Garden Court Chambers Crime Team

Response to the Ministry of Justice Consultation Paper: 'Transforming Legal Aid: delivering a more credible and efficient system.'

Introduction

1. Garden Court Chambers is one of the largest multi-disciplinary Chambers in the UK. We have over 140 tenants carrying out work in criminal law, immigration, family, housing and civil law.

2. This response is prepared by the Crime Team to deal with the specific issues concerning Criminal Legal Aid. In relation to the other questions posed in the 'consultation', we wholeheartedly endorse the submission made by our colleagues in Chambers.

3. Our founding principles were a commitment to human rights and social justice and we remain dedicated to those standards and values today. As well as our commitment to legal aid, we undertake large amounts of pro bono work for the good of individuals and local communities.

4. We are committed to equality and diversity and our tenants and pupils come from a wide range of backgrounds. We believe that the same opportunities, including the ability to qualify and practice as a barrister, should be available to all – regardless of background, income, ethnic group, gender or sexuality.

5. The Crime Team has a particular history and expertise in representing defendants in public order and terrorism trials. Members of Chambers have also been instructed in seminal miscarriage of justice cases over recent decades including the Guildford Four, Birmingham Six, Derek Bentley and Sam Hallam.

Opening observations

6. The proposals put forward by this consultation are a disgrace and all those involved should be thoroughly ashamed of this attempt to destroy a criminal justice system which is the envy of the world. To do so by secondary legislation, without daring to put the matter before Parliament, is craven cowardice. To do so within a ridiculously short timetable, having only allowed interested parties eight weeks to respond, indicates that this consultation paper is a sham designed to add a veneer of respectability to what, in reality, amounts to the looting and pillaging of a national asset. If these proposals are implemented then neither the Ministry of Justice nor the Lord Chancellor deserve their titles. These proposals threaten the independence of our system of justice and open the door to serious conflicts of interest between those needing representation and those who are meant to protect their interests. Garden Court Chambers will continue to fight against this concerted attack on the Rule of Law, and the principles of equality of arms and justice for all, until they are defeated.

7. We adopt and endorse the thorough, detailed and persuasive submissions made by the Criminal Bar Association ('CBA'). Our response should be taken in addition to their criticisms and challenges.

8. The entire consultation is flawed and misleading, beginning with its title. The title suggests that the proposals are designed to increase credibility in the legal aid system. In the Ministerial Foreword, Mr Grayling states that *'Unfortunately, over the past decade, the system has lost much of its credibility with the public.'*

9. In an interview with the Law Society Gazette[1], Mr Grayling failed to produce any empirical evidence to support the claim of a loss in credibility, referring instead to having received *'lots of letters and e-mails'* from people concerned about legal aid entitlement. It is not made clear whether or not these 'letters' relate to criminal legal aid - or whether they are written by people fully informed of the relevant facts.

10. Contrary to Mr Grayling's assertion, a recent poll[2] demonstrated that seven out of ten members of the public feared that the legal aid cuts proposed in this consultation would lead to miscarriages of justice.

11. If there are complaints about legal aid they are undoubtedly provoked in part by the Ministry of Justice's cynical trick of compiling figures for the 'highest earners from legal aid' and releasing this information to the press. These figures ignore or bury the true position:– that these fees accumulate for many years work, carried out late into the night and over weekends, by highly skilled individuals dealing with the most complex cases; that the figures include VAT and take no account of the overhead expenses of the self-employed practitioner, including the need to make their own pension provision, and that those entering the provision have to incur significant qualification costs on top of the now astronomical tuition fees. The reality is that the vast majority of those working for legal aid rates struggle to earn a modest living.

12. Any comparison with commercial Legal Aid incomes would show a vast differential and it would be foolish not to recognise that creating such huge

[1] Law Society Gazette, 20th May 2013, http://www.lawgazette.co.uk/features/interview-chris-grayling
[2] http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/may/7-out-of-10-of-the-british-public-fear-legal-aid-cuts-will-lead-to-injustice—-new-poll/

disparity will in future discourage many of the brightest and best from practising in the Legal Aid system.

13. The Ministry of Justice fails to explain to the public that legal aid spending on criminal cases has already dramatically fallen from £1.34bn in 2003/2004 to £1.08bn in 2011/2012, despite a growing population and the creation of a vast number of new criminal offences. The Legal Aid Agency's business plan for 2013/2014 indicates that the cost by that stage will be £941m. Given the inevitable delay in any savings working their way through the system, further savings are already likely. By arbitrarily imposing further reductions the Ministry will push the system past its breaking point.

14. The suggestion that these cuts would lead to increased efficiency is also wrong and, at best, fundamentally naive. Criminal defence solicitors and barristers already provide extremely good value for money to the tax payer. The only reason the criminal justice system does not collapse entirely is down to the goodwill and hard work of the defence community who chase the Crown Prosecution Service to carry out their duties, who work through the night to draft crucial documents and who prepare cases thoroughly to avoid delays and unnecessary appeals.

15. The savings to the tax-payer suggested by the consultation paper take no account of the cost of an increased number of wrongful convictions and an increased number of people sent to prison unnecessarily. As well as the cost of keeping a person in prison, the price includes the cost of removing a potentially productive member of society to a place where they can no longer contribute to the economy, the cost of tearing apart families and increasing their reliance on the State for support and the cost to society of further

offences being committed by the true culprits or by minor offenders dragged unnecessarily into the prison system and further away from rehabilitation.

16. The real reason for these proposals is nothing to do with ‘efficiency’ or ‘credibility’. The real reason is to cut public spending regardless of the consequences on society or individuals. An indication of the Lord Chancellor’s thought process is given by his response to a question in the House of Commons on 21st May 2013. When asked about these proposals he responded:

‘I am trying to take those decisions in the way that provides the best balance between justice and value for the taxpayer.’

17. We do not believe that any taxpayer, if asked, wants a justice system that is unfair and benefits only those with a high enough income to pay for justice. Furthermore, justice is not a commodity to be stacked up and weighed in the balance like a tin of beans. It is an aim in itself, to be striven for - not to be parcelled up and divided amongst the rich.

18. Finally, what is most striking about the proposals is their economic illiteracy. Even under the pretext of the need to cut public spending, the proposals amount to a false economy. The damage which is likely to be done to the fabric of the criminal justice system will prove far more expensive to repair than the savings which the proposals intend to achieve. The effective working of the criminal justice system depends on the good-will of thousands of hard-working professionals. The relentless dumbing-down of the system destroys that good will and will lead to an error prone, second rate criminal justice system.

