JUDICIARY OF
ENGLAND AND WALES

RESPONSE OF THE JUDICIAL EXECUTIVE BOARD TO THE GOVERNMENT'S CONSULTATION PAPER CP14/2013, *TRANSFORMING LEGAL AID: DELIVERING A MORE CREDIBLE AND EFFICIENT SYSTEM*

INTRODUCTION

1. This is the collective response of the Judicial Executive Board, prepared after discussions with other members of the senior judiciary of England and Wales.

2. We understand the scale of the fiscal and financial challenges currently faced by the public sector, and the ongoing need to make substantial savings to address them.

3. The changes to legal aid proposed in consultation paper CP14/2013, *Transforming Legal Aid: Delivering a more credible and efficient system*, taken together with past changes, will have a significant effect in criminal, family and civil cases and judicial review, and a direct impact on the operation of the courts and the administration of justice.

4. It is a fundamental requirement of the efficient administration of justice that high quality litigators and advocates should be available and represent both sides, and courts cannot effectively deliver justice without their participation. The judiciary therefore has a direct interest in the quality of advocacy, upon which our adversarial system of justice depends, and comments on the proposals in the consultation paper from this standpoint, in line with longstanding constitutional convention.

5. We welcome the Government's commendable objectives to maintain an independent Bar and protect the earnings of young barristers. We also welcome the decision not to put forward a proposal for "one case one fee". We should all similarly welcome changes that would improve the effectiveness of the criminal justice system.

6. We recognise that given the financial imperatives, some of the proposals in the consultation paper are necessary. The senior judiciary has advocated for some time the need to reward efficiency, and better to remunerate those whose work helps to enhance the performance of the court, and therefore has no difficulty in supporting the objective of improved and incentivised efficiency. Indeed the judiciary will continue to contribute to greater efficiency through robust case management and time-tabling, and through reforms to procedure which can be achieved without any diminution in the quality of justice.

7. Our experience is that many lawyers have already ceased to act in legal aid cases. Many of those entering either branch of the legal profession seek to avoid publicly funded areas if their ability and promise permit them the choice. Able practitioners who remain active in publicly funded fields, particularly in crime, family and judicial review, are often in evident overstretch, because, unsurprisingly, the services they offer are in greater demand than those offered by their less competent colleagues. We believe that the proposed changes are likely to accentuate this phenomenon, particularly as it is not clear what steps are being taken to secure proficient advocacy and equality of arms. These issues are covered in our response to chapter four at paragraphs 27 to 33.

8. The judiciary also has a significant interest in encouraging greater long term judicial diversity. A reduced pool of talented people who practice in crime and family work (which, because of the social value of the work are often areas of the professions which attract men and women from less advantaged backgrounds) will make it more difficult to achieve this important long term objective. This potential long term consequence should be addressed head on.

9. Some of the proposed changes are likely to transfer rather than save costs. It cannot be emphasised too strongly that good advocacy reduces cost. Cases are focused on the significant issues only and take less time; unnecessary adjournments are avoided; mistakes are less frequently made; there are fewer appeals; retrials are not necessary. Poor advocacy is wasteful of resources; cases are less well prepared and they occupy more court time and take longer to come to a conclusion, while simultaneously increasing the risk of mistakes and miscarriages of justice.

10. A significant number of individuals involved in family cases, or in applications for judicial review, and potentially some defendants in criminal cases whose means exceed the financial eligibility threshold will become litigants in person. Litigants in person add to the length and eventual cost of cases, which fall on Her Majesty's Courts and Tribunals Service (HMCTS) and also on the other parties to the litigation, who (in a family or criminal case) are themselves likely to be publicly funded, or in the latter case, involve the publicly funded Crown Prosecution Service (CPS). There has already been a significant increase in the number of cases heard by District Judges up and down the country in which one or both sides are litigants in person. The inevitable result has been to reduce the number of cases which can be listed each day, with consequent longer term delays in the delivery of judgments in cases awaiting their turn in the list.

11. The consultation paper invites responses to 36 questions. We have addressed the issues under the chapter headings used in the paper and where appropriate have indicated the specific questions to which they relate; we have not, however sought to answer all the questions.

12. We have also made proposals for procedural changes which it may be sensible to explore in order to achieve the total overall costs savings through a range of different means, for example, at paragraphs 69 and 86. It is not clear from the consultation paper whether other more radical possible options capable of delivering significant savings, such as changes to mode of trial of criminal cases,

have been explored. These would be policy decisions for consideration by the Government in the light of the responses to the consultation.

