TRANSFORMING LEGAL AID

RESPONSE OF THE COUNCIL OF HER MAJESTY'S CIRCUIT JUDGES

INTRODUCTION

1. The Council of Her Majesty's Circuit Judges represents the Circuit Judges and Senior Circuit Judges of England and Wales, who sit in the Crown and County courts, as well as, when authorised, the High Court, Tribunals and the Parole Board.
2. Those who sit in the Crown Court try serious criminal cases; and are responsible for case management, ruling on issues before and during trials, conducting jury trials, sentencing offenders, conducting confiscation inquiries and have appellate jurisdiction over the Magistrates Courts and Youth Courts. They also exercise certain statutory appeal functions.
3. Those who sit in the County Court, including the specialised courts, such as the Mercantile Courts, Technology and Construction Courts and the Patents County Court hear civil and family cases. A significant number are authorised to sit as Deputy High Court Judges in Chancery, Family and Queens Bench Divisions of the High Court and in the Administrative Court. In the County Courts the civil and family jurisdictions are unlimited in value, and Circuit Judges hear appeals from district judges, from the family proceedings courts and from certain statutory bodies such as the UKBA and Housing Authorities
4. We have sought, insofar as it is proper to do so, to answer the specific questions posed in the consultation. However, we do not consider it would be right to make no comment on the introductory pages of the consultation.

5. We are dismayed that in a consultation of this importance there has not been allowed the normal period for reflection and response.
6. We are saddened that the measures proposed seem to be based upon bald assertions concerning the cost of provision of legal aid in the United Kingdom but without analysis of the factors involved, and seeking to compare with other jurisdictions where the structure of the justice system is not comparable.
7. It appears to us from the consultation paper that justification for the proposals is based on assertions that legal aid has lost much of its credibility with the public, that it has been used to fund frivolous claims, to foot the bills of wealthy criminals and to enrich lawyers, yet no evidence is cited to support those assertions, nor has consideration apparently been given to whether such concerns as may be legitimate might not be met by proper use of existing powers.
8. An overview of the consultation paper leads inexorably to the conclusion that little or no consideration has been given to the impact upon the courts of limited , and when available, poor quality representation, and the potential for injustice to victims and to those accused.
9. We are deeply concerned that representation through legal aid is already not available to many who whose disputes require determination in the civil and family courts, and that in the future many accused of serious criminal offences will face trial without the proper protection of competent and appropriately resourced lawyers.
10. We consider it particularly unfortunate that the far reaching measures argued for in this consultation are proposed to be implemented at a time when the effect upon Legal Aid spending of the modernisation of Public Family Law processes, the removal from scope of almost all Private Family Law, the limits upon fees for expert witnesses in family cases, and the implementation of costs budgeting in civil cases are yet to be evaluated.

THE CONSULTATION QUESTIONS AND OUR RESPONSES

Question 1 Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

11. No.
12. In broad terms we adopt the proposition that legal aid should continue to be provided for the purposes defined in paragraph 3.4, namely for any Prison Law case which involves the determination of a criminal charge, or which affects the individual's on-going detention and where liberty is at stake, and in particular for all aspects of Parole Board reviews.
13. However we question the appropriateness of the restriction of legal aid to the *Tarrant* criteria (specified incompletely in footnote 14 to paragraph 3.14). It needs some emphasis that *R v the Secretary of State for the Home Department ex parte Tarrant and another* was decided as long ago as November 1983, when prison law was in its infancy. Today prison law is an established and well recognised discipline in its own right. Practitioners, whether barristers or solicitors, have developed specialist practices in the field; and (by contrast with those who purport to practice in the area without that expertise, who may in consequence provide a disservice to their clients, and are actively unhelpful to the public interest as well as panels of the Parole Board, in presenting unrealistic submissions on behalf of their clients) the specialists provide the greatest assistance to all those to whom their submissions, both oral and written, are directed; and a considerable consequential saving of public money. The impact of the proposed reforms is discussed below, by reference to the suggested restrictions.
14. We note and accept the description of current practice in paragraphs 3.5 – 3.9 of the consultation paper.
15. We suggest that the bulk of the legal aid spend in relation to prison law, which we note was limited to 1.12% of total legal aid spending in England

and Wales in 2011/12, is spent on parole cases which will not alter; and the increase is undoubtedly primarily attributable to the increased numbers of cases being reviewed by the Parole Board, which is itself attributable to the rise in the population of indeterminate sentenced prisoners. While we note that in a significant proportion of such cases there is no longer a need for an oral hearing, and the attendance of the legal representative which accompanies it, since many reviews are resolved with a negative paper decision, the review itself is likely to have been preceded by detailed written representations, which have themselves been based on instructions taken from the prisoner in person. That aspect of the case is inevitably the most expensive.

16. Paragraph 3.10 and 3.11 do not fairly describe the present system. There are many matters of significant importance to prisoners and their families and dependents which are simply ignored. We draw attention to such matters as allocation in a mother and baby unit; categorisation reviews (which may have a dramatic impact on the ability to have family visits); segregation; inappropriate or unreasonable licence conditions; and resettlement issues, even where these relate to vulnerable adults or children. While we accept that these topics are addressed in more detail in Annex B to the consultation paper, the reader of the paragraphs quoted (who may not have focused on the contents of an Annex some 100 pages distant) will not have appreciated the ambit of treatment and sentence cases. The implication from the proposals is that unless and until a complaint engages Article 5 or 6 it can be dealt with through the complaints system, because it raises no real or important legal argument. However it is notorious that such matters do raise complex legal issues: see for example *Hirst v Home Secretary [2001] EWCA Civ 378*; and *R v Governor of HMP Latchmere ex parte Jarvis CO 4141/98, 20 July 1999*.

