



House of Commons  
Justice Committee

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# Transforming Legal Aid: evidence taken by the Committee

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Third Report of Session 2013–14

*Report, together with formal minutes and oral  
evidence*

*Ordered by the House of Commons  
to be printed 16 July 2013*

**HC 91**

Published on 18 July 2013  
by authority of the House of Commons  
London: The Stationery Office Limited  
£12.00

## The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at [www.parliament.uk/justicecttee](http://www.parliament.uk/justicecttee). A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

### Committee staff

The current staff of the Committee are Nick Walker (Clerk), Sarah Petit (Second Clerk), Gemma Buckland (Senior Committee Specialist), Helen Kinghorn (Committee Legal Specialist), Ana Ferreira (Senior Committee Assistant), Miguel Boo Fraga (Committee Assistant), Holly Knowles (Committee Support Assistant), George Margereson (Sandwich student), and Nick Davies (Committee Media Officer).

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# Report

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1. On 9 April 2013 the Government published a consultation paper *Transforming legal aid: delivering a more credible and efficient system*, containing a range of proposals for changes to the system for provision of criminal and civil legal aid in England and Wales. Central among these was the proposal to introduce a model of competitive tendering for provision of criminal legal aid services.

2. We have received many representations on the proposals contained in this consultation paper, both before and after the 4 June deadline for consultation responses to be made to the Government. Many respondents to the consultation sent us a copy of the response they had submitted. In light of those representations,<sup>1</sup> we have held two oral evidence sessions to increase public and parliamentary understanding of the issues at stake.

3. On 11 June we took evidence from representatives of the Bar Council, the Law Society, the Criminal Bar Association, the Criminal Law Solicitors Association and the Legal Services Consumer Panel, as well as Mr Tudur Owen, a Welsh criminal legal aid solicitor and Professor Roger Smith OBE, the former Director of JUSTICE who is currently a visiting professor of law at London South Bank University and an honorary professor at the University of Kent. At this session we focused on the price competitive tendering proposals in the Government's consultation paper. Following the session we wrote to the Solicitors Regulation Authority, the Bar Standards Board and the Legal Services Board to ask about the feasibility of undertaking regulatory authorisation of new market entities within the timescale envisaged by the Government's tendering process. We append this correspondence to this Report (Appendix A).

4. On 3 July 2013 we took evidence from the Lord Chancellor and Secretary of State for Justice, the Rt Hon Chris Grayling MP, on price competitive tendering and other aspects of the Government's proposals. Shortly before the session Mr Grayling wrote to our Chair to indicate that he had already decided to revise his proposals in order to reintroduce client choice to criminal legal aid representation. At the same time the President of the Law Society wrote to us indicating that they had been involved in "constructive discussions" with the Lord Chancellor. We publish those letters with this Report (Appendix B and C). At the oral evidence session with the Lord Chancellor, discussion covered the following topics:

- a) The general consultation process and procurement issues (Questions 124 to 128, and 229 to 239);
- b) Criminal legal aid – competitive tendering (Questions 129 to 189, and 194 to 197);
- c) Criminal legal aid – harmonisation of guilty plea, cracked trials and basic (two day) trial fees (Questions 190 to 193);
- d) Prison law eligibility (Questions 198 to 210);

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<sup>1</sup> Given the volume of representations we have received it has not been possible for us to acknowledge or respond to all of them, although all have been taken into account.

- e) Civil legal aid – introduction of a residence test (Questions 211 to 217);
- f) Civil legal aid – changes to payment in Judicial Review applications (Questions 218 to 228).

5. Following our evidence session with the Lord Chancellor, we wrote to him requesting clarification in relation to the baseline figure against which sums are to be saved, as well as further information on his proposed timetable. We include a copy of this correspondence at Appendix B.

6. During our evidence session, the Lord Chancellor informed us that the Ministry will be holding a second consultation on the criminal legal aid competitive tendering proposals in September 2013.<sup>2</sup> He confirmed that client choice will be retained,<sup>3</sup> with the result that providers will not be guaranteed equal shares of work,<sup>4</sup> and clients will not be restricted to choosing providers within a Ministry-set procurement area.<sup>5</sup>

7. We note that the Ministry has not concluded its analysis of responses to the consultation, and we assume that, in addition to the consequential changes the Government will have to make to the price competitive tendering model as a result of the reinstatement of client choice, other changes may yet be made to the Government's proposals on this and other matters covered by the consultation. We intend to invite the Lord Chancellor to appear again before the Committee to examine the Government's overall response to its initial consultation, and the proposals which are included in its second consultation on the competitive tendering process, in autumn this year.

8. We note that there are other issues which will not be covered in the second consultation and on which the Lord Chancellor expressed his views in the evidence session.<sup>6</sup> These include the ending of legal aid for cases relating to prison treatment matters and some sentencing matters, the limitation of legal aid for judicial review, and the 12-month residency requirement (which the Lord Chancellor told us he was “going to look at again” in relation to “children under 12 months”). We draw the attention of the House to the exchanges on these issues at the evidence session.

9. We are most grateful to all those who have written to us on this subject, and to those who have given oral evidence to us. We draw the attention of the House to the evidence which we have received.

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2 Q 157

3 Q q 124, 129

4 Q 134

5 Q 183

6 Qq 198–228

7 Q 212

# Appendix A – correspondence with the Solicitors Regulation Authority, the Bar Standards Board and the Legal Services Board

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## Letter dated 13<sup>th</sup> June 2013 from the Clerk of the Justice Committee to Charles W Plant, Chair of the SRA Board

I am writing to request information from the Solicitors Regulation Authority in relation to regulatory matters related to the Ministry of Justice's Consultation paper,

The Committee has received numerous representations from organisations and individual practitioners regarding the possible timetable for implementation of the price competitive tendering proposals, and the need for many of the suggested structural changes to be approved by the SRA. The Committee would like to know answers to the following questions:

1. If the proposed timetable is adhered to, is the SRA in a position to grant the necessary approvals for changes to business structures, such as the creation of ABSs or merges between firms, either by the time contracts are awarded in June 2014 or the service commences in September 2014?
2. What is the latest date by which you would need new providers to apply for approval of their new business structures, in order to meet the June or September 2014 proposed dates?
3. Given the resources available to the SRA, is there a limit to the number of applications you would be able to process within the proposed timetable?
4. Have you received any expressions of interest or requests for advice from current or potential criminal legal aid providers on business structures related to the proposed changes?

The Committee would be obliged if you could provide answers to these questions by Tuesday 25 June 2013.

I am writing in similar terms to the Chairs of the Legal Services Board and Bar Standards Board.

## Letter dated 25<sup>th</sup> June 2013 from Charles W Plant, Chair of the SRA Board, to the Clerk of the Justice Committee

Thank you for your letter of 13 June 2013.

In response to your specific questions, our view is as follows.

- |         |  |
|---------|--|
| 1 and 2 | If the current timetable is adhered to, and the issues identified above are addressed by applicants, ABS applications of the type we would expect for this exercise should be capable of being processed within three months and applications for new traditional law firms (recognised bodies) processed within one month.                            |
| 3       | Given the information we have available about the size of the current market, the planned exercise and the number of likely contract awards, we would not expect resources to be a constraint in dealing with approval applications. The SRA is a risk based regulator and used to adjusting resources within the organisation to meet priority needs. |

- 4 We have not received expressions of interest from potential ABS specifically directed at this proposed exercise. There have been a small number of enquiries from existing regulated providers of criminal legal aid services about the proposals. However, these have been within the context of our normal supervisory engagement with firms.

These answers must be accompanied by the caveat that the approval process is necessarily an interaction between the SRA and the applicant body. We have numerous examples of applications that have taken a considerable period to approve because applicants have not given us the information we need to complete the process.

It may be helpful if I explain the context. The issues you raise cover both the recognition of firms of solicitors and the licensing of alternative business structures. The SRA requirements applicable to both types of entity are set out in the SRA Handbook. The most significant, practical difference between the two types of body arises from the provisions of the Legal Services Act 2007 which contains some detailed and specific requirements about the conditions under which we may license ABS. In particular, Schedule 13 of the Act sets out detailed requirements regarding the identification and approval of those with a material interest in ABS, which can, in some circumstances, result in a more complicated and lengthy approval process.

The SRA has been a licensing authority for ABS since the beginning of 2012 and we have now issued over 150 licences.

At the end of 2012 and beginning of 2013, we reviewed and revised the licensing process, in the light of our growing experience of the process and our desire to eliminate unnecessary delays, and issued new information for applicant bodies. As a result of this work, the approval process is becoming simpler, less resource intensive and speedier whilst maintaining the necessary public interest and consumer safeguards required by the Act and our Handbook.

Finally, it is clear from our experience that applications involving very complex ownership or business structures, foreign ownership, complex financing structures and financing through private equity vehicles can take longer to approve than applications where these elements are not present. Primarily this is because of the specific requirements of Schedule 13 of the 2007 Act which provide specific provisions regarding the positive approval by the SRA of all those holding a material interest in licensed bodies and the associated, relatively broad, definition of “material interests”. Having said that, our assessment of the particular market you are inquiring into, and the nature of the majority of any associated applications for approval that we are likely to receive is that we believe it is relatively unlikely that these factors will exist within applications. Our view is that the majority of applications are likely to arise from the restructuring of entities currently providing these services.

We will maintain a close contact with the development of this issue including liaising directly with the Law Society, Legal Aid Agency and Ministry of Justice. This will be in order to ensure that we have good notice of any regulatory impact of the proposals and any impact on the planning of our workloads; including on our approvals processes. We will publish information to assist potential applicants for licences or for new recognitions arising from any process that results from the current consultation. Should the planned process proceed we will, as a public interest regulator, make every effort to ensure that those firms requiring new approvals in order to undertake this important area of work are able to receive them in time to do so.

#### **Letter dated 25<sup>th</sup> June 2013 from Ewen Macleod, Head of Professional Practice, to the Clerk of the Justice Committee**

Thank you for your email to Baroness Deech dated 14 June 2013 regarding the Transforming Legal Aid consultation. I will address each of your questions in turn.

**Q 1 If the proposed timetable is adhered to, is the BSB in a position to grant the necessary approvals for changes to business structures, such as the creation of ABSs or mergers between firms, either by the time contracts are awarded in June 2014 or the service commences in September 2014?**



The Bar Standards Board would distinguish between the regulation of Alternative Business Structures (ABS), which has a specific statutory meaning in the Legal Services Act 2007 (the 2007 Act) and the regulation of entities more generally. The BSB is currently preparing to seek approval from the Legal Services Board (LSB) to be a regulator of entities that are owned and managed by lawyers ('authorised persons' under the 2007 Act). We hope that this can be achieved by the end of 2013 or early 2014 at the latest.

It may be possible to get authorisation from the LSB earlier than this, but there are some outstanding issues that we are seeking to clarify. For example, it is possible that we may need an order under s69 of the 2007 Act to put beyond doubt some of the powers that we will need to regulate entities. This would both delay our application to the LSB and potentially delay the coming into force of our new entity regulation regime. If we do need a s69 order, we expect this will take at least 9 months (depending on Parliamentary time to approve the statutory instrument) so it is unlikely that we would be able to start authorising entities until April 2014 at the earliest. If this is not necessary, we would hope to be approved to authorise entities by the beginning of 2014.

We would anticipate needing at least 3–6 months to approve any new entities, possibly more if we receive a significant number of complex applications (although we would seek to prioritise applications from criminal legal aid entities).

We will also apply to the LSB for designation as a licensing authority for ABSs. This process will take considerably longer (due to the statutory steps required), but we would anticipate being able to authorise ABSs by the end of 2014.

In summary, we may be able to answer more definitively in the near future, but there are significant risks in assuming that we could authorise entities by the deadline of June 2014. If we determine that a s69 order is needed, even September 2014 may be challenging. It would however be possible for barristers to seek authorisation via another approved regulator such as the Solicitors Regulation Authority.

**Q 2      What is the latest date by which you would need new providers to apply for approval of their new business structures, in order to meet the June or September 2014 proposed dates?**

We would need at least 3–6 months to be reasonably confident of authorising entities ahead of the deadlines stated. This does not take account of possible appeal processes if we reject potential applicants at the authorisation stage, but we would seek to work constructively with applicants to avoid the need for appeals.

**Q 3      Given the resources available to the BSB, is there a limit to the number of applications you would be able to process within the proposed timetable?**

We will put in place systems to prioritise this area of work if we receive an unexpectedly high volume of applications.

**Q 4      Have you received any expressions of interest or requests for advice from current or potential criminal legal aid providers on business structures related to the proposed changes?**

Our intelligence is patchy at the moment, but we would anticipate a number of applications from criminal practitioners to form entities. It should be noted that the Legal Aid Agency's proposals do not envisage tendering for advocacy services. Nevertheless, once the new BSB Handbook is introduced (expected January 2014, subject to LSB approval) all barristers will be able to seek authorisation to conduct litigation. In any case, barristers may wish to form entities with solicitors to tender for litigation services.

A recent survey of the profession (albeit on a relatively small sample) suggested that around a third of criminal practitioners were considering forming an entity but relatively few of those had definitely decided to do so at the time of asking. We are currently conducting a more in-depth survey of the Bar to provide further evidence of likely demand for entity regulation.

**Letter dated 25<sup>th</sup> June 2013 from David Edmonds, Chairman, Legal Services Board, to the Clerk of the Justice Committee**

I am replying to your letter enclosing a request for information to the Chairman of the Solicitors Regulatory Authority (SRA), Charles Plant. The Committee may find it helpful to have some information on what the LSB has been doing in relation to the SRA's performance in the matter of alternative business structure (ABS) licences and some information about other potential regulators.

As you may be aware, there has been a lot of public discussion about the speed in which the SRA was handling applications for ABS licences and the complexity of the process. As the body responsible for overseeing regulation in the legal services sector, we have been closely monitoring the SRA's performance in this area. We have used our formal information gathering powers to require the SRA to provide us with information on the progress of ABS applications and to detail their plans to improve the process and deal with the backlog of applications. Since then, my Board has received detailed reports on the SRA's performance at each meeting.

The SRA's early priorities were to deal with the backlog that had developed, to improve the process so that it was more risk based and to improve the quality of data collected and reported to the SRA Board (including the creation of meaningful performance indicators). They have made some clear progress on their priorities. They are managing their application process in a much improved fashion; they will be getting rid of the two stage application process and introducing a single application form; and, they will be reporting publically on their performance against their key performance indicators. We consider that the process improvements and increased focus by the SRA are beginning to achieve a more stable, speedy and simple ABS authorisation process. They have adopted a KPI to approve 100% of completed medium/high risk ABS applications within 6 months of receipt; and 90% of simpler applications in 30 days of receipt of a complete application. These KPI's show a commitment to moving authorisation at an appropriate pace for market participants and should enable the SRA to meet the timings that you detail in your letter.

Of all the ABS applications that have been granted so far it has taken an average of 7 months for the ABS licence to be granted following the submission of the second stage application and the average age of their work in progress, according to our analysis, is 4.5 months. 45% of current licence holders were granted their licence within 6 months of submitting the second stage application. We expect these figures to continue to improve as greater numbers of applicants are approved using the new simplified process. However, we and the SRA recognise that continued focus is needed to ensure that the previous situation of a substantial number of ABS applicants waiting well over 9 months for a decision is not repeated. My Board will continue our monitoring for as long as is necessary.

In terms of business models, the SRA rules allow them to authorise firms that do not employ any solicitors, provided they have appropriate other authorised persons, for instance a barrister or legal executive. Indeed, the SRA have recently granted an ABS licence to a barristers chambers that does not employ any solicitors, Richmond Chambers.

The Bar Standards Board (BSB) has also announced its intention to apply to become a licensing authority, and so be able to authorise and regulate ABS. The BSB has not yet submitted its application to the LSB. When the BSB does so we are required not only to carefully consider the application but also required to consult with the OFT, the Lord Chief Justice, the Legal Services Consumer Panel and any others we feel appropriate.

The Legal Services Act provides the LSB with 12 months (extendable to 16) to complete the statutory process of consideration of a licensing authority application and to make a recommendation to the Lord Chancellor, however we do try to complete the statutory process in 6 months. Although there are a lot of variables (submission by the BSB, LSB consideration, Ministry of Justice review of the LSB recommendation and Parliamentary proceedings) it may be that the BSB will also be a licensing authority in time to meet the proposed timetable for changes to legal aid. We understand that we can expect to receive an application from the BSB in September or October 2013.

The Chartered Institute of Legal Executives also has ambitions to extend the reserved legal activities it regulates and to regulate entities and eventually ABS. However, it is currently focused on extending its regulation and regulating entities owned and managed by authorised people. Therefore we do not expect that

it will submit any licensing authority application to regulate ABS in the areas of advocacy and litigation in time for the proposed changes to legal aid. Other regulators in the market, and any potential new entrants that we are aware of, do not appear to be interested in regulating the reserved legal activities that would be necessary to regulate providers of legal aid.

## Appendix B – correspondence with the Lord Chancellor

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### **Letter dated 1<sup>st</sup> July 2013 from Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, to the Chair of the Justice Committee**

In advance of the Committee hearing on Wednesday, I want to set out my current thinking on my proposals for introducing competitive tendering for criminal legal aid.

My twin objectives in proposing the reforms set out in *Transforming Legal Aid: Delivering a more credible and efficient system* were to reduce the cost of legal aid in the context of the financial pressures we face while also ensuring a sustainable market, that delivers comprehensive coverage, a quality service and improved value for money.

My officials are currently analysing responses to the consultation document to inform the Government's response. As I have consistently made clear, this is a genuine consultation and I have been listening and continue to listen to the views of the professions and others. I have made clear throughout that I am open to alternative proposals that meet the same core objectives, including delivering the same level of savings.

One specific point in the consultation which has attracted significant response is the proposal to remove client choice in the model for competition for criminal litigation. The rationale for proposing this change was to give greater certainty of case volume for providers, making it easier and more predictable for them to organise their businesses to provide the most cost-effective service to the taxpayer - it is not a policy objective in its own right. However, I have heard clearly from the Law Society and other respondents that they regard client choice as fundamental to the effective delivery of criminal legal aid. I am therefore looking again at this issue, and expect to make changes to allow a choice of solicitor for clients receiving criminal legal aid.

I met the President of the Law Society again last week for another constructive discussion, and I have agreed to explore further the proposals they have put forward to consolidate the market in stages, using quality and capacity criteria to achieve this. We were both clear that any future scheme for criminal legal aid must guarantee quality legal advice and representation is available, without giving rise to advice deserts. We agreed that in order to meet the challenges of the future, a managed market consolidation is necessary, ensuring services are sustainable. It is only through sharing back-office costs, developing new ways of working, and driving economies of scale—in the same way that all businesses and public sector organisations have had to do over the past few years—that legal aid providers can sustainably provide a cost-effective quality service both for their clients and the taxpayer. The terms of the Ministry's spending settlement means that all parts of the budget need to deliver savings.

I have asked my officials to work closely with colleagues at the Law Society to explore their proposals, in the context of our wider consideration of all the other responses we have received.

My ministerial team and I continue to listen to the views of the professions and other respondents. I am grateful to the all those who have engaged constructively in the consultation process. In light of last week's Spending Review no-one should doubt the need for my department to reduce its expenditure on criminal legal aid as outlined in the consultation document. I am determined to do this in a way that maintains a sustainable legal aid system, with quality at its heart.

I have written to you separately with regard the Ministry of Justice Spending Round 2013 Settlement in which I refer to the proposals to reform legal aid and the estimated savings from such reform.

I look forward to discussing the proposals with the Committee.

**Letter dated 4<sup>th</sup> July 2013 from the Chair of the Justice Committee, to Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice**

Thank you for giving oral evidence to us yesterday on your *Transforming Legal Aid* proposals. I hope you would agree that it was a lively and interesting session, and it was useful for us to gain an appreciation of how your thinking is developing in certain respects following the conclusion of the initial consultation period.

Given your intention to bring forward modified proposals on competitive tendering for further consultation following your decision to introduce client choice, my Committee does not at this stage intend to report its views on the proposals in the original consultation document, and we shall make this clear publicly soon, at the same time drawing attention to the oral evidence which we took from you and earlier, on 11 June, from interested parties. We will however maintain a keen interest in the subject, and would like to let you know that we are likely to wish to take oral evidence from you again later in the year on the follow-up consultation, as well as on your other proposals on civil and criminal legal aid, whether or not you modify them on the basis of consultation responses or other factors. We naturally reserve the option to report substantively on some or all of the proposals at a later stage.

It would be helpful if you could provide some written clarification of your savings calculations so that we could publish that together with today's evidence transcript. Please can you confirm what the baseline spending figures are against which the £220m legal aid savings (from both civil and criminal legal aid) are to be made and, of equal importance, assessed; and, if the saving is to be made against the Legal Aid Agency budget figures for 2013/14 (which include the effect of the LASPO cuts), whether you will be publishing fresh impact assessments which take into account the larger percentage cut that arises from saving £220m from a smaller overall budget, and which include a reconsideration of the effect on the sustainability of the market for legal services?

If you are able to provide any further information on likely timings in relation to further consultation on and implementation of (i) the criminal legal aid competitive tendering proposals and (ii) the other discrete proposals relating to criminal and civil legal aid in the consultation document that would also be helpful.

With apologies for the short deadline, please could I ask for a response to these points to be with us by close of play on Monday 15 July?

I promised at today's session to forward you copies of the correspondence we received from the Solicitors Regulation Authority, the Bar Standards Board and the Legal Services Board on the feasibility of completion of regulatory authorisation for new entities within your originally proposed timetable for the competitive tendering process, and I enclose that correspondence.

Thank you again for your assistance.

**Letter dated 15<sup>th</sup> July 2013 from Rt Hon Chris Grayling MP, Lord Chancellor and Secretary of State for Justice, to the Chair of the Justice Committee**

Thank you for your letter of 4 July and an interesting session with the Committee last week. I was pleased to be able to make the case for the proposals in the Transforming Legal Aid consultation and am glad that you found the session helpful. I am grateful for the correspondence you enclosed relating to regulatory authorisation.

I note your intention not to report on the proposals as published and agree that this makes sense in light of the expected re-consultation on certain changes to the current proposals this autumn. This will not be a re-consultation on every element of the package. As I said at the Committee session, we are not going back to the start and must bear down on the cost of legal aid. Should you wish to take oral evidence from me again at a later date I would of course be happy to appear before the Committee again.

You asked for further information on my savings calculations. The baseline against which estimated savings from the 'Legal Aid Transformation' consultation are made is the Legal Aid Agency's internal forecast for Legal Aid expenditure. These were published in PO 156695 on 12 June 2013 (<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130612/texU130612w0002.htm#130612w0002.htm wgn63>).

These forecasts include the impact of predicted volume reductions and earlier reforms, including those contained in the Legal Aid Sentencing and Punishment of Offenders Act 2012. Additionally, the forecast assumes that, apart from policy changes factored into the projections, fees remain fixed at current levels.

The latest projections showing legal aid forecast expenditure up to 2016–17 are:

Year	Expenditure (£ million)
2013–14	1,836
2014–15	1,719
2015–16	1,679
2016–17	1,666

The Impact Assessments that accompanied the consultation paper estimated that in steady state the proposals would save £220 million per annum. The Impact Assessments already take account of the baseline changes set out above as far as it is possible to do so given data limitations. We will be updating the Impact Assessments in line with any changes that are made in response to the consultation.

I am afraid, at this stage, that I am unable to provide further information on likely timings for the expected re-consultation and implementation thereafter. I am still in the process of considering all the consultation responses, along with the views expressed at several Parliamentary debates and those of the Committee and it will depend on the decisions I take, following that consideration.

## Appendix C – correspondence from the President of the Law Society

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### **Letter dated 1<sup>st</sup> July 2013 from Lucy Scott-Moncrieff, President, Law Society, to the Chair of the Justice Committee**

As I set out in my evidence to your Committee on 11 June, the Law Society has serious concerns about the proposal for the introduction of price competitive tendering for criminal legal aid contracts. That model, in our view, would have negative consequences for the provision of high quality legal aid services in England and Wales.

However, I am in no doubt that the Lord Chancellor desires to undertake a genuine consultation. He has said many times that he is open to alternative proposals which achieve the same core objectives

For this reason, the Society has been engaging closely with the Ministry of Justice since the launch of this consultation to articulate another approach which we feel better balances the objectives of the Ministry, the legal profession and the public interest.

We are encouraged that most of our objectives are in fact shared, not least the desire to secure long-term sustainability in the criminal legal services sector and to ensure the continued provision of high quality criminal legal defence services for those accused of a crime who would otherwise be unable to pay.

We also agree with the Lord Chancellor that the status quo is not an option. In part as a consequence of the uncertainty that has plagued criminal legal aid, the market has become dominated by ‘micro’ firms, on a very fragile financial footing. The market is, at present, ill equipped to deal with the challenges of a falling crime rate, over-capacity and a difficult economic climate.

We do not disagree on the need for change. However, the proposed model of price competitive tendering, is highly unlikely, in our view, to bring about the sustainable change the sector needs.

In my recent constructive discussions with the Lord Chancellor we have talked instead about the necessity of retaining client choice, not only because it is an important principle in our legal system, but because it is a driver of quality. We have also discussed the extent to which the present market conditions mean that a more measured timescale for proposed consolidation is likely to address concerns about disorderly market exit and the possibility of localised ‘advice deserts’. On both of these points the Lord Chancellor has listened carefully to our arguments and promised to look again. We are particularly encouraged by his indication that he expects to make changes in respect of client choice.

