just how many cases, assessed as “borderline” at a preliminary stage, have gone on to be successful.

15. It is suggested that the current merits criteria regarding cases assessed as "borderline" is too lax. This is not true – the criteria are clear. No evidence is provided that cases assessed as "borderline" are routinely unsuccessful.

16. Clients who are eligible for public funding in "borderline" cases in family law will be particularly vulnerable as a result of their status as victims of domestic abuse.

17. The areas of family law to which this applies are complex and often unclear e.g. EU cases, private law cases which rest on judicial discretion, and other areas of developing law such as cohabitation disputes. Often decisions of the family court are effected by the law of other jurisdictions, which can make it very difficult to assess prospects of success.

18. The suggestion at 3.87 that assessment of merits must be made is unrealistic. Sometimes it is genuinely not possible to assess merits more clearly because of legal conflict or a factual dispute, which cannot be resolved except by court.

(7) PCT

1. We disagree in principle and with the particular propositions advanced in this paper about so-called 'price competitive tendering'. Our reasoning below under questions 7, 8 and 9 should be read as informing our response to questions 7 to 25 inclusive.

Q 7.Do you agree with the proposed scope of criminal legal aid services to be competed?

2. No.

3. Chapter 4 is misleadingly entitled 'Introducing competition in the criminal legal aid market'. 'Competition' is exactly the opposite of what these proposals are about. It is sometimes said that the biggest, most bare-faced lie stands the best chance of fooling the public. That is because

honest people are loath to believe that public servants would deliberately use doublespeak.

4. The claim that these proposals 'introduce competition' is doublespeak. The DDR was not 'democratic'; smoking was never 'healthy'; and these proposals do not introduce competition, they replace it. They replace it with a state licensing system. The state's monopsonist power is to be used to impose exclusive licensing for the provision of legal representation. These exclusive licences are then to be sold to the lowest bidder in a blind reverse auction.

5. Under these proposals, competition between lawyers as to which of them can provide the best service at a given price is to be destroyed and replaced by a blind reverse auction in which large organisations will be awarded exclusive licenses to provide legal representation according to which of them makes the state the 'best' offer. The 'best' offer will simply be the cheapest offer. Regardless of the quality of service achievable by these organisations at the prices which they have bid, whichever says that it will do it cheapest, will be given the exclusive rights to do it for at least three years.

6. In practice, once these licences have been auctioned off, no other professional will be entitled to compete (for instance on quality, continuity or consistency of service) with the big licensees. All other

providers will be excluded from the marketplace for at least three years. Since almost none will survive that wilderness period, the next round of auctioning will be between the organisations which have secured the existing licensees. The organisations which bid the highest in the first auction will therefore have more or less guaranteed themselves exclusive state licenses for the foreseeable future.

7. This might not matter with a consumer product such as baked beans, because the public could always eat something else. Representation before the law is constitutionally more significant and more fragile.

8. Lawyers are unpopular and easy to dislike in the abstract. But the ordinary legally aided criminal lawyer is nothing like the absurd and unrepresentative 'fat cat' mischievously advertised to the reader in the introduction to this paper. The ordinary legally aided criminal lawyer performs a service not unlike the general medical practitioner.

9. Is it even thinkable that in the provision of healthcare a system would be imposed by the state whereby the right to provide medical advice and treatment was licensed by the monopsonist state - not according to quality of service or expertise, but rather in a blind reverse auction simply to whichever large organisation sent in the lowest bid? The likely consequences for choice, for quality, for public confidence, and for the future of the sector, would surely produce a righteous public outcry. If

these present proposals were stripped of doublespeak, presented accurately, and understood by the public, they would have the same effect.

10. There is a direct relationship between the cost of legal representation and its quality. This is an unsurprising function of (amongst other things):

- the quality of graduates and postgraduates aspiring to be criminal lawyers;

- the quality of training provided to those entering criminal law;

- the retention of talent within the criminal field in the two professions;

- the degree of dis/continuity of advice and representation which can be provided to an individual's case at a particular price;

- the amount of time which can be spent on an individual's case at a particular price; and

- the level of care and attention which can be devoted to an individual's case at a particular price.

11. There is a direct relationship between the quality of legal representation and the quality of criminal justice. This will be reflected in (amongst other things):

    - the in/accuracy of its outcomes;

    - the speed of its outcomes;

    - the confidence of its participants; and

    - the quality and training of its judges.

12. There is a direct relationship between the quality of criminal justice and public confidence. This is because of its effect on (amongst other things):

    - the independence of the judiciary;

    - the balance of the constitution;

    - social ex/inclusion; and

    - social consensus and cohesion.

13. There is a direct relationship between the quality of judicial outcomes and the cost of policing, litigating and repairing the consequences of crime.

14. All of these simple, but direct relationships need to be acknowledged and understood if the true consequences of these proposals are to be measured. No 'Impact Assessment' that overlooks them can be relied upon.

15. The state is the near monopoly supplier of prosecution representation and the near monopsonist purchaser of defence representation. What is overlooked in the present proposals is that the state is also the custodian of the criminal justice system and its concomitant benefits. Its responsibilities are not merely mercenary. It must supply and purchase wisely, but it must also try to attract and retain the best lawyers and judges to operate the system. It must try to safeguard the pipeline of those best lawyers and judges.

