



**'Transforming Legal Aid - Next Steps' Consultation  
Paper**

**The Response of  
The Criminal Bar Association  
of England and Wales**

**October 2013**

## **Section A Executive Summary**

1. This response by the Criminal Bar Association (“CBA”) should be read in conjunction with the CBA’s June response to the Ministry of Justice (“MOJ”) April 2013 consultation. Any analysis of this response needs also to address the issues raised in the June response.
2. The CBA welcomes the government’s abandonment of its proposals to introduce Price Competitive Tendering; and in particular its acknowledgement of the principle of client choice.
3. The CBA expresses concern about the government’s stated intention to bring in without further consultation its proposals in relation to prison law, judicial review, imposing a financial eligibility threshold in the Crown Court, introducing a residence test, reducing expert fees and removing borderline cases from the civil merits test. The response raises legitimate concerns about the adverse effect of these measures on access to justice and the CBA calls upon the government not only to reconsider the proposals but to meet with stakeholders to agree a way forward.
4. The CBA opposes the revised model for introducing competition to the Criminal legal aid market and warns of the impact of the proposals on the majority of High Street solicitors’ firms; the downward pressure on firms to provide legal services at the lowest price at the cost of experience and quality of representation; and the effect on access to justice.
5. The CBA highlights the inaccurate and misleading figures used by the MOJ to justify the level of cuts proposed; and challenges the paucity of evidence used by the MOJ to justify the proposals. The actual figures demonstrate a significant drop in legal aid spend over the last 4 years.
6. The CBA warns of the impact of further cuts in advocacy fees (already in

real terms significantly below those paid in 1997 when the Graduated Fee Scheme was introduced) on the independent criminal Bar and the effect on retention and recruitment, the impact on BME and women practitioners and the future recruitment of the judiciary.

7. The CBA expresses genuine fear that the current proposals fundamentally undermine two pillars of the criminal justice system, access to justice for all and the delivery of quality legal services to the State and the most vulnerable by experienced, committed, independent advocates.
8. The CBA expresses its concern that the MOJ has not considered with the CBA and other stakeholders alternative proposals to drive out inefficiencies within the system, drive down cost and maintain quality. Indeed, the public would expect as much. The CBA again offers to assist the MOJ in a review of efficiencies and cost in the criminal justice system and to work with all stakeholders in finding solutions.
9. The CBA calls upon the Lord Chancellor and Secretary of State to pause before implementing any of the current proposals to allow time for proper consideration of the recently MOJ-commissioned systemic review and the Jeffrey review of the future of independent criminal advocacy. The CBA will assist with both of these reviews and will cooperate with the MOJ and other stakeholders to ensure that cost effective solutions are identified and delivered. This would at the same time reassure the public and ensure that the Criminal Justice System in the UK continues to set the international standard for the delivery of Justice for all.

## **Section B General Introduction**

### **The Criminal Bar Association**

10. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
11. The CBA’s role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
12. The CBA is the largest specialist Bar association, with over 4,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

### **The Consultation Process**

13. On 9th April 2013, the Ministry of Justice published a consultation document entitled, ‘Transforming Legal Aid: delivering a more credible and efficient system.’ It was aimed at ‘providers of publicly funded legal services and others with an interest in the justice system.’ In the

ministerial foreword, the Secretary of State for Justice asserted that the proposals to reform legal aid are, *inter alia*, ‘to encourage greater efficiency in the criminal justice system to reduce costs.’ The consultation was dense with detailed proposals relating to five main areas:

- i) Eligibility, scope and merits;
- ii) Introducing competition into the criminal legal aid market;
- iii) Reforming fees in criminal legal aid;
- iv) Reforming fees in civil legal aid; and,
- v) Expert fees in civil, family and criminal proceedings.

14. There was consultation also on the Impact Assessments (IAs) purportedly carried out by the MOJ and responses were invited. In total the consultation paper and IAs extended to some 200 pages.
15. In his foreword, the Secretary of State asserted that “...over the past decade, the [legal aid] system has lost much of its credibility with the public...” We do not accept that there is a lack of public confidence in the criminal legal aid system. No evidence is cited for this assertion, and we do not believe that any exists. For example, there have been several recent cases in which the extradition of a British citizen was sought for trial in a foreign jurisdiction, leading to public clamour, in the press and elsewhere, for the person to be tried in England where it was perceived that he or she ‘would get a fair trial.’ The public perception is that England and Wales has the finest Criminal Justice System in the world, and the dedication and professionalism of legal aid lawyers is a major factor contributing to that reputation.
16. In June 2013 the CBA submitted a 143 page response to the Consultation paper. The response dealt in detail with matters of principle in addition to the specific issues raised. In summary, we argued that the Consultation:

- i) wrongly asserted that Price Competitive Tendering (“PCT”) would ensure sustainability and value for money in the legal aid market; and wrongly assumed that PCT would leave sufficient quality within the criminal justice system;
- ii) recklessly abandoned the principle of client choice over representation in criminal courts;
- iii) would, if implemented, lead to a loss of public confidence in a criminal justice system in which justice would be subordinated to the economic interests of a few providers of defence services, whose market would be guaranteed by success in tendering rather than success in the ability to provide a good quality service;
- iv) would wrongly introduce a financial eligibility threshold for legal aid; inaccurately calculated disposable income; and that there should be a presumption that those who are facing a trial that will cost above £5000 should be granted legal aid;
- v) grossly underestimated the Equalities Impact of the proposed changes; and we expressed our concern that these changes would be socially regressive, would reverse many of the gains in diversity made by the legal profession over the last 25 years, and would have major adverse consequences for recruitment and composition of the judiciary in years to come;
- vi) was misguided in seeking to restrict criminal legal aid for prison law matters; the effect would be to wrongly prevent prisoners from gaining meaningful legal redress;
- vii) proposed dramatic and unwarranted reductions in the professional fees paid to experienced lawyers who have been forced to work harder for less year on year since the time of the last Conservative government in the 1990s; and that the consultation paper makes flawed assumptions on future expenditure even without any of the

- proposed reductions; and,
- viii) wrongly proposed cuts to fees in Very High Cost Cases, when the introduction of the GFS Plus scheme would be far more efficient and would save money.
17. Ultimately, the CBA expressed the view that the government’s proposals, which sought to introduce wholesale changes to the structure of the criminal justice system, would have as devastating an effect on fundamental principles of access to justice and quality of justice as it would to the future of the legal profession which to a great extent upheld those principles; and that the unintended but entirely foreseeable consequences of the proposals would be to irrevocably damage the integrity of the Criminal Justice System itself. This belief, shared by practitioners deeply committed to working for justice throughout the country, was (and remains) genuine and deep-rooted. It is also a belief expressed privately by many judges and more publicly in their own consultation responses and, in recent public speeches by members of the Senior Judiciary. Such warnings should not go unheeded by the government.
18. The CBA response was submitted on 04.06.13, along with some 16,000 other responses from, *inter alia*, the Bar Council, the Law Society, other professional associations, firms of solicitors, sets of chambers and individual practitioners. In those responses were similar forceful arguments of principle and specific detailed concerns were raised.

### **The Government Response**

19. The Ministry of Justice states that over the summer it considered carefully the 16,000 responses and has responded by publishing, on 05.09.13, a second consultation - ‘Transforming Legal Aid: Next Steps.’ The

government's current position can be summarised as follows:

- i) The government's proposed model for PCT has been abandoned;
- ii) the government now proposes a 'modified model of procurement for legal aid' (based on proposals submitted by the Law Society), in which it maintains that client choice is retained, under which the 'capacity to deliver services at the right quality' rather than price will be the criterion for awarding contracts;
- iii) the new model will impose fixed rates (reduced by 17.5% from current rates) for all work in the magistrate's court;
- iv) the government will implement its original proposals in relation to imposing a financial eligibility threshold in the Crown Court, removing legal aid for borderline cases as part of the civil merits test; and has modified its proposals in relation to prison law, the introduction of a residence test and in relation to permission work in judicial review cases;
- v) The proposed 30% cuts in litigation and advocacy fees in VHCC cases will be implemented (effective from December 2013);
- vi) Litigation and advocacy fees in AGFS Crown Court work, with cuts of up to 18%, will be phased in over 2 years from 2014; and 2 different models of fee structuring are specifically consulted upon;
- vii) the number of cases requiring 'multiple advocates' will be reduced and overseen by Presiding Judges or their nominees;
- viii) fees for expert witnesses in civil and criminal cases will be reduced by 20%, save for specific exceptions;
- ix) the government makes it plain that on many fundamental issues the position is non-negotiable; and it seeks to consult further only in relation to its modified proposals and certain specific issues;
- x) the Lord Chancellor and Secretary of State for Justice also



announces that the MOJ has set up a 'panel of experienced defence lawyers to advise on system reform to support better value for money for the taxpayer'; and that the Secretary of State has asked Sir William Jeffrey to conduct 'an independent review of the future of independent criminal advocacy in England and Wales' - to report in six months time.