17. In order to be in a realistic position to argue that he or she should be transferred to open conditions or to be released, a prisoner usually has to progress from category A (if that is the initial categorisation) through to category C. It is very rare for the Parole Board to direct a prisoner's

release into the community or to recommend transfer to open conditions directly from category A conditions. If a prisoner is to have a realistic opportunity to challenge his continued detention, re-categorisation to, at least, category C is essential. As this will directly affect his continued detention, we do not agree that legal aid should be removed for representation in challenges to categorisation or for hearings dealing with categorisation.

18. The prompt and effective resolution of a prisoner's complaint, as a result of the intervention of an appropriately informed lawyer, can save very considerable amounts of public money. A crude example is to compare the cost of a complaint to the Prisons and Probations Ombudsman, which may take many months to complete, at an average cost of over £1000, to the cost of representation by a prison lawyer, which is currently limited to £220. Disgruntled prisoners, with no satisfactory avenue of redress in relation to their legitimate complaints, may take out their frustration in criminal damage against the fabric of the prison itself; and in an extreme case of disorder made by riot or mutiny destroy the prison. The total cost to public funds must always be kept in mind.

19. To suggest that the existing complaints system is a universal panacea to all prisoners, as paragraph 3.10 suggests, ignores the reality that very many prisoners have severe mental health problems; many are foreign nationals, with a limited understanding of English; and others have a learning disability which precludes the effective use of a system designed for a literate population of English-speaking and non-disadvantaged prisoners.

20. As to paragraphs 3.14 – 3.21 we venture to emphasise that no estimate has been provided of the savings which might be achieved by restricting prison law, and the representation of prisoners under legal aid, in the manner here suggested. We have reviewed the detailed existing scope of matters covered by prison law contained in Annex B to the consultation; and we suggest that before any question arises of restricting legal aid in the treatment cases specified, it is incumbent on those who propose

them to identify the cost savings likely to be achieved. We note the concession that "only a handful" of such cases are authorised by the Legal Services Commission each year; and no cost benefit analysis can be performed unless the total sum in question is at least estimated. As to the sentence cases specified in Annex B, without the support of an appropriately qualified prison lawyer it would for practical purposes be impossible to challenge or to make effective representations in such cases. We shall highlight one such topic, which we regard as of importance, but which is not even mentioned in Annex B: applications by those sentenced to be detained at her Majesty's pleasure to have their minimum term reviewed and potentially reduced, due to the exceptional progress which they have made. Parole Board members have told us that not infrequently significant reductions of in excess of 12 months have been made in such cases, following sustained representations advanced on behalf of those who were convicted as juveniles, and are now young adults. We do not extend the length of this response by pointing out that a similarly robust case for the retention of legal aid in the other categories of sentence case which are mentioned on pages 111 – 112 could equally well be made. Given the absence of any figures for the savings which might be achieved for their removal from scope, and the potential damage to public perceptions of basic fairness, as well as the significant impact on individual prisoners' proper treatment, we suggest that the case for change is not made out.

21. We propose to add a few comments on the proposal to introduce competitive tendering for the criminal legal aid contracts described in chapter 4 of the consultation, with particular reference to its impact on the practice of prison law, and the specialists in their practice in that discrete field. That topic is only faintly touched on in paragraph 4.29; and, as we understand the proposal, only those firms which can offer to supply a comprehensive criminal legal aid service as described in paragraph 4.29 generally would be eligible. We regard this as a dangerously inappropriate model, for the reasons rehearsed earlier in this response,

and specifically paragraph 2 above: prison law has been developed as a discrete specialist area of practice by barristers and solicitors, and to require those with specialist expertise to dilute that expertise in other fields is to adopt a step which runs counter to the increased specialisation of the legal profession generally. While we recognise the financial imperatives which underpin the consultation generally, the short timeframe for responses (which we note – in contrast to the standard consultation period for government consultations of 3 months – has in this instance been reduced to less than 8 weeks, including two Bank holidays) our submission is that the topic of prison law is so unique; its impact on the most vulnerable within society so profound; and the potential savings suggested by these reforms so limited at best, and so obscure in any event, prison law should be removed altogether from the scope of the legal aid reforms; that a new consultation process should be undertaken in terms of its scope and budget; and that a fresh and realistic timetable should be set for those proposals to be properly considered by all concerned.

Question 2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

22. No.
23. Successive governments have recognised that it is in the interests of justice for individuals who are defendants in the Crown Court to receive, initially, legal aid, subject to contributions. There are already unacceptable delays in Crown Courts as a result of processing of means testing forms by the Legal Services Commission. Those delays cause hardship to witnesses. The proposal will almost certainly lead to greater delay and a rise in unrepresented defendants in the Crown Court. It is, at present, relatively rare for defendants to represent themselves at the Crown Court. When they do, cases inevitably take longer and there are very high risks that defendants may disclose prejudicial matters to the

jury which will require their discharge in the interests of justice. Proper legal points will not be taken and the trial judge cannot step into the arena to take each and every legal point. We believe that applying a threshold, rather than recovering costs from convicted defendants, is the wrong, as well as being the least efficient, approach. There is an absence of analysis in the consultation paper on why the current powers of the courts to order costs are inadequate. It might be thought that some analysis was also desirable about whether the enforcement of such costs orders is sufficiently robust and, if not, what might be done to improve that.

24. In any event, we believe the threshold is set too low and that insufficient practical consideration has been given to the impact of unrepresented defendants on the criminal justice system, an impact that is potentially even more costly than it is likely to be in the civil justice system. The equation between savings and the on-costs of unrepresented defendants ought to be made and it is not in this paper. (See below for further discussion.)

Question 3: Do you agree that the proposed threshold is set at an appropriate level? Please give reasons.