16. These responsibilities are not someone else's. The state must take these responsibilities seriously. It is the custodian of the criminal justice system not just in the next session of parliament or the next Treasury spending round but for the foreseeable future. Of course it cannot afford to spend unlimited sums on unlimited numbers of prosecution lawyers in the hope

that they will deliver the 'perfect' prosecution. Nor can it afford to spend unlimited sums on unlimited numbers of defence lawyers in the hope that they will deliver the 'perfect' defence. The balance between the quality of justice and the cost of justice is not easy. The balance between the quality of justice tomorrow and the quality of justice in the future is even harder, because it is more difficult (especially for non-practitioners) to visualise, and because its political custodians are here today but elsewhere tomorrow.

17. The balance is struck in the present system by

(a) setting the reward for defence representation administratively by reference to fixed fees which enable the state to predict and control its budget; and

(b) allowing lawyers to compete with each other as to which can provide the best quality of service for the same price.

18. In a 'perfect market' the best lawyers would be the most successful, because they would be chosen over their competitors. Thus quality would inevitably prosper and be rewarded. These arrangements do not work perfectly in practice, because there is not a 'perfect market':

- accused persons (the 'consumers') are not perfectly informed to choose between lawyers; and

- solicitors control the gateway (the police station) to the accused persons and may instruct in-house advocates rather than independent barristers for commercial reasons rather than by objective assessment of the lay client's best interests

19. Notwithstanding these imperfections in the market, there is real choice in the existing system and there is real competition. This choice and competition work effectively and by the hidden hand of the market to reward and promote quality and to squeeze out their opposites. All lawyers are paid the same for a particular case, but the lawyers who have established the best reputations for specialist skill, depth of experience and quality of service by and large succeed in attracting 'customers' while those who have not, do not. This is the system which the MOJ proposes should be abandoned.

20. The replacement system which this paper proposes is one which treats legal representation like baked beans. The body of the consultation paper (unlike its introduction and its ministerial foreword) is often commendably frank about this. The replacement system abandons any concern for quality of representation. It denies any responsibility for the future quality of the criminal justice system itself. It refuses to accept any

continuing responsibility towards the criminal justice system, beyond the immediate parliamentary tomorrow. It exploits the state's monopsonist power to engineer a blind reverse auction of licences to provide legal representation.

21. Any lawyer - no matter how good he is at his job, no matter how long his criminal experience, no matter how respected he is by his local police force, his local prosecution agencies, magistrates' and judges, no matter how trusted he is by his 'customers' to deliver realistic and reliable advice – will no longer be able to practise unless he can secure a licence from the state in its blind reverse auction. No longer will he be judged by reference to his skills or experience, no longer will he be measured against his peers by reference to the quality of service which he provides, and no longer will the market be able to exercise choice in open competition. Instead, he will only be able to practise if he has 'won' one of the state's exclusive licences. In the 'competition' for those licences his professional skill and relevant experience and the respect, which his past performance has earned him, will all count for nothing. The state licences will be awarded simply to the highest (i.e. the lowest) bidder.

22. That is why the use of the word 'competition' in these proposals is doublespeak. The proposed system is one where there will no longer be any competition. An organisation will be allocated customers in a pre-determined amount, no matter how mediocre he is, no matter what level of service he can offer, regardless of whether the customer trusts and

respects him. The organisation will have bought those customers in the initial blind reverse auction. They are stuck with him. Those who might try to escape him are punished. The State conspires with the licensee to drive would-be escapee flies back into the licensed web.

23. Some particular question 7 paragraphs require further detailed investigation by the MOJ.

24. **4.10** What is the true experience of DSCC and CD Direct contracts? Has the Criminal Defence Service not, in truth, been an expensive and embarrassing failure?

25. **4.11 & footnote 55** There should now be almost no criminal trials lasting longer than 60 days. Case management powers should be exercised to cut all contested trials down to a maximum length of three months.

26. That is the effective rule at Southwark Crown Court, which processes the most voluminous and complex fraud prosecutions nationally. Experience has proved to those trying such cases that this is the outer limit of what can safely be asked of a jury and that there is almost no case, which cannot justly and expeditiously be tried in that time. It is the duty of the prosecution and the judge (and to the extent required by the Criminal Procedure Rules of the defence also) to manage trials into this time scale.

The best judges and the best prosecutors already work to this rule. It is accepted best practice.

27. This is important, because it means that there should no longer be a need for the discredited VHCC system. GFS Plus is the obvious solution. GFS Plus is the worked out, creditable and cost saving answer to the VHCC question.

28. **4.15** We acknowledge the benefits – both to the system and to its cost – of removing some mediocre 'one man bands' from the landscape. But these rogue elements stand in stark contrast with many small firms who are superbly competent niche providers. They presently enjoy success beyond their apparent stature based on quality alone. To drive them out of business is absurd. Particularly at a time when so much state money and energy is being devoted to promoting SMEs in every other field of endeavour. The tests for extinction should be departures from quality of service, from efficient accuracy and from conformity with best professional practice. The test for extinction should not be an inability to bid in an artificial auction against huge organisations many of which will not even be owned or run by professional practitioners.