On this basis, we have agreed to work together over the coming weeks and months to explore further the Society’s alternative proposals to manage change in the market on a sustainable basis, using a framework of quality and capacity criteria within a system of rolling contracts. We acknowledge that the Ministry of Justice’s settlement under the Comprehensive Spending Review means that no area of the budget can escape savings.

We are today publishing the details of our alternative model, which has been drafted with the support of the representative bodies of the criminal solicitors’ profession. The proposal sets out in quite some detail our plan for change in the criminal legal aid system that balances objectives and achieves the change that is necessary for long-term sustainability of supply. We are looking forward to discussing its contents in detail with the Ministry.

The Law Society continues to seek the best long-term outcome for the legal profession and the public interest. We will continue to develop our alternative proposal by investigating how and where law firms can innovate and develop their business models and look forward to sharing this insight with the Ministry.

I would be happy to discuss the Society's proposals with the Committee further, and look forward to the outcome of your investigation into this important policy area.



# Formal Minutes

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**Tuesday 16 July 2013**

Members present:

Sir Alan Beith, in the Chair

Steve Brine

Andy McDonald

Rehman Chishti

Seema Malhotra

Nick de Bois

Graham Stringer

Mr Elfyn Llwyd

Draft Report (*Transforming Legal Aid: evidence taken by the Committee*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 9 read and agreed to.

Papers were appended to the Report as Appendices 1 to 3.

*Resolved*, That the Report be the Third Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

[Adjourned till Tuesday 3 September at 9.15am]

## Witnesses

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### Tuesday 11 June 2013

Page

**Lucy Scott-Moncrieff**, President, Law Society, **Bill Waddington**, Chair, Criminal Law Solicitors Association, **Michael Turner QC**, Chair, Criminal Bar Association, and **Maura McGowan QC**

Ev 1

**Tudur Owen**, Senior Partner, Tudur Owen Roberts Glynne & Co, **Roger Smith OBE**, visiting professor at London South Bank University and former director of Justice, and **Steve Brooker**, Consumer Panel Manager, Legal Services Board

Ev 16

### Wednesday 3 July 2013

**Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, **Elizabeth Gibby**, Deputy Director of Legal Aid and Legal Services Policy, Ministry of Justice, and **Hugh Barrett**, Director of Legal Aid Commissioning and Strategy, Legal Aid Agency

Ev 23

# List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

## Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681–I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518–I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519–I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

## Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96–I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97–I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645 (Cm 8600)
Seventh Report	Youth Justice	HC 339 (Cm 8615)
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965 (HC 1119)
Ninth Report	The functions, powers and resources of the Information Commissioner	HC 962 (HC 560, Session 2013–14)
First Special Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013: Government Response to the Committee's	HC 1119

Eighth Report of Session 2012–13

**Session 2013–14**

First Report	Sexual Offences Guidelines: Consultation	HC 93
Second Report	Women offenders: after the Corston Report	HC 92
First Special Report	The functions, powers and resources of the Information Commissioner: Government Response to the Committee's Ninth Report of Session 2012–13	HC 560

# Oral evidence

## Taken before the Justice Committee on Wednesday 12 June 2013

Members present:

Sir Alan Beith (Chair)

Steve Brine  
Rehman Chishti  
Jeremy Corbyn  
Nick de Bois  
Gareth Johnson

Mr Elfyn Llwyd  
Seema Malhotra  
Yasmin Qureshi  
Graham Stringer

### Examination of Witnesses

*Witnesses:* **Lucy Scott-Moncrieff**, President, Law Society, **Bill Waddington**, Chair, Criminal Law Solicitors Association, **Michael Turner QC**, Chair, Criminal Bar Association, and **Maura McGowan QC**, Chair, Bar Council, gave evidence.

**Chair:** A very warm welcome. I am sorry we are in such a large room and you are so far away from us. It is one of the consequences of getting a lot of interest and needing to have a significant amount of seating available for people who want to hear these proceedings.

I would like to welcome Michael Turner from the Criminal Bar Association, Lucy Scott-Moncrieff from the Law Society, Maura McGowan from the Bar Council, and Bill Waddington from the Criminal Law Solicitors Association, our first group of witnesses. Good morning to you all.

At the start of this session I should perhaps make clear that, when the Government announced their consultation and put forward their proposals, they not unnaturally unleashed a great deal of evidence from a wide range of bodies, but in particular a large amount from lawyers and lawyers' organisations. We did not see any value in the Committee taking a separate set of written evidence since we have access to that material and it was important that you should all concentrate on putting the case to the Government, whose proposals these were. There was a considerable focus in the representations on the proposals for price competitive tendering for criminal legal aid and we are making that the main focus of this session today. We want to test some of the arguments that you have put forward, as we will do when we have the Justice Secretary in front of us and we challenge him with some of the issues that you will raise. In the course of doing so, we will ask questions that will not necessarily be expressive of the point of view either of the Committee as a whole, if it comes to one at any stage, or of individual members. We want to test the arguments—the arguments on both sides of this question—and find out how soundly they are based. There are other issues as well as price competitive tendering, some of which we may pick up by other means. It is not the Committee's intention, so far, to set out a complete set of alternative proposals, but, if there are alternative ideas coming forward—particularly from bodies like yours—as to how the Government might achieve its savings without making

changes that you find unwelcome, we are obviously interested in that point as well.

I must ask members of the Committee to declare any relevant interests that they have.

**Gareth Johnson:** Mr Chair, I have a registered interest, as set out in the Register of Members' Financial Interests, that I am an employed solicitor.

**Mr Llwyd:** I have undertaken legal aid work, both as a solicitor and at the Bar.

**Yasmin Qureshi:** I used to take legal aid work at the Bar, but since February 2010, I have not done any legal work. I stopped practising.

**Andy McDonald:** I practised criminal law many years ago.

**Rehman Chishti:** I am a member of the Bar but not practising while a Member of Parliament; previously I prosecuted and defended, and I have undertaken legal aid work.

**Chair:** The rest of us you can assume have no declarable interests. One of those who has not is Mr Brine, and I am going to ask him to open the questioning.

**Q1 Steve Brine:** Thank you, Sir Alan. Good morning, everybody. Thank you for coming.

I will start with money because, ultimately, in part that is what it comes down to. We are aware of the claim that many have made in submissions to us, and which has been reported, that the Ministry of Justice is using the wrong baseline for its savings targets. Indeed, the consultation paper itself says that there have already been reforms to legal aid through the Legal Aid, Sentencing and Punishment of Offenders Act last year, which itself should deliver savings of £320 million per year in 2014 and 2015. So we are aware of that, the accusation being that it is failing to take into account those reductions before it produces this paper.

Starting with Lucy Scott-Moncrieff from the Law Society, do you accept the Secretary of State's argument, as a starting point, that significant savings need to be made from the legal aid budget? Indeed, should the legal sector be protected from cuts?

**Lucy Scott-Moncrieff:** We accept that the budget of the Ministry of Justice is going down and will continue to go down, and we do not think that legal aid should be exempt from any cuts that are made. We do not have access to the figures that the Ministry of Justice is using for setting the level of the cuts and so we cannot possibly say that it is a fair level or an unfair level. Our main concern, though, is that the level of cuts is pretty divorced from the PCT proposals. PCTs are not a way of delivering the cuts; they are intended to be a way of surviving the cuts, but, actually, we think they will make it even more unsurvivable. We do not really have very much to say about the level of cuts—we cannot address that—but our concerns are with the PCT proposals.

**Q2 Steve Brine:** It is important that you all have a go on this one because this is the key point. Maura McGowan, do you accept that savings need to be made from the legal aid budget?

**Maura McGowan:** Rather as has just been said, it is not really for me to accept or not accept. If the budget has been cut, the budget has been cut and we have to work within that. What we do not accept, necessarily, are the figures that are used for the basis of saying we need to save £220 million at the moment. You are right—the overall budget was something in the order of £2.2 billion. LASPO took, we think, £350 million out of civil legal aid, but the difference may not matter for these purposes. What is proposed at the moment is a saving of £220 million on the criminal side of the budget. The figures that are in the consultation paper suggest a spend of £1.14 billion for the year 2011–12, but, when we have looked at the Legal Aid Agency's budget, that looks forward to a spend of £914 million in the year 2013–14. So, without these cuts, there appears to be a fall of nearly £200 million on the way. In addition, it is important to note at this stage that crime, or at least the number of cases going through the courts, has consistently fallen in recent years. It looks, unless something terrible happens in the next year or so, as though there will be another percentage fall—something in the order this year of about 9% or 10% on last year.

**Q3 Steve Brine:** Having opened by saying that you are not sure it is for you to say, you then went on to say. Do you think there is a necessity for reductions in the criminal legal aid budget?

**Maura McGowan:** Sorry, I do not think I did go on to say. What I did was point out what we say are at least queries about the figures upon which this analysis is based. If the Ministry of Justice's budget has been reduced by 10% by the Chancellor of the Exchequer, we accept that money has to go somewhere. This is not the right way, as Lucy says, to achieve that, but in any event there are, we think, savings in the system already that will find at least the greater part of the £220 million that the Lord Chancellor is looking for, and we have made other suggestions as to how savings can be made within the system without rewriting it.

**Q4 Steve Brine:** We will come on to that. Bill Waddington of the Criminal Law Solicitors

Association, do you agree with the Secretary of State that we have one of the most expensive legal aid systems in the world?

**Bill Waddington:** Do I agree with that? No, I fundamentally disagree with that. The National Audit Office did a report in 2010—you may well have had sight of it, certainly in our response—which indicates that it is an average spend across Europe and not the most expensive in the world.

**Q5 Steve Brine:** Mr Turner is Chair of the Bar Council, for those watching. Do you take, on face value, the Secretary of State's assertions that we need to make significant savings here?

**Michael Turner:** No. As has already been pointed out, we think in the first place that he has achieved his target figure when he says he wants to reduce the budget to £1.5 billion once it is worked through. The real point here and where the taxpayer is losing out is that there is huge waste in the system, as we have pointed out. There is at least £100 million that can be saved by plugging the gaps in the system. As we have also pointed out, if he wants real savings to the taxpayer and listens to the proposals that we have put forward, he can have himself £2 billion for a legal aid budget. The real sadness, for us, of all of this is that we are just not being listened to. There are huge savings that can be made here, but Mr Grayling will not even see me to hear what we have to say.

**Q6 Steve Brine:** Would you just outline two for me? You said huge gaps in the system, so which parts then of the criminal legal aid expenditure do you consider do not give our constituents value for money?

**Michael Turner:** Let me just give you an example from Friday. One of my members, last Friday, attended court to do three cases. In the first case, the prisoner was not delivered, so the case could not take place. In the second case, the CPS had failed to instruct a prosecutor, so that case could not take place. In the third case, the Punjabi translator, who was meant to be delivered by Capita, did not turn up either. None of those three cases could go ahead. That is a picture that is happening all across the country on a daily basis.

In terms of the Crown Prosecution Service, which has been advertised as saving the taxpayer £27 million, if you look at their internal audit report, you realise, in fact, that they do not deliver those savings at all because that figure is based on counsel's savings rather than taking into account the cost of their employees. Once you do that, that £27 million disappears altogether.

Then you have to take into account again what is happening on a daily basis, which is that cases are not being properly prosecuted. One example from four weeks ago is a case at Southwark. A five-handed kidnap trial collapsed because disclosure was not done properly. There was a £500,000 costs order against the CPS, with a conservative estimate of £3 million to the taxpayer. There will be a retrial. Again, that is a picture that is happening across the country.

If things were done properly, those are the gaps that will produce huge savings. In addition to that, an entire budget can be produced by three very small

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**12 June 2013 Lucy Scott-Moncrieff, Bill Waddington, Michael Turner QC and Maura McGowan QC**

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measures. If you delivered the magistrates court back into the hands of the Magistrates' Association—it was taken into the MoJ in 2005 and was probably the best example of David Cameron's Big Society in action—that would produce a saving of £1.5 billion. We have suggested an insurance scheme, which would mean that the banks contribute to the cost of the fraud prosecutions. At present, when a bank loses any money, the only person who suffers is the taxpayer. The bank is allowed to write the money off against tax; the taxpayer pays for the investigation; the taxpayer pays for the prosecution. If the prosecution is successful, lo and behold, the bank is delivered free of charge all it needs to get its civil recovery.

**Q7 Chair:** We have your written evidence on some of these points. It raises the general question of whether it is the common view among the four of you that the Government should not attempt to make fundamental changes to the system at this point but should simply find ways of achieving those savings, perhaps from among those you have suggested, and achieve their budget requirements in that way rather than making a change in the system, moving to price competitive tendering?

**Lucy Scott-Moncrieff:** As I said, the cuts that are being proposed are not intended to be achieved by price competitive tendering. That is to do with the restructuring. We accept that there needs to be restructuring because this is a very fragile and unsustainable market because of mistakes that have been made in the past in procurement. We certainly think there needs to be reorganisation, but it certainly should not be this reorganisation. If the reorganisation is accompanied by a much more realistic idea about how the savings can be made, it is more likely to be successful. We see it as a double progress that needs to be made.

**Maura McGowan:** So far as the Bar is concerned, our view is slightly different because, of course, the restructuring that price competitive tendering would bring with it does not have a direct effect on the way in which we work. Our view, put simply, is that there are savings that can be made by efficiencies and reorganisation, without a total restructuring, that would achieve the budget cuts that are required, if they are required. That would allow a short opportunity—a year or two—to have a commission to review the entire system properly. This is piecemeal; these are sticking plaster measures.

**Q8 Nick de Bois:** I am confused by something. Should not many of the examples you gave, Mr Turner, which were effectively inefficiencies, be taken out as well as potential procurement savings? Why should we be tolerating inefficiencies anyway? You seem to be thinking the goal is to save x money, which may be a fair assumption, but I would argue that you should get rid of the inefficiencies regardless of what the budget is, and then look at the structural reforms that have been proposed and challenge those perhaps on quality and outcomes, which would be a fair point.

**Michael Turner:** I would not necessarily disagree with that. The only reason we put it in this way is that Mr Grayling has said in terms that, if we produce

these savings, they will not be banked; he is genuinely looking for them. But I tend to agree with you. Our only point is that everyone, if they see the proposals, realises that this absolutely devastates the profession and has a real impact upon victims of crime in particular. What we are pointing out is that restructuring can deliver the Government the money they need to run a legal aid service that does what it says on the tin for the citizens of this country.

**Q9 Rehman Chishti:** Coming back to Ms McGowan in relation to the point you made, where you said a lot more cases now are not going through the criminal justice system, is that by way of saying that there is a lot more use of cautions and conditional cautions where police officers will now be able to give a community penalty—not simply a matter of giving a caution? That, in itself, would be contrary to the interests of administering justice, whereas one is simply looking at financial savings and not the administration of justice.

**Maura McGowan:** It is difficult to be precise, but the figures that the police have issued would tend to contradict that. The number of cautions has not gone up to match the drop in the number of cases going through. It may genuinely be that there is a fall in the rate of crime or a fall in the rate of detection, but in any event there are something like 10% fewer cases going through the courts in London this year than last, and that is not mirrored by an equal increase in the number of cautions.

**Q10 Rehman Chishti:** How much of a cut is sustainable in the interests of administering justice by each of your different departments?

**Lucy Scott-Moncrieff:** I do not think you can put a figure on that. The research that we have done as part of our response shows what you need to do to remain profitable in terms of the salaries that you need to pay to attract the right quality of people. There are efficiencies that can be made within the way that service is delivered if we have enough time to convert to those different ways of working and different ways of achieving efficiencies. That would also require efficiencies on the other side. As Mike has said, efficiencies in prosecution lead to efficiencies in defence as well because you are not wasting your time, frankly. Given time, we can do quite a lot to make things a lot better, but just accepting a cut is going to drive a lot of people out of business and really destabilise the provision of criminal defence services. You can't put a figure on it.

**Maura McGowan:** For the Bar, we have had at least 15% cuts in fees across the board. In homicide cases there is an extra 25% on top of that; so we have had a 40% cut in fees already. What is clear on any daily experience is that an underfunded system is inefficient and costs more in the long run. An underfunded police service, an underfunded CPS, an underfunded courts service all have the sorts of problems that Michael Turner mentioned a few minutes ago. If three cases go awry in any given day, you have doubled or trebled the cost.

**Q11 Gareth Johnson:** Can I turn to competitive tendering, which all four of you said that you were against in your opening remarks? Is it that you are against it per se, or is it that you are against it if it is linked to the proposals that we have seen from the Ministry of Justice? What the Ministry of Justice would argue is that, if you look right across the public sector, in the main, competitive tendering has succeeded; it has worked. What is it about the criminal justice system that makes it unique, compared with other areas of the public sector?

**Lucy Scott-Moncrieff:** There is no ideological opposition to competitive tendering. We already compete on quality and have done for years. That is also when you are getting your contracts. With regard to price competitive tendering, when the initial statement is that you have to take off 17.5%, and then competitively compete below that price, that is completely unsustainable, as we have set out in our document. It may be that, when you have very large organisations that can afford to lose a contract here because they are going to get one there, and so on and so forth, that might make it workable, but what we are talking about here are rather small organisations. Even the largest legal aid firms are small compared to solicitors' firms across the board. It is just not doable; it is not workable.

Proper price competitive tendering that allowed prices to go up as well as down and did not have artificial constraints would be another story, but this is not really price competitive tendering, this is a way of trying to force through reorganisation. The savings that this document proposes do not come from PCT; they come from what is going to be the 17.5% cut that we start with.

**Q12 Gareth Johnson:** Ms McGowan, are the Bar against it in principle?

**Maura McGowan:** Criminal justice may not be unique, but it is in a very special category, probably along with health and education. You cannot measure the services in lumps. You cannot say, "This is a commodity. It is worth x, but you can buy it for x minus 10% or minus 20%." This goes much, much deeper. We are not selling widgets; we are providing an institutional plank in a democratic society. I am sorry if that sounds pompous, but it is actually as important as that. Of course cost and efficiency are important, but they can never be the determining factor. As Lucy says, all of us have always competed in terms of quality. If I am not as good as the next person, I will not get the work, but I should not be getting it because I am cheaper than the next person if I am not necessarily better than them.

**Q13 Gareth Johnson:** Mr Turner, if you could have competitive tendering with the right safeguards in place, is that something that you could accept?

**Michael Turner:** You would have to give me the safeguards, but I would just counsel you to see how price competitive tendering has worked so far for the MoJ. It has been a complete and utter disaster in terms of the contracts that it has signed.

**Chair:** I think you can take it for granted that we are familiar with the contracts that have gone wrong with the Ministry of Justice.

**Michael Turner:** You can pick almost any contract, but I will just give you one example. If you take your tagging contract and they were done on the basis that they are in the United States, you would have saved yourselves £881 million over the 13-year period where we have had tagging. That would have given you 2,000 probation officers and 1,200 policemen. Price competitive tendering has not proved very successful for the MoJ thus far.

**Q14 Gareth Johnson:** Mr Waddington, on a different matter, can we perhaps move on to something that you may have some knowledge about, which is the fact that there is no pilot that is proposed by the Ministry of Justice for these changes? How do you feel the criminal courts would feel if there were to be pilots? Do you think that that would work? Do you think that that is something that would be desirable before these proposals were implemented?

**Bill Waddington:** A simple answer to this is that I am not sure it is a system that can actually be piloted. For example, if you take a geographical area and say, "Let's try the PCT system here," four successful bidders win a contract in a pilot area. Everybody else in the area goes out of business. The pilot then fails. Then you have just lost the criminal justice system within that geographical area. It is not a system that lends itself to a pilot scheme.

**Q15 Gareth Johnson:** Ms Scott-Moncrieff, can I put you on the spot? I accept that you may not be able to answer this question straight away, but do you feel these proposals are lawful?

**Lucy Scott-Moncrieff:** Not all of them, no. We think that particularly the issue of client choice is something that does not comply with the LASPO provisions and may not comply with the European Convention on Human Rights. I could give you all the details of that, but we have counsel's opinion to that effect. Certainly, if lack of client choice is imposed, we would be looking to challenge that. I know that the MoJ are saying that there is still some client choice in there because in exceptional circumstances you can have a different solicitor, but that is not choice either; that is just a different imposition. After the first relationship has failed, then there is a different imposition. So, yes, there is no choice and we think that that is unlawful.

**Chair:** We are going to come back to some aspects of that issue later.

**Yasmin Qureshi:** Can I just start by saying that I do not agree with my colleague Mr Johnson—

**Chair:** This is a supplementary question that you wanted to ask and not a row of questions.

**Yasmin Qureshi:** Yes, I know. I just wanted to say that I am not coming from the perspective that privatisation works or is brilliant, and you have seen the examples of G4S and Capita. What I wanted to ask you was that the whole basis of the contention that savings must be made is, supposedly, that our system is more expensive, but is it also right that our system is different from many of the other comparative European countries in that we have an



adversarial system, where the lawyers are involved in the case right from the beginning, as opposed to, say, France or Germany because the—

**Chair:** What is the question?

**Yasmin Qureshi:** The question, really, is that trying to make savings is quite nonsensical in this particular situation because our system is very different from the other systems—and, for what it is, it is good value for money.

**Chair:** Ms Qureshi, I still have not heard a question.

**Q16 Yasmin Qureshi:** The question is that we have an adversarial system; other countries have inquisitorial systems. Would you agree with me that, in the light of that, it may well be that we may be slightly more expensive, but, in a comparative system with another country that has a similar system, we are not more expensive?

**Michael Turner:** I would certainly agree with that, if that is the question. The important thing to take from that question is that you see in the inquisitorial system, in the figures, a lot of times that the judicial spend is not put in there, and that is where the weight of the spend is; therefore, these comparisons are often false. That is the point that Ms Qureshi was seeking to make. It is a false comparison if you are not comparing like with like.

**Lucy Scott-Moncrieff:** Could I just add what is perhaps an even more significant point? We have a very small public defender service in this country; it was piloted as a way of showing private practice how to do things properly. It is still continuing, providing much the same sort of service as private practice but at greater cost. International research shows that, in those countries that have a public defender system and also private practice supplying criminal defence services, the public defender system is always cheaper. Only here is it more expensive, which I think tells you something about the efficiency of the way in which private practice provides these services.

**Q17 Chair:** We did hear a number of comments from people suggesting that this whole exercise was one in privatisation, but it is helpful of you to make clear what we are talking about here is whether a system of independent private contractors, solicitors and barristers is preferable to one that means greater state involvement in the management of the professions.

**Maura McGowan:** Can I also make this observation, following up on Mr Brine's question at the start about it all coming down to money? Our system cannot be matched against many others, but one thing you can say about our system is that it is universally recognised as the best. We bring in 1.6% or thereabouts of GDP. That is what the legal services industry, as it is now called, brings in. You cannot measure that against many other European systems because our system is recognised as being so far superior. In part, that is because the criminal justice system in this country has a reputation second to none—or at least it has up until now.

**Q18 Mr Llwyd:** In your opinion—Ms Scott-Moncrieff referred to this in passing—what

exactly is driving this consultation? Is it simply cost-cutting or is it a need to bring in a new model of legal aid provision?

**Lucy Scott-Moncrieff:** The Lord Chancellor has been pretty clear about this. He says, “The cuts is the cuts and we are going to achieve that 17.5% across the board”—or maybe a bit more with PCT. The point about price competitive tendering—the purpose of price competitive tendering—is to help this very fragile market survive those cuts. That is what it is all about. That is what it says in the consultation document. Putting the cuts to one side, we accept that it is a very fragile market, but this is not the way to reform it. There are much better ways of reforming it that will protect the criminal justice system, that will give proper credit for the work of existing practitioners and allow them to adapt so that they are survivable in the long term. We accept that the current system, for all sorts of reasons, is just making the situation worse and worse, and there is going to come a point at which nobody will want to come and work in the criminal defence system. It is not to do with, “This is how to deliver the cuts.” It is how to survive the cuts, and it is not the right way to survive the cuts.

**Q19 Mr Llwyd:** You will know, of course—all of you—that the Secretary of State said in an article in the Law Society Gazette on 20 May: “Unless somebody's got a stunning alternative to PCT, it will go ahead in some form.” Mr Turner has referred to several economies that could be bought in without shaking all the apples off the tree, as it were, and dismantling the system. You, as the Law Society, have also put in some suggestions I believe; is that correct?

**Lucy Scott-Moncrieff:** Yes, that's right. We do think there is an alternative way of doing this. We think that there is an alternative way of doing it that should appeal to the Government because it is market-driven rather than being a state controlled system, which is what is being proposed here. We have been focusing in the very short consultation period on putting in a response to the consultation questions, but we are speaking very widely with colleagues, with the Bar Council, with practitioner associations, to come up with good ideas about how the system can be made more sustainable. It will involve the co-operation of Government. It will involve them having to give up some of their much-loved habits such as having very short contracts—sometimes only six months or a year—but we think that something can be made to work if we all work together in the interests of the justice system.

**Q20 Mr Llwyd:** Is that the view of your organisation, Mr Turner?

**Michael Turner:** Of course it is. We can go on pointing out cuts until the cows come home and alternative ideas that will preserve the system. The most important thing for this Committee to understand is that, if this is introduced, ultimately, in 10 years' time, you are going to lose your independent judiciary, which is a fundamental cornerstone of this democracy—absolutely a fundamental cornerstone. The reason that that is going to happen is because, once you introduce the corporate supplier into this

market, your ethics disappear. You replace what the lawyer is brought up with, which is that ethical consideration, with a competing base that the corporate supplier wants to produce the best contractual price. The Bar supplies your independent judiciary. Once the Bar is brought up in that atmosphere, with those competing interests, your independent judiciary will disappear. It is a very fundamental point.