19. This leads to the conclusion that these proposals are more driven by a blind adherence to the philosophy of privatisation than by a rational analysis of their cost/benefit. Ironically, measures which appear to be designed to place legal services in the hands of large commercial corporations can only be achieved by eliminating competition for the provision of a quality service. The underlying philosophy appears to be that those who find themselves in contact with the criminal justice system are not deserving of a high quality service and are no more than fodder for the generation of corporate profit. That aim is not compatible with the interests of justice.

"Justice is itself the great standing policy of civil society; and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all."

Edmund Burke

Chapter 3: Eligibility, Scope and Merits

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

20. No. Those who find themselves in prison are often amongst the most vulnerable in society. By reason of their incarceration that vulnerability is compounded. Their movements, activities and associations are controlled by the State. It is absolutely imperative, therefore, that they have opportunity for independent legal assistance should they wish to challenge any of the measures employed by agents of the State who detain them. Prisoners are highly unlikely to be able to secure such assistance privately. Any restriction upon the legal aid available to them is strongly opposed.

21. The proposals relate to many matters of fundamental importance such as categorisation, movement between prisons and medical care. They have significant repercussions for the well-being and, sometimes, the restrictions to liberty which a prisoner faces. Challenges to Governors' decisions in respect of the same can involve (if properly conducted) complex issues of law and fact. It is entirely unacceptable to suggest that a prisoner should be expected to master such matters him/herself without assistance.

22. The expectation that prisoners should represent themselves is naïve in the extreme. Prisoners are unable to access alternative sources of advice and support. As well as being ostracised from society and support structures, many are illiterate or have poor reading skills, and many do not speak English as a first language. In addition, they may often feel unwilling to personally challenge those who detain them for fear of the impact it may have on their ongoing conditions of detention. A lawyer can fight for the legal interests of their client without such fear.

23. The suggestion that prisoners may themselves seek remedy for unsatisfactory decisions through the existing complaints system is similarly unrealistic. The existing system cannot possibly match the scrutiny provided by the Courts. Further, the existing system is inadequate. There is no power to enforce the implementation of the ombudsman and, in any event, the process is slow. This is unacceptable where the decisions requiring challenge will often have immediate effects, which require swift remedy.

24. Should the proposals be implemented they will have the effect of causing the collapse of specialist prison law firms. This would be a deeply regrettable loss of skill and knowledge, which will mean that prisoners will not receive the same quality of representation, if they do require assistance in an area which continues to be funded.

25. We adopt the observations of Andrew Neilson, director of campaigns at the Howard League for Penal Reform, who said in relation to these proposals:

'The government's proposals to further curtail legal aid for prisoners are profoundly unfair and will have negative consequences for society as a whole.

The misuse of solitary confinement can exacerbate mental health problems and lead to lost lives. Access to behavioural programmes or help with resettlement can mean the difference between a prisoner going on to change their life for the better or to reoffend.'[3]

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

[3] http://www.guardian.co.uk/society/2013/apr/04/prison-complainants-set-to-lose-legal-aid-funding

26. We have grave concerns about the introduction of a financial eligibility threshold on applications for legal aid in the Crown Court.

27. Equality of arms is fundamental to the rule of law. Equality of arms is not an archaic or idealistic principle. It remains of fundamental importance to maintaining a fair society. Introduction of a financial eligibility threshold risks undermining this.

28. Requiring an individual to bear the financial costs of allegations made against them by the State is particularly concerning in the current climate where the organs of State responsible for initiating, reviewing and prosecuting criminal proceedings are becoming increasingly inefficient. Innumerable anecdotal examples might be given of cases which proceed to trial only to be dropped on the first day because of Crown failures to review or disclose. In those cases, defence solicitors will have written many letters, Counsel will have attended many hearings and much time and expense will have been wasted.

29. The removal of equality of arms and rendering an accused person as financially responsible for their defence is likely to result in an increase in miscarriages of justice, which will gravely damage society. Those who do not meet the threshold may be faced with a significant and improper financial pressure to plead guilty. If they do so, an innocent person will be punished and a guilty person will walk free. Alternatively, they may choose to represent themselves. Without the proper skill or knowledge, they may fail to secure proper disclosure, question witnesses appropriately, or raise necessary legal challenges. This is equally likely to result in the innocent being convicted.

30. There are also numerous practical difficulties in implementing these proposals. Firstly, the introduction of means-testing in the Magistrates' Court has resulted in huge delays and difficulties. Where individuals are self-employed, or married but separated, or simply disorganised with their paperwork, they often find it difficult to provide all the documentation required in order that their claim may be assessed. This results in a protracted period in which paperwork is passed between the Legal Aid Agency and the defendant, sometimes resulting in legal aid being granted, sometimes not. During that period, any hearing listed must be adjourned with the significant cost to the public purse and the delays to justice which such adjournments entail. It is inevitable that this difficulty would also apply to Crown Court cases.

31. Secondly, the income threshold of £37,500 appears to be arbitrary. It applies equally whether it relates to a single individual or a parent with sole financial responsibility for children. It further applies equally regardless whether the case concerned is a one day assault trial or a one month murder. Those cases would necessarily involve completely different preparation costs. The need for experts in a given case, for example, is not taken in to account. It is nonsensical that the same threshold would apply in each case, and the onus would then be on the individual to claim hardship, with the same delays likely to apply which already exist in the processing of such claims in the Magistrates' Court.

32. Thirdly, the proposal for limited reimbursement for defendants who are acquitted is entirely inequitable. The suggestion that, due to a situation imposed upon them, they must pay private fees but will only be reimbursed at a legal aid rate is, frankly, disgraceful. The Government well know that private rates are higher than legal aid rates. Market forces mean that as legal

aid defence firms are forced to turn to private work or collapse, they will not be able to reduce their private rates. Thus, even if acquitted, it is inevitable that a defendant will be left at a significant financial loss, without remedy. Under the present regime, which the proposals do not suggest changing, the Crown are able to claim the entirety of their costs on conclusion of a case in which a defendant is successfully prosecuted. The disparity between that position, and the proposal in respect of defendant's costs, is grossly unjust.