29. **4.27** There is no reason to 'believe' as suggested in this paragraph. We believe it to be unrealistic. On what is it based? Is it not far more likely that as soon as ANY large organisations and/or ANY non-lawyer-owned organisations enter the auction, only very well capitalised organisations

generally will be able to bid down to the rock bottom prices contemplated? The economic risks involved in the newly created and previously untried pseudo-market of exclusive licences will be too great for most SME and/or owner-run firms.

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable to those classes of work not determined by the price competition is reasonable?

30. No.

31. **4.31** The 17.5% figure seems to be entirely arbitrary. On what research and modeling is it based?

32. The relevant milestones in criminal legal aid fees since 1997:

1997 - hourly rates for 1-10 day cases replaced by AGFS (at 1995 rates)

→ reductions and savings

2001 - AGFS extended to cover 11-25 day cases

→ reductions and savings

2004 - AGFS extended to cover 26- 40 day cases

→ reductions and savings

- VHCC introduced

2005 - 12.5% cut in QC fees

→ reductions and savings

- length of trial uplift removed from AGFS

→ reductions and savings

post Carter - AGFS re-cast

→some increases but no restoration of 26% real terms cut since 1997

2010 - VHCC rates now 16% lower on average than in 2004

- AGFS reduced by 13.5% over 3 years

→ reductions and savings

- VHCC extended to cover 40-60 day cases

→ reductions and 39.5% savings

2011 - murder and serious fraud rates cut

→ reductions and savings

- 11% cut particular guilty pleas

→ reductions and savings

33. In what other public sector employment field would the state expect to impose such real terms cuts without causing:

- a dramatic deterioration in the service provided
- a catastrophic loss of professional morale
- a mass withdrawal of labour?

34. One of the particular consequences of impoverishing the criminal system, in the ways proposed, will be the loss of the independent criminal Bar. The reasons for this are well known to the MOJ and were most recently and succinctly explained in a paper produced for the Bar Council by Professor Martin Chalkley. This paper merits wider public attention and is attached. The loss of the independent criminal Bar would effect at a stroke the irreparable reversal of decades of world leadership in this field.

35. This leading role has been reflected in and rewarded by a continuous demand for English criminal barristers to provide training in other systems across the globe. It will be a puzzle elsewhere in the world why the British state should have chosen to undermine to extinction this pre-eminent resource.

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?

36. No.

37. There will be no competition left at the end of the term. The state will have placed itself over a barrel of its own making. The organisations, which beat each other down in the first auction will stand alone in the field. The fewer they are, the better placed they will be to exercise oligopoly pricing power over the state. By exploiting its monopsonist position in the short term the state will have opened itself to the risk of oligopoly pricing thereafter. It does not require an expert games theorist to see that the organisations, bidding in the first auction, will realise that what they are in fact fighting to secure is an exclusive seat at a later state sponsored banquet of the oligopolists.

38. Is this not how state controlled goods and services are divided up in less democratic countries?

39. After the banquet, the only card the state will have left to play is to reduce the number of exclusive licences to be granted in each successive auction. This card is weak. The existing oligopolists need only combine to defeat

it. If the number of licences were reduced to one – and this seems to be the ultimate logic of the present proposal [see 4.45] – the perfect lie would be given to all talk of 'competition'. Rather than competition what would / will have been achieved is something very like nationalisation.

40. Nationalisation does not seem to have produced results in the USA, which enjoy confidence or respect either at home or abroad. It is notable that the English Bar provides a significant number of young advocates working *pro bono* on the indigent death row appeals generated from the USA Public Defender scheme which the present proposals most closely admire.

Choice vs. Exclusivity

41. **3.37** This proposal is shameless. Acquitted persons who have paid privately for the cost of establishing their innocence will hereafter be treated in two wholly different ways depending upon their household incomes. Those whose income was sufficiently high that they failed the eligibility test will be reimbursed at legal aid rates. Those whose income was sufficiently modest that they passed the eligibility test will not be reimbursed at all. The second group is to be punished for having chosen their lawyer.

42. Why should this be? The reason for this discrimination is simple, ruthless, and hidden. Unless the licensing arrangements are skewed in advance, suspects are likely to vote against them by opting out. The skewing anticipates the dissatisfaction that most accused persons will come to feel towards the newly licensed lawyer. Once the bare minimum level of service that can be provided by the public defenders is recognised – a better service being unachievable at the rates created by the opening reverse auction – then, but for this proposal, suspects would find ways to pay the extra costs to choose a level of service available under the existing 'quality competitive' legal aid arrangements.

43. These suspects, by exercising choice, would escape the state web. They would represent lost revenue to the organisations who had bought the licences. If this choice were unchecked, the organisations might increasingly find themselves servicing only the hopelessly indigent (those trapped by their poverty in the licensed system). To prevent this natural consequence of the present proposals the state has recognised that it needs to do what it can to skew the market in advance. The proposal in 3.37 is a contrivance to do just that. It identifies those who might be tempted to find a way to choose a lawyer for their son or daughter or mother or father, or for themselves, and threatens them that if they do so they will be punished financially even if they succeed in establishing their innocence.