25. Without straying into issues of policy and concentrating on the practical consequences of the proposal, we are concerned that the threshold may have been set too low. We would expect that the result of setting the threshold at this level would, inevitably, lead to a substantial increase in self represented defendants with the result that criminal trials will take longer, there will be a greater strain on victims and witnesses, particularly young and vulnerable witnesses and is likely, as well, to lead to more ineffective trials, more discharged juries and more appeals.
26. Self represented defendants often create severe problems in trials. We give just two examples. Cross-examination in sexual cases has to be carried out by specially instructed counsel. The rules relating to hearsay and bad

character evidence are complex and not easy for the layman to apply. Additionally, there is a fear that the jury may return an inappropriate verdict because they feel that the defendant has not had a fair trial. This does not enhance public confidence in the justice system

27. We are not convinced that the proposal has considered the likely costs of these unintended consequences.

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

28. This question, we consider, raises, essentially, matters of policy on which we should not comment. However, one consequence of refusing legal aid for a new claim by an asylum seeker who has been granted leave to remain until the asylum seeker has been lawfully resident in the UK for 12 months is that, in the main, given that they are normally granted leave to remain for 5 years, all that the provision will achieve is that there is a delay in issuing proceedings for the 12 months taken to qualify for legal aid. It is in the interests of all parties to litigation that that litigation is heard as soon as possible and we consider this 12 month delay to be regrettable.

Question 5. Do you agree that providers should only be paid for work carried out on an applications for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event? Please give reasons.

29. No.

30. The proposal would, in our judgment, unduly restrict access to justice for those seeking to challenge unlawful administrative decisions on public law grounds. The consequence of transferring the financial risk of the permission process to legal advisers will inevitably mean that claimants

with properly arguable claims find it impossible to find representatives prepared to take on their cases. Judicial review claims have to be commenced within a short and strictly applied time limit and it is more likely that claimants will miss such time limits if they have to shop around for a limited number of solicitors who might be prepared to take the financial risk.

31. Moreover, judicial review claims almost always require specialised knowledge of administrative law both to determine whether there is a potentially successful claim and to draft both a protocol letter and grounds of claim. Many litigants in person will not realise that they have to draft and serve a protocol letter and, therefore, a consequence of this proposal may be that claims which may not need to be the subject of a claim, where, for example, the defendant may reconsider the challenged decision or even concede the substantive relief sought, are initiated by litigants in person. Additionally, much valuable judge time (which may often be High Court Judge time) is spent considering grounds of claim which are poorly prepared and expressed by litigants, often at inordinate length in order to determine whether there actually is a valid claim. This proposal may, therefore, be a false economy. Much effort has been expended by the judiciary in the last 12 months in reducing waiting times for cases in the Administrative Court and we fear that this proposal may set back that progress.
32. We are also concerned that the judicial review process, which is of such importance in ensuring that the decision making process of public bodies is of a high standard and scrupulously fair, may be rendered significantly less effective in that role by deterring access to many litigants by this proposal.

Question 6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

33. No.

34. The regulations which the proposal would amend were made in 2013 after a consultation. We take the view that no compelling case has been made out to alter them now. The range of cases covered by the proposal were recognised as so important to the individuals seeking legal aid to be kept in scope. We must express our great concern that access to justice will be denied to individuals who may well have a completely valid claim. It is impossible to say that their prospects are poor. They are, in effect, having regard to the definition of "borderline", cases which need to come to court for a judicial determination on the merits. The possibility of an appeal to an Independent Funding Adjudicator provides no effective safety net because that adjudicator will be applying the same threshold test.

35. Removal of legal aid for all borderline cases will result in a denial of access to justice for a number of disadvantaged groups. Briefly litigation in the area of child abuse demonstrates that if it were not for the availability of legal aid many individuals would not have been able to obtain proper recompense for harm suffered as a result of abuse by individuals employed in schools and children's homes etc.

36. We note that there is no statistical analysis or evidence presented in the paper to indicate, first, how many cases have fallen into this category in the past, second, how many cases falling within this category ultimately achieved a successful outcome, or, third, how much money would be saved by taking these cases out of scope (giving a net figure after costs recovered on behalf of the legal aid fund have been taken into account in relation to the successful cases). One of our members points out that a case of his while he was at the Bar (*Sen v Headley [1990] Ch 728* – deathbed gifts) would have been refused legal aid, having failed at first instance, with the judge applying dicta from a 19th Century case supported by text book authority, yet being successful on appeal thus laying down a new legal principle. An injustice would probably have been done had the case been refused legal aid.

37. The litigation that resulted in the overturning of the House of Lords decision in *Stubbings v Webb* (limitation period for injury caused by deliberate assault) would have been borderline when commenced. The House of Lords decision in *A. v Hoare [2008] UKHL 6* was required to overturn a previously accepted rule. Similarly the litigation that resulted in the clarification of an employer's vicarious liability for abuse perpetrated by an employee, required a House of Lords decision: *Lister v Hesley Hall [2001] UKHL 22* . In all these cases, the merits whence commenced , of the ultimately successful claims, would have been borderline. Had these cases not been pursued and the law clarified, a large number of litigants who have suffered abuse as children in care homes and those of any age who have suffered injury as a result of sexual assault, would have been denied access to justice.

38. The law would become fossilised if “borderline” cases were not supported by public funds. The role of legal aid in past cases in refining and clarifying common law and statute should not be underestimated.

39. Neither can we agree with the interpretation of the Council Directive. Inevitably there will be cases within the “borderline” category which will succeed but in relation to which it is not possible to say either that their prospects are poor or moderate.

40. Recent experience in possession actions involving individuals with mental health disabilities and issues raised under the Equality Act 2012 indicates that although the merits of defending the possession actions might be described as "borderline" , there are frequently collateral advantages to be gained by contesting the litigation e.g., by the judge observing that it would not be reasonable to make a possession order against someone whose antisocial behaviour is caused by mental illness, unless or until a social landlord engages the assistance of other agencies in finding a mentally ill tenant suitable, supported accommodation. Accordingly there is a real risk that individuals with mental health difficulties may suffer a disproportionate disadvantage.