**Q21 Chair:** That is a pretty severe criticism of the apparent inability of your members to maintain professional ethics under a different system.

**Michael Turner:** You can already see it in the attitudes of certain of those in the CPS, when a judge is told, as they have been, at 5 o'clock at night when he has required a skeleton argument overnight, "I am sorry, you are not getting it from me, judge, because I clock off at 5 pm and I only come back at 9 o'clock in the morning. That is when I will start working." The independent Bar will stay up till 4 or 5 o'clock in the morning doing that skeleton, in order to supply the court.

**Q22 Chair:** You do know that Crown court advocacy is not covered by these proposals.

**Michael Turner:** I do. It is just an example though. When you say to me the ethics do not disappear in that kind of situation, there are any number of examples of where they have.

**Lucy Scott-Moncrieff:** Can I just say, on behalf of the solicitors' profession, that we do not think—

**Chair:** The witnesses are down there.

**Q23 Mr Llwyd:** I suspect—no, I won't go down that avenue. Solicitors being appointed as judges as well was perhaps the point you were going to make?

**Lucy Scott-Moncrieff:** No, I was actually going to say that the ethics of the solicitors' profession is exactly the same, whatever vehicle they are working in.

**Q24 Mr Llwyd:** Absolutely. In order for this proposed model to work, which external factors such as the CPS and the courts system will require reform and restructuring, and, if so, how?

**Lucy Scott-Moncrieff:** It depends whether you are talking about the 17.5% cut or the restructuring. As far as the cut is concerned, clearly, if the overheads are less or if you are spending less time on a case because there are efficiencies elsewhere, it is easier to survive that cut. If you have to do 10 hours' work for something, that is one thing. If you have to do only eight hours' work, that is something else altogether. So, yes, reforms in other parts of the system are really important to make this survivable, but that is not all that we need to do. We also need to produce a proper coherent way to allow people to have a future in criminal defence work.

One of the things that is a real problem is that, because of the short-term contracts and because of the planning blight that exists in the criminal justice system or in the legal aid system and has done for years, people cannot go to the bank and say, "I want to invest in a really good IT system so that I can bring more people in and they can work at a distance," and

so on and so forth, because the bank will say, "How are you going to pay back this money?" "Here is my business case." "How long is your contract?" "Two years or a year." It is hopeless—it is absolutely hopeless. There has to be a much greater continuity for solicitors' firms to be able to work in a businesslike way. They are providing professional services, but they have to be able to do it in a businesslike way and that does require the MoJ to play ball.

**Maura McGowan:** Given that the MoJ at the moment wants to look at the resourcing and the administration of the courts as a parallel proposal, that is not something that can be achieved in two, three or four months. I go back to what I said earlier. Put the whole thing on hold, take the savings that are there or the reduction in spend, if that is a better way of expressing it, and look at the entire system across the board. Look at the administration of the courts, if that is what the MoJ wants to do. Look at the restructuring. As Lord Carter recommended for the solicitors' profession, give it time to settle down. Once you have brought in a big change, allow it to settle and consolidate.

There is movement across the profession. Because of the fee cuts and the reduction in work already in place, some people are leaving the profession. That is happening, as it were, naturally, without it being forced upon us. Allow the whole thing to work organically for longer than the two or three months that is being proposed currently and the MoJ, I am sure, will see the move in the administration and resourcing that it looks for, and money will ultimately be saved, without losing a system that has quite genuinely worked so well up until now.

**Q25 Mr Llwyd:** There is a concern about the eight-week consultation period as well, isn't there?

**Maura McGowan:** Not just the consultation period, but what is proposed in the immediate future. We are told that the MoJ is likely to respond early September and, given the way that the timetables have worked so far, that seems likely. They will respond and everything will go ahead. That is the way—

**Lucy Scott-Moncrieff:** The complication is the tight time scale. It is a really serious problem. Law firms cannot start adapting until they know what they have to adapt to. They cannot start adapting until September because maybe these provisions will go ahead; maybe they won't. People are not going to start spending money on transforming their businesses until they know what they have to transform to. Even then, they are not going to spend money transforming their businesses unless they know whether they are going to get a contract. They can do all sorts of preparatory work; they can talk to people, they can discuss things, and they can try and gear things up. But, if you are not going to hear that you have a contract until next summer and then you have to provide the service in September, it is completely impossible.

**Q26 Mr Llwyd:** That is the reason why you think as a Society that there is a problem with this pre-qualification questionnaire?

**Lucy Scott-Moncrieff:** I understand why the Government have imposed this timetable, because

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**12 June 2013 Lucy Scott-Moncrieff, Bill Waddington, Michael Turner QC and Maura McGowan QC**

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these things will take these lengths of time, but they do not seem to understand what the profession needs to do to adapt to these timetables. To give a very simple example, we are a very heavily regulated profession and any time you want to change your business structure or whatever, you have to get the consent of the Solicitors Regulation Authority. If it is something quite simple such as bringing new people on board or opening a branch office, that is not a very big deal, but, if it is something major such as combining with other people to create a new structure that can bid for these contracts, that takes six to nine months. You are not going to start that process until you know you have been offered a contract, and yet you are not going to be offered a contract unless you can show that you are going to be able to deliver it in three months. It is just bonkers.

**Q27 Mr Llwyd:** What would you say to Ms McGowan's suggestion about putting all this on hold and looking at the economies that can be put in without fundamentally changing the system? What would you say to her view on that?

**Lucy Scott-Moncrieff:** We would be delighted if the whole thing were put on hold and we had enough time to do this properly. That would be an excellent idea.

**Michael Turner:** Could I just add to that in terms of our worries about the consultation process? Not only is eight weeks a very short time, but there have been 13,000 responses to this consultation, and we cannot see, if it is a genuine consultation, how on earth the MoJ can be reading these consultations properly and considering them properly in the time scale that they have set themselves. If this is a genuine consultation, they have to give themselves more time to consider what are very big responses. The Law Society's response is over 150 pages; ours is almost as big, as is the Bar Council's. These are huge responses to the consultation, which have set out our concerns about legality and all sorts of areas. They have to be considered properly.

**Q28 Graham Stringer:** It has been said a number of times that the market is fragile in this area. Is it possible to give indicative profit levels for the firms in giving criminal legal aid?

**Lucy Scott-Moncrieff:** They vary. Paradoxically, the most successful firms are very often the smallest ones, where it is a single person working from home, supplying a service without having an office, having terribly low overheads and therefore able to make a living. That is not really sustainable. In the larger firms, the profit levels can be very low. Some of them are in negative profit in the sense that their criminal legal aid work is supported by their other work, so if it was just criminal legal aid on its own, it does not make a profit at all. There are some firms that work very efficiently that might have profit levels of about 6%, which is not a huge return on investment considering the risk that the owners of these firms have to take and the risks of huge payouts if things go wrong, they have to close, there are redundancy payments and so on and so forth.

**Q29 Graham Stringer:** Is there any hard evidence in this area? It is an opportunity for you, really, to kill the myth, if it is a myth, of the fat cat lawyers.

**Lucy Scott-Moncrieff:** I would so love to kill the myth of the fat cat lawyers. The average salary of a legal aid lawyer is £25,000; the average salary of a nurse is nearly £30,000; for teachers it is £34,000; for GPs it is £56,000; and I believe for MPs it is £65,000. So we are not fat cat lawyers.

**Q30 Graham Stringer:** It is fat cat MPs, is it?

**Bill Waddington:** If I may say so, there is a lot of financial information in the Otterburn report that accompanies the Law Society's response, where there are real examples given of financial information that was provided by firms to Otterburn for him to do these calculations. Reading those will certainly kill the myth of the fat cat lawyer.

**Q31 Graham Stringer:** I was just going to move on to the Otterburn report and the economic projections that are in there and some of the bases for that. Why are the fees in the Otterburn analysis lower than the fees in the consultation document?

**Lucy Scott-Moncrieff:** The fees in the consultation were based on 2011–2012, I think, by which time the LASPO reductions were not showing up, so there was going to be a reduction as far as that is concerned, with these on top, in those areas of work. We have been told that the fees in the consultation document include VAT, so that has had to be stripped out as well. Then there is the 17.5% cut on top of that.

**Q32 Graham Stringer:** It assumes they have got it right.

**Lucy Scott-Moncrieff:** Yes. It is just assuming various things that seem to be pretty obvious.

**Q33 Graham Stringer:** Why are the levels of people required in Manchester and West Yorkshire so much higher than in West Mercia?

**Lucy Scott-Moncrieff:** We asked Otterburn about that, and the fact is that the case mix in West Mercia is quite different from in the other area. You have an urban area there that has much higher levels of crime, much higher levels of serious crime, many more police station responses are needed, and so on and so forth. Then you have a rural area where the level of crime is lower, the nature of the crimes is lower, and, therefore, the mix of people that you need to deal with those cases is different. We can send you chapter and verse. We have chapter and verse, but that is essentially it.

**Q34 Graham Stringer:** Finally in terms of detailed questions, why is it assumed that it will take 10 months for fees from Crown court litigation to be paid?

**Lucy Scott-Moncrieff:** Because you do not get paid until the end of the case.

**Q35 Graham Stringer:** That is 10 months, is it?

**Lucy Scott-Moncrieff:** On average, it takes that long.

**Maura McGowan:** Can I deal with the fat cat point as well, because that tends to come in our direction slightly more often?

**Q36 Chair:** Is that because some of your members conform to that category while others do not?

**Maura McGowan:** Allegedly so. I accept that there are occasional names that hit the headlines having earned a lot of money, but they are exceptional cases and they are based on all sorts of weird and wonderful accounting systems. Can I make this observation so that the Committee understands? The very high cost cases system, which we think is an administrative burden of itself but it exists currently, will pay a QC, in the most serious case, £500 a day gross for a full court day, plus two hours' preparation outside court. The Lord Chancellor himself accepts that, when you look at barristers' fees, you have to approximately halve them, to take account of overheads and expenses and things of that sort. That takes that down to £250 a day under the current system. Under the proposed system the gross fee would be £350 a day, going down to £175. There are only a few hundred QCs doing criminal work in the entire country. They work only in a limited number of cases. I accept entirely that £175 a day is not to be sniffed at, but it is not the sort of ludicrous wealth and luxurious fees that sometimes the newspapers might have you believe.

**Michael Turner:** To add to that, you should know that under the tapering system it is proposed that, at the end of that taper, junior barristers will earn £14 a day, which is an extraordinary figure, well below the minimum wage. Some junior barristers are even on income support. So be careful of the myth of the fat cat barrister.

**Q37 Chair:** The Government themselves have conceded that the levels of remuneration for most junior barristers are not adequate to sustain the profession at that level.

**Lucy Scott-Moncrieff:** Can I just add something else that is important to bear in mind about the solicitors' profession? All the consultations and so on assume that people know what solicitors do. I do not think a lot of people do really understand the service that solicitors provide in these areas. Solicitors still provide a 24/7 service to police stations. They have not outsourced that.

**Q38 Chair:** Do you know why the fees are so variable in police stations? There are huge variations.

**Lucy Scott-Moncrieff:** It depends, once again, on the case mix to a certain extent and also the amount. When those fees were set, they were set by taking averages. When it moved from hourly rates to fixed fees, averages in areas were taken and those were the fixed fees that were paid, so it reflects local custom and practice, the case mix and so on. That simply continued. People provide this service out of hours. I have friends, people of my age, who are still turning out to go to the police station in the middle of the night and then doing a full day's work the next day, going to court, preparing cases, seeing witnesses and so on and so forth. It is a very dedicated job and they

are very dedicated people who do it, and that has to be borne in mind.

**Q39 Andy McDonald:** It has been suggested that the only companies who are going to be able to bid for these contracts are large companies—we have heard of G4S and others—and that the firms that are currently conducting the work, as you have already reported, Ms Scott-Moncrieff, the ones vested with the expertise, have little or no expertise in putting together large bids of this nature. The Secretary of State has told us that he has no doubt that firms will bid for these contracts. Do you think that optimism is well-placed, and who do you think he is talking about when he is talking about firms bidding?

**Lucy Scott-Moncrieff:** He certainly believes that and I expect he is right—that some firms will bid. I do not know if G4S and Serco would bid. I cannot see why they would bother. There are some larger firms that might be able to make this work, although they say that, as it currently stands, they would not be able to make it work because, paradoxically, although it is intended to give volume, the way that it has been structured—and the very concrete way that it has been structured—means that some firms are going to have to reduce the amount of work they do in particular areas and will only be able to continue employing the same number of people if they are covering much wider areas. For instance, Devon and Cornwall is a single area; Hampshire and the Isle of Wight is a single area. It will be very difficult for people to adapt to that kind of thing, whether they are large or small. The most important point is that, yes, there may be firms that can do this, but what is being asked for is a national service covering everywhere—not just little pockets. As Bill said, you cannot have little pockets here and then the old system somewhere else. It is meant to be all or nothing, and, on that basis, it will be nothing because it certainly cannot be all.

**Q40 Andy McDonald:** You are quite dismissive of some of the names that have been bandied around in this context, with Serco and G4S. Are you saying that there is no incentive for new entrants into the market?

**Lucy Scott-Moncrieff:** It is difficult to see what the incentive would be. If they wanted to come into this market, they would have to become regulated by the Solicitors Regulation Authority. They would then have to maintain the same standards and provide the same supervision and so on and so forth as existing firms. My understanding is that they are not very interested in contracts that show a very small return—and they would only get a very small return. So why would they want to do it?

**Q41 Andy McDonald:** There is no scope, as you see it, for them to come into this market and make a turn on it by trying to retain the very people who are delivering the service at the moment? You do not see that as a possibility?

**Lucy Scott-Moncrieff:** No. I have just been handed a note that says Deloitte, who did some work for us, say there has been very little interest from these large organisations.

**Michael Turner:** Could I just add to that, if I may, in terms of the type of supplier that might come in and look at how they are behaving at the moment? If you take a name that is well known now, which is Eddie Stobart, who is wishing to come into this market, at present he is advertising a service to the public that the public can get for free and he is taking money from them for that service. He advertises as Stobart Barristers. He has not a single barrister on his books. What he is doing is taking the Bar Direct Access Directory and he is charging the public for putting his finger in those pages and saying, “You can go to that barrister.” The public can get that service completely and utterly for free. That is the kind of behaviour that it is going to come into this market.

**Q42 Andy McDonald:** Could I ask a more generic question, perhaps, and throw it open to the entire panel? The fundamental principle that is the foundation of the relationship between solicitor and client is that the solicitor, the lawyer, the barrister must always act in the best interests of their client.

**Lucy Scott-Moncrieff:** Not always.

**Q43 Andy McDonald:** Not always.

**Lucy Scott-Moncrieff:** Duty to the court comes first.

**Q44 Andy McDonald:** There is a duty to the court, but they have a duty to their client. Do you see that that principle is in any way at risk with these proposals if there are financial pressures upon people in terms of the length of time they have available, the amount of money they are going to be paid for the duration of a trial, be it cracked, guilty plea or what have you? Is that principle at risk?

**Lucy Scott-Moncrieff:** Yes. People will always do the best they possibly can, but they can only do the best they possibly can. If they are under enormous pressure, their best is not going to be as good as in other circumstances. What is really important though, in the issue of the flattening of fees between guilty pleas, cracked trials and short trials, is not what the lawyer is doing or what the lawyer is advising, but what the client thinks. If the client thinks and knows that the solicitor or the barrister has a financial interest—quite a big financial interest—in whether they choose one of those different options, that will make it more difficult for the client to trust the solicitor to give them good advice.

With regard to the advice that is being given here, this is not the solicitor and client sitting down and working out what is best to do. “Let us all lay our cards on the table. Yes, I know you did it, but let us see if you can get away with it,” or whatever. That is not how it works. The way that it works is that the client holds their cards close to their chest. Why would they admit to something if they think they might be able to get away with it? Why would any of us admit to something if we think we might be able to get away with it?

What is necessary at that point is to have a solicitor whom they can trust, so that when the solicitor says, “Actually, I know you are saying you didn’t do it, but the evidence is overwhelming,” or when the solicitor says, “I know you say you didn’t do it, but the

evidence is overwhelming, and if you plead guilty, you will get credit for this and credit for that,” if the client believes that, that is going to help the proper administration of justice. If the client does not believe that, then why not plead not guilty, take a chance, and maybe you will get off? Doing your best is not just the solicitor doing their best; it is the client believing that the solicitor or barrister is doing their best.

**Maura McGowan:** It works in some cases already in the system. There was a massive reduction in what was paid if a defendant had chosen a Crown court trial and then pleaded guilty once he got to the Crown court. That pays the barrister £180 or £190—something of that sort. It does not matter how many hearings that takes. The defendant turns up one day and pleads guilty. It gets put over for a report to see what the sentence should be. He does not turn up on the next occasion; it gets put over again. The interpreter does not turn up.

We had an instance in chambers where a young member of chambers went to King’s Lynn six times for a total fee of £190 and had to pay his own travel on top of that. That sort of financial pressure is not going to mean that the person who does the final hearing will do any worse job by way of mitigating for the defendant, but it does mean that you are going to start struggling to find anybody who is going to do that sort of work at the most enormous financial loss.

**Michael Turner:** Those pressures are going to be very real. I came across an example the other day, which I can give you, of someone who was employed within a firm to do work, and, when they had gone down to the police station and they had seen a client whom they knew and who was trusted, they got them to speak in interview and that resulted in a caution. When they got back they were royally ticked off. “Why did you allow your client to speak? Why did you proceed to caution, because, if you had not allowed him to speak and it had gone through the system, we would have made x number of more pounds?” That is the problem. It is already there to a certain extent. It is just going to get worse and worse and worse as those financial pressures for people to make the profit and make profit for their shareholders put—

**Q45 Chair:** But there were not any shareholders in this partnership.

**Michael Turner:** No, there were not.

**Q46 Chair:** It was a partnership of independent barristers.

**Michael Turner:** It was not actually a partnership of independent barristers, but it does not matter. I am saying it is already there. Hopefully we can drive it out, but it is going to get an awful lot worse, which is one of the points I am trying to make.

**Q47 Nick de Bois:** I want to pick up on that point because I am not a barrister and I have never practised in the business, which is probably a good thing for the purposes of this exercise. I am confused. You seem to be saying that it is not very good now because there are financial pressures and someone is earning only £25,000 a year doing legal aid. Surely, from what you

are saying, they are now facing the same pressures to go for early mitigation just to move on and get the next case. I am not quite sure where your evidence is for extrapolating and saying it is necessarily going to get worse. You seem to be almost at the point where you are saying, "I am opposed to this. I am now looking for reasons to assume it is going to get worse." Remember, I am only asking the question to challenge you.

**Lucy Scott-Moncrieff:** In any system where people have too much to do, they have to do the best they can. If you have even more to do because you have more cases to do to earn the same amount of money, it does not mean that you are not going to try and give the best advice you possibly can and make all the investigations you properly can. But there is a reason why wealthy people decide—apart from the fact that they are not eligible for legal aid very often—to pay privately, because you can then spend an enormous amount of time and money investigating everything and trying to find the loophole, trying to find the way through. We see examples of it. There have been recent examples that we all know about. That does not happen in legal aid. Legal aid lawyers will only do what is necessary. They know that they have a duty to the fund; they know they have a duty to the court. They will do the very best they can, but they will have to cut corners if they are having to do more cases.

**Nick de Bois:** That is my point—

**Chair:** We will have to move on because we will not get through all the questions.

**Q48 Rehman Chishti:** Client choice has been touched on briefly, but can I start with some specific questions on that? First, some would ask whether we should be trying to retain a system of choice that benefits repeat offenders.

**Maura McGowan:** Repeat offenders may not actually be guilty on the next occasion. There has never been a system here that says, "You have done it before. Therefore, you must have done it this time." You have to nail that lie to start with. A repeat offender who is guilty, or who might be guilty, is likely to be a connoisseur of the system, to use the phrase. If he is that, then he is somebody who is much more likely to take robust advice from someone he has trusted in the past than somebody he has never set eyes on.

Can I nail this lie? On the current question of choice, the public, I suspect, are being left at the moment with the idea that some old lag sits in a cell at a police station, flicking through a directory and deciding whether he wants Allen & Overy or Linklaters. That is not how it works. Stuck in a cell in a local police station, he has a choice of a few local firms. That is the current system.

**Q49 Rehman Chishti:** I have a clarification on that. A repeat offender would be in a different category from others because he would come under the category where his previous offences would put him in a different category in relation to being before the jury, whereas somebody who has not committed a crime before would not be in that category where offences are put before the jury.

**Bill Waddington:** There is another argument for the repeat offender having the choice of going back to his solicitor, which is of course that the solicitor has his history. There are a great many examples of cases where a solicitor acting for a client, for whom he has acted for a number of years, will of course have, for example, psychiatric reports, pre-sentence reports, up-to-date previous convictions, details of when he was last at court, whether he is on bail conditions and so on and so forth. To take away the choice for the repeat offender and shove them with a different person—

**Q50 Chair:** But should the repeat offender be able to say, "I am not having him. He knows too much about my history"?

**Bill Waddington:** The repeat offender is very unlikely to say that.

**Lucy Scott-Moncrieff:** Can I invite you to think about the opposite way round? Let us suppose that people have no choice about who they choose, and either they go to the same person every time who is allocated to them or they go to different people every time. If they go to the same person every time who is allocated to them and they really do not feel they are getting a good service from that person, they are not going to co-operate with them. The current system relies on most people pleading guilty, and they plead guilty on advice. Some people will plead guilty anyway and they are not represented, but an awful lot of people plead guilty on advice. If you have a situation where not only do you think they did a rotten job for you last time but now you have them again and they are going to do another rotten job for you, the likelihood that people are going to co-operate with all that and go along with that seems to me to be rather remote. If you have people who are having a different solicitor every time because it is a different way of allocating work, you just have huge amounts of repetition.

This will result in innocent people being found guilty—this is the point that Maura was making—because they do not have the support that they need from the people who know them, and it is going to result in guilty people going free, because once you have somebody convicted of a crime, you are not going to look for the person who really did it. It is such a bad idea. As Maura says, this idea that it is a luxury is just so counter to the facts. It is one of the best things about the system in terms of the system—not just in terms of the defendant but in terms of the system.

**Q51 Rehman Chishti:** On that very point, for me, I very much am in favour of having choice—of course I am—but in terms of the point you have just made and also that Ms McGowan has just made, is there any firm evidence to back up the reason that you have just given?

**Bill Waddington:** Yes.

**Maura McGowan:** All our experience.

**Bill Waddington:** We also have a number of case studies. We are more than happy to let you have those and I can give you details of them now, not only from defence solicitors but also CPS lawyers and, indeed, a member of the judiciary, who is able to comment

that, in their collective experiences, the client having a choice of solicitor has resulted in an economic and efficient disposal of the case, saving the court time and therefore taxpayers' money, saving perhaps the defendant going to prison and therefore taxpayers' money.

**Q52 Rehman Chishti:** Is client choice really determinative of quality, and is the Secretary of State not correct in saying, "I don't believe that most people who find themselves in our criminal justice system are great connoisseurs of legal skills"?

**Bill Waddington:** I don't think you think that is correct.

**Lucy Scott-Moncrieff:** "Too thick to pick" is how that is being described.

**Maura McGowan:** That makes no sense at all, if you think about it, because the totally naive, first-time arrested individual is not going to choose anything other than a name from two or three names provided to them by the police officers at the police station. "Who is on the duty rota—x or y?" They will stick a pin in the list of names. That will not be an informed choice, in any sense, any more in the future than it is now. Unless somebody builds up a relationship or because of their own personal difficulties is befriended by and learns to trust a particular firm of solicitors, you might as well just go back. All that is happening now is they have a choice of a few firms; in the future they will have no choice at all.

**Lucy Scott-Moncrieff:** If I can also make a point, I live in London; my friends live round about. Their kids do the things that kids do and sometimes they say to me, "Little Johnny has got into trouble. Who is a good solicitor to use?", just like I would say to them, "There is something wrong with my boiler. Who is a good plumber to use?" You ask around; you ask your friends and that is a legitimate thing to do.

**Q53 Chair:** It helps if you know the president of the Law Society, does it not?

**Lucy Scott-Moncrieff:** You could go to the Law Society, of course, but even before I was president of the Law Society, you know who is good in your area; you know who is best; you know who is particularly good with juveniles; who is particularly good with people who have mental health problems, and so on and so forth. We all do it all the time when trying to find the best service that we can get, and it should apply in criminal legal aid as well.

**Q54 Rehman Chishti:** If I can perhaps clarify, the points I have made are not necessarily my own views on this matter. Let me ask one final question. Whether it is on the issue of client choice or consultation, would you agree with the view that the document and the consultation to a certain extent is flawed because it is written by people who have never practised in this area?

**Lucy Scott-Moncrieff:** I do not know whether that is why it is flawed, but I certainly agree that it is flawed, yes. We wish that the Government had come to us much earlier or, indeed, had done the research that we have done so that they would understand the issues that they are facing.