44. This is one of the clearest examples of the simple economic principle underlying the 'PCT' licensing regime: if the state can impose a licensing regime for the provision of legal representation, then the smaller the number of licences it issues and the more exclusive those licences are, the better the price it can obtain for them.

45. **3.38** Prohibiting restrained assets from being used to fund private defence costs is another utterly irrational device, designed also simply to protect the exclusivity of the state's licences. The proposal at 3.38 is thus also a contrivance to skew the market to promote the initial blind reverse auction. Like 3.37 it identifies those who might be able to opt out and choose a lawyer, and prevents them from doing so, driving them instead back into the clutches of the organisation which bought them with its licence.

The Public Defender Service

46. **4.70** Has the PDS not proved an expensive and embarrassing failure? That the PDS should be explicitly preserved under the new scheme is to make a mockery of 'the market'. The market has turned its back on the PDS. Most of those who know about it and/or have tried it, have rejected it. Is it now seriously suggested as a model for the future?

Election and subsequent guilty plea

47. **4.116 & 4.117** This iniquitous subject has already been addressed in full with reasoned submissions from the CBA and other representative bodies. Those submissions should be read as though repeated here. There is a strong point of principle here which reflects badly both on the MOJ and on some professionals. If the statistics suggest that some solicitors temper best practice and forget their professional duty in the pursuit of profit, then the state, as custodian of the system, ought not to look to exploit this moral weakness, but rather find ways to align best practice with commercial self interest in pursuit of the public good.

PQQ

48. **4.126(1)** PQQ immediately favours the large non-lawyer-owned organisation over the smaller lawyer-owned firm (whatever the professional inexperience of the former and/or the proven professional expertise of the latter). The sort of providers which are thus favoured (e.g. G4S) are already discredited within the criminal justice system. The track record of these organisations in the CJS is not encouraging. It is not only in the public consciousness that they are discredited, but also in the concrete experience of the professional practitioners and other users of the system who will henceforth be marched into the arms of whichever organisation has bought the state's exclusive licences.

ITT

49. **4.126(2)** 'Quality' is a concept rarely mentioned in these proposals. In this paragraph it appears, but as a weasel word. It is used to describe 'the tender', not the services to be provided by the tenderer. The 'quality of the tender' is a procurement concept; it has nothing to do with – indeed it may be diametrically opposed to – the quality of the legal services to be provided. This distinction may not be immediately apparent to an unsuspecting general reader. The MOJ may wish to signpost this distinction more clearly if/when these proposals are properly explained to the public.

(8) Fees in Criminal Legal Aid

50. Generally, our answers to chapter 4 should be read into our answers to chapter 5 and are not repeated here.

51. A disproportionate fraction of the criminal legal aid bill is generated by the small number of cases covered by the VHCC regime. The VHCC regime is, and always has been, a terrible way of organizing payment for legal services. It has served the public very badly and continues to do so. It discourages best practice. It enshrines perverse incentives. It is costly to administer. It should never have been set up, and it should have been abolished long ago.

52. A fully worked out and practical alternative regime – GFS Plus – could have been in place for several years, but was passed over at ministerial level in 2009 without explanation. It should now be embraced without further delay.

53. The Bar Council has gathered together in its response to chapter 5 a body of arithmetic and worked through examples and illustrations. These cover the history of the unremitting progress of impoverishment of criminal legal aid as well as projections for the consequences of the proposals now made in chapter 5. We ask that they be read into our response, but we do not repeat them here.

Q26. Do you agree with the proposals to amend the AGFS 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 will be payable for every additional day of trial?**

54. No, no and no.

55. **5.2** The 22% figure is meaningless. It is inevitable that jury trials will always be much more expensive than other parts of the system. But the constitutional value of jury trial is not in doubt.

56. **5.2** What does the 'efficient resolution of cases' mean? If it means persuading suspects to plead guilty, then the MOJ should say so. If it means something different from 'the just resolution of cases', then the MOJ should say that.

57. **5.3** There are two answers to the VHCC problem:

(1) Trials should be case managed, so as to conclude within three months. This is accepted best practice amongst the top tier of litigators, advocates and judges conducting the most complicated cases (See chapter 4 above); and

(2) GFS Plus (See above).

58. **5.13 & 5.14** See chapter 4 re **4.116** and **4.117** above.

'Harmonisation'

59. **5.15** The MOJ is supposed to be the custodian of the criminal justice system. The MOJ is jointly responsible for the justice of individual

criminal outcomes. This proposal does not distinguish – save by reference to cost – between the accused person who insists that he is innocent and the one who admits that he is guilty. It sets the lawyer's professional duty to advise in the best interests of his client in direct conflict with his own private commercial interests. This is the opposite of what the MOJ ought to be doing its best to devise.

60. That the presentation of a plea in mitigation for a defendant who has confessed his guilt at the police station is to be valued the same as the preparation and presentation in court of a two day trial of the same defendant who denies his guilt is a shocking suggestion.