20. The MOJ have given interested parties until 01.11.13 to respond to the Consultation and have posed a total of nine questions for respondents to answer.
21. The CBA maintains its fundamental principled objections to the government's proposals as set out at length in the CBA's original June 2013 consultation response. In addition, the CBA believes that:
  - i) the government's starting point in relation to the figures used (and often repeated in public) is wrong - the figures are inaccurate and misleading; and the repetition of such figures is disingenuous;
  - ii) the savings required are substantially less than the government repeatedly suggests;
  - iii) those savings can be made by alternative means, the development of which the CBA and other stakeholders can constructively assist with;
  - iv) the new proposed model of legal aid procurement is fundamentally flawed and will allow only the most mercenary, profit driven businesses to compete in a market for the provision

- of cut-price legal services, at the expense of committed, experienced criminal solicitors long established in local communities;
- v) the quality of legal services – litigation and advocacy – skills honed over many years of practice, will diminish exponentially;
  - vi) the fundamental principles of access to justice and equality of arms will be undermined to such an extent that only the rich and the State will be able to afford proper representation; whilst those who are most vulnerable will either have no, or at best limited, access to a lowest-price justice system the State can provide;
  - vii) victims of crime will suffer if inexperienced advocates are allowed to wreak havoc to the trial process in place of those who have the experience to give good advice and ensure that trials run smoothly
  - viii) the long term effects of the proposals, coming on top of repeated cuts, on a legal professional that maintains the highest professional standards in an internationally admired criminal justice system, will be devastating;
  - ix) the cuts will affect most those practitioners from BME backgrounds and women; and the great progress in diversity in the profession over the last 30 years will be reversed, with damaging consequences for the future composition of the judiciary.

22. In the foreword to the Consultation Paper (“CP”), the Lord Chancellor states with admirable clarity his ambitions for the criminal justice system:

*... I want to ensure that the criminal justice system is more efficient so that cases do not demand more resources than necessary, both in terms of public money and in terms of lawyers’ time. We are therefore putting together a panel of criminal lawyers to look at the legal process, identifying scope for improvements and drawing up proposals for reform.*

*... Finally, it is clear to me that advocacy is facing many challenges, from the rise of different routes into the profession, increasing supply but decreasing demand, regulatory changes, as well as financial challenges. I have therefore, in conjunction with the Law Society and the Bar Council, asked Sir William Jeffrey to conduct an independent review of the future of independent criminal advocacy in England and Wales, to report in six months time.*

*... I believe these three actions will help to secure the long term sustainability of the professions in the more difficult financial environment that we face.*

23. The CBA welcomes these expressions of principle, including in particular the decision to set up the ‘Jeffrey independent review’ and the wider systemic review. The CBA joined with the Bar Council in June calling for a systemic review of the criminal justice system and welcomes the Secretary of State’s announcement of two separate reviews. The CBA commits itself to work positively and creatively with the reviews in order to address all aspects of the workings of the criminal justice system, to identify and reduce inefficiencies, to ensure the proportionate and appropriate allocation of resources, and to reduce wherever possible administrative costs.

24. The CBA and its members know that it is irrational to pursue an approach that does not look at the criminal justice system as a whole, but rather seeks to fragment and examine parts in isolation. The proposed reviews are an ideal context in which such debate could be resolved. Such a process would permit the Government to focus its energies on structural changes that will deliver far greater benefits to society without any of the attendant damage.
25. The CBA therefore urges the Government to pause in the implementation of these cuts at least until it has had a chance to consider the outcome of the reviews. Failure to take this proposed course may mean that there is little left of the independent Bar to review at all.

## **Section C Part 1: The Programme of Reform**

### **Restricting the scope of legal aid for prison law**

26. The CBA repeats what it said at paragraphs 59-80 of the June response and defers to the submissions of the Howard League for Penal Reform and the Association of Prison Lawyers.
27. The proposed cuts will be hugely damaging in terms of access to justice for prisoners. The current consultation proposes to introduce fee cuts of 17.5 per cent over two stages to all work, including criminal legal aid for prison law work. The combination of the fee cuts and the scope cuts will be devastating to providers who will struggle to remain in business. Although the revised consultation will allow specialist firms to continue to provide prison law only, it is doubtful that it would be sustainable for a small practice to just do prison law work in future.
28. According to 2013 LAA statistics, approximately 70-80 per cent of cases prison law currently funded will go out of scope entirely. Although this amounts to just approximately £4 million in savings, it will have a significantly adverse impact on providers' abilities to run sustainable businesses and provide a holistic service to clients. Issues such as sentence planning and resettlement, which mean that prisoners can progress effectively through the system and be safely released, will no longer be funded, making it less likely that they will be successful on parole or other early release applications.

### **Imposing financial eligibility threshold in the Crown Ct**

29. Despite the objections raised by the CBA and other organisations in our

June response, the government has indicated that it will press ahead with the implementation of the financial eligibility threshold and at the fixed rate. The CBA's original submissions at paragraphs 81-100 CBA June response are relied on.

30. The figure of £5,000 as the average cost of a criminal trial as a basis for calculating affordability from disposable income is misleading and wholly unrealistic. It is not evidence based or based on the reality that most trials involving serious offences cost considerably more than that. All but the very wealthy would find it impossible to afford to be represented in a typical one week murder case, two week drugs case or six week fraud. Those on middle incomes with children over the age of 18 living at home would inevitably have to shoulder the burden of paying for their children's legal representation. The public would rightly feel that the State has failed in its duty to provide legal assistance to a citizen who it has chosen to prosecute and bring before the courts.
31. The likely (and wholly undesirable) consequence of this proposal is that defendants are less likely to plead guilty and more likely to represent themselves at trial. This will lead to delay and expense as trials slow down. The burden on Judges (and on prosecuting advocates) will increase significantly. The additional costs on the system are likely to far outweigh the claimed savings. The effect of withdrawing legal aid in the family courts has resulted in a 16% rise of contested cases involving litigants in person<sup>1</sup>. This pattern is likely to be replicated in the criminal courts if the proposed changes are brought in. Furthermore, it is our experience that defendants who represent themselves are more likely to achieve an unmerited acquittal because the jury's sympathies are weighted in favour of an unrepresented defendant, who is perceived to be

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<sup>1</sup> BBC Today programme 21.10.13

unfairly disadvantaged.

32. In June we quoted Ward LJ giving judgment in the case of *Wright and Wright* [2013] EWCA Civ 234. The words remain potent and should persuade the Government to change its mind.

*'What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, **I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid**' [emphasis added].*

33. The proposal again fails to take into account that all defendants are already means tested and can be asked to pay a contribution towards their

representation costs, in addition to being liable for the costs of the case on conviction. It cannot be right, it is submitted, that a person who is brought before the courts by the State to face charges brought by the State and who is presumed innocent until proved guilty should be expected to pay all of his costs simply because the disposable income of his household is £37,500 p.a. or more.

34. If the government refuses to heed the concerns of the CBA (and many other stakeholders and human rights organisations) we urge the government in any event to reconsider the threshold and set a rate far higher than currently fixed, so that only the wealthiest should be expected to pay the full cost of legal representation. The current rate will hit far too many in society, including most middle income earners, who are already squeezed from many directions. Such a rate should be arrived at by evidence-based analysis and piloted to ensure that its impact is properly tested.
35. The CBA repeats its call for government to introduce a common sense approach in relation to the use of restrained assets. Truly wealthy defendants, who have assets restrained by the State, should be able to use those assets to pay for legal representation.

### **Introducing a residence test**

36. Whilst the government has agreed with some of the objections raised by the CBA and others in the June response and has indicated changes and certain exemptions to be made to the proposed Residence Test, the CBA is of the view that these changed proposals remain fundamentally flawed. The CBA’s original submissions (paragraphs 110-114 CBA June response)



based on principles of lawfulness and fairness are maintained.