INTRODUCING TENDERING IN THE CRIMINAL LEGAL AID MARKET

Questions 7 to 16 inclusive

41. The prime concern of the Crown Court judiciary is the standard of preparation and representation. It is essential that these should be at a level which ensures a fair trial both for the defendant and the prosecution. In recent years, the judiciary has become increasingly concerned that in both respects, these standards are not being met. How this problem is to solved is a difficult and complex issue but in our view the current proposals, whilst to an extent achieving a reduction in expenditure, will not assist in maintaining and increasing standards. Unless that happens, whilst there may be a reduction in the amount spent on Legal Aid for defendants, the cost in terms of court time and resources is likely to be greater and consequently, overall public expenditure is unlikely to reduce.
42. The judiciary are well aware of the financial difficulties which the country is facing and experience them daily due to the cuts which have already been made. We have taken steps through more active case management to address inappropriate use of resources, through encouraging the resolution of cases at as early a stage as is possible and are more than prepared to engage in schemes which may provide further savings whilst providing a fair system of justice in the criminal courts. Improving case management in all jurisdictions may well achieve real savings to the public purse. However, if that is to succeed, the judiciary must be primarily involved in the design of new case management measures, in order to ensure they are practicable and will achieve the intended aims.
43. There may be many reasons for the reduction in standards and it is not easy to evaluate them.
44. The repeated unilaterally imposed reduction of fees has had a demoralising effect upon the professions. Lawyers who enter into areas of practice which depend substantially upon public funding do so in the knowledge that in other areas the financial rewards may be considerably higher but nevertheless do so out of a sense of public duty and to the benefit of the community. But even for them, the further substantial reductions

proposed may lead to many of those practising at the Bar to leave such work. This would be a substantial detriment for the community.

45. Traditionally, solicitors prepared a case and a barrister presented it. Both had considerable expertise. That has changed with the development of solicitor advocates. Many provide an excellent service equal to that of barristers. But, as yet, the more important cases tend to be presented by barristers who have the experience essential for cross-examining, for example, where there are serious sexual allegations. Our experience is that, too often, solicitor advocates conduct cases for which they do not have sufficient experience.

46. The proposals are to introduce by competitive tendering a limited number of contracts to provide legal services for those arrested and thereafter charged with a criminal offence, who have a net disposable income of less than £35,000 per annum. The accused will have no choice in his representation but will be allocated to a specific service provider from the area in which he or she was arrested. Contracts are to be awarded in Summer 2014 and their service will commence in Autumn 2014. The contract would be for a three year term which, depending upon the circumstances at that time, may or may not be extended for a further two years.

47. The scheme envisages that those awarded contracts will be drawn from existing providers or by groups of providers joining together to form a new legal entity the size of which may vary.

48. We are conscious that these proposals have met with considerable opposition from both professions and we will not become involved in advancing or countering their arguments. We are concerned with the standard of service which would be provided. We see little evidence in the consultation paper of measures to ensure proper quality of representation is provided to those charged with criminal offences.

49. The attraction suggested for those who may seek to be awarded a contract is the guarantee of their source of work. The detraction is that remuneration would be set at 17.5% less than the present rates. That, it is

suggested would be accommodated by what are termed “economies of scope”.

50. Whilst it is impossible to predict with accuracy how such contractors may be of sufficient size to be able to tender, we suggest that it is reasonable to assume that they will be significantly larger than most of the present suppliers. They will, necessarily, increase not only their staff but also their technical and other resources. That will require both a considerable investment but also substantial recruitment of personnel. This is supported by the fact that it is envisaged that the existing number of suppliers (at present approximately 15,488 per Criminal Justice Service area) will be reduced to 400.

51. We are concerned that this will not provide an adequate access to justice for those in rural areas in particular. 4 providers, for example, in Dyfed Powys, will probably lead to several mixed practice solicitors, who currently provide an essential service relatively close to consumers, in areas poorly served by public transport, being not longer economically viable. Elsewhere, concerns have been expressed to us that BAME firms, which tend to be smaller and to be more dependent upon public funds, will be disproportionately affected by these proposals.

52. There appears to have been no consideration given to the provision of legal advice and assistance in criminal matters to those who wish to be represented in the Welsh language. The scheme proposed provides no guarantee at all that a person who wishes to be represented by a Welsh speaker will be able to find such a lawyer in the limited number who successfully tender.

53. The proposals are based on an untested assumption that new and sufficiently resourced and qualified providers will be ready to provide essential services for the continued operation of the entire criminal justice service in 12 to 18 months. These proposals are far more extensive and more critical to the operation of the service than was the provision of interpreters and we are deeply concerned, that, come Autumn 2014 such providers will be able to provide the necessary service.

54. It must be a service fit for purpose on the day it comes into operation. The courts recently had the experience of the introduction of the contract for linguistic services. When introduced it was clearly unfit for purpose. That cost a considerable amount and caused unacceptable delays. A substantial factor was the inexperience of those awarded the contract and inadequate resources. The proposed scheme is much more complicated and we fear being introduced too quickly.
55. The proposal for length of contract also introduces, in our view, an undesirable level of uncertainty of continuity of service in the Criminal Justice System.
56. We are also concerned at the lack of detail in the consultation paper of the standards of quality and expertise which will be demanded from the successful tenderers. If the interests of justice are to be upheld, competitiveness in pricing should patently not be the sole or even the decisive measure by which tenders are awarded. There must be required from those who are granted tender adequate proof of sufficient experience and expertise in preparing and conducting the classes of criminal legal aid set out at paragraph 4.29.

Question 17: 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.

57. We are strongly opposed to this proposal. In our view, the financial guarantees for the providers have been obtained at the expense of the accused's choice of representation.
58. The Consultation professes to be based upon the recommendations of Lord Carter in his review, "Legal Aid: a market-based approach to reform". At Paragraph 15 of the Executive Summary he wrote, "Clients would continue to be able to ask for a firm of their choice but there should be limitations of the amount of work a firm can do of this nature to preserve

the integrity of the quality and economic benefits of the new working arrangements and boundaries."