33. Finally, the increase in litigants in person will significantly increase costs in slow and delayed trials and will increase the number of appeals. Defendants who, on advice from trusted defence solicitors, might have chosen to plead guilty, may proceed to take their matter to trial. Thus, any savings achieved by the threshold may be quickly counterbalanced by wasted costs in other areas. This is before consideration is given to the situation of victims who will increasingly find themselves cross-examined by the person they accused.

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

34. No. For the reasons set out above. In addition, the threshold would not simply exclude those earning over £100,000 per annum, as Mr Grayling recently suggested, but would exclude those earning significantly less than half that amount, bearing in mind that spouses and partner's incomes are taken into account jointly.

Chapter 4: Introducing Competition in the Criminal Legal Aid Market

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

35. We do not agree that any criminal legal aid services should be made subject to competitive tendering.

36. These proposals proceed on the basis set out at paragraph 4.6 of the consultation paper, that *'competition is the best way to promote value for money, innovation and efficiency.'* Nowhere is it suggested, nor could it be, that these proposals are the best way of ensuring justice.

37. It is clear that neither Mr Grayling nor the civil servants have considered or care sufficiently about the risk of miscarriages of justice. When asked in a Parliamentary question[4] about the impact of his proposals on miscarriages of justice, Mr Grayling stated:

'I am very confident that what we are doing, which involves encouraging the litigation part of our system to operate more efficiently and making changes to the top end of the income scale for the Bar, but also protecting incomes for the junior Bar, will be the best way of delivering an effective balance between proper justice and something that is affordable to the taxpayer.'

38. This response ignores the reality that if the question of cost is the sole criterion and, if there are greater rewards for less work, then of course miscarriages of justice will increase. If surgeons were paid more for shorter

[4] 21st May 2013, Column 1051

operations, everyone would recognise the dangers to the system. The same is true for lawyers.

39. In response to another Parliamentary question in the same session[5], Mr Grayling refers again to *'the best balance between justice and value for the taxpayer'*.

40. As we have indicated before, justice is not a commodity to be weighed in the balance. Mr Grayling does not say what this 'something' that is affordable to the taxpayer is, but it is not justice, due process, equality or the presumption of innocence, all of which he is happy to toss on the public spending bonfire.

"Justice extorts no reward, no kind of price:
she is sought, therefore, for her own sake."

Cicero

41. The Ministry's attitude demonstrates an unnecessary hostility to small business models and does not seem to be based on any empirical evidence regarding legal aid firms. As regards 'economies of scale' it is suggested at paragraph 4.16 that *'office overhead costs can account for up to 30% of costs for small organisations, and these could be reduced through consolidation of back-office tasks in larger organisations'*. It is not made clear whether the figure of 30% relates to small solicitors' firms or other 'organisations'. Given the cuts that have taken place to legal aid over the last 15 years, do the government really think that solicitors firms have not trimmed their overheads as far as possible already in order to maximise what small profit is available? Where they have not cut back is where they cannot afford to do so, in the quality of work they do.

[5] Ibid, Column 1052

42. Where will small, medium or large firms cut their expenses? The only possible way to reduce costs is for qualified solicitors to spend less time on each case. Either firms will have to employ warehouses full of paralegals on the minimum wage with one or two qualified solicitors providing nominal oversight, or solicitors will have to reduce the amount of time they currently spend on cases. Either solution clearly means that the risk of miscarriages of justice is vastly increased.

43. The only other solution will be for firms to carry out all advocacy services in-house in order to offset the losses they incur elsewhere. In doing so, they will not be able to afford to select the best advocates or the specialists, but simply those who are willing to work for the least money.

44. These very simple economics give the lie to the suggestion that these proposals will assist junior barristers. There will be no junior Bar if these proposals come in. The best advocates will move to practice in other areas of law where they can afford a reasonable standard of living. Those who wish to remain will have no practice, as the cases they would otherwise be doing will be carried out by in-house advocates. Only the rich and incompetent will remain.

45. If the civil servants in the Ministry of Justice had the slightest idea of what the solicitor's job involves or how the trial process works they would be able to see the danger in their proposals. Anyone involved in defending people in the criminal justice system knows how important it is that time is spent with defendants to get clear instructions, making it less likely that issues arise late in the day necessitating adjournments or even worse, trials proceeding without crucial evidence.

46. Tenants in this Chambers have dealt with many miscarriage of justice cases - some well known, some less so. Anyone involved in investigating and appearing in appeals against conviction in the Court of Appeal knows how serious mistakes can arise – important witnesses who were not contacted, important aspects of the unused material which were overlooked, important evidence not challenged or examined.

47. This is why ‘quality assurance schemes’ or ‘quality controls’, as mentioned in the paper, will only ever be an inferior substitute for the current system. Such artificial devices can only measure a minimum level of competence. Providing a quality service for defendants in the criminal justice system cannot be done by means of a ‘tick box’ list. Each and every case is different and each and every client is different. Compressing these individuals into a factory line with every incentive to push as many cases through as possible with the least amount of work, dehumanises all those involved – including the civil servants who propose such a system.

48. As has been pointed out in other responses, these proposals will mean there is no ongoing need to strive for excellence and no need to offer such low prices in the next round of competition. In the same way that Tesco’s fixed the price of milk to their advantage for years, large corporations will fix the price of due process for years to come. Indeed, more than one of the companies likely to bid for contracts under these proposals have been involved in price-fixing and failing to deliver properly under contracts with the government.

49. In a recent trial, both the prison and the private contractor charged with the Defendant’s transportation to court refused to take a prisoner to hospital,

despite medical advice that it was necessary to receive treatment for a fractured wrist. As a result the Defendant only received treatment after two days when a court order was made, demanding that it be provided. Experience at the Central Criminal Court has shown that the private contractors in charge of the cells are responsible for more delays than ever before, due to a failure to provide sufficient staff where it would not be economical to do so. This lack of concern for Defendants, court time and public money will be replicated and exacerbated, if such companies are awarded criminal defence contracts.

50. Specialist lawyers will be lost to the market. The expertise built up over decades, for example, in this Chambers in areas such as public order and terrorism, will go to waste. In-house advocates will come under pressure to deal with whatever case is sent in their direction, whether or not they are the best person available. The unnecessary hearings, adjournments and lengthier trials - which could be avoided by having practitioners who are familiar with the legal and practical issues which arise, who can process the material quicker and, if appropriate, resolve cases swiftly - will more than swallow up any perceived savings in the short term.