61. Why is the lawyer who engages in all the work necessary to represent the man who protests (and may prove) his innocence be punished for having the professional courage to do so? Why, after cross-examination of the prosecution witnesses, after legal submissions on the admissibility of evidence, after presenting the defence evidence, after making submissions to the judge and jury about the conclusions to be drawn from the evidence heard, and after – if the defendant is convicted – presenting mitigation, is he to be paid the same as if he had done only the shortest and easiest of all those things? This is quite wrong.

62. Equally, why is the lawyer who merely presents a plea in mitigation for a defendant who has confessed his guilt in the police station to be paid the

same as the lawyer who – on the fervent protestations of his client – prepared the same case for trial (written pre-trial submissions about hearsay, special measures, bad character; lines of cross-examination for prosecution witnesses; legal submissions as to dismissal, disclosure, admissibility) only for the defendant to change his plea at the door of the court? This again is utterly wrong.

63. **5.16** Who does the MOJ imagine will be presenting the guilty pleas and who the contested trials? What commercially minded solicitor will be instructing independent counsel in anything other than the contested trials, where the unpaid components in pre-trial preparation and two day hearings will be required? This proposal alone will marginalise and decimate the independent criminal Bar.

64. **5.19** The projected savings are minor. The consequences (mainly for the Bar) are grave.

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by §30%?

65. No.

66. This is fundamentally the wrong reform for those rare cases which cannot be case managed within the bounds of three months' court time. VHCC

has always been a bad system. It fails to promote and reward best practice. It has institutionalised bad incentives and poor professional behaviour. The answer is not, and has never been, to enshrine then further impoverish a bad system, but rather to adopt a whole new system. That system is GFS Plus. It is worked out and ready to go.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts?

67. No.

68. **5.31** The proposal that this impoverishment be retrospective is independently objectionable. We doubt that it would survive judicial scrutiny. It would also be costly. This cost has not been published, but has, we presume, been estimated. It is the cost of the duplication of work required when those who accepted existing contracts on one economic basis withdraw from them and fresh contractors have to be found to start again at the beginning. The unilateral 30% reduction would presumably constitute a fundamental breach of the contracts which those parties originally signed.

'Combined impact'

69. This is a particularly mischievous section of the consultation paper. A fig leaf of false egalitarianism is fingered between the audience and the proposals' true inspiration and effects. For an analysis of some of the arithmetic, please refer to the Bar Council's illustrations and projections. Three particular absurdities emerge.

'Plea only advocate'

70. **5.36** recognises that the proposals favour the discredited concept of the 'plea only advocate'. Under these proposals he – discredited though he may be in professional terms, underqualified though he may be in most cases – would be valued most highly on a *pro rata* basis. He, by virtue of his lesser abilities, would be paid the highest hourly rate for the easiest work. The likelihood is that he will not be a member of the independent Bar.

Specialist trial advocate

71. By contrast, the specialist trial advocate – trained though he may be to a higher level, and notwithstanding his greater experience and expertise in the most demanding form of criminal litigation – will be valued least on a *pro rata* basis. He, by virtue of his greater expertise, will be sent the least 'profitable' morsels from the licensee's banquet - the shorter contested trials. He will be paid, in effect, the lowest hourly rate for the most

difficult work. The likelihood is that he will be a member of the independent Bar.

Extraordinary receipts

72. **5.34 & 5.38** These £500,000 figures are entirely unrepresentative. They are paid to a handful of practitioners each year. They often relate to work conducted over 3 or more years. They are gross not only of tax, but of VAT (now at 20% which is handed straight over to HMRC). They are gross of chambers expenses (now commonly between 15% and 25% in criminal chambers). They are gross of pension contributions, travelling costs, professional indemnity insurance, telephones, professional courses and literature, professional clothes and cleaning, and a range of other expenses commonly paid to, or on behalf of, employees.

73. Each time the MOJ produces these figures from an unrepresentative few to beat the representative majority, it knows all this. It knows also that its payment arrangements can produce anomalies. Months and years of bills may be delayed so as to leave an advocate having to borrow to survive. The delayed payments are then suddenly released all at once and thus several periods of drought (and hardship) will be followed by an extraordinary flood (and the appearance of plenty). Taken out of context this 'flood' figure is amenable to doublespeak in disingenuous hands. Most advocates have to live with an inconstant flow of receipts and to budget accordingly.

74. If on the other hand there is a handful of advocates who repeatedly find themselves extraordinarily flooded year after year by inexplicably large legal aid receipts, then the thousands of other advocates who escape this deluge are entitled to ask how that can be.

Q29. Do you agree with the proposal to tighten the current criteria which inform the decision on allowing the use of multiple advocates?

75. Yes.

76. Will two junior advocates and a solicitor ever be an effective blend of representation? Is the present litigator's fee adequate to reflect the roles that a properly funded litigator should be performing? Are junior solicitor advocates pulling their weight in cases where they are led by QCs in independent practice? All these questions would repay further research by the MOJ.