**Maura McGowan:** It goes back to the point I have made. This is the problem. If you force the consultation through in eight weeks, you force the Government to respond within a few months—they set the timetable for themselves—and you push this all through too quickly. Draw breath. As the former Lord Chancellor said over the weekend, this is an opportunity for a full review. Run it in parallel with a review of the courts and the administration and the resourcing of the courts. Look again, for example, at the status of the magistrates court in relation to the Crown court, what is tried, where and how; look at financing of criminal legal aid and of the prosecution side, because the CPS is being stripped down to an absolute bare minimum and, as a provider of advocacy, is creaking, if not failing.

The whole thing needs to be reviewed, and now is a perfect opportunity, particularly as we are all agreed that there are savings that can be made instantly to tide over the next year or two. At the end of it you will have a much better system, rather than something that ladders on with sticking plaster and Sellotape patching it and holding it together.

**Q55 Jeremy Corbyn:** Thank you very much for coming and giving evidence to us today; it is extremely helpful. I represent an inner city constituency, as do some colleagues around this table. One of the main issues surrounding this whole change is that we have a considerable number of small legal aid practices, many of whom are managed by people from black and minority ethnic communities and many of whom have linguistic skills that are absolutely vital. They are also led by people who often have a great understanding and participation in the local community. What, in your view, will be the effect on those kinds of companies of the proposals that are being put forward at the moment?

**Lucy Scott-Moncrieff:** The simple answer is that, if they cannot scale up to cover a much larger area—for instance, Islington will be part of north and east London, so you would have to be able to cover the whole of north and east London; you would have to be able to turn out to any police station at any time of day—if they cannot scale up for that, which I guess probably most of them cannot, then either they would have to become agents or subcontractors of a firm that could scale up, or they would go out of business.

The trouble with being an agent or a subcontractor is that you are then very dependent on the contract holder to get a proper quality of work. Economics would suggest that the larger firm that has the contract would certainly use the smaller firms to go to the police station, but it would then take for themselves the more interesting and better paid cases and leave these agents and subcontractors to deal with the low value work. In criminal defence work it is always a balance. The low value work loses you money; you can sometimes make money on the high value work. So it is the total package; it is the swings and roundabouts. They would be very badly affected.

It is not just BME firms. There are firms that specialise in representing people who are deaf. They understand the culture. There are firms that have particular expertise in working with forces personnel

who come out of the services and then find their lives falling apart. There are all sorts of areas of expertise within the profession. They are very highly skilled people. All that will be lost because, one way or another, with the loss of choice and with having to provide it over a much wider area, it will all just turn into a homogenised sludge.

**Q56 Jeremy Corbyn:** I have a related question, which any of you can feel free to answer. We have very effective law centres, as I do in my borough. Islington Law Centre is superb but very pressed and very stretched. They are not big organisations.

**Lucy Scott-Moncrieff:** Yes.

**Q57 Jeremy Corbyn:** I assume they are not going to be big enough to be part of this tendering process. They are absolutely essential to basic rights of access to justice.

**Lucy Scott-Moncrieff:** No, you are absolutely right.

**Q58 Jeremy Corbyn:** What happens to them in all this?

**Michael Turner:** They disappear. One of the points that is really important to understand, which is why this is not being thought through, just by way of example is that in Wales there is no requirement for anyone who is tendering for a new contract to have a Welsh speaker.

**Chair:** We are going to come on to that in the second part of this session.

**Q59 Jeremy Corbyn:** We have a Welsh speaker who is going to bring that up.

**Michael Turner:** Right.

**Lucy Scott-Moncrieff:** Just to come back on what you were saying, if we have enough time, we can help all these small firms to remain sustainable, to become part of something a bit larger perhaps, which will not disadvantage them but will give them proper prospects—but we have got to have time.

**Q60 Jeremy Corbyn:** There is a crisis at the moment with small legal aid companies going out of business. Particularly those dealing with immigration, refugee and asylum cases are just going out of business all the time. As a local MP, I get more and more people coming to me who cannot get any representation at the moment. What chance do they have in the future?

**Lucy Scott-Moncrieff:** That is to do with the LASPO cuts and that is a fall-out from that. This will just compound that. Firms that are still doing civil and family legal aid, and then they find they cannot afford to do the criminal legal aid or they lose the criminal legal aid, may well then say, “We cannot do any legal aid at all. We just cannot manage it because the bureaucracy is pretty horrendous and the cost of providing legal aid services is very significant.”

**Maura McGowan:** That substantially increases the burden on those organisations that provide some form of legal advice or service pro bono. So you see now total removal of legal aid from whole areas such as family, immigration and welfare. Those people now have nowhere to go other than pro bono agencies. In the future, those pro bono agencies will be picking up

even more and more of the overspill. We have seen it already. Big successful firms in London have just shut down their matrimonial practices within the last few months.

**Lucy Scott-Moncrieff:** The evidence from the CAB is that they are buckling under the strain of having to provide more and more because the lawyers are not there.

**Q61 Chair:** The point we are looking at here is not an area from which legal aid is being withdrawn, but obviously it has an impact on some of the same businesses, does it not?

**Lucy Scott-Moncrieff:** Yes, absolutely.

**Maura McGowan:** We have always worked on the swings and roundabouts, to go back to the question earlier. With regard to my example of the six trips to King’s Lynn for £200, you will do that because that is a service both for the client but also to the firm of solicitors, and you hope that a month later they will send you a decently paying case. You need those checks and balances or swings and roundabouts, but, if there are no decently paying cases, then you are not going to work at a loss. You simply cannot.

**Q62 Jeremy Corbyn:** If you are a small solicitor in an inner urban area and you are a linguistically-based practice, your chances of getting anything other than legal aid work are very low indeed, and so if they are relying totally on legal aid there is no balance they can make within their company because there is no alternative work.

**Michael Turner:** Correct.

**Q63 Jeremy Corbyn:** Is that your experience?

**Lucy Scott-Moncrieff:** It depends on the variety of work that people want to do, but, yes, there are not any swings and roundabouts left in the system.

**Q64 Seema Malhotra:** Just continuing with questioning around client choice, this particular question is around transferring solicitors. Given existing restrictions on transfer of clients between providers, do you see consultation proposals as a removal of client choice or a narrowing of client choice?

**Lucy Scott-Moncrieff:** It is a removal because the proposal is that you get allocated a lawyer, and then, if there is a very good reason for you not to have that lawyer allocated, you get allocated a different lawyer. You do not have a choice. The current system, which, as you say, is very restricted on your right to transfer from one solicitor to another once legal aid has been granted in a case, works very well. You have to get the court’s permission. You can only do it in certain circumstances, either because the relationship has completely broken down or because the lawyer is professionally embarrassed. That has to be explained to the judge and the judge decides. There is already a perfectly good effective system that is not being abused. That is why we think it would be illegal, because it is not narrowing the choice—it is removing choice altogether.

**Michael Turner:** I agree with that. Some have said, because there is an exceptionality clause suggested



within the consultation, that that is a narrowing, but that exceptionality clause is only where there is a conflict for the solicitor or the solicitor is embarrassed. It is not a matter of choice for the client, who says, "Actually, I think my solicitor is not up to it or doesn't know this area. Can I have another one, please?" The answer is no.

**Q65 Seema Malhotra:** Would you say that there are circumstances in which both the present and the proposed system could be open to abuse by defendants intent on delaying proceedings, and do you see that risk potentially increasing?

**Michael Turner:** No.

**Bill Waddington:** I have never come across that, I must say, in my experience. I do not know about the rest of the panel, but it is not something that happens, because we have currently this fairly robust system. If somebody wants to change solicitors, there is a hearing about it either in the magistrates court or in the Crown court, where incoming and outgoing will make their points to the judge. He will not allow a transfer if he suspects that, behind all this is an attempt by the defendant to delay proceedings.

**Maura McGowan:** In reality, the system works as well as it does because most defendants co-operate and work within the system. They will speak to their solicitors, they will give instructions, they turn up for trial, and they comply with most requirements. It works because there is a relationship of trust—not just the defendant with his solicitor but the defendant with the entire system. Once defendants no longer co-operate, even in small measure, that is going to cause absolute chaos.

**Q66 Seema Malhotra:** The clear aim of the policy is to remove client choice. Under the new proposals there is a variation in terms of how there might be a change; even if we go to court and the court agrees, the legal aid agency will select a new provider from the providers in each procurement area. Do you see that as another cause for concern in terms of delaying court cases?

**Lucy Scott-Moncrieff:** The reason for removing client choice is not actually intended to be tough on defendants. It is intended to ensure that contract holders get the same share of the work available. For the reasons we have set out in our response and many other people have set out, that does not work either, because you cannot be absolutely sure that people are going to get the same share. There are all sorts of variations that mean it will not work. Anyway, that also completely goes against what we think should be the proper level of competition in criminal defence work, which is people competing on quality. If the lawyers know that they are going to get the clients, regardless, at the very least they do not have to have any client care skills. They might do a decent job as lawyers, but they do not have to convince their clients that they are doing a good job, except there will be circumstances when the client is so unconvinced that they will then sack their lawyers and say, "I am going to defend myself. I don't want to be represented at all." That, of course, will save a certain amount of legal aid money, but, if you ask any criminal judge,

they will say that that causes enormous amounts of chaos and disruption and so on, and delay and cost in other parts of the MoJ budget.

**Bill Waddington:** I agree with what Lucy has said there. We have hit the nail on the head with the issue of quality, because it has not been mentioned much. Quality is an essential ingredient at the present time; it drives the issue of competition and it drives client choice. If you do not do a good job for a client now he will wander off, and you might have some difficulty in convincing a court that you have done a good job for him if you have not. Taking away client choice will, of necessity, bring about a lowering of quality. That is even acknowledged in the paper.

**Q67 Steve Brine:** If PCT then, in your view, is removal of client choice, and we have heard the Law Society say they will challenge it if this goes ahead, I presume the logic would conclude, therefore, that there is no way that PCT can work. So many times you have all said today, "Pause. Put it on hold. Make the initial cut if you need to. Let us think again." Just bringing in some comments here from Twitter—people are watching us all around the country—a lot of people are asking this question. Do you want more time to review PCT or do you want no PCT? Let us ask Michael Turner that.

**Michael Turner:** It is no PCT. It is not going to work. We have pointed it out time and again, with the reasons for it. It is not going to work; it is not going to provide value.

**Q68 Steve Brine:** Just to be clear then, PCT is dead as far as you are concerned, if you had your way.

**Lucy Scott-Moncrieff:** If you think of the criminal justice system as a car, at the moment it is bumbling along and it could certainly bumble along a lot better. It could be improved and so on. What we have here is a proposal to give that car four flat tyres. It simply cannot work. We can make it work; we can put on tyres that will work; we can zhush the whole thing up, but not like this. It just won't work.

**Q69 Yasmin Qureshi:** I just wanted to explore the allocation of work at police stations in particular. The Government have suggested two main methods for allocating work under the PCT. One is the idea of equal shares of casework. Secondly, the Law Society has suggested that the current system of allocation of duty solicitor work does not work well. What are your views about the system of allocation of cases at the police station?

**Bill Waddington:** Again, it takes away choice, obviously, because how it works at the moment—forgive me, you may be aware of this—is that a client will be arrested, and, if they have had some involvement with the criminal justice system previously, the chances are that they have a solicitor with whom they are satisfied. They may not have been involved in the system before but somebody may have recommended a solicitor to them. So, either they will ask for their own solicitor and receive representation at the police station, or, if they have no knowledge of any solicitor but want to have somebody present, they will rely on the duty solicitor scheme. That is how it

currently works. Under this proposal, of course, the first choice has gone because they may as well just ask for a duty solicitor because they are going to get somebody whom they do not know and with whom they have never had any involvement previously. That is why choice, as we say, is so important in this.

**Q70 Yasmin Qureshi:** The Law Society has, however, suggested that the current system of allocation of the duty solicitor does not work very well also. What alternative suggestion do you have to the current system of the duty solicitor scheme?

**Lucy Scott-Moncrieff:** We are working on it. We think that the current system creates a distortion and that it could be successfully changed, but we are in discussions with the profession to come up with something that is not going to create its own perverse incentives. We will be talking to the MoJ about that as soon as we have agreement.

**Q71 Chair:** Presumably, it would be theoretically possible to combine the system of price competitive tendering with some elements of client choice, but the payment to the tenderer would have to be adjusted if they had a significantly larger or smaller share of the business, would it not?

**Lucy Scott-Moncrieff:** PCT has been presented as a whole structure and all the bits are seen to be essential. You have guarantees of volume, you have the same shares for everybody, and so on and so forth. If you start tinkering with it, the whole thing falls apart. Yes, of course you could do a different sort of PCT, and other sorts of PCT have been recommended in the past, but at the moment, if you started to try and pick bits out of this, then it would have an effect somewhere else in the assumptions that have been made. Certainly, we think that the duty solicitor scheme could be reformed at the same time as the provision is being reworked so that it becomes more sustainable.

**Q72 Yasmin Qureshi:** Could I just now explore the question of quality? We have had quite a lot of discussion about the fact that the quality of the service provided will be adversely affected by these measures. In fact, the former Lord Chief Justice Lord Woolf said to *The Independent on Sunday* that the proposal would lead to a “factory of mass-produced justice” and miscarriages of justice. He went on to say that there have never been votes in crusading on behalf of people who may be guilty, but the principle of fair justice is important, and the rule of law and our systems should be fair and we should continue to have pride in it.

My question is, really, can you see any ways in the current proposals, if the Law Society and the Bar Council work together, of improving matters in any way?

**Lucy Scott-Moncrieff:** I do not think we can improve the current proposals. We can make suggestions for improving the system, but it would not involve improving the current proposals because, as I say, it is a whole structure and you just have to say, “No, that will not work.”

**Maura McGowan:** We make no secret of this. It has been perfectly open all along. We are more than happy to work with the Ministry to improve the current system. There is no question of any lack of willingness on our part or of the Law Society or the Chartered Institute of Legal Executives. We are all willing to work to find improvements in the current system. It is not perfect; we recognise that. One thing that is very important to remember is that we do not do the job we do just on behalf of those accused of crime. We do the job we do and it has a knock-on effect on everybody—witnesses to crime, victims of crime, people who sit on a jury. So many people beyond the person in the dock are affected by this, and that determines—or should determine—the requirement for a real quality service.

**Michael Turner:** In terms of quality, all you have to do is learn the lessons of history. Look at the demise of the Forensic Science Service, where in one brilliant fell swoop the Government lost all their most experienced scientists whom they had trained up over years because the private sector did not want to take on the most experienced and they ended up with the least experienced. That is exactly what is going to happen. You have had example after example of it. Please learn from it.

**Bill Waddington:** I agree with everything that has been said there. It is important just to repeat that all the representative bodies that are here today are currently working together. We have been a little pushed for time, obviously, with an eight-week consultation, in getting everything ready, but we are working together now on a regular basis in order to come up with some proposals that, hopefully, will be acceptable to the Secretary of State.

**Q73 Chair:** When you say “we”, is that the four organisations that are in front of us?

**Michael Turner:** And more that are not here today. It is the four organisations that are represented here today—the LCCSA—the London Criminal Courts Solicitors Association,—LAPG, BME—all the organisations that are involved in the system.

**Lucy Scott-Moncrieff:** Can I also say that the Ministry has been quite receptive to our wish for further discussions? The Lord Chancellor has said he is really open to other suggestions and he has followed that through, so we are hopeful that we are going to be able to work together to find a way through this, but fiddling with PCT is not going to be that way.

**Bill Waddington:** Our concern is that a lot of the counter-proposals, I should say, that have been put forward in responses are counter-proposals that have been put forward before and not really considered. When we say we are quite willing to work with the Government, we really are. Whether they want to work with us is a different matter.

**Q74 Yasmin Qureshi:** Continuing with the issue about quality, it has been said that there is no quality control mechanism built into the current PCT system to ensure that providers provide a good quality service. First, do you agree with that, and, secondly, what would be the impact of these proposals on access to justice for the poor and vulnerable?

**Maura McGowan:** Can I answer the first bit? Clearly, there is no quality mechanism in the proposals other than what looks like it might be a kitemark for the firms that are going to bid, because, if there were, the Secretary of State would not be asking the Bar Council and the Law Society to work on providing one now. We have every interest in quality in the system. That is what drives us. What we are not prepared to do is work on a system that will facilitate PCT. The question answers itself, given what the MoJ has said most recently.

**Lucy Scott-Moncrieff:** If I can come back to the analogy of the car with the flat tyres, trying to put in quality criteria will be the equivalent of saying, “You have to pass a driving test to drive this car.” Actually, what you need is someone to change the wheels.

**Q75 Yasmin Qureshi:** My final question is about the impact on the vulnerable and the poor under the new proposals.

**Michael Turner:** It has an enormous impact, as has already been identified. We have the most vulnerable in society being unable to access these services already. We have our citizens advice bureaux and our law centres that are on their knees in terms of trying to provide advice. This is just another absolute attack on their ability to access what, for a long time, we have taken for granted in this country.

**Q76 Chair:** The issue here is not that there will not be a police station solicitor but that you will not have a choice?

**Michael Turner:** You will not have a choice, and the point is you will not have a choice of that expertise. What is absolutely not recognised in these proposals is that one solicitor is not necessarily the same as another. They have different experience. They have huge experience in injustice cases, terrorism cases or whatever it is. You want to access those people. You do not want to put it down to its absolute base level, which is what is going to happen.

**Lucy Scott-Moncrieff:** There may be an assumption for a lot of people that the vast majority of people who go through the criminal justice system are guilty and it is a matter of processing them in the most effective way. We do not have terribly good stats for the adult population, but certainly there are Government figures—Government stats—that show that, of the number of juveniles who are arrested, those between 10 and 18, over a third are either not charged or not cautioned, the case is not proceeded with, or they are acquitted. Those things do not happen just in a vacuum. They happen because there are lawyers in there testing the evidence, making the case, negotiating and so on and so forth. That is a third of that population who are not getting criminal records, who are not going to detention and so on and so forth, who are not being groomed to become adult criminals.

I do not know what the proportion is with the adult population, but still there are a significant number of people who are arrested and in the end do not get any kind of criminal record from that. That is a really important part of the job. It is not just that they are poor and vulnerable; it is also that they are innocent.

**Maura McGowan:** Of course the quality of the system—

**Chair:** We really need to move on because we have another group of witnesses to come in.

**Q77 Nick de Bois:** Given the time, I just wanted to touch briefly on the procurement areas. I can well understand the concern over some of the definitions of these procurement areas and the problems they throw up. The Carter review proposed reducing the number of duty areas by merging them according to more criteria rather than necessarily the way they have been done currently, so they take into account travel times and distance. On the assumption that we have PCT, which I know you are not all for, should the Carter area divisions be used by the MoJ instead of the proposed procurement areas now, which you seem concerned about? Perhaps it is best if I start with Mr Turner. Do you want to comment on that?

**Michael Turner:** Yes. The procurement areas that we have at the moment do not work.

**Q78 Nick de Bois:** You mean the ones proposed?

**Michael Turner:** The ones proposed, yes. They do not work. Do you want all the reasons why they do not work?

**Q79 Nick de Bois:** Let us assume you do not like them. What do you think of the ones that are proposed in the Carter review? Do you think they are the ones that should be adopted?

**Michael Turner:** I am going to pass that over to Maura, who will remember what they are. Can you remember them?

**Maura McGowan:** Is it not for the Law Society?

**Michael Turner:** It is probably the Law Society who had best take it.

**Chair:** How soon Carter has been forgotten.

**Q80 Nick de Bois:** I did not think I could silence so many people in the legal profession with just one stroke.

**Lucy Scott-Moncrieff:** The Carter areas are much more sensible than the current proposals. We objected to them then because we did not think that they were good enough, and, indeed, that never came to anything; so that turned out to be right. This is much worse. You could not just go back to the Carter procurement areas because, as I said earlier, I hesitate to say that the PCT proposals are a coherent structure, but they are internally consistent. That is perhaps the right way of putting it. Once you start changing the procurement areas, then everything else has to change as well.

**Q81 Nick de Bois:** But your concern is that they do not seem to factor in the fact that in one area it could take half a day to get somewhere?

**Lucy Scott-Moncrieff:** Absolutely.

**Q82 Nick de Bois:** What would you propose? Would you have no areas at all, do you think?

**Lucy Scott-Moncrieff:** We are still working on that, but we would certainly see something more coherent than we have at the moment and something more

coherent than was proposed in Carter or is being proposed here.

**Bill Waddington:** Also, as far as the Carter procurement areas are concerned, it was a very different scene back then, and we have moved almost as far away from that now as it is possible to move. Of course, although he had smaller procurement areas, he was not also saying, “But let’s start them all off with a plus 17.5% cut.” He recognised that prices would go up as well as down, and that is why trying to find a mix of a small procurement area along with PCT on this basis of a 17.5% cut is just like comparing apples with oranges.

**Nick de Bois:** If any of you want to make representations on that, perhaps you will let us have that.

**Q83 Chair:** Thank you very much. We are grateful to the four of you for the evidence you have given this morning. We have further witnesses. While the witnesses are changing over, perhaps I should explain

that at some point, while the next group of witnesses is giving evidence, bells will ring. This is not likely to be a fire or an evacuation, unless I tell you. It will be the bell for prayers and the bell for the start of proceedings. We may have to run over that for a time in order cover the main topics.

**Lucy Scott-Moncrieff:** Could I just ask you one question? I had the feeling, from the way that you started this, that you are thinking of looking into the other areas in the consultation to do with civil and family law, and to do with prisoners. I know that the profession would be enormously grateful if you did that because they consider that those are areas where there are equal risks to access to justice and the rule of law. Any indication would be very welcome, if not now then—

**Chair:** I am not going to do it by way of exchange across the room, but any further representations on what you would like to see worked on we would certainly look at carefully and sympathetically. Thank you very much.

### Examination of Witnesses

*Witnesses:* **Tudur Owen**, Senior Partner, Tudur Owen Roberts Glynne & Co, **Roger Smith OBE**, visiting professor at London South Bank University and former director of Justice, and **Steve Brooker**, Consumer Panel Manager, Legal Services Board, gave evidence.

**Chair:** Can I welcome Steve Brooker from the Legal Services Consumer Panel, of which he is the manager? Elisabeth Davies had originally hoped to give evidence, but we are very grateful to Mr Brooker for taking over that slot. I welcome Tudur Owen, from Tudur Owen Roberts Glynne & Co, a solicitors’ firm, and Roger Smith, who has given evidence to us before on different subjects. He is a visiting professor at London South Bank university and former director of Justice.

**Q84 Jeremy Corbyn:** Thank you very much for coming in to give us evidence today. We are most grateful. You will have heard the earlier questions from Nick de Bois about procurement areas. In your estimation of these proposals, what do any of you or all of you see as the problems over procurement areas?

**Steve Brooker:** One of the issues for us is that it will be harder for more vulnerable clients, such as those with a disability, to find specialist support in their local area. In addition to that, if you are accused of a crime that is more rare, such as under protest law, for example, again it might be more difficult to source specialist help. In an ideal world, all lawyers would be sensitive to the needs of the vulnerable client base that we have across the country, but we know from our research that that is not always the reality.

Last year, to give you an example, we carried out some research with the Solicitors Regulation Authority and Action on Hearing Loss with deaf clients. Those clients told us that they often felt in a battle to be understood with their own adviser, before making headway with the other side. We are doing research at the moment with Mencap and the Legal Services Board with consumers with learning

disabilities. Again, the story is that, although some lawyers can adapt their practices and make the necessary changes, others find it much harder to be understood.

It might help to increase the number of contractors in each procurement area, but, ultimately, the expertise that those vulnerable clients need is quite thinly spread across the country. The fact that we have a national system now allows those specialist firms to thrive in the marketplace. If you cut off that supply to vulnerable clients, you potentially remove access to justice for them.

**Q85 Jeremy Corbyn:** Is it necessary to have procurement areas at all?

**Steve Brooker:** I do not think so, no.

**Tudur Owen:** All I can say is that, from my perspective, from north Wales, it is proposed that there will be four firms or providers covering the whole of north Wales as an entity. It is difficult to—

**Chair:** Can you speak up a little, please—that applies to all of you—because the acoustics are not that good in here?

**Tudur Owen:** It means then that the access would be denied to people for the simple reason that I do not think there is a single firm currently in north Wales that would be able to meet the criteria that are required. I am told by my colleagues in mid-Wales that it is the same situation for mid-Wales, and a number of colleagues from south Wales have told me that south Wales is in exactly the same position. As it stands at the moment, there are very few, if any, firms in the whole of Wales that would be able to provide the necessary expertise or the necessary requirements to meet the contract.

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**Roger Smith:** In a sense, it is quite a detailed question. To be honest, you can probably make any procurement area work. The question is what the requirements are to do so, and, if it involves long travelling, are you prepared to make the allowances for the cost that that requires? In a sense, that is a pragmatic issue.

There are much more fundamental issues about price competitive tendering. This is a public defender scheme. This is what it would be called in any other country in the world. It is a contracted public defender scheme with a limited number of contracted public defenders. You can make that work. You can make it work with various procurement areas. I have seen it work, but you have to get much more involved in the questions of quality and delivery, which will unavoidably arise, than this document does.

**Q86 Jeremy Corbyn:** In a relatively sparsely populated part such as mid-Wales or the south-west, it is very unlikely you would have specialist firms dealing with a whole range of cases.

**Roger Smith:** It is highly unlikely. Therefore, to make it work you are going to have to meet the costs that will come from that. You can make anything work. Around the world there are all sorts of different models. You can make it work. It is just that you cannot shave the cost that far down on some of the models that are less well worked out than others.