37. The CBA remains concerned that the government is still proposing to introduce an arbitrary exclusionary test which, by definition, discriminates against a whole class of people – immigrants – those recently arrived/resident in the country as well as all those who cannot provide documentary evidence to prove 12 months residence in the UK. The proposals will still discriminate against the most vulnerable in the country who have legitimate need to access justice, including children excluded from home, the homeless, those with mental health difficulties, persons held at immigration centres and those British citizens out of the country (including those lawfully or unlawfully detained abroad).
38. The government seeks to reassure those who have genuine concern about the rights of the most vulnerable to access justice in the UK by stating that there is a safety net in the ‘exceptional funding scheme’. However, the application procedure itself is overly complicated and the evidence suggests that few applicants (only 2%) have successfully managed to obtain such funding. The CBA calls on the government to re-examine the proposals and to ensure that the proposals are submitted for proper parliamentary scrutiny before any are implemented.

### **Permission work in judicial review cases**

39. The September consultation paper outlines further proposals to alter the legal framework for judicial review. The CBA understands that these proposals are in addition to the proposals made in *Transforming Legal Aid*. We have grave concerns regarding the latest proposals in any event, and when considered together with the earlier proposals we consider the

cumulative effect to be catastrophic for access to justice and the rule of law. These proposals will shield public bodies from judicial scrutiny and accountability. They are based upon a wholly inadequate evidence base of assertion and assumption, and they misstate or misunderstand fundamental principles regarding public law, and basic practices of the Administrative Court.

40. In addition to the concerns which we have previously raised in our June response, and in anticipation of further proposals, we highlight proposed changes in four areas which in our view would significantly hamper the courts’ ability to hold the Executive and public bodies to account for abuses of power: (i) standing, (ii) interventions, (iii) legal aid and (iv) PCOs.

#### *Standing*

41. Currently, the test for standing in judicial review is whether the individual/ body has ‘sufficient interest’ in the matter. The consultation paper starts from the premise that the current test for standing in judicial review is overly liberal, as it allows judicial review *“to be used to seek publicity or otherwise hinder the process of proper decision-making. The concern is based on the principle that Parliament and the elected Government are best placed to determine what is in the public interest.”* It is proposed to narrow the test, so that individuals and groups who do not have a ‘direct and tangible interest’ in the outcome of the proceedings should not have standing. A variety of possible alternatives are suggested. We disagree with all of the proposed alternatives, and consider it essential that the existing ‘sufficient interest’ test remains.
42. First, the underlying premise of the proposal misunderstands the very purpose of judicial review. Judicial review is not private litigation, conducted by private parties. It is a long-standing constitutional

mechanism whereby the courts can act to check the unlawful exercise of power. All members of society have an interest in judicial review for this reason, and that is reflected in the standing test. A restrictive standing test is not in keeping with the role of judicial review.

43. Second, we are concerned to note that the government acknowledges in the consultation document that judicial review claims brought by organizations have a higher success rate (para. 78). This proposal would result in meritorious claims such as these being barred from being brought. Again, this approach disregards the role of judicial review, and the appropriate manner in which the Secretary of State and all other public bodies should consider it. The role of a public body in judicial review is not to 'win at all costs'; it is to assist the court in reaching the correct result and thereby to improve standards in public administration.
  
44. Third, there is no evidence whatsoever of unmeritorious judicial review cases being used to 'seek publicity' or 'hinder' proper decision-making. In the event that such a claim is brought, the courts have existing mechanisms to manage any abuses. In fact these proposed changes would hinder meritorious claims from being brought. Furthermore, the proposals would make it far more difficult for representative bodies, charities, NGOs and others to bring judicial review claims. So, for example, this test would have prevented the Howard League for Penal Reform from correctly identifying and challenging the Home Secretary's flawed decision that the Children Act 1989 did not apply to children in custody; the Refugee Legal Centre from establishing that the Secretary of State had an unlawful policy which placed asylum seekers at unacceptable risk of being processed unfairly; it would also have prevented the Countryside Alliance challenging the Hunting Act 2004, in which, although unsuccessful, the House of Lords considered the case to raise a question of

public importance.

45. In addition to our concerns of principle regarding such a bar, we also consider it to be fundamentally flawed for practical reasons. Undermining the ability of groups to bring ‘test case’ challenges such as these may simply result in multiple individual cases being brought, and defended, which is not a cost-effective way to address what are policy challenges.

#### *Interventions*

46. The Government states in the consultation that it is concerned that third party interventions substantially increase costs of judicial reviews (although there is no supporting evidence for this assertion), and so it proposes a presumption that interveners would be liable to pay the additional costs incurred as a result of their intervention. This proposal would increase the financial risk of intervening, and so would deter expert interventions by charities, NGOs, and campaigning groups. This is despite the undoubted assistance of such interventions to the Courts and ignores the extensive case management powers which exist to manage them and ensure that they do not disrupt proceedings or increase costs.

#### *Legal aid*

47. There are multiple aspects of both the June and September proposals which will fundamentally undermine legally aided judicial review, and thus the ability of many vulnerable individuals to hold public bodies to account. We maintain our earlier concerns raised in the June response. We are concerned that the increased costs risks to claimants (including restricted payment of legal aid in judicial review cases in which permission to apply for judicial review is not granted, seeking to make claimants liable for all of the defendant’s costs where permission to apply

for judicial review is refused, and increasing the circumstances in which the court is able to make wasted costs orders) will have a chilling effect upon judicial reviews which would otherwise be properly brought, and the consequent impact on the rule of law.

48. The proposed modification to the earlier proposal that providers would not be paid for making an application for judicial review if permission is not obtained, does little to alleviate the concerns previously raised. The criteria for determining payment create a wide discretion for the LAA and so creates much uncertainty for providers. However, it seems that the criteria add little to those applied by the court in considering whether to make a costs order in the claimant's favour.

#### *PCOs*

49. The Government also proposes restricting the availability of PCOs (which are already only available in very limited circumstances), so that they would not be available in any situation where the claimant has a 'direct interest' in the outcome of proceedings. The proposal creates a Catch-22 situation for NGOs, charities and campaigning groups, as if they were to satisfy the new standing rules they would be automatically prevented from having any costs protection, and vice versa.

#### **Civil merits test - removing borderline cases**

50. The CBA's position, to be found in paragraph 116 of the CBA June response, is maintained. It is submitted that the government is wrong to press ahead with its proposals and that the government's intransigence is another example of it failing to listen to those who work in these specialised fields. We simply add that the categorization of borderline

cases are by definition subjective decisions; many of these cases will have the potential to influence the development of the law; and such cases provide the individual claimant with the opportunity of legal redress against the State. It is wrong in principle for the citizen to be denied access to justice by the State, whilst the State has no such restriction when deciding to challenge a ruling against it.

## **Introducing Competition to Criminal Legal Aid Market**

### *General Introduction*

51. The CBA has made clear its position on competition in the Criminal Legal Aid market in its June response and, although the government has abandoned its proposals for PCT, many of the principles still apply. The CBA maintains its arguments of principle laid out in the June response (see paragraphs 117-235).
  
52. The CBA has no difficulty with the general principle of competition. Criminal barristers in independent practice work in a highly competitive market where quality is (or should be) the determining factor. With very few exceptions, if a barrister is not good enough he or she will not be instructed again. The barrister is paid a set fee per case and cannot negotiate for a higher fee, even where the actual hourly rate for work done is derisorily low. The set fee applies to work additional to preparing the case for trial, including but not limited to conferences, skeleton arguments, preparation of defence case statements, admissions, listening to ABE interviews etc. He or she does not enjoy the security of a salary, paid holidays, pension, health care or other benefits. Legal aid does not cover travel, essential resources, IT or other expenses or the regulatory requirements of continuing professional development. Chambers

expenses are kept to a minimum and there can be little doubt that when the number of hours required to prepare and conduct a case are taken into account, barristers provide extremely good value for money.

53. At its best the Bar provides a quality of service, across a range of specialisms, unrivalled throughout the world. It is an incontrovertible fact that individuals and the State instruct the independent bar for its specialist expertise in criminal law; and that the quality of criminal advocacy in this country is internationally renowned. Such experience and quality is gained gradually over many years of practice. Opinion polls and focus groups show that the public value the quality of legal aid services provided by the Bar and believe that the cost of such services is a price worth paying for a fair and strong criminal justice system. The CBA understands that the Secretary of State shares the widely held belief in the importance to democracy of fundamental principles of access to justice; and in the need for an independent referral Bar to defend and uphold fearlessly a robust and fair criminal justice system.
  