77. Our experience is that two junior advocates and a litigator (who is doing his job properly) will seldom be the right balance of representation. Where two advocates and a litigator are required one of the advocates will almost inevitably need to be a QC. This is the practice at Southwark Crown Court and could be adopted more widely. In serious, but not

especially complicated cases (for instance some murders) a QC does not need a junior as well as a fully engaged litigator.

78. Our experience is that a properly funded and qualified litigator of appropriate seniority will take responsibility for instruction taking, scheduling of evidence, and recording of evidence as it is given.

79. In privately paid cases of this category, this sort of senior litigator will also produce first drafts of defence statements, hearsay applications and responses, bad character applications and responses, and other submissions of law. If this is the division of labour which the open market promotes in cases where individuals are paying for representation with their own money why should public funding arrangements not be structured to promote the same efficient division of labour where the tax payer is the funder?

80. In a serious case which is also complicated (for instance many fraud trials) a junior will be vital to assist a QC and litigator. Each has a distinct and complementary role in the most effective and efficient presentation of the defence case. Each needs to do his job. He cannot do this if the roles of each are not properly defined or understood.

81. Our experience is that a practice has developed in some hard pressed solicitors firms whereby an in-house junior advocate is inserted between

a (fully justified) QC and a (fully justified) litigator, who, because of his want of experience or skill, contributes little to the team and certainly far less than a conscientious litigator and a conscientious QC (and the public) would expect from independent junior counsel. This is not an efficient use of public funds. It is far from best practice. It makes it hard for the QC to do his job properly. He cannot delegate as he should. He cannot concentrate on his own job as effectively as he should. Equally, and for the same reasons, the litigator may be distracted from doing his job as effectively as he should. Neither is receiving the support from the junior advocate which each is entitled to expect and for which the public is paying. It is an inefficient division of labour. A better payment structure could correct this.

82. Involving Presiding Judges in this process is unnecessary and would be unwise. Their workload is already extremely onerous. Consistency is desirable and could best be improved by liaison with the Judicial Studies Board. The word 'robustly' in the question, as usual, means nothing at all.

83. **Footnote 88**. We agree with the Recorder of Leeds.

(9) Civil Legal Aid

Family/care proceeding

Q.30: Do you agree with the proposal that public family law representation fee should be reduced by 10%? Please give reasons

1. No.

2. This proposal is couched in these terms: "We are concerned to ensure value for money in public law family cases" (para 6.3) .It is then said that

"The benefits resulting from the streamlining and speeding up of the family justice system as a result of the current programme of reform should also be reflected in remuneration rates."

3. This involves a fundamental misunderstanding of the impact of the Family Justice Reform programme. There may be efficiencies in the court process, but not necessarily a reduction in work to be carried out by solicitors. We accept that fewer hearings will lead to fewer payments for court hearings, but there will be an increase in work to be done per hearing. Therefore it is most unlikely that efficiencies will lead to less work per solicitor or per case.

4. We have serious concerns that this will lead to a further reduction in the number of firms doing public family law There are already issues with the adequacy of the supply of solicitors in some more rural areas. Public law clients are often especially vulnerable and would struggle to travel for legal advice.

5. It may also lead to a reduction in the number of experienced solicitors undertaking public law work. The basis of reforms to the family justice system rely on high quality legal advice and representation. Planned efficiencies will fail without an adequate supply of quality legal advisors.

6. It will also have a significant effect on the future of solicitor's firms carrying out this type of work. It is highly unlikely that the most able candidates will be attracted to a future in public law work, unless they are independently wealthy. This will have an effect on the quality of representation and diversity of representation in the future. Moreover, it will potentially impact on the future availability of an adequate pool of high calibre candidates for the judiciary.

Civil: non - family

Q. 31 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.

1. No.

2. The rates paid to barristers were already reduced in October 2011 and this proposal seeks to reduce the rates payable to barristers again. In no other industry have rates of pay been continuously cut, as opposed to being increased proportionately with average earnings increases. The hourly rates proposed do not reflect the market value of the services provided. The Government has (out of necessity) a monopsony on publicly-funded legal services. When procuring services from the private sector, it ought to behave responsibly with price setting, instead of acting in an anti-competitive manner by abusing its position in the legal services marketplace.

3. The proposals will have the effect of dis-incentivising the Bar from undertaking civil Legal Aid work. The Bar is specialised in advocacy. Its role is complementary to the preparatory work undertaken by solicitors, who are specialists in that form of work. The split profession have persisted for centuries, because the system works and is in the best interests of the client. If the Bar no longer undertakes civil Legal Aid advocacy, the work will be undertaken by those less specialised in it. Indeed, even this is doubtful, considering that Legal Aid

fees for non-barristers was also cut. The client who cannot afford to procure legal services privately will have lesser quality representation than his opponent who, most likely, will have paid for legal representation by private means (see below in relation to our views about whether the quality assurance mechanisms provide an adequate safeguard).

Q. 32 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.

4. No.

5. For the reasons set out above, in relation to the proposal to abolish funding for "borderline cases", we do not feel that removal of the 35% uplift is a fair proposal. We disagree with the premise of paragraph 6.29 of the Consultation Paper that it is always possible to predict the prospects of success with accuracy. There are many imponderables when conducting litigation. Notwithstanding those imponderables, work must still be carried out on behalf of the client. In those circumstances, it is unfair to place the entirety of the financial risk on the legal services provider.