**Tudur Owen:** One size fits all might not be appropriate.

**Steve Brooker:** There is provision in the proposals, if you do have a specialist need, for the legal aid agency to allocate you to a firm in a different procurement area, but we can safely cut out the middlemen here. Those clients and the charities that represent them know where those specialist support networks are and can make the necessary referrals instead of relying on the bureaucracy to randomly allocate clients and get things wrong the first time and then have to come back and try again.

**Q87 Chair:** For the Government's proposed system to work, there would have to be some exceptionality in which certain types of case required you to bring in someone from another firm, in which case your firm has then lost the proportion of cases that it is supposed to be getting.

**Tudur Owen:** That would be correct, yes.

**Roger Smith:** Yes, that is the problem. You are imposing this rigid, arithmetical formula and you are depriving people of choice to do it to get the price right down. There are all sorts of problems with that. One is geography, but there are a number of reasons why choice is desirable. It is not absolutely essential in a way and we do not have an absolutely free choice at the moment because there are quality criteria that are imposed. But, if you start to say you do not have a choice of solicitor, constitutional issues arise. We all want to choose our solicitors. Why can't the poor? Secondly, there are quality issues of competition, but, thirdly, there is a rule of law issue.

A lot of people who go through the criminal justice system are pretty angry about society as a whole. The obvious example would be somebody accused of a

terrorist offence. They are pretty angry. What you want to happen at the end of the system is that the process of going through the court gives them a lawyer in whom they have confidence and, to the maximum extent you can, you reassert the fairness of this society against anybody who wants to challenge it, if they want to challenge it. That is the sort of accommodation that you can make in the current system. If you are accused of a terrorist offence, there are probably three solicitors you would go to at the moment, whether you were guilty or innocent. You have that choice to do that. They will be carved out of the system.

There will be problems in Wales about geography; there will be problems with deaf people who cannot get somebody else; there will be problems with types of cases where you cannot get choice. You can remove choice, but you have to do it much more carefully than these proposals do.

**Q88 Chair:** Turning now to the Welsh language issue, in which Mr Owen has expertise, can you tell us how you think the Welsh language issue is expected to be provided for under the Government's proposals, which did not appear to have been mentioned at an early stage?

**Tudur Owen:** It is not mentioned at all. It is not as if it has been considered, as far as I can see, in any of the documentation that I have seen. Welsh is a living language in Wales. You will find statistics that show perhaps that it is not recorded as being used as much as it is. The reality is that it is used all the time. Custody records will show they are being completed in English, but the whole process will be undertaken in Welsh. The review by the inspector will be in the Welsh language; the interview will often be in the Welsh language. There was recently a murder case where the interview was conducted throughout in the medium of Welsh. The charge procedure might take place in Welsh. The subsequent procedure then, obviously if charged, will go on to the magistrates court to start with. Some of that may be in Welsh. I did a duty stint on Friday. I saw about nine people, and I spoke to five in Welsh, three of whom chose to have either the whole or part of their cases dealt with in Welsh.

There does not seem to be any provision, as far as I can see, in these proposals for the need for Welsh language solicitors to be dealing with the work, which touches on the point Mr Corbyn raised earlier about communities in inner-city areas as well. That is my understanding of the position.

Duty solicitor schemes now in Wales—for instance in north Wales, Anglesey—will have everybody there fluent in Welsh. In the Gwynedd scheme, of 16, about four are not fluent in Welsh. That will all be lost according to these proposals. That is of concern, obviously.

**Q89 Chair:** Could that need be met by a contractual requirement in Wales that the bidder must deliver services in Welsh in any case where the client seeks it?

**Tudur Owen:** There would have to be a clause in the contract that insists on that throughout Wales. It is

my understanding—I am not an expert on the Welsh Language Act—that certain requirements are met. It is somewhat unusual, on reading the policies of the CPS and the North Wales police, that those who prosecute the individuals concerned seem to be far more concerned about the linguistic concerns than those who defend them, which seems a very incongruous situation to be in.

**Q90 Mr Llwyd:** Does it concern you that, in fact, the consultation document was not produced in Welsh until halfway through the consultation period?

**Tudor Owen:** Yes, it does. It was only produced after complaints were made to the various institutions involved. The Commissioner for the Welsh Language has responded in some detail.

**Q91 Chair:** We have his response.

**Tudor Owen:** Her response.

**Chair:** Her response, sorry.

**Q92 Mr Llwyd:** You and I both know that it is quite routine for Welsh language trials to be conducted throughout Wales.

**Tudor Owen:** Exactly; that is the whole point. The statistics will show you a relatively low level of use, for the simple reason that they do not record, for instance, that in a trial you can have one witness or two giving evidence in Welsh, you can have the defence conducted in Welsh, and you can have the prosecution perhaps conducted in Welsh. There will be a mishmash of various aspects as to how it is done. You can have the prosecution case produced in English; the defendant may mitigate in Welsh.

**Q93 Mr Llwyd:** You said earlier that you do not believe in north Wales, and indeed mid-Wales as well, that there will be any existing firms there that can actually take on the contract being offered.

**Tudor Owen:** I cannot think of an existing firm in the north Wales area that can do it. We spoke last night with various people about mid-Wales, and they were indicating that they could not. My colleagues in south Wales, who are present here today, also indicated they cannot think of a firm in south Wales that would meet the criteria.

**Q94 Mr Llwyd:** If this scheme is to work, there will have to be some movement from outside to try and comply or bid for the contract.

**Tudor Owen:** There is that possibility, or the other possibility is for various firms to link together either as a unit or hive off the criminal work. The problem with that has been covered already by those who have gone before me, who have said, first, it is financial, and, secondly, there are going to be regulatory problems involved in doing that, especially in such a short period of time.

**Q95 Chair:** Thank you. I just want to be clear about that. The problem you are describing, which will be common to a number of other parts of England as well—

**Tudor Owen:** Yes; it is the rurality problem. The language problem is obviously different. Some aspects of the language matter will crop up on other matters, but the rurality of it will cover areas such as Cornwall, Devon, Cumbria and other areas.

**Q96 Chair:** When you said that the people you contacted felt that their firms could not bid, were they excluding the possibility of working with others in order to get the bid, or was that not the question that you asked?

**Tudor Owen:** We are all waiting at the moment to see what comes of this. That, again, was covered in earlier comments that were made.

**Q97 Chair:** Is it your judgment that, faced with the potential loss of a significant part of their work, if the scheme went ahead, they would in fact get together and try and produce some sort of ad hoc criminal legal aid business or work as a partnership?

**Tudor Owen:** It is pretty difficult, within the time span that is granted to us, to see how that is workable.

**Q98 Nick de Bois:** I just want to return briefly to client or consumer choice, if I may, principally for you, Mr Brooker, but I would just like to start with you, Mr Smith. Broadly speaking, the question is to what extent do you think restrictions in consumer choice will undermine the client trust in their solicitor or barrister? In a way you have touched on that. If you go to the Crown court, you can effectively choose your barrister through a solicitor. Can you bear that in mind in the context of the question of how it will ultimately undermine trust, because you said it could possibly work but needed more work, effectively?

**Roger Smith:** Yes. The ability to choose has some advantages to it. It allows in a diversity of provider. We have talked about the Welsh language, but suppose you are a Nigerian. It would be reasonable to say, “I want a Nigerian solicitor”, and at the moment you will probably be able to get one. You might not under a PCT situation. If you are facing a charge of murder, terrorism or serious fraud you go to a specialist provider now. There is nothing in the document about doing that, so there are problems with taking it away.

**Q99 Nick de Bois:** Could you choose a barrister who had a record in that and ask for that barrister?

**Roger Smith:** Yes, you could.

**Q100 Nick de Bois:** That is the point that I am pressing, because they are very serious cases.

**Roger Smith:** Yes, you could. So far as the court presentation in these proposals is concerned, you would be preserved, but all the pre-trial stuff, which is the person you will actually see for the majority of the case, is going to be someone who is chosen for you on the basis of your date of birth or the first letter of your name. That is the relationship that is the primary one, in the sense of chronologically primary, and is really important. You can say there are overriding considerations that restrict that, and at the moment we restrict it in terms of quality and that is reasonable. If you are thinking about replacing client

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choice, then you have to think about how you compensate for all the things that are going to go.

What is going to go? All the experienced practitioners are going to go. We know this from what happens in other jurisdictions. The contractor comes in; all the older experienced people go within two or three years. They are hired by juniors; they are overworked. When we talk loosely about quality, what do we mean? The number of guilty pleas will go up and the number of trials will go down. There will be fewer appeals and fewer challenges to the prosecution; there will be less looking for witnesses, because the economic necessity will be to do the least amount of work for the maximum amount of money as you are being cut so close to the bone. Those are neutral effects of the system.

If you are going to put in a PCT system, you have to think how you are going to counteract it. Other jurisdictions have found various ways of counteracting them to various degrees, but you have to think about it. The only quality provision in this paper is a suggestion that, after nine months, you might get the barest acceptable level of peer review quality.

**Q101 Nick de Bois:** It is very helpful, but is it possible that you could identify—I may be asking the impossible—a type of defendant who will suffer particularly from this change? You pointed to minority ethnic groups possibly, but is it possible to identify a typical type of client who would be most affected by this change that you have outlined? What are we talking about?

**Roger Smith:** You can see the potential effects in a number of ways. I would be—[*Interruption.*—]—stopped by the bell.

**Nick de Bois:** That is up to the Chairman.

**Chair:** You would be paused by the bell just because it makes it more difficult to hear. Continue.

**Roger Smith:** Constitutionally, my big concern would be in big cases. There is a sub-story to the Birmingham Six, which has never really been told. Part of the problems for the Birmingham Six arose because, on the day when they were arrested, they were acted for by the duty solicitor on the day—two of them—who were intimidated by the armed security, and things were not done when they should have been done. You are going to get somebody barely qualified in the midst of a really heavy police operation and they are not going to do the job properly. That would be one example. You are not going to get, potentially, the empathy. There are going to be a whole range of problems about the personal relationship and the professional relationship with the client.

**Q102 Nick de Bois:** Very briefly, because that bell is no doubt hurrying us, Mr Brooker, can you explain the analogy to me a little more about school places as a model of managed choice? The LSCP submitted that and I did not quite grasp it myself, which is more a reflection on me than you, I am sure.

**Steve Brooker:** I will try my best. Our research shows that people value choice in the current system. In fact, people are more likely to shop around when they are funded by legal aid than when they purchase legal

services privately, which is slightly counterintuitive, but that is what the stats say.

The circle that the Government are trying to square is how you allow consumers to exercise a degree of choice, while giving providers sufficient certainty about caseload volume to make it attractive to them to bid. Our consultation response refers to what the Office of Fair Trading has called a managed choice, where you allow a degree of choice in the system. As you know, in schools, parents are allowed to express a preference about which school their child goes to. The vast majority of parents exercise that choice and most get either their first or second preference. The system is not perfect because parents do not always get their preferred option, and it does not force failing schools out of the market because, ultimately, they still get those school places, but it does allow a degree of choice.

A second example is the social care system, where we have a system of personal budgets where people can choose the treatment options and the services, in consultation with their medical team, that they feel will best suit their needs. Government expenditure is capped so it does not cost the taxpayer any more, but it does afford a degree of choice in the system. What those systems of managed choice allow is an incentive for those providers to design and deliver services that are tailored towards the needs of the users rather than some artificial criteria imposed by the Government in a PCT mechanism.

**Q103 Mr Llwyd:** Following on what from Mr de Bois asked earlier on, Professor Smith, you referred to the attendance of the solicitor at the police station being the primary relationship.

**Roger Smith:** Not just at the police station; in the preparation of the case.

**Q104 Mr Llwyd:** Yes. May I perhaps ask you about the attendance at the police station? If that relationship somehow does not work out, a lot of harm can be done at an early stage if the solicitor does not do a proper job. At the end of the day, the fact that there is a choice of barrister later on is merely trying to pick up the bits. Would you agree with that?

**Roger Smith:** Yes.

**Q105 Gareth Johnson:** If I can pick up on some of the points I made earlier, under the present system there is a financial incentive for a firm receiving a case from another firm of solicitors. If there is a transfer of legal aid, then there is a legal aid order given to the subsequent firm. Equally, if a case is given, because of speciality reasons, to another firm, there is a financial incentive for that firm to receive that case. As I understand the current proposals, there is a financial disincentive for firms to receive cases from other firms. It may be that you can force firms to take on other cases, but it does seem to me that you are not going to be proactive. A firm is not likely to be proactive in seeking out cases that they specialise in because there is no financial gain at all for them, and, actually, there will be a disincentive for them to do so. Do you think that will compound some of the issues you have been talking about?

**Roger Smith:** It would depend whether it came within the quota of cases they got. Nobody outside the system is going to want the case because they are not going to be paid for it. If you are in the system and it counts towards the quota for which you are being paid, that is fine. The jurisdictions that I have seen with this sort of system have people who are managing the caseloads to the providers. This thing is not a fire and forget mechanism. If you are managing four contracts in an area, you could have, just by force of circumstance, five murders coming in all with the same birth date. You need to have some management of the system. It will not just work like clockwork from day one. One of my concerns about the paper is that there is no understanding in it that, even if you go to this system, it will need managing. We need people who will need to—

**Tudor Owen:** If we are going by initial surnames, can I bag all the Js, please?

**Q106 Chair:** Can I just follow that up? Can you envisage a system in which a number of larger firms have contracts—perhaps on this random basis they have a fixed number of contracts—but that there is sufficient of a financial incentive for them to put out a specialised case or, indeed, a case in a more distant area to another firm that is not a major bid contractor?

**Roger Smith:** Yes; you could run it like that. That is the sort of system of thinking that you need. Terrorism would be my example. Those are highly specialised cases where the police want the specialist lawyers, the people accused probably want specialist lawyers, and you would want to set up a specialist unit. You could imagine, potentially, the same for murder and serious fraud, certainly. Yes, if you start to look at how you would make PCT work, you would get a much more sophisticated and thoughtful approach than there is in this rather derisory document.

**Q107 Mr Llwyd:** Professor Smith, in that instance, for example, where, if I can call them that, an ordinary solicitors' firm might engage a specialist firm, are they really going to work for the rates of pay now being canvassed—an initial cut of 17.5%? I do not think they are going to do the work, are they?

**Roger Smith:** That would be a question that you should put to the Secretary of State, because the Secretary of State has to come up with rates of payment that will ensure that the constitutional duty to provide representation is met.

**Tudor Owen:** You all seem to assume that barristers will be used for advocacy by these institutions when they start. The reality of it will be that these institutions will employ their own barristers, who will not necessarily be the right people to do those jobs. There is no incentive on them to use an independent Bar, because once they have the case they have nothing to keep the client; there is no incentive to keep that client ever again. That is something that needs to be considered as well.

**Q108 Chair:** I suppose, if you are assuming they have a set lot of cases, they can calculate how much barrister time they need.

**Tudor Owen:** They can put their own in-house person in to do the work. There is nothing preventing them doing that throughout. Then they get the extra fee on top of the work that they get because the advocacy in the Crown court is not covered within the scheme, so that is an extra incentive for them to employ in-house people who might not be the right people. They may be but they may not be either.

**Q109 Chair:** We are talking about junior barristers, are we not, because we are talking about magistrates court work?

**Tudor Owen:** No; we are talking about Crown court work, because they could easily employ in-house counsel. They would do so because that is the only way they can make it pay in any better way. They would employ in-house counsel, and those would be used both in the magistrates court and for Crown court trials.

**Steve Brooker:** Can I make a wider point that there are financial incentives in any system of lawyer remuneration? If you are paying by the hour, the incentive on a lawyer is to drag out the case. If you are paying a fixed fee, the incentive is to cut corners. So, whichever system of pay we introduce, we have to accept that there will be financial incentives and find ways to monitor and control those. One of the criticisms I would have of the current proposals is a lack of accountability for the providers who are potentially awarded quite lucrative contracts paid by taxpayers. Where is the information about their success rates? Where is the information about their peer review scores, their complaints history, or their customer satisfaction? That information is either collected and not publicised or not collected at all. If we are to ensure proper value for money for taxpayers, shouldn't we be collecting that information and putting it into the public domain? It is the Government's default policy that public bodies and complaints organisations should now publish that information in order to drive up quality in the marketplace.

**Q110 Seema Malhotra:** Could I direct this question to Mr Smith initially? You have already alluded quite a lot to your argument that what we are seeing is the creation of a public defender system, and, in a sense, you are probably arguing that the Government should be coming more clean about that, rather than talking about this as just a reform. Could I ask for some clarification? You have talked about considerable domestic prejudice against public defenders. Could you explain what you mean by that and your evidence for it?

**Roger Smith:** Talk to any lawyer. A public defender is what you threaten your child with if they misbehave. "If you misbehave, I will get you a public defender." There is an enormous prejudice. If I say this is a public defender scheme in this context, that is a prejudicial comment. If I said it in the state of Oregon, Washington State or Washington DC, they would just shrug their shoulders; that is how it is. It is prejudicial in this jurisdiction, which is why the Government are not using it, but I think it is really helpful to use it because it identifies the differences in



this scheme from what we have had until now, which has been a *judicare* legal aid individual scheme.

**Q111 Seema Malhotra:** Could I ask about the differences and particularly the point about quality, which you also raised a lot in terms of any quality review or quality management? In your experience and your research, was there a decline in the quality of provision through a public defender system in the US, and were there any variations in that—good and bad services within the US?

**Roger Smith:** Yes, there is enormous variation. In some of the southern states you had cases where the public defender fell asleep during a murder trial. I have watched a Supreme Court case on basically that point. This public defender system has been coming here for the last 15 years. I went in 1998 to states that I thought had good public defender schemes that were worth looking at. Yes, the federal public defender in the States is a really impressive operation and I saw a number in a number of states. They are well resourced, and when you ask them what they do, one said, “Yes, I have quite a lot of trials. I have three a year.” It is a very different system and it is a much more process-orientated system for a variety of ways. But, yes, in another life I could be a public defender in the state of Oregon and go canoeing in the evenings. It would be wonderful.

**Q112 Seema Malhotra:** What do you think is the real underlying intention of these proposals? Do you think it is to fundamentally change our model to reduce the number of firms? What do you think is really behind this?

**Roger Smith:** This is an unholy deal between the big providers of solicitors who want this scheme and who have been arguing for it for ages—they are a bit taken aback to find out they are expected to come up with 20% savings; it was not quite what they imagined—and a Government who think that, if they can get a public defender scheme in, they will be able to cut more money than they would otherwise.

**Tudor Owen:** I would agree with that.

**Q113 Chair:** Let us just explore that a little more. If this is a public defender scheme, it is not a salaried public defender scheme run by a state organisation. It is the contracting of defence legal advice and representation on what basis? In what sense is it a public defender scheme?

**Roger Smith:** It is a public defender scheme in the sense that it is contracted, there are a limited number of providers, and you have no choice. In the old days when I was a lad, it was *judicare*, legal aid, private practice on the one hand and then salaried services on the other. With the advent of contracting, it basically means there is not all that much of a distinction if you are a contractor. Chile contracts with firms of private solicitors. There will not be much difference being a member of a firm there and in the public defence operation in Washington State. There is no difference, effectively, except in one you are directly salaried and in the other you are indirectly salaried.

**Q114 Chair:** There is quite a significant difference, though, between a state agency—something like the Crown Prosecution Service, if you like—a defence equivalent of the CPS, although even the CPS of course contracts a significant part of its work. This is, or at least it is intended to start as, a system in which all the providers are private. The nature of the contract is what the state does.

**Roger Smith:** Yes. All the providers are selected by the Secretary of State—not you. Indeed, the proposals make it absolutely clear that the small public defender office that exists at the moment will be potentially used as back-up when, as is probably quite likely, some of these people go bust. I am not sure there will be that much distinction between the public defender office as now is and these contracted providers.

**Q115 Chair:** In your description of the Chilean model, you say that the model aims to protect experience.

**Roger Smith:** Yes. I thought that was really interesting. I interviewed, in a way slightly by chance, this Chilean public defender who was working with Justice, and was asking her questions as she was referring back to the firm that she was part of to get the answers. They have a system whereby in the bid process there are allowances made for experience. I may come in with a bid for £2 million and Tudor may come in with a bid for £2.5 million, and Tudor may still get it because he is putting up 20 experienced lawyers who are coming into the bid process with a financial premium. The point is that you have heard all the objections to PCT, and, if it is done crudely, they are all there, but one of the objections is that the experienced people go. You can correct for that, as the Chileans do, and it is an interesting way of doing it. The other thing that almost everybody who has implemented this sort of system has found is that the junior staff get exploited and so you need to have maximum caseload levels on what they can do in the contract. No lawyer can be required to do more than x numbers of cases a year, otherwise it is absolutely predictable what will happen.

**Q116 Chair:** Do you know if the Government have engaged in any examination of either the Chilean model or other similar models or, indeed, asked people like you who have looked at these things for guidance?

**Roger Smith:** Certainly, no, they have not asked me, but I would not expect that. There is no evidence from the paper that they have lifted their head above the desk. Out there in the big wide world there is massive experience here. The ineptitude of Government never ceases to amaze me.

**Q117 Steve Brine:** It has been suggested that this weighty tome has been written by people who have no—dare I say zero?—experience of practising at the criminal Bar. Would any of you disagree with that statement?

**Roger Smith:** It has been written by civil servants, and, in a way, it is an unfair question because of course it has been written by civil servants in the Ministry of Justice.

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**Q118 Steve Brine:** Not by but closely with.

**Roger Smith:** If your essential point is do you get the reek of sweat and smell of blood and fear from this document of someone who has actually seen it in operation and knows what they are talking about, no.

**Tudor Owen:** It would seem to have no bearing on my day-to-day existence as a solicitor hack going around the courts and the police stations of north Wales.

**Steve Brooker:** It is a false question. Why should I have to have a heart operation in order to comment on the performance of a surgeon? Why should I have to go through a bereavement in order to comment on the workings of the funerals system? Politicians are there to represent the taxpayers, not to represent the practitioners. Yes, they must have close dialogue with lawyers in order to understand the system and to make proposals that would work for both lawyers and consumers, but I would feel uncomfortable if the proposals were made in very close consultation with the lawyers, and consumer representatives were excluded from that process.

**Q119 Jeremy Corbyn:** Going back to the public defender parallel that Roger Smith was quoting from Chile, what about the perhaps more apposite parallel with the United States, where public defenders are seen as the worst option and there is a general perception that there is often very poor defence offered by them? Does that not lead to the possibility of serious miscarriages of justice?

**Roger Smith:** You just have to be quite precise. There was a big study done of New York, in part by Mike McConville, who was a professor at Warwick. The good guys in New York turned out to be the public

defenders and the bad guys turned out to be the scrabbling private practitioners who took the conflict of interest cases.

**Q120 Jeremy Corbyn:** What about the small town in the mid-west?

**Roger Smith:** I have no idea because I have never been there. The southern states are a big example. There are whole swathes of states that have unsatisfactory public defenders. The point that you are getting at, which I would absolutely agree with, is that public defenders vary. When I looked at the variables, the chief one I found was level of resources. I would have no problem about instructing the federal public defender in a major case in the US. If I was in the state of Arizona, would I trust a public defender? Not on your life.

**Q121 Chair:** It is actually public defender systems that you are saying vary.

**Roger Smith:** Yes.

**Q122 Yasmin Qureshi:** You talk about the fact that there are the good ones and bad ones. The truth of the matter is that the public defender system in theory is very good if it is resourced properly and the staff in it are paid properly, but if, as most of these attempts are, it is to cut costs and to reduce money, then you are not going to have very good public defender systems, are you?

**Roger Smith:** No.

**Chair:** Thank you very much. We like straight answers. We are very grateful to you for your help this morning. Thank you.

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## Wednesday 3 July 2013

Members present:

Sir Alan Beith (Chair)

Steve Brine  
Jeremy Corbyn  
Gareth Johnson  
Mr Elfyn Llwyd

Seema Malhotra  
Andy McDonald  
Yasmin Qureshi  
Graham Stringer

### Examination of Witnesses

*Witnesses:* **Rt Hon Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, **Elizabeth Gibby**, Deputy Director of Legal Aid and Legal Services Policy, Ministry of Justice, and **Hugh Barrett**, Director of Legal Aid Commissioning and Strategy, Legal Aid Agency, gave evidence.

**Chair:** Welcome, Lord Chancellor, and we also welcome your colleagues. I shall ask them to identify themselves in a moment. First, we have to declare any interests there might be, and I shall start with Mr Brine.

**Steve Brine:** None.

**Graham Stringer:** None.

**Yasmin Qureshi:** As a former practising barrister, I used to receive legal aid funding.

**Chair:** None.

**Mr Llwyd:** I have done legally aided work in family and crime, as a solicitor and a barrister, but I do not do any at the moment.

**Seema Malhotra:** None.

**Andy McDonald:** I was in criminal practice nearly 25 years ago. In November I left a firm that still does criminal work, but I do not do any myself.

**Jeremy Corbyn:** None.

**Gareth Johnson:** I am a practising solicitor for a firm that is partly funded by legal aid.

**Q123 Chair:** Thank you. Lord Chancellor, can you tell us who your two colleagues are?

**Chris Grayling:** Do you want to introduce yourselves?

**Elizabeth Gibby:** My name is Elizabeth Gibby, and I am head of legal aid and legal services policy at the Ministry of Justice.