54. Solicitors also compete in terms of quality. Again, such experience and quality is gained over many years providing legal services in the local community. Solicitors also compete to be awarded legal aid contracts. Unlike the Bar, a referral service, criminal solicitors compete for market share on the High Street through duty solicitor schemes at local police stations and own client work. Few firms make any significant profit, many have already cut costs to the bone; all are having to cut costs which are increasingly difficult to sustain. The proposed changes to procurement of legal aid need to be seen therefore in their proper context and a closer analysis of where reasonable profits are acceptable on the one hand and where cost cutting begins to endanger the quality of legal services on the other should be undertaken. Indeed, the CBA believes that common sense

dictates that such review should be held *before* the introduction of any proposed new model.

55. Whilst competition in principle is not objectionable, the criminal justice system, like the NHS, is not a profit making business working in lightly regulated free enterprise markets. The latest model proposed by the government does not, it is submitted, promote fair competition in the market place. The fact that the government has now proposed two different, highly contentious models in less than a year is evidence that a solution cannot easily be found. It is evident that the vast majority of solicitors' firms are against the latest version. The new proposals appear to have been influenced by and will clearly favour only a few large, profit-seeking firms. There is a genuine and reasonable fear that those businesses will sacrifice quality and experience. The CBA repeats its warnings from its June response that a rushed introduction of wholesale change in the procurement of legal aid will lead to unintended and costly consequences; and, above all the delivery of quality legal services to the community will be adversely and irreparably affected.

#### *Procurement of Legal Aid Services*

56. The CBA remains opposed to the government's new proposals. They are not supported by evidence nor have they been properly reviewed or tested in any pilot scheme. For a firm to be able to compete in the market, costs will have to be kept to a minimum. Cost cutting on such a scale will inevitably mean that experienced, criminal solicitors will be made redundant and replaced by part-qualified or non-qualified staff 'supervised' by a solicitor. Economies of scale and downward financial pressure will be such that less time, care and attention will be spent on each case. Again, once experience and quality are lost, they cannot be



replaced. Again, the individual will suffer and there will be an increasing gulf in equality of arms between the individual and the State. Ultimately, Society suffers from a weakened criminal justice system where fundamental rights are put in danger and access to justice is limited.

57. The CBA understands that most solicitors now believe that they will go out of business if the proposed further cuts are introduced. These businesses cannot sustain 17.5% cut in litigation fees in magistrates' court work and crown court litigation fees. Indeed many believe that the actual cuts will be far greater. Most of the few firms undertaking VHCC work will be unable to provide the required standard of service if 30% cuts are introduced.
58. These proposals aimed at solicitors will inevitably impact heavily on the independent Bar. As a referral service, the Bar depends on receiving instructions from solicitors employed in private practice or by the State. If further cuts are to be made, a profit-seeking business will not outsource the advocacy work to the Bar, if it can keep the work and have double recovery of (litigation and advocacy) fees, even where it does not employ enough sufficiently qualified, experienced advocates. Whilst there may be some criminal barristers who will have little option but to take employment in such firms, they will be relatively few as the most experienced and highly qualified barristers will move into other areas of work (as is already happening). The example of indigent defense services in the US, as outlined in the CBA's June response, is a stark warning of where downward financial pressure leads.
59. The CBA defers to the views of experienced High Street solicitors when it comes to the detail of the new proposed model. However, it is abundantly clear that many highly respected criminal solicitors believe that the

combination of the proposed contract structure, the cuts to police station duty fees, Magistrates Court and Crown Court litigation fees and to Crown Court advocacy fees will destroy High Street firms and that in terms of quality there will be an unbridled race to the bottom for the quality of services provided.

60. The additional pressure on solicitors to put pressure on (often vulnerable) clients to plead guilty inevitably raises fundamental issues of professional conduct and ethics. Again, once standards that have been established over many years drop or are lost and once experienced, trusted local solicitors are no longer available on the High Street, they cannot be replaced. Again, it is the individual, who faces arrest or prosecution by the State, who will suffer.

### **Reforming Fees in Criminal Legal Aid - AGFS**

61. The CBA maintains its position as stated in paragraphs 242 to 291 of the CBA’s June response.
62. In his foreword to the second consultation the Lord Chancellor has made it plain that he wishes to ensure the survival of a *“sustainable legal aid market in criminal litigation”*. The CBA welcomes and supports this ambition. For reasons that will become apparent we consider that the proposals set out in Chapter 4 of the consultation will not achieve this end. The consultation paper provides two options on fee structure and indicates that the Government *“will be guided by the views of the profession and other stakeholders in reaching a final decision on which scheme to implement”*.
63. The CBA welcomes the opportunity to set out the views of the profession on behalf of all of those who specialise in criminal law and urges the Government to accept the submissions we make. The CBA does not believe that either scheme will operate to achieve the Government’s objectives. Our objections are based primarily on principle not self-interest: we genuinely believe that there will be fatal blow to the publicly funded independent Bar and this will seriously damage the administration of justice. We believe that public confidence in the system will be irreversibly damaged.
64. The government’s own figures show that expenditure on advocacy in the higher courts has shrunk very significantly in recent years and all indications are that the overall spend continues to fall precipitately. The cuts imposed in recent years are deeper than planned and continue to work their way through the system.

65. The rates of remuneration in the Graduated Fee Scheme ("GFS") were set in 1997 and were intended to reflect the levels of payment made in 1995. These rates remained frozen until 2007, when some increases were made, ostensibly to match what had been lost to inflation. There was never any attempt to provide for an increase over and above the rate of inflation. Since 2010 all those increases have been reversed. Fees are now at levels below 1997. During this period inflation has eroded the value of those fees by some 30%.
66. A fair assessment of the real figures shows that the proposed changes are wholly unnecessary. If the Government believes what it has so often said about the virtues of the independent Bar it has to create a system that permits its survival either by leaving fees as they are or by freeing up the system so as to permit those accused to more readily use their assets to pay for their representation. The current BSB rules prohibit "top up fees" to legal aid being paid. Even if fees remain unchanged, we believe the overall spend will continue to drop.
67. The CBA is aware that the Bar Council has commissioned Professor Martin Chalkley to analyse how fees set under the AGFS have changed over the period 2007-2013 and how they will change if either Options 1 or 2 as proposed in the Consultation Paper are adopted. We are not aware of any other comprehensive study that evaluates the cumulative effect of fee changes in AGFS between 2007 - 2013.
68. The CBA is aware of Professor Chalkley's likely conclusions and will rely upon them in support of the arguments that we have advanced. The CBA believes that Professor Chalkley's work will demonstrate decisively that we are correct in that unparalleled cuts have already taken place since 2007 and that it is beyond argument that barristers are already being paid

at rates that are in real terms significantly below those paid in 1997 when the GFS scheme was brought into existence.

69. We challenge the Government to demonstrate that any other publicly funded sector has suffered comparable reductions in rates of remuneration. Nor would the government be able to impose such a cut on any employees in public service. There can be no fair or rational reason to cut further. It is perhaps not surprising given this extraordinary reduction on the value placed on the work done by advocates that there is a universal sense that “enough is enough” and that there is no fat left to cut.
70. Independent advocates are the most efficient part of the system. It is no myth to suggest we are the oil that enables the engine to function smoothly. Remove the experienced independent advocate and the engine will operate far less efficiently and suffer expensive and debilitating damage. The removal of experienced advocates is bound to result in more appeals, more retrials and longer trials.
71. The Government originally proposed that the next round of cuts would take effect from Easter 2015. We do not understand why it is thought necessary to bring the cuts *forward* by twelve months before the full impact of previous cuts has been properly measured. We suggest there are compelling reasons to pause so that the real effect of previous cuts and procedural innovations can be measured and to enable the proposed reviews to complete their work.
72. We remain particularly concerned about access to justice and the shape of the legal market that is likely to emerge if these savage cuts are implemented. Above all we consider that there will be real damage to the diversity of the profession. Our surveys suggest that most women at the

Bar will not return to practice after maternity leave if the rates are cuts as proposed. The profession will revert to something akin to several generations ago when it was populated by the privileged and wealthy. The Government has simply failed to properly assess the impact of its proposed changes. Its impact assessment fails to acknowledge the importance of diversity within the profession.