59. The proposed scheme does not simply reduce the choice, as, arguably, Lord Carter envisaged, but eliminates choice entirely. It appears that his recommendation has been jettisoned but there is no explanation of the reasons for doing so.

60. We believe that the general public favour an alleged offender having the right to choose his legal representative. It will remain for those who are able to fund their representation but not for the poorer sections of the community. Choice seems to be favoured in other areas of publicly funded service but, on purely economic grounds, is ruled out of legal services.

61. Choice of representation also has a practical benefit. In our view, it is essential that a person who is charged with a criminal offence should have confidence in whoever is to represent him or her. Where there is such confidence, the case is more likely to be dealt with expeditiously and thereby save resources. The client is often more willing to accept advice, even if it is unpalatable. This is important in securing pleas of guilty where they are proper. It also means the client may be more willing to follow advice concerning the preparation and presentation of his or her case and thereby the legal representative is able to be more efficient in his or her conduct of the case.

62. Furthermore, it is common for a solicitor not only to have represented the defendant on a previous occasion but also to have represented his or her family for successive generations. The influence of family in such situations can be very important for a swift resolution of the case whether as a guilty plea or as a trial. Again in such circumstances advice may be more readily accepted.

63. Again we believe that these proposals may disproportionately disadvantage the defendant from a BAME background who may not be able to be represented by the solicitor of his or her choice in whom he or she has confidence.

64. We can easily envisage the dismay which a defendant may feel if, they are allocated to one contract holder and they know that the solicitor of their choice is employed by another contract holder and that it is no more than the wheel of fortune which precludes him or her from the solicitor of choice. That will appear to the defendant, and we suggest the general public, to be bizarre.

65. Conversely, the defendant, or a member of his family, may have been previously represented by a solicitor and have formed a hostile opinion of that solicitor. It matters not whether that opinion is justified or not; there will be no confidence and likely to be an unwillingness to accept advice. The result is dissatisfaction and it is likely to lead to difficulties in the case which may lead to a late change of representation, unnecessary expense, delay and inconvenience to witnesses and a loss of valuable court resources.

66. The proposals set out at paragraph 4.81 to 4.86 for a transfer in exceptional circumstances seeks to deal with a problem which, if initial client choice is maintained should rarely occur. There are cases in which applications for transfer are made when a defendant expresses dissatisfaction. The most common sources of grievance are that a particular advocate is not going to conduct the case, that full instructions have not been taken or that the defendant has not been visited by a representative of the solicitors whilst on remand. These are often resolved either on paper or in court by the timely intervention of the judge. Enquiries are made and it is discovered that it is not reasonably practicable to obtain the desired representation. The defendant is usually grateful for the intervention and a suitable alternative advocate is instructed. In the latter situations, it is often discovered that, in fact there was no need for such an appointment to take instructions or to make a visit because, for example the solicitors were awaiting service of papers and a visit would have been no more than a “hand holding” exercise. Once aired, the grievance often been disappears and the representation is maintained.

67. We recognise that there may be cases in which the agreement to assign a different caseworker will succeed but we are far from confident that this will necessarily resolve the issues. In our experience, once the grievance is established, the defendant is likely to regard all members of that firm unfavourably. A defendant who is dissatisfied at the beginning remains dissatisfied if convicted and is likely to provide business for the court of Appeal Criminal Division, with or without representation for an appeal.
68. For these reasons, we consider the elimination of choice of a legal representative is a detrimental step.
69. If this scheme is implemented we would encourage those holding a contract, always to take steps to try and accommodate the wishes of the defendant in assigning the particular persons who will be dealing with the case. But the inflexibility of the proposals may not easily allow this.
70. Questions 18 and 19 are not such as we should express an opinion about.

Question 20: Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

71. We consider that such a rigid system is undesirable from the point of view of the defendant and the allocated provider. It may be logistically difficult for the provider. The transfer of the case could be to a court in a different region. There are many cases in which the defendants who are to be tried together are arrested in different areas and one court is chosen as the trial centre. For example where there are allegations of the importation of drugs. The driver of a lorry on which the drugs are hidden may be arrested at a channel port. He would be allocated a provider from that

area. Others may have been waiting for him to do a transfer of the drugs once it had cleared London and they are arrested there. They would be allocated to providers in that area. Others who were to take final delivery may be scattered in the great conurbations of the Midlands and the North. Again each would be allocated to local providers. H.M Revenue and Customs have often chosen Manchester as it is logistically more convenient for them.

72. In such a case, providers could be required to provide services far from their base. Their clients could well be remanded in custody close to the trial centre which would make the taking of instructions difficult. Attendance at the trial would also present problems. It may be suggested that they may seek to sub-contract to a local provider. That may be suitable in some cases but present problems in many others. It could lead to uncertainty for defendants and, we suggest, should only be done with the defendant's consent. Experience shows that where cases are dealt with by agents, difficulties do happen. The agent may not be as familiar with the case as he or she would be with a case for which they had direct responsibility. They may not feel able to give advice without checking with their principals. Delays may occur whilst the designated provider attends court and valuable court time is lost.
73. For these reasons we consider that there should be a degree of flexibility and that the proposals overlook the interests of the defendant in providing appropriate representation.
74. We do not think that it is appropriate for us to answer questions 21 to 25 inclusive.

Question 26: Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- ***Introduce a single harmonized basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;***

- ***Reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and***
- ***Taper rates so that a decreased fee will be payable for every additional day of trial?***

  Please give reasons.