**Hugh Barrett:** My name is Hugh Barrett. I am the director of commissioning at the Legal Aid Agency.

**Q124 Chair:** Thank you very much. You wrote me a letter on Monday and the Law Society wrote me a letter, and these two letters taken together indicate that at least some constructive discussion is taking place. I asked you yesterday if you had heard from the Bar Council. Have you heard from it in the meantime?

**Chris Grayling:** I had a meeting yesterday afternoon with the Bar Council. I should say that the discussions with the Law Society have been constructive and have been going on for a number of weeks. We have had a series of meetings.

As I explained to you when we spoke, it was my intention to use the letters that I sent to you on Monday as a vehicle to make it clear that we had reached agreement—I won't say common ground—on a number of principles for discussion, that I accepted that we would move away from the issue of limiting choice, and that we would look again at the

time frame for the changes. That will not necessarily change the time frame for financial change, but it may be that we can adjust the time frame for a new contractual framework in a way that makes it easier for practitioners to adapt to it. That is something that the Law Society had asked for, and I was very happy to open discussions with them about it. In return, they have said that they accept that we face a very large financial challenge, and they have also accepted the need for consolidation of their sector. They have submitted to us a very interesting proposal as a possible alternative model, which still contracts the marketplace, and we have said we will engage in constructive discussion with them about that.

I know that this is difficult for the solicitors' profession. It has always been an issue that, to my mind, was going to be a bigger challenge for the solicitors' profession, because we are asking it to go through significant change. I have had a number of constructive meetings with local committee members of the Law Society, with individual firms, and indeed with the Law Society nationally. I recognise the challenge that what we are doing presents to them, and we are genuinely keen to find a way of working through it that delivers change in the best possible way.

On the Bar front, I should be clear that the reaction from the Bar has been rather different—disappointingly so, because in one of the first decisions that I took the obvious choice was to go for one case, one fee. A number of my colleagues have argued that, and a number of my colleagues are still arguing that. I have taken the decision that we need to protect an independent Bar. I therefore chose not to go for one case, one fee, which in my view would have destroyed the independent Bar. I have to say that we have not had the same level of constructive response from the Bar as we have had from the solicitors' profession. I had a meeting with the Bar Council yesterday, and I hope very much that that changes, because it is in all of our interests to work this through in a way that does the best for the professions in the context of the fact that we cannot avoid tough financial decisions.

**Q125 Chair:** What is the objective of the process that you have now embarked on? Is it to achieve the savings that the Treasury require of you, or is it to make a fundamental change in the way that both

professions are organised in respect of criminal practice, and legally aided practice in particular?

**Chris Grayling:** There are two levels of challenge here. One is that, like every other part of Government, we have to deliver financial savings. If you look across the range of what the Ministry of Justice does—I have no doubt that we will be talking about other areas in the months ahead—we have challenging savings to make in the courts area, which we will need to achieve through greater efficiencies, as well as looking at ways in which we can recover assets or contributions from those who have committed offences. Within the probation area we are looking at generating savings, but also at reinvesting money in supervision of the under-12-month sentence group, because if we can start to bring down the reoffending rate among that group in particular, as well as among offenders more generally, that will ease pressure on the system and allow us to bring down costs in the future. Within the Prison Service, with the prison benchmarking that we are doing at the moment, we are also working to bring down costs as far as we can. We have a financial challenge. It touches every part of the Department; it will touch the centre—the Department itself. Ultimately, Sir Alan, my first priority will have to be to meet the strictures that the Treasury puts upon us. I want to do that in a way that delivers change in a way that is sustainable. Some people have said to me, “Just cut fees,” but I have a big concern about just cutting fees, and I am being told very clearly by many in the solicitors’ profession that they are businesses that operate on tight margins, and that they cannot accept, or stay in business with, a tight cut in fees.

I do not have much room for manoeuvre, so what we need to do—I think we are going to have to do this across Government—is to see that there comes a point where financial change has to come with reform. That is the only way that you can deliver change, and deliver change financially, in a way that is sustainable. That is what we are looking to do with these changes. The reason that I am very open to discussions is that we want to get it right. I have to bring the cost down. I have no option but to bring the cost down, but I want to do so in a way that leaves a sustainable structure beyond, where we do not have advice deserts. My concern is that, if I just leave the market to sort itself out, we will run the risk of having blocks of the country where people opt out of delivering legal aid, and there is an advice desert.

**Q126 Chair:** That has happened already.

**Chris Grayling:** I need some kind of contractual mechanism to ensure that I can cover all parts of the country, and ensure that at the very least there is legal support for those who need it.

**Q127 Chair:** Is it a policy objective to move away from the very small businesses that provide a lot of these services and from an independent Bar, towards one in which very large firms take on numbers of barristers as salaried employees?

**Chris Grayling:** That second premise I do not buy. One of the arguments used about this is that the Bar will lose lots of work in-house. That is not something

that I, as somebody who has been involved in running businesses, can comprehend. If you are going through tough times financially, if you have to tighten your margins and bring down costs, and if you have the option of keeping in-house salaried employees who you have to pay come rain or shine, or of having a team of expert freelancers—professionals upon whom you can draw to do the work when it is needed—it seems to me that the second option is rather more attractive than the first. Actually, tighter environments for solicitors are, in my view, likely to lead to more work for the Bar rather than less. I have sat with solicitors firms that say that, with these changes, they will be more inclined to use independent advocates than to use in-house staff.

There has never been a process of change in any walk of life or in any organisation where the people affected by change were not left very jumpy by it, but in my view this actually strengthens independent advocacy rather than weakening it. I can see no logic in those firms having expensive staff on their books when they do not need to.

**Q128 Chair:** We shall return to some of those points, but there is one other issue that I want to ask you about before opening up the questioning. You are placing upon your Department, in this area as in others, the responsibility to manage large contracts with nationwide application. The interpreters’ contract was a shambles. The tagging contract is the subject of an investigation, the prison market testing and bidding process has been halted by the investigation into tagging, and the Probation Service contract is the subject of fierce current controversy. You haven’t got the capacity in the Department to manage contracts on this scale, have you?

**Chris Grayling:** I believe that we will do, and we will have to resource to make sure that we can for a temporary period, so that we do. We have to do this anyway. The three-year contracts come to an end next year, so we have to put something in place whatever happens. We have long debates about the other contracting issues, but one of the ironies of the arguments being used—the interpreters contract is the example most regularly raised—is that the problems with the interpreters contract arose from the fact that it was placed with a relatively small organisation that struggled to deliver, and it actually took the larger organisation to sort them out.

There is a myth here. These changes are not about somehow exposing the legal market to a handful of giants who will just take over everything. All I am seeking to do is to encourage firms to look at new ways of working together, or through alternative business structures. We now have the ability for firms to do multidisciplinary activities. I am not attempting to set a one-size-fits-all model from the centre. I am saying to the market simply that we need the confidence that, if we bring down costs as we have to, the organisations working with us will have the ability to deal with that. Otherwise, I would end up with advice deserts.

That is fundamentally what I am looking for. Do I have the comfort that the next round of contracts, when they are placed after 2014, will be with

organisations that can sustain the work that they are committing to? It does not matter to me whether they are large, medium or small; what matters to me is that the service is sustainable.

**Q129 Andy McDonald:** Secretary of State, good morning. I am going back to the letters and the exchange of correspondence referred to earlier. For a long time many people have been saying that a choice of solicitor is absolutely fundamental to our system, and have been trying to impress that idea upon you. You have indicated that you are going to make changes to allow for a choice of solicitor. Can you explain your reasons for that change of heart?

**Chris Grayling:** I have done the radical thing of being a Government Minister who consulted on a set of proposals, listened to the responses and decided fairly early on that this was probably something that we needed to change. I waited for the consultation responses to come in, had a look at some of them and decided that I was of the same view. I decided that, to avoid uncertainty, it was better to make an early announcement than a late announcement, and got on with it. Isn't that what Governments are supposed to do?

**Q130 Andy McDonald:** Hurrah for that. You have also said that you have agreed to explore the proposals to consolidate the market in stages. Can you tell us what effect this is going to have on the proposed timetable? If you could be as reasonably precise as you can, with some markers, that would be helpful.

**Chris Grayling:** I can't really, at the moment. It is simply that, as I said, the Law Society have come to me and said, "Look, can we have more time to go through the contracting process?", and I have said, "I'm very happy to sit down with you and work through that." What I cannot really change, for obvious reasons, is the timetable of delivering reductions in costs to us, because I have to ensure that in the 2015–16 financial year—the subject of the most recent spending review—we as a Department are able to meet the targets for that year. We are now starting detailed talks on that with the Law Society; that is one of the messages that they gave us strongly in their response.

I am very open to adapting the process, but, to take you back to what I said before, I have two objectives: I have to meet the financial targets, and I want to leave a sustainable structure within which we have confidence that the organisations in place to deliver the service can do so.

**Q131 Andy McDonald:** So the timetable can take care of itself, but what you must address urgently is the money, and a bigger cut is coming immediately. Is that what you are saying?

**Chris Grayling:** I have to deliver a reduction in fees by the time that I am required to in order to deliver the budget timetable. We could do that alongside a more extended contracting process, as long as I was confident that that more extended contracting process took us to a point where we had a sustainable market. All that I am concerned about here is those two goals: I need to deliver a more cost-effective system, and I

have to do it in a way that does not leave areas without cover. I need some form of contractual mechanism that enables me to be sure that, if somebody is arrested and taken to a police station, there is a lawyer in the area who can come over and sort them out. That has always been the prime driver of this, and I need to do it in a way that is sustainable contractually and delivers that service.

**Q132 Andy McDonald:** The model that you previously presented has been described as internally incoherent. Would it all unravel if you addressed the fundamental principle of choice? How does the rest of it still fit together if that element is removed?

**Chris Grayling:** I would point you to the diagram on page 66 of the consultation document, which sets out how the process works. This is something that I have been saying all the way through at the meetings that I have attended, including those with third parties—that the process, as we envisage it, is this. First, we need to understand that the organisations that put their names forward are capable of sustaining a service at a lower level. They have to be able to do that in order simply to get to the table. Then the key thing is: what is the quality of that service? Is it delivering a quality legal service? The price point was always there: okay, if I have two organisations that are able to deliver a quality service at a lower price, but one's bid is 1% lower than the other, I have a duty to secure value for the taxpayer, as you would expect. However, there has been a myth in circulation that quality is ignored in all of this, but there is a whacking great big box in the middle of page 66 that says "Quality".

**Chair:** We are going to come to that issue in due course.

**Q133 Andy McDonald:** In my area there will be six potential providers, and they are all to get an equal share. You have now introduced the principle that choice is important. If an accused chooses one firm, what is happening to the principle of equal shares?

**Chris Grayling:** What happens there is one of the reasons why I changed my mind. We put that in the document in the first place because we judged that in order to invest in scaling the business—two firms merging, for example—there would be a need to provide a guarantee of volumes. Yet one of the clear messages I got back from the solicitors' profession was that the choice issue was more important—"Why do you not simply leave competition in place, because the best will then flourish?"—and I accepted that argument.

**Q134 Andy McDonald:** The guarantee of equal shares of work has gone.

**Chris Grayling:** Yes. We could not do that: you cannot both provide a guarantee of a slice of the work and provide choice. That is something that the market has said to me: "Actually, the principle of choice is one that we regard as more important."

**Q135 Andy McDonald:** Finally, is it still the intention for any businesses that do come forward to be set at 17.5% below the current rate?

**Chris Grayling:** Our working plan is that the base line we need to achieve is a 17.5% reduction. I am not actually in a position where I need to get lots more than that. I am certainly not in the position of saying that, if somebody tips up with half a dozen law students and says that they can do it for half the price, we will give them a contract. I am definitely not going to do that. I want a quality service delivered by experienced and qualified solicitors and barristers—but, yes, I do need to achieve that level of saving.

**Q136 Chair:** In respect of the timetable, may I point out that the regulatory bodies for the Bar and for solicitors have, in response to questions from us, both indicated that it takes months at least to achieve the regulation compliance agreement that would be required for some of the alternative business structures that you envisage? You have to take that into account in the timetable.

**Chris Grayling:** That is an interesting point. Since you mentioned this to me, Sir Alan, I have checked. We have spoken to the Solicitors Regulation Authority, who say that they do not envisage there being a problem. I am not sure whether they have written to you separately to say that there is.

**Q137 Chair:** We can let you have the correspondence.

**Chris Grayling:** We will need to look into that. We have met them and discussed this, and they have said very clearly that they do not see an issue. We have obviously got a crossed wire, which we need to look at.

**Q138 Gareth Johnson:** May I pick up that point, Secretary of State? I am very pleased that you have retained the element of choice in the proposals. Did you come to that conclusion because you believed that the original proposal was unlawful, because you felt that it was unworkable, or for some other reason?

**Chris Grayling:** It was not anything to do with the lawful nature of it. The article 6 argument was used, but I have read article 6 and I am not at all convinced that the “unlawful” argument is right. It was just listening to the views of those who made representations and deciding that it was the right thing to do. The very clear message said, “Look, competition between firms based on choice is a good thing, and there are specialisms that we would not want to lose.” I simply decided that it was the right thing to do.

I actually decided this a little while back, but you cannot make changes in mid-consultation. I had to go through the process of allowing the consultation to be completed, and looking at some of the responses to make sure that I got it right. It would have been irresponsible of me, and probably illegal, simply to take a decision without considering the issue, but I accelerated consideration of that issue post the end of the consultation, because my instinct was that it was the right thing to do.

**Q139 Mr Llwyd:** Good morning. What proportion of the proposed savings of £122 million that you seek to make from CPT are attributable to the model of

competitive tendering, as opposed to the required 17.5% cut in bidders’ rates?

**Chris Grayling:** The 17.5% cut delivers the savings. I had not been anticipating that we would generate significant savings beyond that. I thought that the price competitive element would be, as much as anything, a small differentiator between firms. As you know, it is clearly in the interests of the taxpayer if I can generate an extra 1% or 2% of savings, but that was not a prime purpose.

**Q140 Mr Llwyd:** Is the underlying intention of competitive tendering to change the long-term model of legal services provision, in part by reducing the number of firms?

**Chris Grayling:** It is about sustainability of service. What matters is that we have in each part of the country legal aid firms that are available to work with people who are accused of crimes. If there are none, that is a problem. We therefore seek to put in place a proper contractual mechanism that ensures that we have coverage, and that we have a mechanism to bring in new organisations if, for any reason, one of the existing organisations pulls out.

My concern was that, if we simply cut fees and left the market to sort itself out, we would get a fairly chaotic period in which some firms would survive and some would not, which would not be the case if we had a managed period of change over 18 months, which is what we are talking about from the start of the consultation. Please bear in mind that this is something that has been presaged for two or three years; it is not something that I conjured up as the new Secretary of State. It was always due to be consulted upon this autumn; I simply accelerated the process by six months. The Government originally announced in 2010 that they were going to follow this path. The previous Government, back in 2006, had set out a path towards competitive tendering in this area. This is not something that has come totally out of the blue. Indeed, one of the messages that I got from the Law Society and others is that this has been a bit of uncertainty hanging over the sector for a long time.

I looked at creating a managed process of change. We and the Law Society think that there are too many organisations out there to sustain the kind of financial challenges that we have. There will need to be some consolidation; what I am seeking is a sensible mechanism to achieve that and to make sure that we can sustain the service.

**Q141 Mr Llwyd:** The question is whether the mechanism is in fact sensible. Mr McDonald, my colleague, mentioned six providers in his area. For the whole of Wales we will be going down from about 460 providers to 21. That, I think, is highly irresponsible and ridiculous, and it is not going to work.

**Chris Grayling:** One of the things that I have said—I said it in the House yesterday—is that I have listened to the concerns of people in rural areas about whether we’ve got the numbers right. Of course, what matters is sustainability. You can have 460 providers today, but, if half of them cannot sustain a more challenging financial environment, I would not want to see a

situation where parts of Wales had no access to legal aid support. I therefore hope, Mr Llwyd, that one of the things that you would want is for me to have a mechanism in place to ensure that your constituents have access to legal aid—and that is what I am seeking to do.

**Q142 Mr Llwyd:** Certainly, but I do not think that these proposals will do that. We will have to differ on that.

The consultation paper does not in fact say what will happen if a provider is unable to find sufficient or sufficiently qualified lawyers to fulfil its obligations. Unlike with the Olympics, the Army cannot be drafted in. What does the Ministry propose?

**Chris Grayling:** To be honest, a shortage of lawyers in this country is not one of the big challenges that we have. One of the areas that the Bar particularly, but both sides of the profession, need to look at is the number of people operating in the criminal legal aid field at the moment. One of the things that concerns me most in looking at the data that we have put forward—you will see the charts in the consultation document—is that the barristers at the lower end of the legal aid fee income scale are doing a relatively small number of cases. That is a real issue: a lot of people are struggling to get enough work to do. My big concern in all this is not the availability of lawyers.

**Q143 Mr Llwyd:** Very well. Apart from the brief mention of the possible effect of defendants representing themselves, the consultation paper and the assessments do not consider the position of victims of crime. Why is that?

**Chris Grayling:** I think that what victims of crime want is for the people who carried out those crimes to be tried fairly, prosecuted and when found guilty to be punished appropriately. We are doing a whole range of things to support victims. We have just published a draft victims code, and we will be moving ahead with the implementation of new victims rules shortly. We have appointed a new victims commissioner, who is bringing forward new ideas to us. Support for victims is a very important part of what we are doing, but the best thing we can do for the victims of crime is to have a proper justice system that deals effectively with the people who carried out the crimes in the first place.

**Q144 Mr Llwyd:** In October 2004, your Cabinet colleague the Attorney-General told *The Law Society Gazette*, “I cannot see that competitive tendering in criminal legal aid makes sense—legal aid contracts do not pay market rates. If firms want to win a competitive tender, the only way they will be able to undercut each other is by steps that could open them up to potential allegations of incompetence.” Even in 2004 it was being said that legal aid rates were well below normal legal rates. Do you accept this criticism from a highly experienced lawyer and a highly experienced Cabinet member?

**Chris Grayling:** Let us be clear about two things. First, I discussed—and I did so before the consultation—these proposals extensively with the

Attorney-General. Secondly, the world today is very different from the way it was in 2004. We face tough financial challenges today, which in 2004 we did not imagine would be ahead of us. The reality is that the whole public sector, including those areas funded by the public sector, has to adapt to tough and challenging changes, because that is the only way in which we can meet the financial challenges that this nation faces.

I would rather we did not have to be doing any of this. I certainly have no particular personal desire to be a Lord Chancellor sitting in front of this Committee talking about driving through changes of this kind. It is not my personal choice, but you have to deal with the world as it is, rather than how you would like it to be.

**Q145 Mr Llwyd:** I note that the Attorney-General has not made any public statement in support of your proposals.

**Chris Grayling:** I do not think that it is the Attorney-General’s role to make public statements in support. All that I can say is that he has been extensively consulted. He has had involvement and continues to have involvement in discussing what we do. That is right and proper, but his position is not one in which I would expect him to be out making policy pronouncements.

**Q146 Mr Llwyd:** Fair enough. I have one final question. The Government’s “Open Public Services” White Paper states, “it is not enough to pay someone to provide a service with the only recourse being that if they fail they will not be re-awarded the contract.” Can you explain how the proposals for CPT are currently drafted to meet this aim?

**Chris Grayling:** If the “Open Public Services” White Paper was to a significant degree about choice, I think that I have just addressed the choice issue by accepting the arguments that have been put to me. That question has been rather superseded by events this week.

**Q147 Mr Llwyd:** With respect, it has not. If they fail in their duty, how will you know that, and how will you be able to act quickly in that regard?

**Chris Grayling:** If they fail in their duty, there are two or three mechanisms that would apply. There is a peer review process, which already exists but is not widely enough used yet. One of the things that has really surprised me in terms of quality—the quality issue is crucial here—followed from the fact that one of the arguments used against the proposals was that it will destroy quality, and that we will end up with cheap and cheerful, ineffective, under-qualified legal services. My response to that was to say, “That’s not my intention, so why don’t you, the professions, shape the quality standards that you would want me to apply in order to ensure that we maintain quality?” The Law Society is now doing that with us, but the Bar has said no. To me, that does not compute. People are saying, “You’re going to destroy quality,” and I say, “Okay, so you set the quality threshold so that I can’t.” If they then say no, how does that work?

**Chair:** We shall return to that point in a moment, but while we are still talking about the basic structure I want to turn to Mr Stringer.

**Q148 Graham Stringer:** What alternatives to competitive tendering did you consider?

**Chris Grayling:** I guess that the biggest was one case, one fee. A variety of options are set out in the document, but one case, one fee is the obvious one. Certainly I have had people within and around the Government saying to me, “You should go down this road.” With one case, one fee, you can understand the logic. We have solicitor advocates and we have barristers. Why are we simply not paying a single block of money and allowing the solicitor to decide how to run the advocacy? It is the most cost-effective and the most administratively simple, and it makes blinding good sense—but I did not do it because I did not want to kill the Bar. I wish the Bar would recognise that.

**Q149 Graham Stringer:** Why did you not put that comparison and other comparisons in the impact assessments?

**Chris Grayling:** The comparison for one case, one fee?

**Q150 Graham Stringer:** You said that there were other alternatives.

**Chris Grayling:** There are other alternatives within there.

**Q151 Graham Stringer:** Why were they not in the impact assessments?

**Chris Grayling:** I am trying to find the right balance for the use of public funds. We have produced a perfectly sensible impact assessment that meets the requirements. How much extra officials’ time do we want to spend producing longer and longer documents at a time when finances are under pressure and we are trying to do a lot of things at once?

**Q152 Graham Stringer:** That is a very strange answer. It is the nature of impact assessments to justify change, quantified against cost, against what is happening at the present time, and against the alternative proposals and other alternative proposals—so that is not a proper impact assessment.

**Chris Grayling:** Why would I want to do an extended—

**Q153 Graham Stringer:** Just let me finish. It is not a proper impact assessment if you do not put all those alternatives in, is it?

**Chris Grayling:** I am sorry, but I think that it would be a complete waste of public money for me to do an extended impact assessment on one case, one fee, when I thought that it would just destroy the Bar. That would not have been in the interests of the country, and I would not do it.

**Q154 Graham Stringer:** That is not my understanding of what impact assessments should be, even if you were to put that in. You say that you have no doubt whatsoever that firms will bid in the

competitive tendering process. Why are you so optimistic?

**Chris Grayling:** Because they told me, and us, both on and off the record. At the moment the Legal Aid Agency is deluged with inquiries from law firms trying to get more statistical evidence about the marketplace as they consider their future, so I have no doubt at all that firms will bid.

**Q155 Graham Stringer:** Even though many of the smaller firms will have to merge or increase their size, and it will take time for them to get into a position where they can compete for a tender.

**Chris Grayling:** As I said very early on, if we start a process of contract renewal later this year, what we are not going to do is to say, “If you have not completed your move to the new world, you can’t bid.” That would be wrong; it would be irresponsible. What I have said is, “Look, as long as you set a path and you are explaining to us where you are going and how that is going to make this sustainable, that’s fine. You will be able to bid.” It is not a problem. This is meant to be an iterative process. It would not be workable if I simply said, “By November you’ve got to have merged your firm; it’s all got to be done and dusted. Only then will you be able to bid.” We are not doing that.

**Q156 Graham Stringer:** If your optimism is justified and you get through the first round of tendering and different firms win the tenders, it is likely, is it not, that some firms will go to the wall? They will be out of business. What analysis have you done to show that there will be sufficient competition for the second round of tendering?

**Chris Grayling:** There is no doubt. The Law Society itself has stated clearly that it believes that there needs to be consolidation in the market, and that it will come as a result of this. There has been extensive analysis of the profitability and the structures of law firms, as this has been discussed over the last two or three years. We believe that there will be plenty of bidders. All the evidence that we have, and the feedback that we are getting from existing suppliers, is that there will be plenty of bidders. There will be some firms that cannot bid in their own right, but I am completely confident, given all the discussions that we have had. Bear in mind that the team and I have spoken to large numbers of firms, privately and publicly. There are a lot of people who, for obvious reasons, are saying publicly that they do not like these changes, and are campaigning for us to modify them, but who are privately making it absolutely clear that they will bid—and they are not in small numbers.

**Q157 Graham Stringer:** What work have you done to understand the profitability of firms, to show that they can take a 17.5% cut?

**Chris Grayling:** One of the challenges is that I suspect—in fact I do not suspect, I know—that some firms, in their current form, will not be able to absorb a 17.5% cut. That is actually why we are doing this. If I simply applied the 17.5% cut across the board to all solicitors firms, the consequence would be an unmanaged transition. Some would opt out immediately; some



would not be able to continue or would struggle to continue, or would struggle to deliver a proper service. The whole objective of this is to have a managed transition.

That is the nature of the discussion that we are having with the Law Society at the moment. We have brought forward a proposal for consultation that sets out what we believe is a managed transition. I said on day one, in the interview that I gave *The Times* and in the comments that I made to the House, that if somebody has a better approach for delivering a managed transition, which achieves our goals of reducing the budget and ensuring that we have a sustainable sector thereafter, we are perfectly open to discussing that. That is why you have a consultation. We are now, as I say, engaging in conversation with the Law Society. We are looking at our own model in terms of the feedback that we have had, and we are looking at the ideas that the Law Society has put forward. I cannot anticipate that work today—you will understand why—but we will move shortly to bring forward alternative thoughts based on those discussions.