51. Any reduction in the rates payable is not sustainable for the reasons set out above. The Ministry have no idea what figure is sustainable, have carried out no research and have made no viable practical suggestions as to how such a saving could be achieved by individual firms. It is anticipated that the overwhelming majority of responses to this consultation paper, from those who know the current strains on the system better than the civil servants reading the responses, will say that such significant cuts are impossible. Nonetheless, the Ministry will pluck a figure out of the air and press on regardless.

"We will sell to no man, we will not deny or defer to any man either Justice or Right"

Magna Carta, Clause 29

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

52. No. It is understood that the 'classes of work' referred to include advice and representation in appeals against conviction or sentence and public law challenges arising out of criminal cases.

53. Not only do the Ministry of Justice appear to be determined to cause mistakes and miscarriages of justice, they also appear to be determined to make it harder to correct those devastating errors.

54. The consultation paper acknowledges that these areas of work are 'relatively low volume'. Such a swingeing cut would therefore have a devastating effect on individual cases and a negligible effect on the legal aid budget.

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

55. No. The fabric of the criminal justice system will be destroyed the moment these contracts come in to force. It therefore matters not whether they last

three years or thirty years. It is the length of time that their repercussions would be felt that is our concern.

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

56. No. There is a difference between organisational models which are efficient for the State and those which are efficient for individuals. The proposals, yet again, fail to take account of the practicalities of representing vulnerable clients in the criminal justice system.

57. To give some examples, under the proposals, there would be four 'providers' for the whole of the Thames Valley CJS area. The Thames Valley CJS area is one of the largest geographically and includes major towns and cities such as Oxford, Reading, Milton Keynes and Slough. It also includes many smaller towns and villages, which are currently serviced by small solicitor's firms.

58. Under the proposals, even if such small firms survived – which will be nigh on impossible – clients living next door to those firms would not be allowed to use their services. Instead they would have to travel across three counties to speak to their assigned solicitor. Even clients living in larger towns, near to large corporations set up to dispense legal aid in that CJS area, next to the magistrates' court or Crown Court that the client needs to attend, would have to spend hours of their time and significant amounts of money travelling long distances to give their instructions.

59. The proposals pay no regard to the real difficulties many clients have in being able to afford to travel long distances. If it comes to a choice between eating, paying their rent and looking after their children, or travelling to see their lawyer, most clients would choose the former.

60. Under the current system, solicitors will travel to meet the client at a location convenient to them, if necessary. This will not happen under the new system as the reduction in fees mean that the solicitors are already likely to be losing money on any case which is proceeding to trial. The overwhelming incentive created by these proposals is to do the minimum amount of work on each case. The cost of any travel expenses will wipe out any remaining profit and the time spent travelling could instead be spent on the factory line, churning out less difficult cases. Therefore, such additional work simply will not be done.

61. Telephones and video-links will not provide the answer. When taking instructions from a client, it is necessary to be able to go through witness statements in detail and to point things out to them from the paperwork. Graphics, plans, photographs and CCTV are increasingly part of modern criminal cases and these cannot be gone through over video-links or by telephone. When explaining the law and evidence, it is often easier to write things down or draw diagrams to explain things. Crucial decisions and the obtaining of expert reports require client's signatures. All of this can be done quickly and effectively in person. The alternative will be going through material with Defendants at Court – increasing delays and costs rather than making proceedings more efficient.

62. Most importantly, when advising someone properly and effectively on significant decisions, it is essential to have their trust. In order to give their

instructions a client may need to discuss their family history, to discuss the time they spent in care, to be open about the extent of their drug addiction, to finally say how often their partner has assaulted and abused them, to talk about the most intimate aspects of their life. Such conversations cannot be carried out other than face to face.

63. If these conferences do not take place, important points will be missed. Inefficiencies and injustice will result.

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

64. The suggestion of joining such large areas is made, not with any consideration of the effect of justice or quality but simply because otherwise *'there would be too little work available to use these as an effective basis for procurement.'*[6]

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

65. We can add nothing further to the CBA's excellent response.

Q13: Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won

[6] Consultation Paper, Paragraph 4.49

competitively tendered contracts within the applicable procurement areas? Please give reasons.

66. No. These proposals will destroy client choice and remove any incentive to provide more than the bare minimum level of service required. Where Defendants are automatically assigned to a particular corporation with little chance of transferring their representative, even if they are not carrying out all the extra work necessary, quality will suffer.

67. For a Government that supposedly supports choice and competition as a safeguard against inefficiency and bad conduct, this is simply absurd. Experience of other contracted-out services in the criminal justice system demonstrates that such providers feel protected from any form of accountability due to bad conduct.

68. The proposals take no account of cases in which the Defendant lives in a different area of the country to the one in which the case is to be tried. The difficulties this will cause for effective communication between Defendants and their representatives are highlighted above. A client living next door to a solicitor's firm in Newcastle but having to travel to London to see their assigned solicitor shows what a nonsense these proposals are, how little understanding the Ministry of Justice have of the realities of providing a criminal defence service and how inefficient the system would become.

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

69. No. We can add nothing further to the CBA response.

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

70. No. The factors listed take no account of geography. The size of the area and the number of courts within that area are crucial factors in deciding how many solicitors are provided in a particular area. If this is not taken into account then there is a danger that providers will be spread too thinly in more rural areas to be able to provide an effective service.

71. Currently, the number of providers in an area is determined by solicitors competing on quality and service. The balance has been determined over many years and has been able to react swiftly to changes in the market – new courts, new towns, new offences. A one-size-fits-all approach will lose all of these advantages.

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

72. No. For the reasons set out above and below in relation to client choice.

"Client choice may in certain circumstances... give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price."

Impact Assessment for Chapter 4, para 23

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

73. No. Client choice is fundamental to the smooth running of the criminal justice system. In an interview with the Law Society Gazette, Mr Grayling stated that:

"I don't believe that most people who find themselves in our criminal justice system are great connoisseurs of legal skills. We know the people in our prisons and who come into our courts often come from the most difficult and challenged backgrounds."[7]

74. For a 'Lord Chancellor' to make this comment is staggering. Firstly, those who encounter the criminal justice system regularly are able to recognise good quality service when they see it. The majority of work carried out by solicitors firms, at present, is done either because they have represented the Defendant previously and have been requested to do so again, or because they have been recommended by a previous client. The inevitable increase in complaints to the legal professions' regulators and appeals on the grounds of inadequate representation, which will follow these proposals, will demonstrate just how wrong Mr Grayling is.