CHAPTER 3: ELIGIBILITY, SCOPE AND MERITS

Restricting the scope of legal aid for prison law

Question 1

13. We generally accept the proposals for legal aid for prison law matters. In matters where the individual's ongoing detention or where liberty is at stake, it is important that legal aid continues to be available. However, for consistency with this principle, the detail of the proposal needs further work. For example, whilst we welcome the Government's intention to continue to make legal aid available for Parole Board review matters, in our view, categorisation reviews and reviews of licence conditions should continue to be eligible for legal aid because they also affect the prisoner's ongoing detention or liberty: a move to a lower category prison is often a precondition of release.

Imposing a financial eligibility threshold

Question 2

14. The experience of the courts dealing with cases in which parties are not automatically granted legal aid is that there are substantial delays while the question of eligibility for legal aid is resolved, particularly if the defendant is self-employed. Until legal aid is in place, most solicitors are not willing to undertake any significant work in relation to the case. This means that the court can do nothing other than adjourn it. In a multi-handed case, it slows the case down for all the parties. These delays have an adverse impact on the efficient running of the courts, and are wasteful of resources to other parties, many of whom will themselves be publicly funded. The new system will need to be designed in a way that minimises such delays and associated cost implications.

15. As already noted above at paragraph 10, the introduction of a financial eligibility threshold may have the consequence that some defendants who are not entitled to legal aid elect to become litigants in person because they cannot afford representation. This would undermine efficiency savings in other parts of the system. On the other hand, there are a number of cases, particularly heavy cases, in which the defendant would have sufficient funds to pay for his defence if his assets had not been frozen. Immediate steps should be taken to enable the release of reasonable funds for this purpose.

16. We have principled reservations about limiting the ability of a defendant in a criminal case who is not entitled to legal aid to reclaim reasonable costs where he is acquitted. This applies with even greater force where the case is dropped due to lack of evidence. In general, if a convicted defendant has the means to pay for the costs of prosecution, an order to this effect is usually made. If he is acquitted, then in our view he should in general be entitled to reclaim the reasonable costs of his defence.

Paying for permission work in judicial review cases

Question 5

17. Applications for judicial review are considered first on the papers by a High Court judge or deputy High Court judge. A small number of cases of particular urgency or complexity are the subject of a direction that they be listed for oral hearing of the permission application. Otherwise the judge considering the paper application may: (a) grant permission; (b) refuse permission; or (c) refuse permission and certify the case as being totally without merit.

18. Except in one category of case, an applicant refused permission on the papers may not appeal directly to the Court of Appeal, even on the papers (CPR 54.12(3)): the only right of recourse is to request that the decision be reconsidered at an oral hearing. The excepted category is an application for judicial review of a decision of the Upper Tribunal ("UT") refusing permission to

appeal to the UT from a decision of the First-Tier Tribunal. In these cases, generally known as "Cart" cases after the Supreme Court decision of that name, the applicant cannot request an oral hearing (CPR 54.7A(8)) and, if refused permission on the papers in the High Court, may only seek permission to appeal to the Court of Appeal on the papers. A further category to be introduced following the Government's recent consultation on judicial review and due to come into effect from 1 July 2013, is where the High Court refuses permission on the papers and certifies the application as totally without merit: in such a case the applicant will not be able to request an oral hearing in the High Court (CPR 54.12(7) as due to be amended by the Civil Procedure (Amendment No.4) Rules 2013) and may only seek permission to appeal to the Court of Appeal on the papers. The judiciary has previously stated that it supports these proposals.[1]

19. In the Court of Appeal an applicant for judicial review refused permission to appeal on the papers may renew that application to an oral hearing except (a) in a "Cart" case (CPR 52.15(1A)); or (b) where the single Lord or Lady Justice has certified the application as totally without merit (CPR 52.3(4A)). A further exception will apply with effect from 1 July 2013 in relation to cases where the High Court has refused permission to apply for judicial review and has certified the application as totally without merit (CPR 52.15(1A) as due to be amended by the Civil Procedure (Amendment No.4) Rules 2013).

20. In our view those who lodge applications for permission to seek judicial review in the Administrative Court should not be able to recover the costs of doing so if the judge certifies that the application is totally without merit, but otherwise the costs of the paper application should be funded in the usual way; we set out our views on renewed applications below. We reach that view both as a matter of principle and for two pragmatic reasons.