It might be helpful, Sir Alan, to say at this point that my intention is that we should have a second, shorter, phase of consultation in the early autumn, starting in September, so that we can coalesce some of the things that have been brought to us, see how they affect the model that we have put forward, and see whether there is a viable alternative in what the Law Society and others have put to us, so that we can consider all this and then move ahead. Despite all the criticisms that have been made about the length of consultation, in fact we will end up having consulted for a longer period than the 13 weeks that people have called for.

**Q158 Chair:** Will that consultation be on the basis of a revised set of proposals?

**Chris Grayling:** Yes. It will say, “We have now consulted and listened to everyone. We have looked at where our proposal needs to be modified, and we have looked at the alternatives.” We are not going to start at the beginning all over again; we will simply say, “Right, based on the consultation, this is how we think things might be different”—to a smaller or greater degree; I am not judging whether there will be big changes or small changes. I have already made one, with the choice agenda, and I have said that I will look carefully at the rural areas issue. You would expect me to do that. We will bring back a set of finalised proposals in the autumn for final comments, for a shorter period of consultation. Then we will proceed with change.

**Q159 Seema Malhotra:** Secretary of State, may I continue the conversation you began about quality, the work that you are doing with the Law Society now, and how they are helping you to set standards? What process are you going through with them?

**Chris Grayling:** Let me start by saying that the most important judge of quality is the qualification. We have a good system of legal training in this country. If somebody is a qualified solicitor or a qualified barrister in the UK, in England and Wales, that brings a stamp of authority with it. Therefore, one of the clear issues of quality for me is whether firms are

using qualified people in places where qualified people are needed. There are places where other parts of the legal profession can perform a service—paralegals, for example—but I want to know that, where qualified lawyers are required, qualified lawyers are available. There are also other elements to quality: there is sustainability of business and there is the way the business works.

I have been a bit puzzled by the slightly contradictory attitudes of parts of the legal profession to the issue of quality. There is a big battle at the moment within the Bar about the new quality assurance for advocacy. That is nothing to do with the Government or me, and it is nothing that I have a vested interest in one way or the other, but it has been a bit of a puzzle to me why on the one hand I get a message saying, “We’re terrified that the work is going to be done by unqualified people who will be no good,” but on the other hand there is resistance to a quality standard that will prevent work from being done by unqualified people who are no good. It is a bit of a puzzle in the context of me saying, about quality standards for this change, “If you think that, as a result of what we are doing, work will be handed over to people who are not equipped to do it—which is not my intention—then you set the quality standards”—

**Q160 Seema Malhotra:** May I interrupt you for a second, Secretary of State? There is a big difference between quality of service and how that is going to be received, the quality of advice, particularly to vulnerable people, and qualification. You can have the best qualification, but provide a very poor quality of service. Do you not think that there is a concern that, while you have been thinking about quality criteria, there does not seem to be a significantly developed view about what the standards of service will need to be in order to ensure that clients are receiving the best quality of service?

**Chris Grayling:** In terms of quality, the benchmark that exists at the moment, which was introduced a few years ago, was peer review. Peer review was supposed to have been applied to all the firms involved in criminal legal aid, but actually it is only about 10%. That is one avenue that we could follow.

**Q161 Seema Malhotra:** Peer review would take place primarily where there are red flag cases or a particular area of concern.

**Chris Grayling:** That is why one of the things that I have said to the two parts of the profession is, “Okay, if you are worried about quality, tell me the things we should do to judge quality. You can write the quality part of the contracting process if you want, because that gives us both comfort.” As has been widely touted, I am not a lawyer, so let us get the lawyers to design the quality standard so that they are confident that the support provided to people in a difficult situation meets a quality standard.

**Q162 Seema Malhotra:** Is it true, though, that the Legal Services Commission, as was, reduced its use of peer review because of cost?

**Chris Grayling:** I shall refer that question to my colleague.

**Hugh Barrett:** Yes, it is. About two years ago, we moved down the number of peer reviews. As the Secretary of State said, at the moment roughly 10% of firms are peer reviewed. The proposal in the consultation documentation is that we move it to 100%. That would be a way of ensuring that we have high levels of delivered quality.

**Q163 Seema Malhotra:** What would be the increase in cost in order to deliver that, and how would that be achieved?

**Hugh Barrett:** It would cost, ballpark, a couple of million pounds extra a year, but as a guarantee of quality I think it would be seen as being a good value-for-money proposition.

**Q164 Seema Malhotra:** You would see it as being able to provide a guarantee of quality.

**Hugh Barrett:** It would be a much better system than a 10% sample, because you would be sampling 100% of firms.

**Chris Grayling:** As I say, my challenge to the whole profession is that I am perfectly willing to let them either reshape peer review or put an extra dimension in. I do not really see that I can do much more than that. If they are all worried that this is going to lead to completely ill-equipped and unqualified operators in this marketplace, they should write the standards so that it cannot happen. I am up for that.

**Q165 Chair:** I hope that the user of the service is getting some input into this process.

**Chris Grayling:** I am not sure that that is necessarily very easy to devise, but, if the Committee has a way for the user of the service to make recommendations on this, I am very up for that. However, the choice decision that I have taken goes some way towards achieving that, because it restores the pressure on businesses to make sure that they are good.

**Q166 Seema Malhotra:** At the moment there is no process for feedback from the client. You think that £2 million extra for peer review will cover the shortfall in potential costs. How would you see an assessment of performance against quality standards taking place within this process? Would this be self-assessment by firms, as to whether they are meeting quality standards?

**Chris Grayling:** Are you talking about within the contracting process?

**Q167 Seema Malhotra:** Yes, and during delivery of service, when people have a contract.

**Chris Grayling:** During delivery of service, our current intention would be to use peer review, because that is the mechanism that is in place. As I said, if there are suggestions from anyone—from this Committee, for example—about how to strengthen that, I am very willing to consider them. I have said from the start that we need to be sure that we can continue to deliver a quality service.

**Q168 Seema Malhotra:** Okay, but from what you say, there seems to be quite a significant shortfall in

terms of how that quality will be delivered, managed and—

**Chris Grayling:** Why?

**Q169 Seema Malhotra:** You are talking about a red flag system that would lead to peer review in 10% of cases, and you say that it will go to 100% with a £2 million budget. You are saying that at the moment there is no way in which you are building client voice into the system to get feedback. It seems that there will probably be a long time before people can be challenged on the quality of service that a firm is providing. Secretary of State, is your U-turn in relation to client choice possibly a reflection of concern about quality?

**Chris Grayling:** May I ask you a question? What do you mean by “U-turn”?

**Chair:** I think that we ask the questions.

**Q170 Seema Malhotra:** In terms of your letter, we know that there has been a U-turn in relation to client choice.

**Chris Grayling:** I take it that, if a Government Minister consults, listens and modifies proposals, that is a U-turn. Dare I ask—

**Q171 Seema Malhotra:** I am asking a simple question. Was a concern about quality—and any feedback in relation to that, which could be one of the reasons why somebody might want to change provider—at all a concern in your consideration of whether to bring in an element of choice?

**Chris Grayling:** One of the arguments that I listened to was that, if you allow choice, if you do not have a managed process of allocation of fees, it will put extra pressure on providers to make sure that they deliver a first-rate service. In terms of feedback from people who are charged with criminal offences, from their point of view there is a simple benchmark that they would tend to use: did they get off or not? We listened to the arguments on choice, and one of the arguments that influenced my decision was that it would drive up quality.

**Chair:** This Committee is not against U-turns. We quite often advocate them, and sometimes they take place.

**Q172 Steve Brine:** Very briefly, Lord Chancellor, following on from the mention of the U-turn, you said that you had asked the lawyers to design the quality standard. I am pleased to hear you say that there will be a further short consultation stage, possibly starting in September. Is there any part of you—this came up in our first evidence session—that is even mildly concerned that the profession is writing its own rules here? Is this not a little bit like the poacher writing the rules for the gamekeeper?

**Chris Grayling:** I do not think that it is. This is not a single organisation doing it for itself. The profession is a collection of different independent firms, which are competing with each other for business.

I regard the national bodies as being well able to say, “From our point of view, this represents an acceptable standard of service, and that doesn’t.” In a sense, given the difficult changes that we are asking the two

parts of the profession to go through, it is better that they are seeking safeguards to prevent a diminution of quality. What I really want is improvement and cost reduction through more efficient ways of working. What I do not want is to chuck out all the experienced lawyers and use cheap and cheerful services.

**Q173 Steve Brine:** But is there not a logical consequence to that? With great respect to your team, one of the criticisms made of the consultation document is that it had the feel of being written by people who had not been within a country mile of practising anywhere near this profession. Does that not suggest that this kind of collegiate work with the profession, with it being involved in designing the quality standards, should have been the starting point, rather than a point at which we have arrived only now?

**Chris Grayling:** I do not accept that at all. First, this document has not been conjured out of nowhere. It has been discussed exhaustively. The whole principle of competitive tendering goes back to 2006. It was proposed by the current Government in 2010.

The mechanism that we are actually proposing—a cost reduction that we need the solicitors to be able to deal with, a quality test to make sure that they are delivering a quality service, and then, effectively, a tie-breaker based on price—is not rocket science. There was only one issue of dispute that was very obvious to me early on. I know that there is lots of controversy around the depth of the proposal, but the one thing that resonated with me early on was that perhaps we had not got the choice piece right. The rationale for taking that decision was entirely logical. If we are asking organisations to go through a big process of change, I thought that we needed to be able to offer some certainty about the amount of business that they would get. But they themselves came back and said, “Actually, the choice issue is more important. You should use it to drive competition and quality.” I accepted that argument.

One thing that the MoJ is not short of is those who have been in practice as lawyers. I personally discussed the direction of travel with people I know in the legal world. We talked about this with senior figures privately before we did it. This was not conjured up out of thin air. It was not developed in isolation, in discussions with legal people; we talked to people quite extensively.

**Q174 Yasmin Qureshi:** Lord Chancellor, I want to explore with you the impact of some of the reforms that you are proposing on black and minority ethnic firms. We have received considerable evidence from different practitioners, solicitors and barristers, that the proposals would have a particular impact on BME firms, because by their nature they tend to be small firms, often one-person or two-person firms, and they may not be able to compete with the bigger firms. Are there any proposals or any way to protect those firms?

**Chris Grayling:** I simply do not accept that. I pay tribute to the BME business community in this country, which is among the most entrepreneurial, successful and effective parts of the private sector in the UK. There are some really great success stories in

the BME communities, and I simply do not accept that the BME communities are not as capable as any other part of our society. Probably they are more capable, given that entrepreneurial spirit, of rising to the challenge of delivering a new kind of business model, and delivering specialist services that are needed by parts of the BME community as well as more general services. I am absolutely confident that the BME communities have the entrepreneurial skills, the management skills, the business skills and the innovative skills to deal with these challenges just as well as anyone else.

**Q175 Yasmin Qureshi:** Lord Chancellor, I respectfully disagree. I attended a meeting of the Society of Asian Lawyers, composed of solicitors and barristers, about two weeks ago in the House. About 70 or 80 people turned up, and every one of them was complaining about this particular impact, and the fact that it would affect them more than any others. I have received letters from BME solicitors to the effect that they will be decimated as a result of this proposal. How come the practitioners are completely of the view that they will be decimated, whereas you seem quite confident that they will all survive?

**Chris Grayling:** Let me ask you a question. We do have an issue, which we fully accept, and which the Law Society fully accepts, because they are saying that there will have to be consolidation within this sector. Why should BME businesses be less capable of going through that than any other business? I just do not see why that should be the case. I know that it is difficult. It is difficult for all firms—for micro-firms and for the sector as a whole—and I have made no attempt to hide that, but I do not see why BME firms should face more of a challenge than anyone else.

**Q176 Yasmin Qureshi:** They tend to be much smaller. They often tend to be one-man or one-woman organisations, so for them to be able to achieve some of the economies of scale that the bigger firms can achieve is a problem. The majority of them are one-person firms. That is why they have more difficulties. The other problem, of course, is that if they go out of business the number of people from ethnic minority backgrounds in the judiciary is going to be reduced considerably as well.

**Chris Grayling:** I do not think these changes are going to lead to the sudden disappearance of large numbers of criminal legal aid lawyers. It may mean that people are working in bigger firms or in partnership groups that share back offices, but the solicitors who are currently working in those 1,600 firms doing legal aid work week in, week out are not going to disappear in a puff of smoke. Very likely they will end up, in many cases, working in a different environment, but that does not mean that we are not going to have highly qualified BME solicitors and barristers. It is desirable that we should have that, and it is desirable that we should encourage it, but I do not think that BME firms should have more fear than any other group of the changing landscape of criminal legal aid litigation.

You talk about Asian lawyers, but frankly, without the Asian business community in this country at the

moment our economy would be in a much poorer place, and I am confident that they will adapt to change as well as everybody else.

**Q177 Yasmin Qureshi:** I do not disagree that the Asian community and ethnic minority community make a very good contribution to our country. The point is that, in terms of the legal profession and small businesses, their view is that they will feel an unusually high impact. They tend to be right in the centre of the community. A lot of people go to them because of linguistic or cultural difficulties, and people who can understand them can act far better for them. I do not say that others cannot understand them, but on the whole if you can speak the language of your client you are more likely to understand where they are coming from. That is one of the problems that will happen. I am not saying that they are all going to go out of business—I do not think anyone is saying that—but the number of them who will be able to practise on the high street is going to be diminished a lot more than perhaps other businesses will.

**Chris Grayling:** Those points are valid. They are perfectly good reasons why I think I have taken the right decision on choice. However, the difference between having five sole practitioner firms in a town and having one firm with five partners delivering support is not going to remove from the individual the opportunity to go to somebody who speaks their language and understands the cultural issues and challenges.

One of the other issues is whether we have enough firms in the structure to deal with the issue of conflicts in cases. In the estimates that we have done we have looked at the case mix and the number of providers in our plans, and 99.95% of cases within a single criminal justice area are covered. Exceptionally, and very rarely, we might need to have a firm outside an area covering a big trial with multiple defendants. Actually, that can often happen now anyway, because you can end up in a big multiple trial with solicitors based some way away—but of course, in those situations the solicitor comes to the accused rather than the other way around.

**Chair:** We are now going to turn to other minority issues, with Mr Llwyd.

**Q178 Mr Llwyd:** Yes—although there are two of us on the Committee who speak Welsh, so we are not that small a minority.

May I tell you, Secretary of State, that in large parts of Wales, the Welsh language is the language of administration, of business and indeed of the law? Do you have a Welsh language policy in the MoJ?

**Chris Grayling:** Yes: the Welsh language issue is dealt with very straightforwardly. It is the law. In the same way, we have not set out in this document clear plans for how Welsh would be provided, because it is a legal requirement to do that. It is just a given.

**Q179 Mr Llwyd:** I am sorry, but I do not accept that. The fact that the consultation paper makes no reference at all to the Welsh language is, first of all, a breach of your own policy, so possibly unlawful. Secondly, it is offensive to many people in Wales who

speak Welsh and English. To finesse it by saying, “Of course it is a requirement, so we didn’t mention it”—well, I don’t buy that.

**Chris Grayling:** I do not want to have an argument about it, but the need to provide Welsh language services in Wales in the public sector generally is a given. It has to happen; it is a matter of routine, and it should happen. Welsh is the second language, or the first language, in Wales, depending on where you come from and your time of birth. We have an obligation in the Courts Service, the legal aid system, the prison system, including the prison that we will shortly start in north Wales, and in the probation system, to be able to speak Welsh. That is a given; it will always be the case. It is not something out of the ordinary, because it is routine.

**Q180 Mr Llwyd:** The first point, Minister, is that I was disappointed, as were many others, that there was no mention of the language in the competitive tendering paperwork. You say that that is because it is a general legal requirement. I say, “Sorry, but that excuse does not wash.” The reason why I say that is that, when I and others complained about the consultation paper not making any mention of it and being in English only, suddenly a Welsh language version was produced from thin air. If your excuse now is true, it would be true in that instance as well, so I am sorry, but I do not believe what you are saying.

**Chris Grayling:** That is your prerogative, but I regard the delivery of services in Welsh in Wales as an absolute *sine qua non*.

**Q181 Mr Llwyd:** Do you not see that there is a problem concerning the numerous firms in north Wales, west Wales, mid-Wales and south Wales that provide these services to those who require them? Again, you should be in favour of choice, I am sure. The scenario is that mega-firms from heaven knows where—it might be Eddie Stobart, or whoever—will come in, have a race to the bottom, and provide basic minimum cover. That is really what they are going to be doing; otherwise they would not be able to run it financially. Many of us in Wales, whatever our first language may be, are very concerned that there will be no provision for Welsh language clients, and there are many of them.

Last week we had a solicitor from north Wales—from Caernarfon, in fact—who said that the day before he gave evidence he had met nine people as a duty solicitor in the Caernarfon magistrates court. I think he said that there were nine who wanted Welsh language provision, three who wanted their trials to be conducted through the medium of Welsh, and so on. This is a big issue, which has been sidelined.

**Chris Grayling:** I simply do not accept your premise of big firms coming into Wales and driving things down to the lowest common denominator. As I have been saying all the way through this discussion, we need to deliver a quality service. I am not going to accept bids from organisations that cannot deliver a quality service.

I think that you are doing down the legal firms in Wales, which I believe will respond to this. I do not

see why Wales is not able to deliver a quality legal service, in a different business model and at a price that we can afford to pay, to deliver a Welsh language service and high-quality legal services to individuals. I am absolutely certain that the Welsh profession will rise to the challenge, and that we will have Welsh lawyers providing legal aid services to Welsh accused people, in Welsh or in English as appropriate.

**Chair:** Mr Brine, we are now moving on to procurement areas.

**Q182 Steve Brine:** Under the proposal for procurement areas, Lord Chancellor, it would be possible, would it not, for a defendant who lives, say, 50 yards from a criminal legal aid solicitor to be allocated a solicitor 50 miles away? Do I understand that correctly?

**Chris Grayling:** Of course, the solicitor in such cases comes to the individual. With a system of choice, the person will have the freedom to go to the solicitor 50 yards away. We have addressed that and given the individual the choice; if they choose to go to someone who is 50 miles away, because there is particular expertise, given the change that I announced earlier in the week they will be free to do so.

**Q183 Steve Brine:** Going back to the point raised by Mr McDonald earlier, and following on from the potential unravelling of the proposals as a result of the acceptance of choice—for the record, I do not think that that is a U-turn; you are right to say that it is the result of listening—will providers be able to tender for work only in the area that they are providing for, or can they cross boundaries? Does that have to change as well? I would suggest that it probably does.

**Chris Grayling:** Self-evidently, if we are going to have free choice, an individual can theoretically choose a solicitor from another part of the country. However, in making the changes we will have to look at what we do about duty slots. One of the areas about which we are in discussion with the Law Society is the allocation of duty slots in police stations, because in that mechanism we will need to be able to guarantee coverage. The means of allocating duty slots is something that we are now looking at quite carefully.

**Q184 Steve Brine:** I want to ask about one of the responses to the consultation that has been copied to us—as have a lot of them, I might add. Obviously I am a Hampshire MP, as you know, and one respondent asked how providers who win tenders for the Hampshire area, which covers the Isle of Wight, will be able to provide a full service, including 24-hour police station cover, when the ferries from the mainland to the Isle of Wight do not run on a 24-hour basis. Does that mean that one of the providers for Hampshire—it says on page 52 of the document that there will be nine of them—must be an island firm?

**Chris Grayling:** One of the things that have come through in the consultation is a strong representation from our good friend and colleague Mr Andrew Turner, from the Isle of Wight, who has asked us to look at the Isle of Wight as a special case. That is something that we will consider carefully, but the

means of ensuring that, most immediately, somebody has access to a lawyer in a police station, will be how we allocate and manage the duty slots. Given the change of choice, that is something that we are looking at carefully.

**Q185 Steve Brine:** You mentioned at the start your concern about coverage deserts; that was good to hear. This was mentioned in the Back-Bench debate last Thursday, which I am sure you have read, and yesterday in Justice questions. Concern is being expressed about what happens when the firms in some areas dry up—to continue with the desert terminology. I take on board the argument that the firms that are part of the contract in the proposed new procurement areas can subcontract to the smaller firms, but when those smaller firms have dried up the bigger ones cannot subcontract to them. You cannot reinvent them once they are gone. What happens about that?

The other concern that I have, which I raised in the Back-Bench debate last Thursday, is this. Does it not put us, and the taxpayers we represent, in a rather difficult position, in that the providers in those procurement areas will hold a pretty stacked pack of cards when it comes to reassessment and the re-judgment of the contract down the line? Does the document consider that? Have you considered that?

**Chris Grayling:** I am not sure that I quite understand that last point.

**Q186 Steve Brine:** Take the point on deserts first.

**Chris Grayling:** The whole point about deserts, and the reason why we are doing this, is as follows. The easy option would be just to say that we are cutting fees by 17.5%, full stop, end of story. A few people have said, “Why don’t you do that?” The answer is that you then have an unmanaged process of transition. The danger in that case is that in parts of the country the right steps are not taken to amalgamate shared costs and bring down costs in a deliverable way, and we end up simply with an absence of provision altogether.

In my judgment, through all this we need a mechanism that ensures that, at the very least, when people are arrested and taken to a police station there is a duty solicitor—somebody based in the area—who has the ability to come in and provide legally aided advice to that person. That is the reason that we are going for a contracting framework. The whole point about the contract structure is not that it creates advice deserts but that it prevents them. In an unmanaged transition we would have no guarantees whatever about the availability of support, and I would have no mechanisms in place to simply replace. If we have a contracted structure and somebody goes bust, disappears or pulls out, there is a mechanism available to move to replace them quickly.

**Q187 Chair:** Do you recognise that that problem exists already, and that what you are now proposing has to address the fact that, in a number of areas, the number of solicitors doing criminal legal aid work is very small? In the town of Berwick-upon-Tweed there are only two firms doing criminal legal aid work; you have to go 40 or 50 miles to find another firm that

you could bring in. There are only two firms resident in the area. There are other remote communities like that around the country. The pressure on criminal legal aid lawyers under the present system has driven us to that point. We cannot afford to make it worse.

**Chris Grayling:** Yes, Sir Alan, but the whole point is that, if I bring down costs, which I must, the danger is that that process accelerates, and I have no mechanism to sort it out. Most fundamentally, at the very least I have an obligation to ensure that, if somebody is arrested and taken to a police station, we know that there is somebody who will be there to go and provide them with legal advice. That person can subsequently choose to go wherever they want to go in terms of solicitors, given the change that I have made, but we need to be sure that there is somebody there to give them legal advice. At the moment, there is no mechanism to do that. If we push through further changes and reductions in cost, which we have to, without any kind of structure in place to ensure that we can guarantee that coverage, there is a danger that that problem will become more acute.

**Q188 Steve Brine:** The point is still that you cannot guarantee that coverage if the providers that you would turn to—if somebody becomes insolvent, for instance—have disappeared, because they have dried up. That is the concern that keeps being expressed.

**Chris Grayling:** Yes, but the essence of the discussion that we are having with the Law Society, which they accept, is that their sector has not changed as it should have done. One of the things that they are saying is that it has not changed as it should because for the past seven years, going back to 2006, there has been a doubt about what the future held.

If we do not have a sector on a sustainable footing and we are forced to drive through change, we will have less certainty that anyone will be around to step in. It will be different if we have a sector with fewer, stronger, organisations—it is a business sector, and people like to expand and grow their businesses; we know that there are stronger organisations around. I do not mean giant organisations; that is all a complete myth. It has been frustrating to see the way in which people have focused in on a small number of giant national brands, in which I have no interest in all of this. I am simply looking to get medium-sized decent law firms, delivering a service at a price that we can afford, around the country. The acceptance from the Law Society is that some consolidation will have to take place to achieve that.

**Q189 Steve Brine:** Yes. I shall now try to make my second point more eloquently, as I clearly failed the first time.

If there are fewer, stronger, organisations, are you confident that there will be enough of a market to create a vibrant, competitive marketplace when it comes to re-contracting the companies working in the proposed procurement areas?

**Chris Grayling:** Yes, I am. Actually, the sector itself is going through a huge amount of change, with alternative business structures being set up. You are now looking towards multidisciplinary professional firms, with more stronger firms. Their opportunities to

look to expand will be much greater, frankly, than those of the one-man or two-man, one-woman or two-woman, or one-partner or two-partner firms would ever be. I think that you will end up with a more vibrant, more competitive marketplace, and certainly not with one that is dominated by half a dozen giants.

**Q190 Gareth Johnson:** Secretary of State, may I move on to your proposals to amalgamate the fees awarded where a defendant pleads guilty or where there is a late guilty plea—otherwise known as cracked trial—or a short trial? Your proposal, as I understand it, is to have just one fee. Whether someone has a two-day trial, pleads guilty or has a cracked trial, they will get one fee based on the cracked fee model that exists at the moment.

Do you accept that there are at least dangers here, and that undue influence will be placed upon a defendant to plead guilty because clearly, under your proposals, there are financial incentives to have someone pleading guilty at an early stage rather than going through a short trial?

**Chris Grayling:** As a steward of taxpayers' funds I want people who are guilty to plead guilty as early as possible, but I do not for a second believe that the high professional standards in our legal profession would allow any lawyer to try to persuade someone who was not guilty to plead guilty.

**Q191 Gareth Johnson:** With the best will in the world, Secretary of State, and contrary to some people's opinions, lawyers are human beings.