75. Defendants who encounter the system for the first time are more and more likely to carry out research on their choice of representative before requesting that a firm represent them. The reputation and specialisms of firms and counsel can easily be discovered through their online presence,

[7] http://www.lawgazette.co.uk/features/interview-chris-grayling

their reputation in the community and through free guides such as the ‘Legal 500’ and ‘Chambers and Partners’.

76. Such relationships are important, because they provide confidence in the system. This means a client having confidence in his representatives, which means it is more likely that cases can be resolved as quickly and efficiently as possible. It also means the public can have confidence in the system. This is the reason why, contrary to the premise of the consultation paper, the system does have credibility. An effective defence gives legitimacy to the court’s verdict. It leaves less room for complaint. It ensures that not only has the Defendant had a fair trial, he has also been seen to have had a fair trial.

77. If Mr Grayling were right then applications to transfer representation orders would be a rarity in the current system and clients would always be happy to be represented by the duty solicitor. As he knows, or should know, this simply is not the case at present.

78. Mr Grayling’s further comment, that many people in the courts and prisons come from difficult and challenged backgrounds, implies that either they cannot make a choice or any desire they have to choose is so unimportant as to be meaningless. This is simply inhumane. This takes advantage of the most vulnerable members of society, disregards their autonomy and treats them as worthless.

79. If the education minister were to make similar remarks about parental choice regarding schools in poor areas, such a remark would rightly be seen as patronising and offensive.

80. When sections of society feel disenfranchised, unrest and an increase in crime is likely to follow. Among the causes of the 2011 riots was a feeling among members of society that they were viewed as second-class citizens, that they were treated unfairly by the State. In the aftermath of the riots, the importance of having defence solicitors and counsel who were trusted and independent dealing with the court proceedings which followed was crucial. Were the representatives to have been forced upon them by the same State that was policing them and prosecuting them, disregarding their wishes and treating them as products on a conveyor belt, that anger and sense of injustice may well have continued.

"Clients need to have confidence in their legal representative in order for justice to be fair and effective"

Lord Carter's Review of Legal Aid Procurement

81. It has been suggested by Mr Grayling that Defendants with more than one case will be represented by the same firm, even if they are arrested at different times in different locations. Price competitive tendering simply does not allow this to take place. To do so would defeat the aim of providing an equal share of the market to all providers. Nor is there any explanation as to how this would work in practice.

82. The effects of this problem are obvious. Clients with mental health or other personal difficulties would need to explain those problems to several different representatives. Medical records and psychiatric assessments would be duplicated unnecessarily. Court time and money would be wasted whilst three or four different firms sought to gain the Defendant's trust and coordinate their various different hearings.

83. Confidence and time would also be lost by the destruction of black and minority ethnic firms. Small firms with close ties to a particular community are invaluable to the smooth running of the system, adding trust and legitimacy to the dispensation of justice. If these proposals are implemented the legal profession will comprise overwhelmingly of rich, white men. It will fail to represent the diverse population of this country and will further lose credibility.

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

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

84. Other. Cases should be allocated by client choice for the reasons set out above. Options 1(b) and (c) are so farcical they cannot be taken seriously. It has been pointed out in other published responses to the consultation that (b) would only be likely to work in areas with 31 providers (with those allocated the 31st having a smaller share of work) or 12, 6, 4 or 3 providers. Option (c) would only work in areas with 26 or 13 providers with significant advantages for providers assigned 'J' for Jones in Wales or 'S' for Smith elsewhere. If these proposals have been suggested genuinely by those who have drafted this consultation paper, we suggest that the following options also be considered:

    1. Cases allocated by client's horoscope;

2. Cases allocated by client's shoe size;
3. Cases allocated by client's favourite member of 'One Direction'.

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

85. No. Cases should be allocated on the basis of client choice.

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

86. No. The current legislation already provides for legal aid to be transferred only in very limited circumstances. Where it is transferred it is only done so where a Judge is satisfied that it is in the interests of justice to do so, in order to facilitate the smooth running of the case and having carefully considered the effect on the Legal Aid fund.

87. Limiting the ability to transfer to 'exceptional circumstances' will mean that there will be cases where all parties agree it is in the interests of justice to change representative, but the court is powerless to do so because the case is not exceptional. The problem will be particularly acute because, due to the other proposals, inadequate representation by a client's assigned representative will not be 'exceptional'. It will be the norm.

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

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

88. No. Block payments and fixed fees do not take into account the amount of work required or done on a particular case. As set out above, these proposals incentivise cutting corners and doing the minimum amount of work possible.

89. The effect at the police stations will be an increase in unrepresented suspects, as in this way corporations can maximise their profits. The miscarriage of justice cases of previous decades demonstrate that it is at the police station where innocent clients are most vulnerable and where it is most important that a representative is present to protect a suspect's basic and legal rights. The presence of a solicitor can help resolve suitable cases by way of alternative disposals. The welfare of clients with mental and physical difficulties can be safeguarded. Important issues can be identified early so that, in appropriate cases, matters may be resolved at the first

appearance in the Magistrates' Court. All of this can only happen if a solicitor has sufficient time with their client and they have the client's trust.

90. The fee currently paid for work in the Magistrates Court barely covers the amount of work required in preparing a trial. Solicitors are now expected to bid for this work at such a price that makes it uneconomical to carry out any work on it. The effect will be that cases cannot be prepared properly and delays will mount up in the system.

91. Furthermore, no firm working to tight profit margins will ask to lose money by requesting a pre-trial review because the Crown Prosecution Service have not served any papers. Bitter experience of the current system shows that listing a matter for mention is the only way that, possibly, the CPS will do what is required of them. Late service of papers by the Prosecution is a significant cause of ineffective trials, which up until now has been ameliorated by the hard work of defence practitioners. That safeguard will be lost. The same problem will arise in the Crown Court with more serious consequences for the public purse and public confidence, if trials are adjourned or discontinued.

92. The young barristers who often deal with these mentions often earn far less than the minimum wage once travel time, waiting time and travel costs are taken into account. It is only due to the professionalism of the defence Bar that problems caused by the others are dealt with when they arise and matters are not left to wait until the trial date.

93. The consultation paper also suggests that it will require solicitors to attend court to support advocates. This used to occur regularly and the benefits to the effectiveness of the system were enormous. The reason it no longer does

is because the government cut the litigation fees so that it was no longer financially possible. It appears that the Ministry of Justice doesn't simply expect solicitors to do the same work for less money, they are expected to do more work for less money.