21. The issue of principle is that, as the consultation paper says in paragraph 3.61, "it is important to make legal aid available for most judicial review cases, to ensure access to a mechanism which enables persons to challenge decisions made by

[1] http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/senior-judiciary-response-moj-consultation-judicial-review-reform-27022013.pdf, paragraph 21

public authorities which affect them"; and that if cases which have some merit, but are not quite strong enough for permission to be granted, result in solicitors not being paid for the application, the pool of conscientious practitioners in this important field of law may be seriously reduced. On the other hand, the lodging of applications which are totally without merit must be discouraged.

22. Turning to pragmatic reasons: the consultation paper accepts that legal aid would continue to be paid for the earlier stages of a case. It suggests, however, that the costs of drafting and lodging an application for judicial review should be irrecoverable unless permission is granted. One possible effect is likely to be that the claimant will lodge a home-made application anyway (with perhaps a page or two drafted with the help of the solicitor). The defendant is then required to acknowledge service and the judge to make a decision on the papers, only this time without the assistance given by a competently drafted application.

23. The second pragmatic reason is what may be described as the "double or quits" effect. If the refusal of permission means that the costs of drafting the application are irrecoverable, solicitors will almost inevitably advise the client to renew the application to an oral hearing, in the hope that permission will be granted and thus their costs will become recoverable from public funds. It is very rare for an application certified as totally without merit to succeed on renewal, but around 20% of paper applications not so certified are successful at an oral hearing. However, we believe that renewal should be dealt with in a manner similar to that applied to criminal appeals, namely if the renewal is successful a fee should be paid; if it is unsuccessful then no fee is payable. Although unmeritorious paper applications are a burden for the Administrative Court, unmeritorious oral renewals are a greater burden still: they take up a great deal of judge time and cause serious delay and often inconvenience to defendants.

24. An alternative would be to implement what we suggest for borderline cases at paragraph 26 below. This would have the advantage that many cases would not proceed to issue if they lacked the necessary merit.

Civil merits test – removing legal aid for borderline cases

Question 6

25. In light of the changes introduced very recently by the Civil Legal Aid (Merits Criteria) Regulations 2013, we would encourage the Government to allow sufficient time to evaluate the impact of these changes before considering any further changes to the eligibility criteria, particularly in light of the far-reaching consequences of the removal of legal aid for borderline cases.

26. An alternative which should be considered is the re-creation of local committees of lawyers to advise the Legal Aid Agency (LAA) on whether it should fund cases where the merits are borderline. These committees worked well in the past as they were informed, independent advisers who took a realistic and responsible view of which cases should be funded.

CHAPTER 4: INTRODUCING COMPETITION IN THE CRIMINAL LEGAL AID MARKET

Proposed competitive tendering model

27. The fundamental changes as to how cases will be allocated to litigators before they come to the Crown Court will have an impact on the operation of the Crown Court. We have not sought to provide direct responses to the majority of the questions in this part of the consultation paper, many of which relate to the detail of how the proposed contracts will work. However, we make general observations about the impact of the major elements of the proposed model on the operation of the courts and administration of justice.

Scope of the new contract

Question 7

28. The questions as to whether there should in principle be competition for legal services or the scope of legal services to be subject to competition are matters of Government and legislative policy on which it would not be appropriate for the judiciary to comment.

29. However, as set out in paragraph 4, we have a real concern about the quality of representation provided in the publicly funded legal aid sector, and the impact on the administration of justice of any reduction in the quality of case preparation and advocacy. It is our view that there should be standards of quality and a robust quality review and assurance process in place as an integral part of any price competitive tendering model. If not, there is a real risk that the firms obtaining contracts will employ those who will take the lowest salary in order to maximise the firm's profits. There is evidence in the field of immigration law that in order to maximise profits, solicitors are employing trainees or unqualified staff to conduct work which should be done by qualified lawyers. It is not made clear at this stage what quality mechanism will be developed. We could not support a proposal which did not have a robust system for assessing quality in addition to the current requirements for compliance with regulatory standards. The task of developing such a system should not be underestimated.

30. We note, but do not comment on the Government's Small and Medium Sized Enterprise agenda, save to say it seems inevitable that most small firms will have to restructure, merging to become much larger firms, or go out of business. This will mean at least a period of significant transition, with the possibility of some adverse impact on the performance of the criminal courts.

31. In the longer term, there is a danger that the anticipated reduction in the number of solicitors' firms may make legal services a difficult market for new bidders to enter in subsequent rounds of contract tendering.