73. The following figures derived from the LSC/ LAA’s own documents. The figures demonstrate how the MOJ’s use of figures is unreliable and/or misleading. Whether deliberate or not, the effect is the same.
74. The April consultation paper failed to identify a baseline from which the MOJ supposedly had to cut £220 million. During the public “Road-shows” held earlier this year as part of the first consultation, various questions were asked of MOJ officials about the baseline and there was a public commitment to publicly declare the baseline from which cuts were needed. This has never been done. The on-going failure to identify the baseline inevitably leads to the suspicion that the Government is moving the goal posts. There can be no reason consistent with good Government that preclude clarification of the baseline. The fact that officials have declined to release these figures is deplorable.
75. Criminal Legal Aid Spend (‘outturn’) figures are as follows:

**2010/11**                      **£1,175m** (source MOJ)

**2011/12**                      **£1,115m** (source MOJ)

2012/13                      £995m (figure available during the first consultation; figures published more recently show the figures for 2012/12 are even lower)

<b>2012/13</b>	<b>£975m</b> (Crime Higher £591m + Crime Lower £385m) <sup>2</sup> The budget set out in the LSC Business Plan was £1,025m (Crime Higher £602m + Crime Lower £423m = £1,025m) – p26, demonstrating an underspend of £50 million.
<b>2013/14</b>	<b>Projected CDS spend 2013/14 £941m</b> (source - LAA Business Plan 2013/14 p23).

76. Therefore **during the 3 year period 2010/11 to 2012/13 the reduction in spend on CDS was £200m i.e. £1,175m to £975m.** If MOJ projections are accurate, then the reduction in overall spend in the lifetime of the parliament is already 20%. There is every reason to suppose this downward trend will continue without any further cuts.
77. The figures for the first half of 2013/14 must now be available. These should be released so that the Government can show that it is basing its decision on accurate data rather than speculation or political expedience. Further cuts should not be contemplated until such figures are available.
78. In response to the April Consultation Paper's we submitted that the phrase "no change" would be shown to be disingenuous and that the MOJ had failed to acknowledge the scale of fee reductions already implemented. We were right. The figures since published show that the attempt to justify cuts earlier this year was based on a false premise. The MOJ should learn from its mistake and not repeat it now. To do otherwise

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<sup>2</sup> LSC Annual Report and Accounts 2012/13 (p56), published 25<sup>th</sup> June 2013, [www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf](http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf) at [page 27](#)

is irrational and will result in unnecessary and irreversible changes to those who will be willing to provide advocacy services.

79. The significant downward pressure on fees is still working through the system. The full impact of these final cuts to advocacy fees will not be fully revealed until the end of the current financial year. This is because particularly in the highest paying graduated fee cases many of the payments at the new rates will not be made until then. Many of the larger graduated fee payments in the financial year 2012/13 will have been at the old rates.
80. Currently the self-employed Bar conduct the vast majority of serious and complex trials in the Crown Court. These trials are briefed to the independent Bar because of their experience and ability to conduct difficult and complicated trials. The proposed changes will affect the independent Bar far more than any employed advocates. No solicitor will brief counsel in any case likely to be a plea. The solicitors will take all the most lucrative work at the expense of the Bar. The government proposals will significantly alter the playing field in favour of solicitors who control the flow of work. If the Government wants the Bar to survive it has to rethink these proposals.
81. The Consultation Paper claims that

*We have been conscious throughout of the impact that the options would have on those with lower fee income and the accompanying Impact Assessment provides a detailed analysis of the impacts of the two options whilst also recognising that fee income is determined not only by the values of the fees paid but also the number of advocates and volume of*



*cases in the criminal market, as well as the specific case mix undertaken by each advocate.*

82. The truth is very different from what the MOJ blithely asserts. In reality young Barristers enter the profession with very substantial debts, which need to be repaid. The Young Barristers Committee calculates that given tuition fees, professional course fees and living allowance loans, a pupil barrister may be in debt to the tune of £75,000 by the time he or she begins in full time practice. Few without substantial parental assistance will be able to afford to choose publicly funded work. This will inevitably have a disproportionate adverse effect on those from non-privileged and BME backgrounds and the most talented will no longer choose to practice criminal law.
83. Moreover, senior barristers increasingly question whether the ever-diminishing rewards justify the hard work and time commitment required of an experienced advocate at the expense of a family life; the poor work life balance is ultimately not worthwhile if there is no financial reward. Again the value of experience built up over many years will be lost to the detriment of the criminal justice system. Visit any Crown Court, inspect any CPS room, or ask any Circuit Judge and the story is the same: the system is almost at breaking point and too many cases, especially the most serious, are already largely held together only through the experience brought to them by senior barristers. Experienced barristers have begun to move into more lucrative areas of work. Further cuts will drive out the experienced who have a choice to seek work elsewhere.
84. The damaging effects will be most pronounced on women who will be far less likely to return from maternity leave or continue to work where they cannot meet the cost of full-time childcare. The long-term future of the

Bar as a profession for women to flourish in is already being damaged and many are not returning to publicly funded work after maternity leave. Many of those that return to work soon find they are unable to afford the costs of childcare in a profession with little flexibility and long hours. We are deeply concerned that these changes will be socially regressive and reverse many of the gains in diversity made by the profession over the last 25 years. It will become far harder to achieve a balanced and diverse judiciary that reflects the composition of and retains the confidence of society. Work at the Bar is both stressful and demanding with unsociable and unduly long hours. The proposed rates of remuneration will deter many without private means from returning to practice or remaining in practice at the criminal Bar.

### **Reforming Fees in Criminal Legal Aid - VHCC**

85. The CBA maintains its position as stated in paragraphs 292 to 306 of the CBA’s June response.
86. The proposed contractual amendments are to allow for the rates of payment under a VHCC contract to be removed from the body of the contract and instead to be set out in Statutory Instruments. The new rates of payment under the Statutory Instruments will amount to a 30% reduction to the current contractual payment rates. These amendments will apply to both *existing* contracts and *future* contracts.
87. Notice of the proposed amendments and the laying of the Statutory Instruments containing the new payment rates by the MOJ, is scheduled to take place on the 4 November 2013, with the changes coming into effect on 2 December 2013. All work carried out on or after that date, under the 2008, 2010 and 2013 contracts will be at the new rates. The LAA relies on different clauses in respect of each of the contracts, which it asserts entitles them to amend the rates of payment.
88. The MOJ suggests that this reduction of 30% will lead to a saving of £20 million annually. Assuming this figure is accurate, this in all probability means that the actual spend on VHCCs is closer to £60 million and not £92 million as claimed by the MOJ. This is an example of misleading and inaccurate figures being advanced as a basis for these proposals. We urge the MOJ to release up to date figures about expenditure so that a well-founded and fair assessment of the extent of further cuts can be made against an objective set of figures rather than the morass that are currently being advanced.
89. This lower figure is perhaps not surprising as the rates for VHCCs were

reduced in July 2010 by 5% and the qualifying criteria were modified to reduce the number of cases which come within the VHCC scheme. Contract managers have also applied a much more restrictive approach to the hours they will allow for case preparation. These significant changes, were not retrospective or immediate, and so will have had a limited impact upon VHCC spend in the financial year (2011/12). The £20 million savings figure may therefore reveal the extent to which significant savings have already been made to the VHCC scheme. If this analysis is broadly accurate then actual expenditure is already much lower than is being suggested.

90. As the CBA and the Bar Council has contended before, the contracting and payment processes for cases currently falling into the VHCC regime are unnecessary, inefficient, administratively consuming (of time and resources) and full of perverse incentives. The cumbersome and complex nature of these processes has been created by Government and the Civil Service. The whole scheme has proved itself to be not fit for purpose. The Government should disclose the true cost of this added layer of management (including all the attendant benefits that employees enjoy), which almost certainly far exceeds the cost of paying advocates a fair fee to conduct a VHCC case. It remains absurd that barristers have to argue for hours in order to conduct what is required in order to prepare a case for trial with a contract manager, a task which takes up an inordinate length of time for both sides. Furthermore, contract managers are invariably not lawyers and have no real understanding of the case. It is quite usual for a contract manager to say that counsel can read and absorb a document in 15 seconds or an exhibit in 30 seconds, regardless of the amount of detail in the document.
91. The analysis upon which the Ministry of Justice relies for the effect of a

30% cut is flawed for the following reasons:

- i. The figure of 30% is plucked out of thin air. There is no evidence that a 30% cut will improve the credibility of the system. There is also a danger of a tipping point after which the level of fees paid to defenders becomes so low that confidence in the system is damaged;
- ii. There is no evidence that the Ministry of Justice has considered whether a reduction by 30% would have an effect upon the number of 'providers' prepared to make themselves available for VHCC work;
- iii. The daily rate and hourly rate in serious fraud is low e.g. for an experienced junior on a category two fraud the rate includes two hours of preparation. A reduction in rates would result in advocates choosing not to conduct more difficult and complex work because its rate of pay is so poor compared with the time invested;
- iv. The number of 'providers' has already been restricted by the tendering process and length of contracts. Whilst new providers could be accredited at any point, there is no evidence that they would wish to do so at the new rates.
- v. The effect will not fall upon the highest paid advocates, but upon the junior Bar, whose work will be taken by those senior juniors, fleeing from a 30% cut, who will no longer be prepared to take on VHCC work.