75. We welcome the intention to seek to maintain the Criminal Bar. That is not a sentiment born simply from old allegiances which most, though not all Circuit Judges may have, but because of the vast experience which so many barristers possess. However, we question whether the proposals will actually succeed in doing so.
76. It is proposed to introduce a fee which will be the same for a guilty plea, a plea at trial or basic two day trial. It is suggested that this will mean that there will be an incentive to produce a guilty plea. This may seem logical. However, it also means that there is no disadvantage to the provider if the case proceeds to the Crown Court or if it is a short trial. The disadvantage may be to the defendant's detriment in that his credit is reduced. However, that too may be more symbolic than real if the case is one which will attract either a community sentence or a short prison sentence. Accordingly, in our view, this does not assist the court to save its resources to the extent which may be expected at first sight.
77. Furthermore, in order to benefit from the contract we consider it inevitable that those awarded a contract will seek to increase the number of advocates whom they employ. This has already been seen in relation to the Crown Prosecution Service. Some will be drawn from the Bar and others will be solicitors. Economic factors of turnover, expenditure and profit will require them to seek to identify the most profitable cases and where they cannot profitably provide service for the case, they will probably seek to instruct the Bar to carry out the less profitable. Thus, we envisage that there would be a creaming off of the guilty pleas or those cases likely to become cracked trials. Many short trials would be conducted in-house which would reduce the work available to barristers,

especially the more newly qualified. The case mix of the barrister would be seriously affected. Given the proposals in relation to fees for trials and the tapering provisions, this will be an unattractive proposition for many barristers and we fear that we will lead to its further erosion.

78. In addition to further "harmonisation" of fees it is proposed to introduce a system to be called "tapering". It is, we believe, a new concept. It is suggested at Paragraph 5.18 that this will "encourage the prompt resolution of cases in a way that is consistent with our overall CJS objectives." It is "intended to ensure that the fee scheme does not inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in proceedings, because fees no longer rise the later a case is resolved."

79. In the previous consultation it was expressly stated that it was not suggested that lawyers deliberately advised so as to increase their fees. We hope that this view persists. That said, those designing a fee system should take care to avoid strong financial pressures which produce a conflict with the best interests of the defendant.

80. We would point out and quote from the submissions which we then made which were in these terms.

81. "We [also] understand the concern (Para 6.16) that the fee structure should not discourage a defendant's lawyers from giving proper consideration to, and proper advice about, the question of plea at an early stage of the proceedings. It would be wrong, however, to think that the problem can be addressed adequately in terms of incentives to lawyers or that the incentives produced by the proposal would be necessarily beneficial:

82. [Thus], whilst lawyers will have some influence over a defendant through the giving of appropriate advice, they do not take the decision and they do not generally have a decisive influence over the decision.

83. The lawyer's duty to his client is to advance the client's case to the best of his ability and to give advice accordingly."

84. These comments remain apposite.

85. We respectfully question whether in advancing the concept of tapering, the realities of court have been properly evaluated. An advocate does not have control of the trial. He or she may prepare their work diligently and making the best use of their skills but nevertheless the case may take longer than initially expected. Factors completely beyond the control of the advocate regularly arise. We give common examples. A juror cannot attend because of illness; a day is lost in the hope that the juror may be well enough to attend the next day. A juror or witness arrives late because the train, bus, their car broke down; the case goes into an additional day. The DVD player does not work and there is no member of staff available who can rectify the problem; time is lost. These are all very common experiences in the Crown Courts throughout the country. Differing people and differing organisations are responsible but tapering would hold the advocate financially disadvantaged. In our view that is unfair.

86. Tapering also appears to assume that as the case proceeds less work is involved. That is a fallacy. With each day, the evidence becomes greater and requires careful analysis for effective and efficient presentation, or cross-examination. More work is needed for final speeches.

87. It has often been said that such situations can be remedied by a "swings and roundabouts" view but given the likely reduction in work available to the Bar, such is not an acceptable approach.

88. We suggest that consideration should be given to producing a fairer system.

89. It is suggested that some form of judicial time-tabling may assist in expediting trials. The judiciary already has some experience of such schemes and it is fair to say that in the civil jurisdictions it often works well. However, we have reservations about its use in the criminal courts. In civil cases often it is a question of whether a witness is accurate or not. In the criminal courts it is more usually whether a witness is telling the truth or not. Answers are often not so readily obtained from those who wish to mislead; it takes time.

90. Another possibility which we canvass is whether at the beginning of a trial there should be some agreement between advocates and approved by the trial judge as to the likely length of the trial. If it is exceeded, then it would be for the advocates to justify the further time and for the judge to agree or reject as appropriate. A presumption could be introduced that days in excess of the initial agreement should not attract fees unless the advocate or advocates can persuade the judge that circumstances beyond their control have led to the initial estimate being exceeded.

91. In our view therefore the scheme of harmonisation and tapering is not likely to assist in achieving the intended aim of maintaining a strong and independent Bar.

Question 27: Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

Question 28: Do you agree that the reduction should be applied to future work under current contracts as well as future contracts. Please give reasons.

92. We share the concerns expressed in this section of the consultation paper that a very small number of Very High Cost Criminal Cases (VHCCs) soak up an excessive proportion of public money. The change in the definition of VHCCs so that a smaller number of cases was covered (Para 6.42) was a move in the right direction, and we agree with the proposal to align the criteria for VHCCs for litigators so that they are consistent with those now currently in place for advocates (Para 6.44). But the consultation paper does not grapple with the deeper problems concerning VHCCs. In particular, although it expresses a wish "to reward efficient providers through the graduated fees schemes and to move away from hourly rates wherever possible" (Para 6.44), it does not go far enough in this respect. We agree with the need to reward efficiency: fees should be assessed for the quality of work done, not for the length of time it has taken. The payment of hourly rates should at least be changed to daily rates, which would mitigate some abuse of the system."

93. In relation to Q28, if this proposed reduction were introduced, it would be a unilateral change. Is it envisaged that the lawyer would be bound to continue with the case? There could be an awful waste of money. We simply raise the question. As it does not directly fall within the scope of our reply we make no further comment about the issue.

Question 29: Do you agree with the proposals:

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

  Please give reasons.