Question 8

32. The level of fees paid to those representing defendants in the criminal courts is a matter for the Government. However, for the reasons we have given, we have a close interest in the quality of legal services and in particular advocacy before the courts. The level of fees must be commensurate with the level of responsibility and sufficient to attract able people into publicly funded work and to retain them. It is worth noting that the judiciary routinely sees the level of charges made in non legal aid cases, which are very significantly higher than those currently available for legal aid practitioners. It is also important to bear in mind that comparisons with some other systems must take into account the central role of high quality advocacy in our adversarial system.

33. Many young and talented lawyers are no longer choosing to practise in crime. Some who feel trapped in this area of practice may continue because they have no option. However, in the medium term, if the more talented lawyers do not work in crime, the impact will be not only on the quality of the defence, but also on the quality of the prosecution, many of whom are drawn from the same pool, whether currently employed by the CPS or working as self-employed practitioners. In the long term, there will be a negative impact on the quality of those joining the judiciary.

Geographical areas and size

Questions 10 – 12

34. Some of the proposed contract areas cover very large areas of the country. It may be very difficult for providers to provide sufficient effective cover across the whole area, for example in predominantly rural areas, such as Devon and Cornwall, or large geographical areas also including major cities, such as West Yorkshire (see also paragraph 47). At the other end of the scale, it is proposed that there will only be four contracts in many areas, which would not be enough providers to cover a large Crown Court case, for example an affray with six

defendants in conflict with each other, who may need representation by different providers in order to avoid a conflict of interest.

35. The detail of the model and the way in which cases are allocated is not a matter for the judiciary, but the Government may wish to reflect on the following practical considerations, which we have explained with reference to the position in the West Midlands by way of illustration.

36. Criminal representation in the Crown Court at Birmingham is provided, broadly, by some 50 firms who appear at the court with sufficient regularity to consider proposals for the more efficient conduct of business, receive local practice guidance and be invited to court user events.

37. Approximately 3,000 cases are sent for trial to the court annually. Many of them involve two or more defendants. A further 1,200 cases are committed for sentence. There are about 400 appeals. Some firms are involved in hundreds of cases a year; others are involved in only a few dozen. There are two large firms which have a presence in a number of other cities. Whether or not either of these seeks to tender, it is difficult to see how any other, smaller firm could tender under the proposed model unless it restructures or merges with others. None of the existing firms in the area could tender for 5% of all the work in the West Midlands, as is proposed. Therefore we cannot see how the majority of applicants would be drawn from existing providers in the market, as envisaged in the consultation paper, unless there is a major restructuring.

Case allocation and continuing representation

38. Most cases in the West Midlands are dealt with by solicitors in the West Midlands. However, it is self evident that crimes are committed in the region by people who are not from the region, and that those who come from the West Midlands sometimes commit crimes elsewhere. This applies with particular force to some very heavy cases, in particular serious organised crime and terrorism cases investigated by national agencies such as SOCA (or in future the National Crime Agency), or at the other end of the scale the Scambusters Team

for Trading Standards, and to cases prosecuted by national agencies such as the Organised Crime Division and CPS Central Fraud division.

39. Investigators working for national agencies frequently arrest people far from their base and may either take them for interview at police stations close to the place of arrest, or at one in the town in which their agency is based. In either event, they will almost always issue process at the local Magistrates' Court which inevitably commits to the local Crown Court, which then has to decide where the case will be tried. Often the place where the defendants or the witnesses reside will lead to a change of venue for their convenience. The pre trial dealings in complex cases are substantial.

40. The proposals do not appear to take account of these types of cases. Any decision to change venue is usually taken after representation is well established. At the moment, many defendants in such cases would have local solicitors, so a change of venue would create no difficulties. However, under the proposed model, if there is a change of venue the court will find it difficult to make progress when the solicitors are so far from the court. Solicitors will probably use agents for any hearings. The confident expectation is that lack of knowledge of the case by the agents would make it more difficult to resolve issues at interlocutory hearings. This will in effect be a cost transfer to the courts.

Client choice

Question 17

41. As a legal challenge on whether removal of client choice is compatible with Article 6 of the European Convention on Human Rights may come before the courts in due course, we do not express a view on the legal issues; nor do we express a view as to whether the proposed system for tendering is practical if client choice is maintained.

42. Assuming that there is no contravention of principle, we should nevertheless underline that this system would represent a fundamental change of approach and would have significant practical problems. We refer to some of these.

43. The relationship between an accused person and his legal representative is, of necessity, a close one, and depends on mutual trust. This is a key point that does not merely bear on the welfare of the accused, but on the working of the whole system. The efficient disposal of cases, particularly the acceptance of informed advice as to an early guilty plea, depends upon the relationship between defendant, solicitor and advocate. The relationship is likely to be more constructive when the parties have entered into it freely, rather than when it has been imposed.