**Chair:** We shall assume that for the moment, anyway.

**Gareth Johnson:** Assuming that lawyers are human beings, there is a great danger, is there not, that they could turn up at a courthouse and say to themselves, "You'll get the same amount of pay if you are there for one hour, with that person pleading guilty, as you'll get if you are there for two days with that individual"? Surely there is a huge danger of that human being saying to the defendant, "Look, do you want to plead guilty to this?" Even if that is just a small element of lawyers, who are perhaps not as professional as they should be, do you not accept that under these proposals, where there will be less kicking around in fees, and less money in the system, a huge pressure will be placed upon the lawyer, who is trying to pay their mortgage and trying to make ends meet, to say to their client, "Look, if you can plead guilty, if there is a way you want to plead guilty to this, let's facilitate that"?

**Chris Grayling:** I struggle to accept that, I am afraid. It is in all of our interests if someone who is guilty pleads guilty early. They get a shorter sentence, it costs the system less money, and it takes less time. It is by far the best option. But I simply do not believe that we are going to get into a situation where people who are innocent are being coerced into pleading guilty by lawyers for financial reasons. I just do not believe that those standards exist in the legal profession.

**Q192 Gareth Johnson:** Under the current system, as you are aware, you get paid for the work that you do. Quite rightly, the defendant gets a discount in their

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sentence if they plead guilty at an early stage. That is absolutely right, and no one is arguing against that happening. However, what we do not have in the system at the moment is a financial interest for the lawyer in having their client pleading guilty, and being there for an hour rather than two days. Surely common sense says that there is a danger of undue influence upon that defendant to plead guilty, when otherwise they should not be doing so.

**Q193 Chair:** Or of the defendant believing that their lawyer is persuading them into a course of action because he has a financial interest in it.

**Chris Grayling:** You could equally well look at it the other way around and argue, which I do not, that the lawyer has a vested interest in persuading the individual not to plead guilty so that they go to trial, with the additional financial benefit of a trial.

When it comes to a guilty plea decision, I do not accept that individual lawyers will put pressure on somebody who is not guilty to plead guilty. I want lawyers to be putting pressure on those who are guilty to plead guilty early, because that is in all of our interests. I do not want, and I would expect, an individual—I regard the professional standards of the legal profession as being much higher than that—to try to persuade somebody who is not guilty to plead guilty.

**Q194 Gareth Johnson:** We could explore that further, but we are under time pressure. I have just one further question. I understand, Secretary of State, that no impact assessment has been carried out on the impact that these proposals would have on the victims of crime. Is that the case, or has an impact assessment been carried out on the consequences of these proposals for victims of crime, particularly vulnerable victims?

**Chris Grayling:** I am not immediately sure that I understand directly why such an impact assessment would have been produced. We are talking about victims of crime, and what those victims need is for people to be convicted when they are guilty, so that victims have some degree of closure.

**Q195 Gareth Johnson:** The whole point of the criminal justice system is to protect the victims of crime.

**Chris Grayling:** It is.

**Q196 Gareth Johnson:** So surely an impact assessment would have been carried out on the consequences of these proposals for vulnerable victims of crime, would it not?

**Chris Grayling:** I am not entirely sure that I understand where the consequences are that would lead to a need for that.

**Q197 Chair:** To take one example, we might have more self-represented offenders confronting the victims of their crimes.

**Chris Grayling:** I have to say, Sir Alan, that, looking at the changes that we are bringing forward, I do not think that that is going to be the case. In the kind of serious case that you are talking about, the accused

will still have—and would always have had—access to a barrister of choice, selected by their solicitor as being most suited to represent them in court. I do not really believe that we are likely to see more self-represented individuals than we do at the moment. The prime concern of somebody accused of a serious crime will be to get themselves found not guilty. To do that they will seek legal advice, particularly where legal advice is made available by the taxpayer, as it will be.

**Chair:** Thank you. There is a significant area that we have not talked about so far, which perhaps has not featured sufficiently in the public discussion about these proposals. That is their impact in the civil area. We are going to look at some aspects of that, and we start with Mr Corbyn.

**Q198 Jeremy Corbyn:** I want to move on to the question of prisons and prisoners. Do you accept that putting somebody in prison is an enormous responsibility? There is a duty of care on the Prison Service and the Ministry to ensure that they are okay. Thirdly, prisoners have the right to make complaints and, if necessary, take a case to court if they feel that they have been badly treated in prison.

**Chris Grayling:** I suspect, Mr Corbyn, that this is an area where there is an ideological difference between us. I am absolutely of the view that somebody in prison should have the right to legal aid when it is a matter relating to their sentence and the length of time that they will spend in prison. When it is a matter relating to the conditions in the prison, or the choice of prison in which they are detained, we have a prison complaints system and a prisons ombudsman. To my mind, that is the route that we should follow. I do not believe that prisoners in jail should have the right to access legal aid to debate which prison they are put in.

**Q199 Jeremy Corbyn:** I shall quote Her Majesty's chief inspector of prisons to you. He stated that "inspection evidence is that the internal prisoner complaints system cannot be entirely relied on to consistently resolve prisoner complaints and concerns in a fair way." There are many examples where prisoners have been able to take a case to court through legal aid, or get resolution through legal aid support without going to court, because the internal prison system did not work, and their complaints were not taken seriously because the governor was not interested. Do you not accept that prisoners have rights to have their complaints properly dealt with?

**Chris Grayling:** That is why we have a prisons ombudsman. I do not believe that they should be able to take those complaints to court, unless it is a matter relating to the amount of time that they are going to spend in prison. As I say, I suspect that this is simply an ideological difference between us. I do not agree.

**Q200 Jeremy Corbyn:** It might be an ideological difference, but you have a duty of responsibility to ensure that prisoners can exercise their rights. You are trying to save £4 million on prison law. Is this ideological or practical?

**Chris Grayling:** It is ideological. I do not think that prisoners should be able to go to court to debate which

prison they are sent to. That should be a matter for the people who detain them. We have an ombudsman service that they can refer to if they have a legitimate complaint, which can make appropriate rulings, but I think that is as far as we should go.

**Q201 Jeremy Corbyn:** What other things could they not take to court?

**Chris Grayling:** The matters to be taken to court should be limited to the whole issue of the length of time that they are in prison. That is a perfectly legitimate reason for a convicted offender to have access to legal aid in order to seek a ruling from a court. That, to my mind, is the only area in which they should be able to do that.

**Q202 Jeremy Corbyn:** They have no rights other than to challenge the length of sentence. Is that what you are saying?

**Chris Grayling:** I am saying that the taxpayer should not be paying legal aid for prisoners to go to court to debate which prison the Prison Service has decided to detain them in, what the conditions are in their cell, or whatever.

**Q203 Jeremy Corbyn:** You have already answered that point, but there are cases where a prisoner may claim ill treatment, violence and so on.

**Chris Grayling:** A small number of treatment cases still come through, but more cases are about which prison people are sent to—and I am afraid that I do not think that that should happen.

**Q204 Chair:** If somebody has suffered significant neglect in respect of a medical condition while in prison, for example, or has been put in conditions that are totally unreasonable and would not have been imposed in most other prisons, are there not circumstances where, as has happened in the past, these are proper matters to come before a court, as part of the ability of the courts to safeguard how prisons function?

**Chris Grayling:** I think that these are matters for an ombudsman. We have seen the area of prison law expand dramatically. It has more than doubled in the last few years, with the amount of money that is being spent on legal aid for prison law. In my view, it now covers areas that it should not. Those who end up in our prisons should rightly have a route of complaint, which they do through the internal complaints service and through the ombudsman, but I do not believe that the taxpayer should be paying for them to go to court.

**Q205 Jeremy Corbyn:** Do you believe that in cases of inappropriate treatment in a mother and baby unit, or the denial of access to a mother and baby unit, or when prisoners have mental health difficulties and may need help and support and representation, such people do not have a right for their case ultimately to go to court, if they feel that they are not getting their concerns addressed by the prison ombudsman? Surely that is a right that every other citizen has.

**Chris Grayling:** That is why we have prison visitors, a prison complaints system, independent monitoring boards and a prisons ombudsman—to make sure that

those safeguards are in place. I do not believe that it is appropriate for us then, on top of that, to be paying for legal aid for those cases to go to court.

**Q206 Yasmin Qureshi:** Lord Chancellor, I know that you say this is an ideological difference, and you have said that you think that prisoners are going to court because they want to change the prisons they are living in—but I think you will find that very few, or hardly any, cases go to court on the basis that someone should be in prison A as opposed to prison B. Most of the cases that end up going to the courts are those of people who have been abused physically or mentally, have not been looked after properly or have been neglected, or have had their mental health issues affected. That is the type of case in which people have committed suicide.

In some prisons, like Feltham young offenders institution, you must be aware of the level of abuse that takes place of young people by other inmates, and sometimes by prison officers who fail to take account of their vulnerability and need for protection. Unless there is recourse to the court, all those people who are being abused and treated badly in the Prison Service—I am not talking about a prison regime that makes them get up at 7 or 8 o'clock in the morning and do some work, but about real abuse of prisoners that takes place in prison—will not be able to go to court at all, simply because they happen to be incarcerated.

**Chris Grayling:** A huge amount of effort is made within the prison system to try to protect those who are vulnerable and those where there is a risk of harm.

**Q207 Yasmin Qureshi:** I am sorry, but that is not right. I can tell from my experience of 20-odd years in practising criminal law, and having come across clients who have had problems in prison, that the internal prison complaints system is just not working.

**Q208 Chair:** The Secretary of State has given us his view very clearly. I just want to explore one point. Is it your position that the Legal Aid Agency and its predecessor, which have allowed 11 cases to be the subject of legal aid since 2010, is not applying a stringent enough test?

**Chris Grayling:** The 11 treatment cases are really only a small part of the change. The big change is that we are actually moving into a middle block. There are really three groups of cases. There have been treatment cases, cases that are more about categorisation of detention, and cases about length of sentence. We are saying that for the first two of those legal aid will not be available, but for the third it will be.

**Q209 Chair:** What is wrong with a system where a stringent test is applied and only a very limited number of cases are granted legal aid in the categories that you want to exclude altogether?

**Chris Grayling:** The numbers in the middle section are rather bigger, but it is a question of principle. I do not believe that people in our prisons should be able to get legal aid to go to court. We have an



inspectorate, we have independent monitoring boards, we have—

**Q210 Chair:** We are familiar with all those organisations. They come to see us regularly.

**Chris Grayling:** They are there to safeguard against—

**Chair:** Your answers on this subject have the benefit of being absolutely clear, although many people might disagree with them.

Let us move on to another important area, the residence test.

**Q211 Steve Brine:** The residence test was very much the focus of the debate last Thursday, but only in the opening speech by the sponsor of the debate. We then moved on, me included, to talk about the choice agenda. Do you accept that the 12-month continuous residence test will have a serious effect on a range of vulnerable people? Let me qualify that by asking you this. How will the rights of victims of domestic violence and, in an immigration context, trafficking victims be protected if there is a 12-month residence requirement?

**Chris Grayling:** The important thing to bear in mind is that the residence requirement excludes asylum seekers, so assume that it excludes people who are seeking refugee status—and it should, because this country has always been a welcoming refuge for people who are genuine refugees seeking that status. I am not at all convinced, however, that we should be providing legal aid to, for example, failed asylum seekers. What we sought to do was to find a balance. We are going to have to do this across Government, and there is overwhelming public desire for it.

People cannot simply expect to be able to come to the UK and access public services free and without condition in all circumstances. We are going to see a whole range of tightening up. Today we have heard announcements on the health service and more charging for people coming into the country. My personal view, in the case of legal aid, is that you should have spent some time in this country and contributed to the country before you can access legal aid in civil cases. In criminal cases it is different. In criminal cases we have an obligation, for somebody who comes here and commits an offence, even if it is only 24 hours after they have arrived here, to provide them with a lawyer to defend them in court.

My judgment on these proposals is that there are a number of caveats around them: we have an obligation to provide exceptional funding in cases linked to international agreements; and inquest funding has always been treated as exceptional funding. The tragic case of Jean Charles de Menezes has been cited, but that would not have been covered by these changes because inquest funding has always been provided on an exceptional basis, and that will continue. A trafficking victim who seeks refugee status would be covered by the provisions on refugee status. I think that we have to set the bar somewhere and say that there are limits to how far we are willing to allow people simply to come to the country and access publicly funded support very quickly. That is what the residence test is all about.

**Q212 Steve Brine:** But it would exclude, for instance, all children under 12 months from receiving legal aid, because clearly they could not—

**Chris Grayling:** The one issue that I would indicate today that I am going to look at again is that of children under 12 months. It is an area that has been mentioned to me by figures in the judiciary. That is the one area that I will look at again, but, as for the overall principle, I stand firmly behind it.

**Q213 Steve Brine:** That is very welcome news, and I think that a lot of people will hear that loud and clear. In the arguments on LASPO—the Legal Aid, Sentencing and Punishment of Offenders Bill—in the other place, exceptional funding was the compromise, if you like, that was worked out. Is that to be completely redrafted? It is relatively new, but are the exceptional funding provisions to be redrafted already? If so, who will decide who comes under exceptional funding?

**Chris Grayling:** At the moment that is decided by the Legal Aid Agency, and that will continue to be so. For example, for a case linked to a UN convention that we were part of, it would have to be decided within the Legal Aid Agency.

**Q214 Steve Brine:** As to who is a deserving domestic violence victim or who is not, for instance.

**Chris Grayling:** Or who is eligible under the agreement.

**Q215 Steve Brine:** That is another piece of work that will have to be done.

**Chris Grayling:** That is always there; that has been there from the start. We clearly have an obligation to fulfil international treaty requirements, and in a very small number of cases we may have to act in order to fulfil international agreements.

**Chair:** I turn to Yasmin Qureshi for a quick point before going on to one other aspect.

**Q216 Yasmin Qureshi:** On the residency test I am glad to see that you will review the issue of 12-month babies, but what about some of the other cases—for example the Gurkhas, or the people in Guantanamo Bay, who would obviously, under these proposals, not be able to bring cases to court? Often these are cases of a citizen against the state, and the state is quite often doing wrong things. Effectively, under the new proposals, that challenge of the state by a citizen can no longer happen, can it?

**Chris Grayling:** You have to draw a line somewhere. We face tough financial times, and there are limits to how much the state can do for all people in all circumstances, but what I am trying to do is to draw sensible lines.

**Q217 Yasmin Qureshi:** Are you saying, for example, that we should not have any sympathy for the Guantanamo Bay people or make any provision for those people to challenge in the courts here what has happened to them? Given the level of abuse that they have had, and the abuse that the people have had in Iraq, are you really telling us, as a civilised society and as a state responsible for engaging in wars in these

countries, that we can find billions of pounds to spend in Iraq and other places but we cannot afford to give a little bit of money for people affected by abuses to be able to challenge that in our courts?

**Chris Grayling:** I do not believe that the British taxpayer should be expected to pay for Iraqi citizens to sue the British Government.

**Chair:** We now move on to another area, with Mr Corbyn.

**Q218 Jeremy Corbyn:** Do you accept that judicial review is quite an important right that citizens have in order to hold public authorities to account?

**Chris Grayling:** Yes, I do, and we intend to retain judicial review as a way for individuals and others to hold public bodies to account. However, I am also very much of the view that judicial review is not the creature it was originally intended to be. It has expanded in numbers beyond where it was originally intended to be, and it is often used as a PR tool rather than a serious legal tool. Too many cases are being brought before the courts by individuals and law firms that are simply rejected at that point, which have been funded by the taxpayer. I think we need a tighter system that protects judicial review as it was originally intended to be, and not what it has become.

**Q219 Jeremy Corbyn:** The power exists for a judge deciding upon an application for permission for judicial review to identify a case as “totally without merit.” Would not relying on the judge making that decision meet your concerns better than ministerial interference to decide what should or should not be a judicial review?

**Chris Grayling:** The basic problem at the moment is that, of the 1,800 or so cases that come to a judge, almost half are rejected, and we are paying for those cases to be brought. At the end of the day, if a lawyer is advising a client that the case is good enough to get through and to go to judicial review, should that lawyer not have some risk on the table with that judgment? At the point when the case would be brought before the court, and whether or not the judge decides to allow it to go forward, should we as taxpayers automatically pay for it?

My view is that, if it is a bona fide case that goes through properly, the lawyers involved will be paid, and legal aid will be paid as it is now—but if a case is too weak but a lawyer who writes a good letter gets approval from an unqualified person in the Legal Aid Agency, and the judge then says that that is simply not the case, should we as taxpayers be picking up the bill for that? There seems to me to be a very obvious and simple test. If the judge says, “Yes, this is something that needs serious consideration,” we will pay the bill. If he does not, we will not.

**Q220 Jeremy Corbyn:** How do you get to the situation where the judge can make that decision if you deny legal aid to anyone wanting to make an application in the first place? You have already said that less than half the cases are rejected by the judge, which means that over half are accepted.

**Chris Grayling:** In that case the lawyer will be paid. It puts a bit more of an onus on the lawyers involved

to make sure that the cases that come forward are strong ones.

**Q221 Jeremy Corbyn:** How will they get there if there is no money to be paid for individuals to take a case?

**Chris Grayling:** I would expect the lawyers to be working on the understanding that if they are confident enough in their case it will get through, and they will be paid on that basis. I am not going to guarantee them payment for failure.

**Q222 Jeremy Corbyn:** Will you be monitoring this, if and when the proposal ever comes in?

**Chris Grayling:** Yes. We will look quite carefully at the impact, but I hope and believe that it will lead to fewer cases being rejected. Actually, that is what we want. We want judicial review to be a system whereby people bring genuine cases that are given proper consideration. I do not want judicial review to be, in my view, devalued by a large number of cases that should not have been brought. We have seen that in many areas.

In an immigration case last autumn, the judge was scathing about the use of judicial review to keep on coming back. We are tightening the rules around immigration, but you see these things going round and round, and in too many cases judicial review is not used for the genuine purpose of challenging a decision—a substantial decision—by a public body. Often, it is used as a delaying tactic or as a public relations tool, and those are the bits that we have to get rid of.

**Jeremy Corbyn:** You will have received many representations on this subject, and that is what I want to ask you about. We heard a very strange answer from you yesterday—

**Chair:** We are still on judicial review. If you are moving on to another point, I want to hear Seema Malhotra on judicial review first, if I may.

**Jeremy Corbyn:** I shall come back to that.

**Q223 Seema Malhotra:** Secretary of State, may I ask whether you believe that your proposed changes to civil legal aid for judicial review raise any constitutional issues and require scrutiny from a constitutional perspective?

**Chris Grayling:** I do not think so, because I am not planning to get rid of judicial review. I want it to be used for serious purposes.

**Q224 Seema Malhotra:** Do you think that there could be, even if it is unintended, a cumulative effect whereby one of the key mechanisms for protecting, or for providing a constitutional safeguard, against the misuse of executive power could be reduced in any way?

**Chris Grayling:** When judicial review was first introduced 40-odd years ago, I do not believe that the people who designed it ever intended it to be used as a technical delaying tactic, which is what it is sometimes. Those bringing judicial review will find a nuance in a consultation document or a bit of a policy platform that is not 100% right, and will go to court to try to get a consultation re-carried out or

whatever—on a technicality. Judicial review should be used to challenge material decisions taken by a public body that are materially wrong. That should be its purpose; it should not be used for campaigning purposes.

**Q225 Seema Malhotra:** Are you aware that the Constitution Committee of the House of Lords has drawn this conclusion, saying that it agrees that the Government's proposal raises constitutional issues and that they require scrutiny from a constitutional perspective?

**Chris Grayling:** I would be very surprised if the Constitution Committee of the House of Lords did not want to investigate constitutional matters, and it will no doubt do so, but we do not intend to remove judicial review. We do not intend to change the fundamental purpose of judicial review, but we do intend to achieve a situation where judicial review is used for the purposes it was intended to be used for.

**Q226 Seema Malhotra:** I take it, then, that you would disagree with the conclusion reached by the Constitution Committee.

**Chris Grayling:** I do not believe that anything that we have proposed so far on judicial review, or indeed anything that we are likely to propose, will have a significant constitutional impact. What we are trying to do is to leave judicial review in its core constitutional role, which is to challenge public bodies where they do things materially wrong. It is not there, and was never designed to be there, to delay or to grandstand, but that is often what it is used for.

**Q227 Chair:** You rather give the impression that some of the successful judicial review cases are ones that you would regard as inappropriate for judicial review.

**Chris Grayling:** No, it is more some of the unsuccessful cases.

**Q228 Chair:** I am thinking of the successful cases where the Government's consultation process has erred in some way, rather fitting your earlier description.

**Chris Grayling:** Okay, in that particular situation. To my mind, a judicial review challenge should be all about whether, if something had been done differently or had been known differently, it would have made a material difference to the decision making of that public body. If it would have done, it is right and proper that it should be looked at again. Often, cases are built around a nuance, where it would have made very little difference or no difference to what the public body would have done, and the case has been brought for delaying purposes or because the body bringing the case wants to make a political or campaigning point. That is really what I want to see off.

**Q229 Jeremy Corbyn:** You gave a very strange answer yesterday about the consultation process. There have been a lot of replies to the consultation process, despite it being very short. Many of the people that have written in by e-mail have been told

that their e-mails have been deleted. You said yesterday that none had been deleted, but that if any had, people should send them again. Will you publish a list of everyone that has made submissions, and will you publish the submissions that they have sent?

**Chris Grayling:** Let's be clear about the position. I am sorry if my answer confused. The position is that no consultation responses have been deleted. There may have been a software error, we think, possibly because of automated responses between e-mails, which we often get in the House. If I e-mail Sir Alan, I may well get a response saying, "Thank you very much for your message to Sir Alan Beith, MP for Berwick." It may well be that my e-mail then bounces back to him.

**Q230 Chair:** Oh no; you would have got a substantive reply from me.

**Chris Grayling:** There are automated responses, and we think that in the to-ing and fro-ing of automated responses an error message appeared that should not have done. It was a software error, and we are looking at why that has happened and getting it investigated. We will obviously make contact with anybody that we can identify who has received that e-mail to reassure them, but let me give a clear assurance that no responses have actually been deleted, and all responses are going to be considered.

**Q231 Jeremy Corbyn:** Will all responses be published?

**Chris Grayling:** It has never been the practice for all responses to be published. What we will do is publish a summary of all the responses in due course.

**Q232 Jeremy Corbyn:** In the absence of a receipt, how do individuals know whether their submission has been considered or not?

**Chris Grayling:** We have checked on the software front. Bear in mind that we log responses when they come in, and no responses have been deleted. We have gone through the software side of this and checked with our IT people, and no responses have been deleted. It is an unfortunate error message that has got into circulation, we think due to the to-ings and fro-ings of automatic e-mail responses, but I assure the Committee that no responses have been deleted.

**Jeremy Corbyn:** You cannot blame people for being a bit confused and a bit suspicious when the only reply they get is that their e-mail has been deleted.

**Q233 Chair:** Not only that, but the reply said that the email "has been deleted without being read."

**Chris Grayling:** I am not pretending that this is ideal, but I can say to the Committee that we have checked and that no responses have been deleted.

**Q234 Jeremy Corbyn:** What would your advice be to somebody who has had such an e-mail, saying that their message has been deleted unread?

**Chris Grayling:** My advice to them would be that they should be reassured that it has not been deleted unread.

**Q235 Jeremy Corbyn:** It is the opposite of what they were told.

**Chris Grayling:** It is an error message that should not have been generated. It was a software error, and it should not have happened. I apologise to them for the fact that they received that message, but I would reassure them that their e-mail has not actually been deleted.

**Q236 Jeremy Corbyn:** Will they now get a message saying that it has been received and is being read?

**Chris Grayling:** Where we can identify people who have had that message, we are following it up to make sure that they are aware that that is the situation.

**Q237 Jeremy Corbyn:** If they contact you on receipt of that message, will a proper reply be sent that is the truth, and not the opposite of the truth?

**Chris Grayling:** They will, of course, be told the truth, but I say to the Committee that the truth is now that all responses have been received and are being read.

**Q238 Chair:** Thank you for the time that you have given us this morning, and for the clarity of your answers, even those answers that caused us to raise our eyebrows. We will engage with you in the process that you have described to us. That is welcome to us, because if we had been looking at the original timetable, the one that was first suggested for bringing

the original proposals into place, we would have been making it clear to you that we did not see how that could be achieved. A different process is now taking place, including a new consultation document of some kind. Did you say it would be released in September?

**Chris Grayling:** Yes, I would expect to have a short consultation starting at the beginning of September. We would set out our finalised proposals, or at most a couple of options for those finalised proposals. We would do a short consultation on those and then move ahead with change.

**Q239 Chair:** A short consultation presumably means that it will be over before Christmas, does it?

**Chris Grayling:** Yes, it will be something like four to six weeks. That would still mean, Sir Alan, that the overall period of consultation will be longer than the 13 weeks that was called for previously. It seemed more sensible to do it that way, because it enables us to digest the first responses, to coalesce any common issues—such as the choice issue, where I took the early decision that it was something that we should change. We can then set out pretty clearly where we have got to, having listened to everyone, and be able to get any nuances where people come back and say, “Yes, but that bit still does not work because...” Then we can press ahead.

**Chair:** Thank you very much indeed, and thanks to your colleagues. The Committee now needs to continue in private session.

ISBN 978-0-215-06091-4