- vi. The work is demanding and complex and demands a rate of pay which meets the experience which is required to conduct such work. An inexperienced advocate will require more hours to work on a case than an experienced advocate and slow down the conduct of the trial. Any savings would in all likelihood be outweighed by the inefficient inexperienced advocate.
92. The detailed submissions made in relation to the differing contractual positions has already been set out in writing by the Bar Council (informed by the view of the CBA) to the Government in the Response dated 11<sup>th</sup> October and we rely upon those representations. In summary, we believe that the Government's actions will amount to a repudiatory breach of its contractual obligations and that universal reaction of all advocates currently instructed will be to treat this conduct as the termination of their instructions to act.
93. The CBA believes that its members will refuse to work at these new rates. They have expressed the same in response to a CBA questionnaire issued to Heads of Chambers.
94. The terms of the clause(s) that it is said entitle the proposed amendments to take place, are different as between the 2008, and 2010 and 2013 Contracts.

*The 2008 Contract*

95. The 2008 Contract was with the Legal Services Commission ("LSC"). This was a statutory corporation established under Part 1 of the Access to Justice Act 1999. The amendment clause can be found at Clause 25.2, which provides:

*“Ongoing changes – from us*

*25.2 We may make such amendments to this Contract as we consider necessary in the circumstances to comply with, or take account of, any U.K. legislation or any EU legislation having direct effect, or as a result of any decision of a U.K. court or tribunal, or a decision of the European Court of Human Rights or of the European Court of Justice or any other institution of the European Union, or to comply with the requirements of any regulatory body or tax or similar authority. Such amendments may include (without limitation) changes to payment provisions, imposing controls not previously imposed, and amending procedures in the Contract”. [emphasis added]*

96. The purpose of this clause was to allow the LSC to make amendments so as to give effect to UK legislation with which it was required to comply, or of which it was required to take account. Such amendments being required to give effect to acts of a third party such as Parliament. This was clearly intended to refer to primary legislation rather than delegated legislation. What it was not intended to facilitate, either expressly or impliedly, a party to the contract (such as the LSC or such equivalent) to unilaterally alter the terms of the contract by itself laying a Statutory Instrument before Parliament. The MOJ of which the LAA forms a part intends to do exactly that. The Statutory Instrument would therefore not have the effect which it is intended to have. The MOJ has no contractual power under the 2008 Contract to effect any reduction in the rates of remuneration of Panel Advocates working under that Contract.
97. This is supported by the fact that the amendment clauses in the 2010 and 2013 Contracts, namely Clause 13.4, were initially identically worded to the amendment Clause 25.2 in the 2008 Contract. However, in April 2013,

Clauses 13.2 and 13.3 were introduced into the 2010 and 2013 Contracts; they go much further and provide as follows:

*“Amending the Contract to reflect the Lord Chancellor’s legislative changes*

*13.2 We may amend the Contract to reflect the Lord Chancellor’s legislative changes as set out at Clause 13.3.*

*13.3 The Lord Chancellor’s legislative changes include:*

*(a) any changes the Lord Chancellor may make to Legal Aid Legislation pursuant to:*

*(i) section 2(3) of the Act (regulations making provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made by the purposes of Part 1 of the Act);*

*(ii) section 9 of the Act (orders modifying Schedule 1 to the Act);*

*(iii) section 11 of the Act (criteria for qualifying for civil legal services);*

*(iv) section 12 of the Act (determinations);*

*(v) any power to make secondary legislation under Part 1 and 4 of the Act; and*

*(b) any changes the Lord Chancellor may make to other legislation, including by way of Statutory Instrument as defined in the Statutory Instruments Act 1946 (as amended), which we reasonably believe requires a change to how Contract Work is undertaken and paid for”.*



98. The power to amend is extended to permit the Lord Chancellor's legislative changes pursuant to specifically identified delegated legislation. Had the amendment Clause 25.2 been sufficient, these new Clauses would not have needed to be added. No doubt the MOJ effected these changes as they were aware of the limitations of Clause 25.2.
99. The CBA submits therefore that:
- a) There is no power to amend the 2008 Contract as proposed;
  - b) Any attempts to reduce the rates of payment to advocates under that Contract would be a repudiation of that Contract; and
  - c) The advocate would be entitled to bring that Contract to an end.

*The 2010 and 2013 Contracts*

100. We do not at this stage argue the validity of the mechanism by which the MOJ seeks to make the proposed amendments to the 2010 and 2013.
101. However, there remains the advocate's contractual right to terminate:
- a) Where there has been an amendment made by the LSC/LAA pursuant to the powers granted to it under the 2008, 2010 and 2013 Contracts, there is an express right vested in the advocate who does not wish to accept the amendment, to give notice to terminate the Contract;
  - b) Notice to terminate may be given by the advocate at any time after notice is given of the intended amendment;

- c) Termination would take effect the day before any such amendment comes into effect; and
- d) Up to the date of termination, work will continue to be done at the existing contract rate and all unpaid work will be required to be paid at that existing rate.

*Professional obligation of advocates*

102. In the Ministry of Justices’ Consultation Paper – “*Transforming Legal Aid: Next Steps (2013)*” at paragraph 367, was written:

*“Even after a 30% reduction VHCCs will remain high value, long duration cases that bring certainty of income for providers, which is important, particularly for self-employed advocates. For that reason, in addition to their professional obligations to clients, we do not consider there is a significant risk that advocates will return briefs or that solicitors will exercise their unilateral right of termination under their VHCC contracts.”*

103. This statement implies that there is a professional obligation on advocates such that they have no right to terminate despite the unilateral amendment, or if they do they would have to continue to act without recourse to payment (pro bono). Both can properly be described as extraordinary propositions.

104. The Bar Standards Board, *Guidance on Rules 608,609 and 610 of the Code of Conduct: Withdrawal from a case and return of Instructions (2012)*, states as follows:

*“The position if the nature of Counsel's remuneration is changed*

9. *The BSB takes the view that if there is a material change made to the basis of Counsel's remuneration, his original instructions have been withdrawn by the client and substituted by an offer of new instructions on different terms".*

105. In other words this is not a 'return' of the brief by the advocate, but a significant change in remuneration, which amounts to a 'withdrawal' of instructions. The offer of new instructions on different terms is something which the advocate is entitled to refuse.

*Impact of proposed amendments*

106. The suggestion by the MOJ that these cases, even with such a reduction, remain high value and are unlikely to be returned, is simply wrong. Already, experienced juniors are balking at the existing refresher rate of £199 per day (£160 for led junior) – rates that are reduced by 50% if the Court is unable to sit for more than 3.5 hours – which is far less than the £225 daily rate that under the proposed new AGFS that the MOJ believe to be the appropriate tapered floor for a junior.
107. If VHCC cases are returned in circumstances where instructions have been constructively withdrawn due to the proposed amendments, there are likely to very serious consequences:
- i. If a trial is part heard, juries will have to be discharged and justice delayed;
  - ii. Even if a trial has not commenced, any work completed under the Contract would have to be re-done by a new 'provider' (assuming that there would be one to take up the case);

- iii. There would thereby be double payment;
- iv. Trial dates would have to be put back;
- v. Any victims pending giving evidence, or families of victims, would find justice delayed;
- vi. Credibility in the system would not be increased quite the reverse; and
- vii. Far from saving money the proposal to cut existing contracts will cost money.