44. Repeat offenders tend to use the same firms of solicitors over many years. The solicitor knows the client well, knows the history of previous offending, including the details of previous similar offences, and knows the family circumstances. This knowledge enables the solicitor or advocate to give informed advice immediately both at the police station and at court. The relationship and knowledge are often key to giving difficult advice and to its acceptance, including, where appropriate, persuading the defendant that it is in his best interests to plead guilty in appropriate circumstances. It is understood that the fee structure and sentencing should give incentives for early pleas, but it would be wrong to ignore or minimise the importance of such relationships in achieving the same end. A defendant is more likely to accept unpalatable advice from a lawyer he trusts than from one about whom he has even the slightest reservations.

45. Most guilty defendants are not interested in the efficient operation of the criminal justice system. Indeed, the opposite is true. Their co-operation is usually achieved by their accepting the advice of a solicitor with whom they have an existing relationship.

46. Where a defendant is not happy with his representation, the trial often takes longer because the defendant will typically complain repeatedly about his representative to the judge and/or the jury, refuse to take advice and persist with

hopeless defences. He will often insist on a particular course being taken, for example cross-examining many witnesses. Whilst the judge can use case management powers to keep excesses within check, such cases do take more time. Appeals on grounds of inadequate representation and/or excessive judicial interference are much more common than they once were.

47. We take West Yorkshire as an example. The proposal is for 25 contracts. Each contracted entity will have to provide cover across the whole of the area from Huddersfield and Halifax (at the western end of the county) to Castleford and Pontefract (at the eastern end) and also to include both the large cities of Leeds and Bradford. Solicitors employed by the contracted entities will have to attend at several police stations across the area at any time of day and night, seven days a week and then follow that up with attendances at Magistrates' Courts across the county on the following morning.

48. They will be allocated clients, many of whom they do not know, whereas the next solicitor to be allocated a case may be allocated one of their former regular clients. If the solicitor lacks knowledge of the client, he or she will have to act defensively. They are likely to ask for adjournments, for example so that the mental health issues of their client can be investigated before they take definitive instructions or allow pleas to be tendered.

49. There will also be occasions when conflict will arise, but will not be detected. The solicitor sent to the police station or who accepts the case at court will have insufficient knowledge of the defendant, but in due course it may emerge that the firm has prior involvement with the victim or with a co-accused.

50. Some firms of solicitors have developed specialist knowledge and experience in relation to certain offences (for example death by dangerous driving), or speak particular languages. This specialisation, which makes for efficient disposal of the case before the court, is likely to diminish or disappear. In Wales, the contractual arrangements will need to ensure that defendants who wish to be represented by a Welsh-speaking solicitor and advocate have that opportunity. The consultation paper is silent on this point.

Changing provider

Question 20

51. The current Regulations came into force on 1st April 2013. It is not yet clear how they will work. Regulation 16(b) of the 2001 Regulations was interpreted to mean that it was for the representative (not the defendant) to assert or, at least, accept that a breakdown in the relationship had occurred. Whether a new representative was then assigned depended on the judge's view of the reasonableness of the conduct of the defendant.

52. A major change was effected by the new Regulations, which does not contain the same requirement. The consultation paper envisages that the defendant may assert that the relationship has broken down. Where a defendant has been given no choice as to representation it is much more likely that he will seek a change of representative at some later stage.

53. It is the experience of judges who sit in the Crown Court that a defendant who has been provided with a duty solicitor in the police station and at first appearance in the Magistrates' Court when the case is sent for trial is far more likely to seek a transfer of representation than the defendant who has been represented by a solicitor known to him. These applications (with the restriction we have identified) already take up a significant amount of time in busy Crown Courts; each application entails cost for the court, and for the Crown, and for any other defendant who needs to attend; all three sets of cost fall on the public purse. The applications are often refused, although there are obviously occasions when it is necessary for there to be a transfer of a representation order.

54. The new process is likely to lead to a significant rise in applications for transfer of representation. Where defendants have had a representative imposed upon them, their prospects of achieving a change are likely to be greater than in the past. Where they are refused, defendants may choose to represent themselves more often, which risks a cost transfer, rather than a cost saving.

55. The consultation paper proposes that where relationships have broken down between a particular member of the firm and the client, the firm should allocate a different representative, in consultation with the client. This situation occurs now. Applications only get to court where a defendant is so dissatisfied with his representation that he will not agree to another representative from the same firm.