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

94. No. Firms will be forced to submit the lowest possible bid. Travel costs will eat into a corporation's profits and therefore work will not be done, even if it is necessary. The problems mentioned above relating to an insufficient number of cell staff, clearly arose out of an unrealistic estimate being provided and accepted in the bidding process and demonstrates that the burden of such errors falls on the public, not the private company.

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

95. Public confidence in this artificial system is not going be created or assured by corporations having a badge awarded by civil servants. The factors do not and could not take account of:

1. Whether the provider instructs the best and most suitable advocate available;
2. Whether the provider is concerned to present a full and fearless protect defence;

3. Whether the provider will choose to act in the client's interests even when it may reduce their firm's profits;
4. Whether the provider will work late unpaid hours in order to ensure that hearings will be effective;
5. Whether the provider fully understands, through experience, the ethical constraints involved in running a legal practice.

96. If quality assessments are to be carried out periodically after contracts are awarded, how will the Ministry of Justice respond to failing firms? The Ministry of Justice representatives have confirmed at the Consultation 'events' around the country that there is no 'safety net' in case of market failure. If these proposals are implemented, there will be no suitably sized firms waiting in the wings to take over should a provider fall below standard. Redistribution of work will not succeed, as the other firms in the area will be set up to deal with a particular volume of work. There is no back-up plan and there is therefore every incentive for the Ministry and the LAA to ensure that no firm fails its quality assessment. The bar will be set as low as possible. If quality assessments are not carried out periodically, there is no assurance that quality will be maintained. The difficulty of signing lengthy contracts is that there is no day by day accountability.

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

97. We endorse the response of the CBA.

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

98. No. As has been indicated above these proposals are ethically unsound, fundamentally flawed, seriously unprincipled, dangerously incoherent and clearly impractical.

99. A one-size-fits-all approach to cases simply does not work. One murder trial may involve just one defendant but significant amounts of expert evidence. Another may involve several defendants and many hours of CCTV. To treat them the same and to introduce inducements to do as little work as possible is unprincipled and dangerous.

100. The system is already stretched beyond capacity. The only way for defence practitioners to do the same (or more) work for less money is to spend less time on cases. Given the small fixed fees currently paid and the tight margins that most firms work to at the moment, do the government really think that solicitors are currently carrying out unnecessary work as it is? The only way to do any less is to stop doing work that is necessary.

101. The process will cause a race to the bottom. The Criminal Justice System that Damian Green MP said in a speech on 19th February 2013 was 'lauded internationally as one which is fair and just' will disappear. Mr Green also said that:

"There is much that we can be proud of in our criminal justice system. From those investigating a crime right through to those involved in sentencing and rehabilitating offenders, it is characterised by dedicated professionals who

work hard to deliver for the public that they serve, sometimes under considerable pressure and, in the current financial climate, whilst making significant savings."[8]

102. It is about time that the Mr Grayling and those who advise him recognise that the same applies to those who defend those charged with criminal offences. We too are dedicated professionals, working hard for the public under considerably more pressure than many others involved in the system and having already absorbed cuts which have provided the Government with significant savings. It will not be possible to say the same in a few years time if haulage companies, supermarkets and faceless corporations are peddling 'pile 'em high, sell 'em cheap' McJustice.

[8] https://www.gov.uk/government/speeches/criminal-justice-reform-lecture

Chapter 5: Reforming fees in criminal legal aid

103. There are fundamental difficulties with the current proposals in the Consultation Paper. Despite it being stated in the Introduction that *'the Bar is a well respected part of the legal system in England and Wales'*, the tenor of the proposals calls this into question. Most of the proposals are based on generalised statements, unsupported by evidence, with little or no explanation.

104. An example of the above, dealt with in more detail below, is the lamentable proposal to taper fees. There simply is no evidence to support the proposal. The rationale seems to be that by reducing fees as the trial progresses, advocates will ensure that a trial proceeds quicker than it otherwise would do. Anybody with any experience of a criminal trial will know that the trial judge is responsible for managing the trial process. The Criminal Procedure Rules have given judges greater powers to manage cases. Advocates cannot dictate or influence the speed with which a trial progresses. Moreover, the notion of providing an incentive to advocates to make sure a trial progresses expeditiously fails to recognise the sheer professionalism of those involved in the CJS.

105. The Criminal Bar Association analysis of the figures provided is wholly adopted. It is of significant concern that the proposals are based on 2011/12 figures, which would relate to historic work billed and is not an accurate reflection of current rates. It certainly does not take into account the effect of more recent reductions. At best it may be a fundamental flaw of the speed at which the proposals have been brought forward, which has lead to the absence of crucial data for such a sweeping change of the entire criminal legal aid landscape. Unfortunately, however, it appears to be an attempt to

create a misleading impression to justify inordinate reductions. This is particularly the case given that the LAA budget for criminal legal aid for 2012-13 is available, which already reflects a significant reduction.

106. It is acknowledged by the Consultation Paper that 65% of advocates receive legal aid fee income of £50,000 per annum or less (again this figure may be substantially less as it is based on 'indicative analysis' only). This figure clearly does not take into account that it is inclusive of VAT, which will need to be repaid to HMRC. There are extensive annual business costs including travel, professional fees, reference materials, correct court attire and Chambers' fees. Furthermore as self-employed individuals there is no entitlement to holiday pay, maternity leave, healthcare or pensions; all of which would have to be budgeted from the remainder of fees minus expenses. In light of this how can it possibly be suggested that the Bar would remain a viable profession for the majority of individuals if further reductions were imposed.

107. The commentary and proposals are littered with general statements with no supporting explanation. It is suggested that work is being undertaken with *'wider criminal justice partners to embed the principles of 'right first time', ensuring that cases are solved more quickly and cheaply'*. CJS reforms have been prioritised aimed at reducing the amount of time barristers must spend on each case. There is no explanation as to what is being done with 'wider CJS partners' and how this can be practically achieved. Each case has a different factual and legal matrix that will need to be fully assessed for comprehensive legal advice. This cannot be achieved with a pro forma and prescription on preparation.

108. The most disturbing aspect of the proposals is the underlying assumption that a financial 'incentive' needs to be created for defence teams to seek early resolution of cases. There is no reference to the interests of justice or the quality of legal advice. There is cursory reference to plea being ultimately for the individual and the length of trial not being dependent on the defence alone. This in itself shows how little understanding the Ministry of Justice have of the trial process. Any trial lawyer knows that it is the Prosecution that determines which witnesses are to be called, which exhibits produced etc. The Crown's case is almost invariably longer than the Defence case.