*Objection to the manner in which it is proposed to make the amendments*

108. The CBA adopts the Bar Council response and its objection to the manner in which it is proposed to amend the terms of each of the 2008, 2010 and 2013 Contracts. In their present form, the payment rates under each Contract are set out as part of the Contract concerned. The LAA intends not to replace those rates within each Contract with the reduced rates provided for in the proposed Statutory Instruments, but rather to remove from the Contracts any recitation of rates whatsoever and to replace them instead merely with a reference to the Instrument itself where those reduced rates are to be found. As a matter of construction of each Contract, such an amendment is impermissible. It is neither “necessary...to comply with, or take account of, any UK legislation” (the 2008 Contract) nor does it “reflect the Lord Chancellor’s legislative changes” (the 2010 and 2013 Contracts). What would be contractually permissible (in accordance with the passages quoted in the previous

sentence) would be to substitute within each Contract the reduced rates themselves. This is not an arid point, but one of real substance.

109. The CBA shares the Bar Council’s concerns that, if the amendments proceed in the manner currently proposed, the LAA will be able to avoid future consultation over any further changes to payment rates, by making those changes under the same Instrument (by the mechanism of an Amending Order). The CBA and the Bar Council are not prepared to be excluded from future consultation on the rates of pay for its barrister members in this way or, indeed, at all.
110. Finally, the CBA reminds the MOJ and the LAA of the important ministerial duties under the Access to Justice Act 1999, namely that ministers must provide remuneration which guarantees a suitably qualified body of advocates to do the work. These proposed measures are contrary to this duty.
111. The CBA urges that a halt is brought to the unnecessary haste to introduce these measures. Complete and accurate figures should be provided as to both the actual spend and savings required before any review of VHCC contracts is undertaken and options analysed. Again, the CBA is willing to assist the MOJ and all stakeholders in this process. It is however, the CBA’s genuine concern that the effect of the proposed, rushed and ill-considered cuts will be counterproductive. The proposals remove any incentive for advocates of sufficient experience to undertake such work at all, now or in the future. Critically, money ultimately will not be saved as hoped by the MOJ, but will result in greater costs on the public purse for the reasons set out above.

### **Reducing the use of multiple advocates**

112. The government intends to press ahead with its proposals for reducing the use of multiple advocates, but has made some limited concessions including that the Presiding Judge may nominate others to oversee such applications. This may lead to Resident Judges supervising the amendment of representation orders, but the precise process of delegation is not made clear. This proposal seems merely to tinker with the existing procedure and there is no evidence that a new model will in fact create savings. Nor are the revised criteria for the grant of legal aid to cover more than one advocate published in the consultation.
113. The CBA submits that such decisions as to the extension of legal aid for representation by more than one advocate should properly be left to the judiciary of the Crown Court, whose knowledge and experience in these matters is very great. Page counts are not a reliable guide to the complexity or gravity of a case, whereas a trial Judge is best placed to determine whether a case requires more than one advocate and the appropriate level of such representation. As the Council of HM Circuit Judges and the Judges' Council have made clear, Judges believe that the use of leading counsel (QCs) has a positive impact on the smooth running of a case and that QCs bring invaluable experience to a case which will often shorten trial length.
114. The public expects the most serious cases in the land to be prosecuted and defended, now and in the future, by the best advocates. The CBA submits that having a cadre of highly experienced, specialist advocates dealing with the most grave and complex cases is not an unreasonable expectation for the public to have. Such quality and experience is gained over many years in practice and inevitably has a cost. The government itself

frequently instructs leading counsel in both civil and criminal cases (and in civil cases government expenditure will be far greater). As with other areas of public spending on expertise (such as health, defence, the senior civil service), it is not unreasonable to expect that such leading practitioners should be well remunerated for their expertise. It follows that the government should not bring in proposals the consequences of which would lead to fewer practitioners applying to be appointed Queen’s Counsel and the resulting reduction of experience and quality available. As with junior counsel, QCs are already giving up legal aid work in favour of more lucrative areas.

115. The CBA agrees with the Council of Judges that led, junior advocates should be of sufficient experience to be able to conduct the case in the event of a leader’s short absence.
116. The CBA also agrees with the government that there should be proper litigation support in Crown Court trials. It is hoped that the Jeffrey Review will consider the position.

### **Reforming Fees in Civil Legal Aid**

117. The CBA maintains its position as set out in paragraphs 317 to 333 in its June response.

### **Reducing Expert Fees**

118. The government again states that it will press ahead with the proposals to cut fees for expert witnesses, with exceptions where there are market

supply issues. This underlines the CBA's concerns (to be found at paragraph 335 of the CBA June response) that the reduction of fees will lead to a diminution in quality of experts available to the defence – experts whose evidence may be critical to a defence or essential in assisting the court on a particular issue in a criminal trial. It is difficult to envisage experts of sufficient standing and experience agreeing to take instruction in cases where their fees (already low by commercial standards) are cut by 20%.

119. Again, it is the individual who will suffer from such inequality of arms, as the State will continue to instruct the expert of its choice, and, when necessary, regardless of cost.



## **Section D                    Part 2: Further Consultation**

### **Chapter 3:    Procurement of Criminal Legal Aid Services**

**Q1    Do you agree with the modified model described in Chapter 3? Please give reasons.**

120.. No, for the reasons given above. The CBA believes that access to justice will be fundamentally compromised by introducing a system which will lead to the devastation of High Street criminal solicitor firms, inadequate scrutiny of evidence, advice to vulnerable clients based on financial pressures (bearing down on the amount of time given to the preparation of a case and ultimately advice given) and a fall in professional standards. As with the long-established high reputation of the criminal justice system, once that expertise and quality of representation is lost, it cannot be regained.

121. Whilst the CBA is relieved that the MOJ has listened to the principled arguments against PCT propounded by the CBA and countless others, it is still concerned that the new proposed model does not go far enough to ensure that client choice is not simply retained in name alone. If the solicitor who has a long-established relationship (for reasons of particular expertise, local or family knowledge or ethnic or cultural connections) with a particular, often vulnerable, client is no longer in business, the client will have little real choice left. Likewise, a solicitor who does not have the means to compete for a duty provider contract will not be able to replenish their 'own client' base to survive.

122. Finally, any client choice provision must be able to work in such a way as to be practically effective and administratively simple to implement. Here the input of experienced stakeholders, particularly High Street solicitors,

ought to be properly considered.

123. In relation to the Defence Solicitor Call Centre and Criminal Defence Direct services, it seems to the CBA that these are unnecessary, administratively cumbersome and not sufficiently efficient or cost effective to justify their existence. The CBA proposes that the government's review into systemic reform should address the necessity, cost and effectiveness of these services.

**Q 2 Do you agree with the proposed procurement areas under the modified model (paras 3.20-24)? Please give reasons.**

124. No. The CBA adopts the reasoning given by the CLSA and LCCSA.

**Q 3 Do you agree with the proposed methodology for determining the number of contracts for Duty Provider Work (paras 3.27-35)? Please give reasons.**

125. No. The CBA adopts the reasoning given by the CLSA and LCCSA.

**Q 4 Do you agree with the proposed remuneration mechanisms under the modified model (paras 3.52-73)? Please give reasons.**

126. No for the reasons given above. In addition, the CBA adopts the reasoning of the CLSA and LCCSA.

**Q 5 Do you agree with the proposed interim fee reduction (paras 3.52-55) for all classes of work in scope of the 2010 Standard Crime Contract (except Associated Civil Work)? Please give reasons.**

127. No for the reasons given above. The CBA also adopts the reasoning of the CLSA and LCCSA.

#### **Chapter 4: Advocacy Fee Reforms**

**Q 6 Do you prefer the approach in:**

- **Option 1 (revised harmonization and tapering proposal); or,**
- **Option 2 (the modified CPS advocacy fee scheme model)?**

**Please give reasons.**

128. The government’s intransigence in announcing its intention to plough ahead with plans for further reductions in fees is an affront to a profession that has experienced uniquely savage cuts over the last two decades. No other profession or public service workforce has been subjected to anything like these cuts. Unlike public service employees, criminal barristers being self-employed do not receive benefits such as pension, healthcare or overtime and must meet their own expenses. They have no employment rights to challenge the legality of such cuts. The cuts proposed are simply unsustainable. The offer of a choice between Options 1 and 2 is moreover as contemptuous as offering a condemned man a choice in the manner of his execution. The government cannot simply hope that barristers will be unable to afford not to work, committed practitioners in independent practice have made it clear to the CBA, the

Circuits and the Bar Council that they simply cannot afford to continue to undertake legal aid work if their fees are cut further.