Conditions of tender

Questions 23 and 24

56. The consultation paper rightly identifies regulatory and quality standards as an essential condition of tender. We consider it essential that these should also form part of the ongoing service standards. It is important to draw a distinction between assessment of and compliance with regulatory standards, which is relatively straightforward to measure and must, as proposed, form part of the basic requirements for any successful bid; and assessment of quality standards, which are essential to the proper administration of justice. The task of setting and measuring these will, as we have observed, not be easy.

57. There is an inherent risk in allowing entities to bid for contracts without already being subject to regulation and the relevant quality standards: it is unclear what the process will be in the event that a successful bidder subsequently fails to meet these standards.

58. In the current market structure, the existence of client choice from amongst the approved legal aid providers is one of the safeguards against poor quality: solicitors rely on reputation to secure new and repeat business, because there are many alternative providers. If the new competitive tendering structure is adopted, it is essential that the Government works with the regulators and the profession to design a system which guarantees not just compliance, but continuous high quality provision of legal advice and representation, and that it addresses the question of removing and replacing providers who fail to comply with these standards.

CHAPTER 5 – REFORMING FEES IN CRIMINAL LEGAL AID

Restructuring the Advocates' Graduated Fee Scheme

Question 26

59. The decision to plead guilty is influenced by many factors, including the advice given by trial advocates. Particularly in serious and/ or lengthy cases, it will only be after considering the material in detail that the trial advocate will be able to offer the defendant realistic advice, in such a way that the defendant will appreciate that full attention has been given to his case, and which will potentially result in a guilty plea. The fee structure must not provide a disincentive for the early engagement of trial advocates.

60. For some considerable time, the senior judiciary has advocated the need for efficiency to be rewarded. As we have already observed, this objective should be central to the reforms. It is always a difficult decision as to the balance between paying for case preparation by the brief and daily attendance through the refresher. If cost savings have to be made, we accept that balancing this is very difficult. We are supportive of the argument that good preparation and the expeditious conduct of the trial by focusing on real issues should be properly rewarded and would be happy to explore further the role the judiciary might play in decisions on these issues.

61. A fee system which does not reward quality and attract experienced advocates to the most serious and difficult cases will represent a perverse incentive. The proposals to reduce the daily attendance rate and the taper rates may do this, by offering reward for accepting short cases, rather than for conducting cases quickly and efficiently.

62. A further consideration is that delays during the course of a trial are by no means always the fault of the defence. We have significant concerns about delays caused by the prosecution, and there are inevitable delays due for example to jury sickness, or demands on the trial judge to conduct an urgent hearing on the

morning otherwise scheduled for the trial, or problems with interpreters or delays in delivery of a prisoner. Any proposals for a taper must be designed to address delays to the trial process for which the defendant's legal representative has no responsibility.

63. We acknowledge that further work may need to be undertaken to evaluate the options for avoiding such perverse incentives and cost savings. We would be happy to discuss these matters further with the LAA. Some judges who specialise in crime suggest that, rather than reducing refreshers across the board, judges could be given the power to penalise defence advocates that have contributed to extending the length of a trial unjustifiably by ordering a reduction in the amount of or number of refreshers granted. This is a topic that has long been discussed and needs careful consideration.

Reducing litigator and advocate fees in Very High Cost Cases (Crime)

Questions 27 and 28

64. The judiciary, and the public, have a strong interest in maintaining high quality advocacy in criminal trials, particularly in the more serious cases. That is to ensure that the guilty are convicted and that those against whom the evidence is inadequate are acquitted. It is the common experience of trial judges that with experienced and skilled advocates, trials are shorter and justice is better served.

65. The judiciary does not comment on specific fee rates. However any change must preserve the incentive to engage experienced trial advocates, including QCs, where they are needed. The examples quoted in paragraph 5.29 of the consultation document do not demonstrate that the engagement of a QC has changed the cost profile of such cases. The cost of such cases is only partially related to categorisation of number of defendants, length of trial, etc. Much also depends on other factors, including the volume of disclosure, the nature of the defence, and whether there is heavy interlocutory litigation.

66. Whether experienced trial advocates, including QCs, continue to act in complex cases is not merely a matter of choice for them, but for those who choose to instruct them. An incentive to solicitors to choose relatively junior trial advocates, particularly those employed by them and whose fees they will therefore receive as income, to conduct complex trials is likely to produce an unintended cost transfer to the courts system, in the shape of longer trials, more miscarriages of justice and more appeals.