94. The short answers we give to these questions are these.

a. We consider this unnecessary

b. We consider this could be useful but is not the complete answer to the issue.

c. This is inappropriate.

95. At paragraph 5.40, the authors of the consultation assert, " in recent years, we have grown increasingly concerned that the appointment of leading or multiple counsel is being permitted in cases where it is not absolutely necessary in order to ensure that the defendant receives a fair trial".

96. No evidential basis is given for such an assertion. Furthermore, it misses the point which we sought to make in our response to the consultation in 2012. We repeat it.

97. "We take issue with the suggestion that judges allow more than one counsel in cases where this is not justified. The purpose of the provisions must be to ensure that cases of complexity and seriousness are dealt with by an advocate or team of advocates of sufficient skill and experience to help the court handle the case efficiently. This sometimes calls for the appointment of leading counsel, supported where appropriate by a competent junior, rather than the appointment of two junior counsel. As judges know better than anyone, appointment of leading counsel usually has a positive impact on the running of a trial. Such an advocate has the ability and experience to know good points from bad and the confidence to argue only the good. Senior advocates who are not leading counsel are likely to be less assured under the pressure of handling cases which stretch their ability levels, leading to an overly cautious approach in making submissions or concessions. The same consideration applies to cases of length and complexity where two junior counsel are appointed."

98. In a later paragraph we continued,

99. " We suggest that judges should be given greater freedom in this area. Where a case genuinely merits two counsel on the grounds of seriousness or complexity of issues (which judges should be free to determine without the constraint of criteria such as the number of pages of

prosecution evidence), certificates should be issued for leading counsel supported by a competent junior."

100. Later in the same response we supported the increased role of the involvement of the litigator.

101. We adhere to these views and commend them for more serious consideration.

102. The decision whether a case requires the appointment of two counsel is essentially a case management function. In a case which may require such representation the designated trial judge is the person who is best equipped to make the decision. It is an important decision but no more important than many of the difficult decisions which such cases demand of the trial judge. No other decision is subject to supervision as is suggested. Many judges would take the view that the proposal is offensive.

103. We would respectfully seek to explain how these cases proceed. The Resident Judge will readily appreciate that the case is one of complexity or seriousness or both. In some cases, the Resident will be required to refer the case to the Presiding Judge for determination of the identity of the trial judge. Often there will be a recommendation made which may well depend upon the availability of a judge appropriately authorised. The decision will be made and the specific judge will be asked to take responsibility for that case. That responsibility will take effect immediately and thereafter all applications will be referred to him or her for determination. This is a procedure which takes place at an early stage and is essential for the proper case management of the case. Applications for more than one counsel may be made at the first hearing or may be made once the extent of the case is better known. It will be supported by an advice from the advocate who has already been instructed. Often these a re very detailed analyses of the case and of the work to be carried out and the respective scopes of work will be identified. The trial judge will make a decision. By that time he or she may have read well into the case and has an understanding of the issues which

are likely to arise, the work to be done and the appropriateness of the appointment of two counsel. It is not a decision which is made lightly. A referral to the Presiding Judge at that stage would be onerous and is in our view unnecessary.

104. The question suggests that the Presiding judge may apply the criteria "more consistently and robustly" but no indication is given as to how this is to be achieved. These are individual cases and much turns on the specific case. We fail to see how consistency will be achieved or what it means in this context? It would be a curious situation if a Presiding Judge who has entrusted a case to a specific person to be the trial judge should then supervise that judge for one aspect of the case management? That would be a most undesirable situation.

105. For a short time after the implementation of the Human Rights Act, the argument was raised that because the prosecution were represented by two counsel each defendant could only have "equality of arms" is two counsel were provided for his case.

106. There are some cases in which it is necessary for two counsel to be allocated and indeed one can envisage some cases where the bulk of evidence and work to be carried out on behalf of a defendant merit two counsel even if the Crown Prosecution Service does not chose to instruct two counsel. But the basic argument was rejected by judges long before the judgment of his Honour Judge Collier Q.C. in 2008 on the very same grounds as he lucidly explained. We doubt that such a "clarification" is really necessary or even appropriate.

107. We would welcome the support of advocates in court by appropriate persons. Delays occur in cases, whether or not two counsel are instructed, because of the lack of support. This applies to the prosecution as well as the defence. Indeed it could be argued that the prosecution are more in need than the defence. Often one CPS clerk is required to cover 2, 3 or even more courts.

108. However, it should not be thought that the provision of assistance in court will necessarily fill the role of a second counsel. Where two counsel

are instructed, it is now common for judges to insist on the junior counsel satisfying the court that he or she is able to conduct the case if for some reason, leading counsel is not available. Moreover, the division of tasks means that often a specific part or parts of a case are to be conducted by the junior advocate. No member of the litigation team could satisfy this need.

109. We suggest that it is not only to ensure a fair trial that two counsel are instructed but that there is a wider context that it often makes for greater efficiency and use of valuable court time which thereby is more cost effective.

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

110. The recent reduction in fees has already led to a number of lawyers withdrawing from practice in this area. Recent and proposed changes to practice in public family law cases are likely to lead to more robust case management, shorter hearings and reduction in the expense to legal aid funds in any event. There is already a perception that public law family work is poorly remunerated. It is not unreasonable to observe that talent will nearly always follow money. Disadvantaged families, and in particular the children represented by the Children's Guardians are likely to suffer as a result.

Question 31. Do you agree with the proposal that fees for self employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts? Please give reasons.

111. We do not consider it is appropriate for us to respond to this question.

Question 32. Do you agree with the proposal that the higher civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

112. This question entirely relates to appeals to the Upper Tribunal and it would not be appropriate for us to comment.

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

113. No.

114. We consider it is premature to make these reductions before it is established how much public funding is being spent on experts in these proceedings. There is no sufficient justification and no real argument supporting the cuts and we consider that there are insufficient similarities in the type of expert evidence provided to the prosecution in criminal cases to justify the conclusion that defence rates in criminal cases and, even less arguably, the rates paid to experts in family and civil cases should be equalised with those paid to prosecution experts in criminal cases. There is virtually no assessment in the paper of what type of work is done by prosecution experts and how complex the issues they consider are, nor how the economies of scale they achieve from being consistent suppliers to the prosecution reduce the fees they are able to charge.