6. Furthermore, in Upper Tribunal cases, fees are not payable if permission is not granted on the basis that the case is not "arguable". Please see our response to Question 5, above, for our reasons as to why this is unjust. However, if the Government wishes to maintain the position where fees are not payable in the

absence of permission, an adequate *quid pro quo* is to grant an uplift where permission is granted. If not, there will be little incentive for lawyers to carry out work on behalf of those seeking to challenge the Secretary of State, particularly in borderline cases where the prospects of success cannot be predicted with certainty in the early stages of the case. Whilst this might be the Government's real motivation, it is unfair that those claiming asylum will not be able to obtain quality representation.

Q. 33 Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

7. In cases where claimants, holding public bodies to account, need access to expert witnesses, it is imperative that the calibre of those expert witnesses is as good as those instructed by the public bodies. For example, in medical negligence cases (for the limited class of cases in which funding is still provided), NHS trusts will have ready access to the top specialists in their field. In order to do justice between the parties, it is important that there is an equality of arms and that claimants also have access to high quality specialists.

8. Expert witnesses will be unwilling to act in cases where their instructing party is funded by Legal Aid. They will do more work for public bodies. It is important that expert witnesses work for both sides so that they can maintain an objective and independent approach to cases. If expert witnesses choose only to act for non-publicly funded clients, over time they will cease to have a balanced and objective approach. This will affect the overall pool of experts available for

instruction in civil cases in the medium to long-term. However, the more pressing concern is that publicly funded litigants will not be able to have access to high quality expert witnesses.

Family

9. Existing reforms in family law will reduce the number of experts instructed in those cases to those who are "necessary" and will require experts to produce far more concise reports within stringent timescales.

10. This will require the availability of good quality experts who are willing to work for public funding rates, within tight timescales. Following the previous reductions in rates of pay for experts, there are already issues with an adequate supply of a sufficient quality of experts in many areas of family work.

11. It is noted that this may cause injustice with Local Authorities in public law cases being able to instruct experts at a rate of their choosing whilst the other parties in the case would be limited to public funding rates which, if set too low, will limit the experts who can be instructed and it is unlikely that the highest quality of experts will work for the lower rates.

(10) Impact Assessment

Q.34 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Q.35 Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Q.36 Are there forms of mitigation in relation to impacts that we have not considered?

1. The Consultation Paper identifies a negative impact on particular groups with protected characteristics. We regard it as a matter of great concern that proposals, which have an adverse impact on, for example, women, BAME groups and disabled people are nevertheless considered "justified" because the Legal Aid budget needs to be reduced.

2. We do not feel that sufficient consideration has been given to the impact upon service providers, particularly the fact that many service providers will cease to provide publicly-funded services, as a result of the proposals. By aiming to achieve, at all costs, a reduction in the Legal Aid budget, through economies of scale, the quality of the services provided will undoubtedly be affected. We do not believe that we are overstating matters when we say that the proposals contained in the Consultation Paper will lead to the destruction of what is widely regarded as the finest legal system in the world. This has not been considered in the impact assessments.

3. We disagree that the Consultation Paper's proposed quality control mechanisms will be a sufficient safeguard against poor quality service. The reduction in the amount of fees payable to service providers (as the proposals will ultimately lead to) will have an inevitable downward impact on the quality of providers.

4. Good quality lawyers will be driven away from providing publicly-funded services and will be replaced by large corporate entities, who aim to provide only the minimum standard required. The proposed quality control mechanisms have not yet been brought into force. The Consultation Paper refers to no evidence to show that the quality mechanisms are an adequate safeguard because there is no evidence to substantiate this assertion. We therefore disagree that the quality mechanisms will help ensure that there is "*no impact on the quality of advice received by clients*."

5. We feel that insufficient consideration has been given to the impact on the composition of the judiciary. The Consultation Paper rightly acknowledges that the proposals will have an adverse impact on minority groups.

6. Lawyers who fall into these groups will be driven away from publicly funded work (where they are more likely to practise) and may even be driven away from the legal profession altogether. Aspiring lawyers who fall into these groups, who are more likely to want to practise in areas of law where public funding is prevalent, will be discouraged from entering into the legal profession. In the long-term, the pool of lawyers from which the judiciary is drawn will be less diverse. Accordingly, the judiciary will not have sufficient diversity to reflect the population that it serves.

7. Throughout the consultation paper it is acknowledged that the proposals will have a disproportionate effect on BAME barristers, but this is dealt with insouciantly. The reality is that the Coalition have destroyed the ability of BAME candidates to join the Bar, as a result of University tuition fees and have compounded this by reducing fees in public sector work. The reduction is such that those most empathetic to clients, as a result of their background, will no longer be able to afford to study, make a living from Legal Aid at the Bar, or become future judges.

8. Our bench will become less diverse and this will be the legacy of these proposed changes. Our politicians are drawn from such a narrow background that they either do not know what it is to struggle, achieve and progress or they

simply do not care about the added value such individuals bring to our legal system.