129. The justification offered in the Consultation Paper(s) for the structure of the proposed changes to AGFS rates is that they would provide incentives for efficiency. This argument, however, is not supported by any evidence or any analysis of the true causes of inefficiency that exist in the criminal justice system. Again, the CBA will work with the MOJ, stakeholders and any systemic review on identifying inefficiencies in the system – from arrest to trial – and in working on cost-effective solutions.
130. It follows that both options are objected to. The CBA observes that Option 1 is particularly perverse as its financial model will encourage and reward practitioners to exert pressure on defendants to plead guilty (whatever the strengths or weaknesses of the case or the client's instructions), whilst punishing financially a practitioner whose lay client exercises his right to trial by jury or where there is a properly advisable defence. Furthermore, it severs any correlation between effort and reward. Proper representation for all defendants means that even those who stubbornly fight an overwhelming case have trials that are shorter, more focussed and better managed; their victims are cross-examined professionally and they are unlikely to have arguable grounds of appeal when they are convicted. The experience and quality of the independent Bar fosters public confidence in the criminal justice system and reduces costs elsewhere.
131. As for the suggested introduction of a tapering fee, the proposals are iniquitous and illogical. They simply penalise financially an advocate for being in a lengthy trial. No evidence is offered or suggestion made that advocates are responsible for delay in the conduct of trials. By contrast, it is well known that delays are caused by a host of factors which are either

under the control of the State or are outside the control of defence advocates. In the first category we have, for example: late disclosure by the prosecution; failure to warn witnesses; the frequent late production of prisoners to and at Court by the Government's preferred suppliers SERCO; and the failure by Capita to provide interpreters. Why should the advocate be punished for the length of time a jury may choose to deliberate in a case? In the second category we have illness or non-attendance of witnesses or jurors and unexpected developments in the evidence. In many courts the cause of delay is often the pattern of listing short hearings in other cases each day when trials are taking place. This can mean the trial courts lose several hours a week. It is grotesquely unfair to suggest that the defence advocates should have to bear the costs of these factors over which the advocate has no control and which are often the failings of the State, particularly where they are unable to conduct other work at the same time.

132. Tapering can have no proper incentive effect if it starts before the end of the trial estimate. If a case is expected, without undue delays, to last 40 days, then using a taper to reducing the fees on days 3 to 40 will simply be a fee cut, since it cannot act as an incentive to the advocates to avoid undue delay. Cases lasting 40 days undoubtedly require significant preparation and work during the trial in order to avoid delay. This work is invariably conducted when the court is not sitting i.e. early mornings, evenings, and weekends. There should not be a penalising of advocates for trials which last longer when they work hard both in court and out of court.
133. We strongly assert that all substantial criminal trials – not merely those lasting 40 days – require and receive significant preparation by dedicated barristers. The consultation paper utterly fails to demonstrate awareness

of this fact, and seeks instead to introduce arbitrary changes by tapering fees in such a way that bears no comparison with the reality of the hard work undertaken by criminal barristers.

134. Furthermore, the analysis of impact in the Consultation Paper is fundamentally flawed, since it assumes that advocates' mix of work would be the same after, as well as before, the implementation of the proposals. But the proposals themselves undermine that assumption, by creating a greater incentive for the increase of plea-only advocates and "cherry-picking" by solicitors. This has already taken place in the last 5 years. The self-employed Bar rarely conducts guilty pleas because solicitors prefer to keep such fees 'in house'. It is plain to all self-employed advocates that the Crown Prosecution Service and defence solicitors keep the cases where they think (or hope) there will be guilty pleas and only brief counsel when it is plain that trials will take place. This kind of behaviour serves only to impede proper case preparation and is inconsistent with the Criminal Procedure Rules and good case management. Public confidence is damaged and justice is delayed.
135. There is no doubt that the proposed changes to the AGFS would be to lead to an increase in the number of guilty pleas being conducted by "plea-only advocates", with the reductions in fees falling disproportionately on trial advocates, i.e. predominantly the Bar. The Impact assessment fails to take proper account of this inevitable consequence of the way the market for legal services is structured. The Government may claim that it wishes the independent Bar to survive, but, if these proposals are implemented, the claim is hollow.
136. Reductions at these levels would undermine the financial viability of most sets of chambers and the attraction of a career at the criminal Bar both for

new entrants and established practitioners. Within a short time, the cadre of experienced, able, specialist criminal advocates on which the criminal justice system relies so heavily would disappear. The effects for the criminal justice system would be considerable, since reductions in the standards of advocacy would lead, amongst other things, to: more delay, rather than less; more ineffective trials; more appeals; and a substantial risk of injustice arising from poor representation. Furthermore, the pool of skilled and experienced advocates from which the judiciary is drawn will be significantly reduced in size and diversity. The impact of this change would take decades to reverse.

137. Option 2 includes the assertion that it is in part justifiable on the grounds of administrative efficiency. This is not the whole story as the option also contemplates further cuts. If this option was cost neutral (but did operate to reduce administrative costs) our reaction might be very different. But all experience of recent Government changes to the administration of fee payment in the criminal justice system has been negative, resulting in long delays and inaccurate payments. It is wholly wrong that self-employed advocates should bear the consequences of mistakes made by the State. A return to the court-based system of fee-claim taxing, or an attempt to find a more efficient system, would be more cost effective.
138. Ultimately, the CBA submits, a fair system based on *proper remuneration* for the type of case and amount of work properly undertaken, based on parity with advocates who prosecute, is logical and preferable. Again, the CBA offers to work with the MOJ and others to find a suitable model.

## Chapter 5: Impact Assessments

**Q7 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.**

139. For reasons set out in June and above, the CBA disagrees. The Government has recognised that the reactions to the original Impact Assessments was largely negative and raised important issues that had been given insufficient consideration by the MOJ. The second consultation paper has addressed some matters raised in the first consultation process. However where the Government has recognized a potential issue, their approach is invariably to say that the proposals are proportionate in order to achieve the Government’s legitimate aim.
140. The impact assessment produced by the MOJ states a reduction of fees in the GFS will result in a consolidation of the legal aid market. Whether or not consolidation takes place, the overwhelming likelihood is a replacement of established and experienced practitioners by the inexperienced. The impact of this is set out above but will result in more indirect costs.
141. There is no evidence that the Bar can or will sustain a cut in fees. Whilst the MOJ impact assessment’s makes reference to the Law Society stating providers could sustain such a cut no reference is made to the Bar being able to sustain such cuts.
142. The MOJ impact assessment makes reference to a reduction in spending associated with criminal legal aid contributing to the Government’s macroeconomic objectives. However, as set out above, the effect of such cuts will cause more costs to be incurred elsewhere.



**Q 8 Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.**

143. No, for the reasons set out above. In particular the Government has completely failed to properly assess the impact on young and BME practitioners. The consequence of the Government plans will be a flight from VHCC work to what remains of AGFS work. It is absurd for the Government to maintain that the very junior Bar will be able to conduct VHCCs as they simply do not have the experience to properly conduct such cases. No guilty pleas will ever be available to the Bar from solicitors who employ HCAs as they will retain all these in house.
144. The Government has also failed to take account of how Chambers are financed. Almost all are funded by a percentage contribution by each member. Once higher earners suffer cuts, their ability to effectively cross subsidize the young and women on maternity leave and / or seeking to return to practice is undermined. Only those long established and with independent wealth will survive. The part of the profession that undertakes publicly funded work will wither and die.
145. The Government has refused to acknowledge what the CBA has previously submitted about the effect on women, young and BME practitioners and asserts that "we consider that, particularly in the overall macro-economic context and taking account of the need to make such savings, these reforms are a proportionate and necessary means of achieving the legitimate aims set out."
146. It must not be forgotten that given the plummeting costs of overall spend since 2010/11, and the Government's failure to disclose either the actual

current spend, or to disclose the baseline from which it is said cuts must be made, means that there is no demonstrated 'need to make such savings'. It follows that it is disingenuous for the Government to state that it has balanced this supposed 'need' against the damage that will occur and conclude that the reforms are 'proportionate and necessary.'

147. The Government refuses to accept that the adverse consequences for the composition of the judiciary should be taken in to account. The Government is wrong and should accept the position. These changes will entrench privilege and undermine public confidence in the administration of justice.

**Q 9 Are there forms of mitigation in relation to impacts that we have not considered?**

148. The question is redundant, for the reasons set out above. The only effective mitigation would be to not introduce these damaging and ill thought out proposals.

**THE CRIMINAL BAR ASSOCIATION**

**OCTOBER 2013**