109. The consultation goes on to suggest that the existing graduated fee scheme may 'discourage' the defence team from giving early consideration of the question of plea or working towards the earliest possible resolution of cases. It is widely known that criminal legal aid work is not well remunerated as compared with other areas of law. Those who have secured pupillage and tenancy have competed against several thousands of applicants, who could have chosen to enter other fields. The underlying assumption of the proposals that financial motivations would override the commitment to the best interests of the client, in delaying any plea (despite the stringent enforcement of early guilty plea schemes), is quite discordant with the commitment which those entering or remaining at the Criminal Bar have already shown. It is contradictory to the Consultation Paper's own assertion that the Bar is a well-respected part of the legal system. It does not appear to be well respected if the integrity of the Bar is being undermined in this way.

110. There is no empirical evidence to suggest that Barristers harm client's interests by delaying pleas to get more money. Furthermore, the Bar Code of Conduct requires:

Applicable to all barristers

301. A barrister must have regard to paragraph 104 and must not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:

(i) dishonest or otherwise discreditable to a barrister;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

(b) engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

Applicable to practising barristers

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

303. A barrister:

(a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister's employer or any Authorised Body of which the barrister may be an owner or manager);

(b) owes his primary duty as between the lay client and any other person to the lay client and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served;

(c) when supplying legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service owes his primary duty to the lay client subject only to compliance with paragraph 304.

111. Not only is there oversight from the Bar Standards Board, but the natural competition from the current system would mean a lack of instructions, if clients were routinely being misadvised in this way.

112. The proposals also have no regard to the expertise brought by the Bar, accumulated over several years. Any fees must fairly reflect the training and experienced required to do a particular level of case. In relation to VHCC matters it is recognised that those conducting VHCC work must be accredited by the LAA, satisfying a number of criteria regarding experience and business processes. The proposals then have no regard for this expertise in imposing a blanket 30% reduction. It is also surprising that it is thought

that Crown Court Judges are not deemed to be capable of providing consistency in dealing with applications for multiple counsel.

113. Throughout the proposals there is little or no reference to the interests of justice or the impact on the quality of advice to be given. Due to a combination of previous reductions and delays in the payment of fees, following the reform of the payment of Crown Court fees, considerable hardship has been caused to practitioners who have been unable to meet personal daily living expenses and the cost of travel to and from court. Further cuts would make financial concern an even greater worry for practitioners and there is likely to be a need to take on a greater caseload to make the profession viable. Financial worries for representatives, the overstretching of energy and time and, quite possibly, a mass exodus of very capable members of the Bar will have an adverse affect on the quality of advice and interests of justice.

114. The Bar has made huge steps to diversify over the last twenty years. It has been a lengthy and gradual process. There is still some distance to go. Cuts of the magnitude proposed (up to 50% in some cases) will have a significant impact upon whether, in particular, the less well-off and women will be able to enter the profession. It is almost inevitable that - should Bar survive the cuts - it would return to what it was 25 years ago. This in turn will have consequence for the diversity of the judiciary, which has, like the Bar, made significant progress on this front. Such regression would be detrimental both for the profession and for society in general.

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

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

115. No.

Single harmonised fee

116. A single harmonised basic fee defies all logic. There are no other instances where varying levels of work would attract the same payment. In considering a simple case with no legal complexities: a guilty plea will require the taking of instructions and advice on the papers. A cracked trial will often have involved the preparation of legal arguments, witness handling, evidence presentation and speeches. An effective trial will require the execution of the aforementioned preparation. There is then no rational explanation for less work to be rewarded with a greater fee and more work to be remunerated with a lesser fee. If this concept was introduced in any field of work it would be risible. If a service company charged more for doing less work it would be fraudulent.

117. There is already a considerable amount of work that is done that is not paid. In terms of actual court hearings, a brief fee is expected to cover any pre-trial hearings and the first two days of trial. It is widely known among the Bar and Judiciary that there are significant problems with the organisation of the Crown Prosecution Service and non-disclosure. Often

several hearing are required before trial to obtain material to which the defence are entitled, there is no separate payment for these hearings. Wasted costs can no longer be obtained for defence representatives' attendance in legally aided cases, because they are not considered to be a party to the proceedings. In addition, cases often require work in the evenings and weekends, which substantially reduce any per hour income covered by the fee for the case.

118. There is no basis for excluding prosecution witnesses from the assessment of the cracked trial fee. The greater the number of witnesses, the more work that is required. There are already several aspects of the proceedings which are not reflected in the current fee. On occasion, hundreds of pages of unused material may be served which has to be individually examined and considered by the defence and which is not included in the assessment of fees. There is often a need to draft documents to assist with the court process, including CPIA compliant defence statements, skeleton arguments, bad character or hearsay notices, applications for disclosure, admissions, schedules for the presentation of evidence and putting together any jury bundles. It is unlikely that any other profession carries out as much unpaid work.

119. It is clear that the proposals aim to create a system, which prioritises guilty pleas above the interests of justice. The decision to plead is ultimately a matter for the client, who is entitled to receive full and proper advice according to each case not on the basis that there is a financial incentive for the representative. Credit for a guilty plea already provides incentives for defendants who are guilty to plead guilty at the earliest opportunity. The

drive to make plea a primary financial concern for their representatives, however, suggests advising defendants who are not guilty of pleading guilty.

120. It is suggested that there may be a small increase in fees for junior advocates. However, there will clearly be a reduction in fees for all advocates. Senior advocates will be required to take on cases ordinarily covered by junior advocates in order to obtain a sustainable income. If price-based competition is implemented and 'plea only' advocates permitted, there will also be no incentive for contracted providers to brief Counsel of any seniority.

Reduction of daily rate and tapering

121. In light of previous reductions in fees the criminal bar cannot sustain a further reduction of 20-30% in daily fees. Again there is a strong suggestion that cases are being inordinately prolonged for financial gain. This would be in direct contravention of the Code of Conduct and is now highly unlikely given the Criminal Procedure Rules and the active case management powers obligations of the Judiciary. Issues have to be identified at PCMH, the attendance of required witnesses have to be justified, time limits can be provided for cross examination and there is an emphasis on agreeing admissions to avoid ancillary, lengthy evidence. There is no evidence to suggest trials are being unnecessarily prolonged for financial reasons. It is often in fact the case that overrunning trials result in cancelled holidays for advocates, impacting family life and the return of work on which a considerable amount of preparation has been done, which will not be remunerated.