115. In civil matters the expert witness usually has far more documentation to read than does the prosecution expert and many more issues to deal with. In a contested personal injury case, for example, where the expert is instructed on assessing the injury sustained by a claimant, the expert may have to consider expert reports from experts from different disciplines, voluminous medical and occupational health records, radiography of considerable sophistication and detailed witness

statements. The expert may have to deal with diagnosis, symptoms, prognosis, causation of symptoms, acceleration of symptoms and may have to consider the appropriateness of care regimes and equipment. In clinical negligence cases the complexities of expert evidence in, say, a birth damage case, require expertise of the highest calibre.

116. We are concerned that insufficient data has been obtained and insufficient thought has been given to the effect these very substantial cuts may have on the quality of expert evidence available to the court in what are extremely difficult and technical cases.

117. More specifically, as far as family cases are concerned, it is noted there is no data provided to show the impact of such reductions on the total legal aid spend. It is unclear whether any reduction would form part of the overall projected savings of £220 million and if so, in what amount.

118. There is a number of reasons why it is submitted that such a reduction would be unwarranted and damaging.

119. The lack of comparability with CPS expert reports is particularly obvious when family cases are concerned. The nature and ambit of such reports are wholly dissimilar as between the jurisdictions. An expert in a criminal case would be likely to be reporting on a discrete, often narrow, issue such as fitness to plead. The documentation to be read would generally be quite limited. Further there may be economies of scale in acting as a consistent supplier to the CPS. In distinction an expert in a family case is likely to have to read a mass of documentation, potentially meet a number of different involved adults/children, to review the reports of other experts and attend expert meetings. The assessment may be overarching i.e considering all the key issues for determination in the case as a psychological report may often do. There is no assessment in the consultation of the differences between expert work in these two diverse fields or even discussion of it.

120. We are also concerned about the impact on the quality and supply of experts.

121. The reduction in experts' fees introduced in October 2011 has already had an impact on the pool of suitable experts, for example, highly specialised medical experts as might be required in a complex non-accidental injury case. There are now only a handful of paediatric radiologists nationwide, whose expertise is routinely needed in such cases to interpret X-rays, prepared to undertake medico-legal work. The evidence for this development is by its nature anecdotal but none the less valid for that. It is inevitable that a further and significant reduction in fees across the board will have a real impact on the quality and availability of current experts and a disincentive to entrants to this field. In complex cases where medical issues are central to fact finding and decision making, experts of the highest calibre are essential to avoid the risk of grave injustice. The risk more generally is of compromising the safe and efficient administration of justice and the quality of decision making in the best interests of children and their families.

122. The Family Justice reforms which are currently being piloted and will come fully into effect in April 2014 envisage a significant reduction in the use of experts (as noted in paragraph 7.2 of the Consultation Paper) following the introduction of the more stringent test under Practice Direction 25B paragraph 5.1 to "that which is necessary to assist the court to resolve the proceeding." The President has made clear in his decision in *TG (A Child) [2013] EWCA Civ 5* that "the new test is intended to be significantly more stringent than the old." Indeed this has been one of the key themes of the Judicial College training on the new reforms. The President has also reinforced in his addresses round the country and in his View from the President's Chambers (1) that reports will be delivered in a shorter and more focused fashion.

123. The Children and Families Bill will also introduce the mandatory 26 week time limit for public law cases. This requires a streamlined approach and most effective use of limited time, e.g for assessments. This reform will also be likely to produce reductions to the legal aid spend in public law cases as recognised in the Consultation Paper. However the proposal for

reduction in experts' fees is highly likely to reduce the range and quality of experts prepared to carry out this work (see ii) above). This in turn will be productive of delays. Thus, in our view, a fundamental component of the new reforms will be undermined.

124. As far as private law changes are concerned, as a result of LASPO the numbers of litigants with public funding in these cases will fall dramatically. Thus there will a limited number of cases in the private law field where experts will be funded by legal aid. Where the child is represented by a rule 16.4 Guardian, and thus legally aided, he or she may wish to commission expert reports. A recent decision by Ryder J. (now Ryder LJ) made it clear that the Legal Aid Agency was entitled to refuse to fund fully an expert report directed by the court where the child was legally aided but the parents were not and were unable to afford the costs of a report: *R (JG) v The Legal Services Commission EWHC 804.*

125. Thus, in conclusion, it is submitted that it would be wrong to reduce experts' fees for the following reasons:

a. There has only recently been an across the board reduction in experts' fees, which based on anecdotal evidence from a number of sources, contrary to the views of the Consultation, has reduced the number and quality of current experts and potential new entrants particularly in the medico-legal field.
b. There is now going to be a further significant reduction in the use of experts in the public law field as a result of the new Part 25 of Family Procedure Rules 2010 and the length of such reports as a result of the message emanating from leadership judges.
c. There will be a corresponding reduction in the private law field as a result of the changes introduced by LASPO.
d. There has been no evaluation of the differences between expert evidence provided for the CPS and in the family jurisdiction.
e. Such a step would undermine the Family Justice reforms particularly the 26 week timeline.

126. At the very least such a step is premature pending an evaluation of the effect of the current changes on the spend on expert provision.

2nd June 2013

THE COUNCIL OF HER MAJESTY'S CIRCUIT JUDGES,

HIS HONOUR JUDGE BIDDER QC,

HONORARY SECRETARY,

CARDIFF CROWN COURT,

THE LAW COURTS,

KING EDWARD VII AVENUE,

CARDIFF CF10 3PG