(11) Postscript:

Alternative Cost Savings

Background

1. On 23rd April 2013, the Secretary of State for Justice told Circuit Leaders that if credible alternative suggestions could be made to reduce expenditure, those savings could be implemented instead of cuts to the Legal Aid budget.

2. On the basis of that assertion (in addition to the GFS+ proposals already advanced) the Circuit suggest that over £110,000,000 of savings could be made by introducing court costs in criminal cases.

3. This is a principled position. It is reasonable to ask why law-abiding members of society should subsidise those who break the law or those who bring poorly considered prosecutions.

Current Position

4. At present[5] a criminal court has a power (though not a duty) to order a convicted defendant to pay the reasonable costs incurred by the prosecution. This is the case whether the prosecutor is:

   (i) An organisation whose purpose is to bring prosecutions on behalf of the state (i.e. the Crown Prosecution Service or Serious Fraud Office – 'statutory prosecutors');

   (ii) An organisation who bring prosecutions, as a way of discharging their statutory functions (e.g. the Health and Safety Executive, Local Authorities, TV Licensing Authority – 'optional state prosecutors');

   (iii) Charitable organisations who choose to bring prosecutions (e.g. RSPCA, League Against Cruel Sports – 'non-statutory prosecutors'); or

   (iv) A Company or Individual ('truly private prosecutor');

5. A convicted Defendant is *not* liable to pay costs incurred by the Court, costs of the investigation[6] or costs of implementing any sanction imposed[7].

[5] Section 18 of the Prosecution of Offences Act 1985

Civil Jurisdiction

6. At present, court fees are payable in civil cases upon the issue of proceedings, allocation and other stages. The fee depends, in part, on the nature and value of the case.

7. 22% of HMCtS £1.62bn budget (i.e. £363m) is spent on criminal courts.

8. 80% of all income (c. £500m) is raised from court fees in civil cases[8].

Proposal – Defendants

9. There ought to be a statutory presumption that a convicted Defendant pays the costs of the HMCtS in administering justice in his or her case.

10. This would be just and fair. An individual, who chooses to contest a charge he is in fact guilty of, should bear the true cost of his or her offending.

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[6] See R v Associated Octel Ltd [1997] Crim LR 144

[7] In the United States of America many inmates are required to pay a Cost of Incarceration Fee (COIF) – a contribution toward the cost of their own imprisonment

[8] All figures from HMCtS annual reports

11. As to practical matters, we suggest the following:

    (i) The costs to be assessed on a summary basis – i.e. a set fee prescribed by statutory instrument per hearing depending on type (mention or trial hearing) in the Magistrates' or Crown Court;

    (ii) Costs awarded to be dealt with as compensation – an option for a sentence of imprisonment in default of payment where appropriate would be available;

    (iii) Enforcement to be dealt with using the existing procedures for enforcement of fines, compensation and confiscation orders.

12. In 2012, the CPS brought just under 900,000 prosecutions in the Magistrates' Court with a total conviction rate of 86.5% - over 750,000 successes[9].

13. Even allowing for a significant number of indigent Defendants who would be unable to pay and for failures in enforcement – a 70% collection rate on an average cost of just £100 would raise £52.5m for limited additional enforcement expenditure.

[9] http://www.cps.gov.uk/publications/reports/2011/annex_b.html

14. Collection of Crown Costs would create greater difficulties. Where lengthy sentences of imprisonment are imposed it would be more difficult to enforce costs orders. Nonetheless, it is submitted there are a number of cases where significant costs orders could reasonably be made, not least those involving:

    (i) Corporate Defendants – such as regulatory offenders (HSE, fire or financial services); and

    (ii) Individuals convicted of fraud offences after substantial proceedings, who do not receive immediate custodial sentences.

15. On a conservative estimate this could raise at least £40m.

Proposal – Prosecutors

16. All non-statutory prosecutors ought to pay court fees in a similar way to civil cases. There ought to be a judicial discretion to waive the fee in appropriate cases and, any fee paid, would be refunded upon conviction.

17. The CPS (or SFO) are bound to bring a prosecution if there is a reasonable prospect of conviction and the public interest demands it.[10] Should

[10] Code for Crown Prosecutors 2013

another individual choose to bring a case to the criminal courts (for which they are under no obligation) why should they not pay the costs of this choice?

18. Optional state and non-statutory prosecutors use the criminal courts as one of the weapons in their armoury or to enforce their own aims (e.g. a local authority dealing with a noise issue by a tenant). Why should they not bear the costs of this choice, as they would with other options? The imposition of a fee would have the added benefit of improving scrutiny and the decision-making process of instigating a prosecution.

19. Many truly private prosecutors now choose to bring criminal proceedings over civil actions due to the reduced costs, quicker hearing times and absence of court fees. A number of established solicitors firms and new enterprises are specifically marketing and targeting this option.

20. Given the number of non-statutory prosecutions (TFL, local authority, TV licensing, HSE, RSCPA) that deal in both volume and 'heavy' work, this should raise a minimum of £20m.

South Eastern Circuit Response Committee

May 30th 2013