Reducing the use of multiple advocates

Question 29

67. We welcome the proposals to co-operate closely with the judiciary in the decision as to what category and number of advocates are approved. The priority to ensure that where necessary, experienced trial advocates, where appropriate QCs, are appointed, is clear. There has been a considerable body of anecdotal reports from the judiciary that the "second" advocate position has been filled by advocates with rights of audience, employed by the instructing solicitors, who play no real part in the conduct of the case in court and would not be in a position to take over the running of the case if, for example, the leader was taken ill. That is an unjustifiable abuse.

68. There are a very few cases where the volume of paperwork or other business means that two or even three advocates are necessary, and where even a highly competent leading advocate would be overwhelmed. The judiciary commend the observations of HHJ Collier QC quoted in footnote 88 of the consultation paper. The changes must preserve the incentive to instruct experienced trial advocates where necessary.

69. An alternative means by which savings might be achieved would be to consider the introduction of a procedural change to enable the Plea and Case Management Hearing to be conducted by telephone (or by some other 'virtual' mechanism) in suitable cases. This would facilitate the participation of the trial advocate, which will be all the more important if there is a single trial advocate, and would cut

down on costs and time for all parties associated with travelling to or from court. There are various technical issues that would need more detailed consideration with all those interested.

CHAPTER 6: REFORMING FEES IN CIVIL LEGAL AID

Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Question 32

70. While we make no specific comment on the level of fees, we would have concerns if the removal of the uplift has the effect of making practice in this field uneconomic, leading to a collapse of the firms still willing to work in this field, or such a reduction in quality as to be of little assistance to the court.

71. If the premium available for this work is eliminated or reduced by the current proposal, there is concern that the current system of issuing Country Guidance judgments, used by the Upper Tribunal in order to save costs, ensure high quality representation, prepare large bundles of materials and secure opinions of experts, would come to an end. Instead of determining one lead country case, based on the best available material, the Tribunal would have to decide several thousand cases in each category, without a guarantee that they had discovered all available material.

72. If the payment of the premium is to be significantly curtailed, we would encourage the Government to consider a system which would retain the possibility for it to be paid in relation to particularly significant cases (potential Country Guidance cases), which would be certified by the President of the Upper Tribunal for Immigration and Asylum. This would reflect the rationale behind the proposal at paragraph 5.48 of the consultation document (for tightening up the rules on appointment of QCs and multiple counsel), by concentrating the

authority to take such decisions in an individual with the necessary oversight of the business of the tribunal.

CHAPTER 7: EXPERT FEES IN CIVIL, FAMILY AND CRIMINAL PROCEEDINGS

Question 33

73. We accept that there is a significant issue in relation to experts. They are frequently instructed when they are not necessary and their reports are often too long and unfocused. There is a case for reform in relation to criminal proceedings. However, in relation to civil and family proceedings, we recommend that the Government gives further consideration to whether the reforms already introduced or envisaged in this area will deliver the required savings when they are fully in force, without the need for such significant additional changes, which we believe would have a significant impact on the supply of experts in civil and family cases.

Civil and family proceedings

74. There is insufficient financial data provided with this Consultation Paper on which to make an informed assessment of the effect of these specific proposals on the planned savings (in relation to expert fees) to the legal aid budget overall; before responding definitively, we would wish to better understand the expected benefit to the legal aid fund.

75. Since 31 January 2013[2], efficiencies are inherently being achieved, given the reform of Part 25 of the Family Procedure Rules ("FPR") 2010, with its higher threshold for court-authorised expert instructions (i.e. the need to prove that such a report is truly 'necessary'); it is anticipated that Part 25 will be buttressed by primary legislation in 2014 (Clause 13 of the Children & Families Bill 2013). These provisions are being underpinned:

[2] Family Procedure (Amendment) (No 5) Rules 2012

i. in public law proceedings by the reforms likely to be implemented by the *Children and Families Bill 2013* (currently *Clause 14*, which provides for the disposal of the application "*within twenty-six weeks beginning with the day on which the application was issued*");

and

ii. by the President of the Family Division's expectations of the profession and judiciary (integral to the Modernisation Programme)[3] to commission shorter, and more focused, expert reports.

76. Fewer reports will be deemed "necessary" under the new rule, than had been considered "reasonably required" under the old, which will have a downward effect on the level of expenditure.

77. When the President of the Family Division recently gave evidence to the House of Commons Public Bill Committee, he emphasised that 'social workers are experts. In just the same way, Cafcass officers are experts'[4], thereby explicitly discouraging the legal profession and judiciary from resorting to further expertise 'with a capital E', except where 'necessary'. He has gone on to declare his expectation that where expert reports are commissioned they should be shorter and more focused[5]. Reform to the family justice system by adoption of the messages outlined above will bring important savings to the legal aid fund, remunerating many of its experts on hourly rates.