122. There has been no appreciation of delays caused by factors beyond the control of the defence, for which they should not be financially penalised. Delays are often caused by the prosecution failure to sufficiently warn witnesses, the correct interpreters not being provided or defendants in custody not being brought to court on time. There may also be instances when witnesses or jurors are unwell and judges are often required to deal with other matters at the start of the day before the trial recommences. Why should a defence advocate be penalised if the Crown fail to get a witness to court on time or, as has happened on a number of occasions, fail to carry out proper disclosure so that trials take significantly longer or have to be aborted? In failing to address these issues, the Consultation overlooks areas which would provide mechanism for considerable savings without compromising justice. The interests of justice would, in fact, be greatly enhanced by timely disclosure and the production of clients that enables sufficient time for conferencing before any court hearing.

123. The reduction in fees and tapering from Day 4 also gives no consideration to the time estimate for any trial. It is very difficult to imagine circumstances whereby a trial with a two week time estimate could be reduced to a three day trial. There again appears to be a concerted push to create a structure where only guilty pleas are financially viable.

Q27: Do you agree that Very High Cost Cases (Crime) fees should be reduced by 30%?

124. No. The current VHCC scheme is barely fit for purpose. Any scheme involving a non-lawyer dictating to a lawyer how many seconds can be spent on reading pages of evidence is flawed and bound to fail, and so it has.

When one factors in the enormous cost in employing these non-lawyers, it beggars belief that the scheme has survived as long as it has. One possible explanation for its survival is that it exists to create the impression that costs are being managed and reduced.

125. The present administrative scheme responsible for deciding how much work an advocate can carry out on any given task is wholly unnecessary and costly. It would be a much better use of resources if the present VHCC scheme was consigned to the scrap heap and cases currently within the scheme brought within the GFS+ system.

126. It would appear that the 30 % figure has simply been plucked from thin air. One can readily understand that, if one is intent on reducing fees, a figure has to be put forward, however, in selecting the proposed figure, it is staggering that there has been no attempt to assess the impact such a cut would have. Given the low level of fees already paid in such cases, a cut of any size, let alone one of 30 % is simply unworkable. At present levels many experienced advocates simply refuse to act in such cases due to the current levels of remuneration. A further reduction would result in more, and possibly all, doing the same. The irony is that these cases are some of the more complex that come before the Courts. They should be handled by the most experienced advocates. Inexperienced advocates dealing with such cases will lead to delay and an increase in expense. Even if simply cutting fees had the effect of reducing the legal aid budget, the burden will fall elsewhere, such as on the Courts.

127. Should cuts of any size, let alone the proposed 30% cut, be introduced it is extremely unlikely that any advocate could afford to work for such rates. The system will simply collapse.

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

128. No. For the reasons set out above the proposals are unworkable.

129. If, however, cuts are introduced any existing agreement cannot be retrospectively amended. Should that occur it is highly likely that advocates would return the cases they are currently contracted to do. This would have a significant impact upon when such trials would be heard, causing lengthy delays with likely implications for custody time limits. The net result of which may be that certain individuals who are in custody would be released due to the delay in hearing their cases. This would have a very damaging impact upon the CJS as a whole.

130. Advocates instructed under contracts have agreed to act at the current rate. A unilateral variation of the rate would entitle the advocate to return the brief. If a new advocate then agreed to act at the reduced rates he/she would have to undertake work already carried out in preparation by the previous advocate, thus duplicating the cost of the case. Alternatively, the defendant would be left unrepresented.

Q29: Do you agree with the proposals:

- **to tighten the current criteria which inform the decision on allowing the use of multiple advocates;**
- **to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and**

- **to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?**

131. Each point will be dealt with in turn.

132. No. The current system does not require "tightening". To suggest otherwise is an insult to the many judges who presently perform these tasks. Experience tells us that, if anything, multiple counsel certificates are not granted when they ought to be, as opposed to being granted when they ought not to be granted. The present criteria are robust and result in certificates being granted when they are truly necessary.

133. Anything which sets out guidance as to when a litigator must provide appropriate support to advocates is to be welcomed. All participants in the CJS must, if they are being paid to do so, provide a meaningful service.

134. No. As above, Judges already scrutinise such applications with great care and attention. There is no evidence to suggest otherwise.

135. In general terms, it is of great concern to see proposals which are not based upon any evidence. There is no evidence that the current system is not working as it should do. Moreover, there is no evidence that a change would result in improvements or indeed in any financial savings. In fact, on a sensible analysis of the issues it is self evident that an over-restrictive use of multiple counsel will result in higher costs. If it currently takes two advocates to conduct a particular case it will take one advocate a lot longer to do the same. An extensive amount of work on these type of cases takes place outside sitting hours. With the best will in the world, one advocate can

only do so much work in any given day. The result will be that an increase in adjournments and a waste in Court time. Once again, the pattern of changes repeats itself, saving costs on one budget whilst increasing it elsewhere. Should the current system be amended the net result is likely to be that the public purse will pay the same or even more and, in the meantime, a system that currently works becomes less efficient.

Conclusion

136. We adopt the recommendations put forward by the Criminal Bar Association as to alternative ways of saving funds and making the system more efficient. If the Government were serious about saving money, then it would enter into a dialogue with the Defence community rather than unilaterally imposing ridiculous proposals on a system it clearly does not understand.

137. The Ministry of Justice should look to other areas of savings. They should consider the number of cases where the Prosecution offer no evidence, but only after experienced Counsel has examined the papers and concluded that there is insufficient evidence or that it is not in the public interest to proceed or that an alternative disposal is appropriate or that different charges would appropriately resolve the matter. They should consider recovering money from contractors who cause delays in the court process by failing to produce prisoners or interpreters.

138. These proposals would create a two-tier justice system. The Ministers and civil servants who propose them do so, safe in the knowledge that they are fortunate enough that they will be able to pay for private representation should they be charged with an offence in the future. The majority of the public who would not be so lucky, should be appalled and should resist the proposals in their entirety.

139. If these reforms go ahead, this Government will be responsible for thousands of innocent people being imprisoned, thousands of families being ripped apart and thousands of lives being destroyed. We will not allow that to happen.

“Do Right, Fear No-one”