78. Since 1 April 2013, we anticipate that considerable savings are being made to the 'spend' on experts in private law family cases, given that significant numbers of civil and family litigants have been removed from the scope of eligibility for public funds (under the reforms implemented by the Legal Aid Sentencing and Punishment of Offenders Act 2012).

79. We do not consider it appropriate to compare rates paid to experts under the CPS's Expert Witness Fee Scheme in criminal cases with the rates paid to experts in civil or family cases. The work of the expert in the criminal court is usually of

[3] View from the President's Chambers: the Process of Reform [2013] Fam Law 548
[4] Official Report, Children and Families Bill Public Bill Committee, 5 March 2013; c. 33, Q74
[5] View from the President's Chambers (*see above*)

a different order (for instance a psychiatric report in a criminal case may be limited to the question of fitness to plead), to that in the family or civil court, where the expert will not necessarily be simply advising on the mental state of the defendant/respondent, but will often be required to engage in a much wider risk assessment and review of the evidence and meet many members of a family. The report on a substantive disputed issue in a case, which may include, for instance, paediatric evidence, may be limited in the criminal enquiry to identifying any reasonable doubt as to causation of injury. In the civil and particularly the family jurisdiction, there is often a more profound paediatric enquiry which includes consideration of siblings.

80. Moreover, we believe that the expert in the civil or family case is more likely than their counterpart in the criminal courts to be required to read and comment upon sometimes extensive filed evidence (i.e. witness statements and other reports).

81. We are concerned that the proposals for the reduction in the fees may have an adverse effect on the quality and supply of paediatric experts in family cases; a declining availability of true expertise will inevitably impede efficient administration of justice, and detrimentally affect decision-making in the best interests of children.

82. Selection of the right expert is often vital to the efficient disposal of a family case; it is important that there is a wide pool of high quality experts from which to select the expert of choice for a case. There are already difficulties in achieving a steady supply of experts into forensic work in the fields of civil and family law. A number of initiatives[6] in the recent past have recognised this problem, analysed it, and have struggled to stimulate sufficient interest in the work. Our concern is that:

    i. The proposals to reduce fees permitted for the engagement of experts is likely to have a deleterious effect on the quality and supply of experts prepared to do the work;

[6] See *Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases – A report by the Chief Medical Officer,* Dept of Health, 30 October 2006, Family Justice Council mini-pupillage scheme, 1 Garden Court mentoring scheme

ii. There is an imperative (within the modernisation programme) to accelerate family court processes; accordingly, there is a greater need for focused reports swiftly prepared. If there is a problem over the supply of experts prepared to do the work, there is a risk that these proposals will run counter to these objectives.

83. There may, we suggest, be a case for harmonising the rates paid to experts practising in London and out of London, fixing the fees at the higher rate payable in each category; a uniform scheme may achieve reductions in the administrative costs of processing experts' fees. We are unconvinced that geographical location plays any, or any significant, part in the selection of the right expert for the case. Many experts have nationwide reputations, and are selected for their professional standing. We can identify fields of medicine in which the most distinguished experts practise in medical centres out of London, yet they regularly appear in the London courts.

84. We wonder therefore whether some savings may be achieved by harmonising the rates (in each case at the higher level of the two levels) and thereby reducing the costs of administration.

Criminal proceedings

85. We have already acknowledged that there is a case for reform, in order to reduce the instruction of experts when they are not necessary and to curtail the length of reports, which are often too long and do not focus on the right points.

86. One option which the Government may wish to consider is for the criminal courts to have similar powers to those in the family courts (see paragraph 76 above) such that expert reports must be court-authorised or approved before an application is made to the LAA for funding. The Criminal Procedure Rule Committee may not currently have the power to make a Rule parallel to that in part 25 of the Family Procedure Rules, as the "necessary" test is a rule of evidence. However, one other possibility that might be considered is using the Criminal Procedure Rules to introduce another test that could reduce the cost of

expert reports by requiring early judicial scrutiny. This could reduce spend by filtering out experts that do not assist the court.

87. While it is difficult for us to predict the impact on the market of fee cuts, not least given the wider changes to the market in other fields, we are aware that under the current rates it is often very difficult for the defence to employ experts at rates which are approved by the LAA, which can and does delay trials. We would be concerned if this were to become an increasingly frequent problem which resulted in an increase in applications to the judge that it would be an abuse to allow the trial to continue.

Judicial Executive Board
4th June 2013