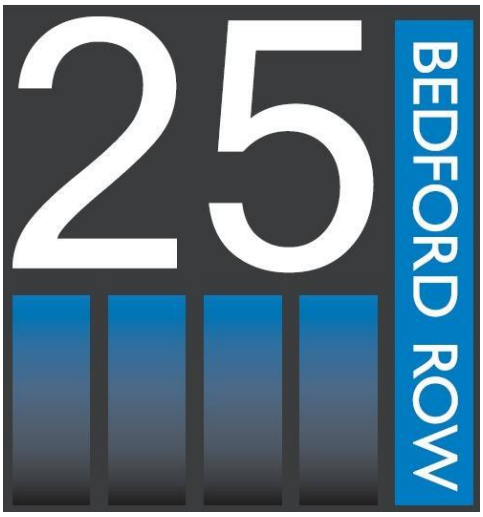

TRANSFORMING LEGAL AID

RESPONSE TO CONSULTATION

"It's unwise to pay too much, but it's worse to pay too little. When you pay too much, you lose a little money - that's all. When you pay too little, you sometimes lose everything, because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot - it can't be done. If you deal with the lowest bidder, it is well to add something for the risk you run, and if you do that you will have enough to pay for something better."

John Ruskin

Introduction

1. 25 Bedford Row is a leading set of chambers that specialises in legally aided criminal defence representation at all levels, particularly in the Crown Court. We have 65 barristers, including 18 Queens Counsel, and we thus encompass a wide range of experience in all aspects of criminal proceedings at every level.

2. We are a relatively young set, established less than 40 years ago, and if we have achieved a position of pre-eminence, it is because of the very high standards of advocacy and advice we provide our clients, both professional and lay. In other words, like all successful barristers' chambers, our success is founded not upon the *price* of our services but upon our *reputation* for *quality*. This issue of quality is of the utmost significance, as we shall show in our answers.

3. This paper represents the views of all our members, from the most junior to the most senior. We have not attempted to answer all the questions but have instead confined ourselves to answering questions from those areas in Chapters 3, 4 & 5 where we are able to draw upon our knowledge of and practical experience in the criminal justice system.

4. Although as will be apparent we oppose almost all of the proposals from the Ministry of Justice [MoJ], we do not do so out of intransigence or perversity or a bloody-minded desire to oppose whatever scheme the MoJ happens to come up with. Neither do we oppose the proposals out of self-interest or narrow-minded protectionism. We oppose this paper and the ideas in it because we believe they will undermine and threaten to destroy a criminal justice system [CJS] that is among the finest in the world; and because once such damage has been caused it will be impossible to restore the CJS to its previous state.

5. Two members of the group who wrote this response for chambers were members of the group that wrote the Bar Council [BC] response. We have thus where appropriate drawn upon, adopted or quoted that response.

6. As other respondents have noted, the format of the paper seems designed to narrow debate by posing closed questions, a technique that makes short answers to many of the questions singularly difficult. For instance, the first question in Chapter 4 asks if we agree with the scope of the services to be competed. As will be apparent, we do strongly disagree with the premise of the question, namely, that Price Competitive Tendering [PCT] is appropriate for criminal legal aid. Many other questions are similarly tendentious but rather than a long introduction setting out our opposition to the fundamental premises of the paper, we have chosen to incorporate our general comments in the answers, so some of them are answered at greater length than others.

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

7. We disagree with this proposal.

8. The proposal would leave in scope only matters that engage Articles 5 & 6 of the European Convention on Human Rights (ECHR). This means that taken out of scope would be some of the most important decisions affecting prisoners such as:

- Categorisation
- Segregation
- Licence Conditions
- Rehabilitation & Resettlement issues

9. These excluded matters engage other ECHR articles and/or the common law and there is no rational basis for removing them from scope. In our view, it does the MoJ no credit that it should seek to provide nothing but the bare minimum required by the ECHR.

10. This could be seen as a penny-pinching and mean-spirited proposal given that, even within the context of LA expenditure, let alone the whole MoJ budget, it will save a relatively small sum (£1 million a year by 2013/2014, and £4 million a year by 2016/2017 if the figures in the paper are accurate) yet will seriously prejudice some of the most vulnerable and disadvantaged members of society by hamstringing their ability to gain access to the courts.

11. If the motive for the proposal is to save money, it fails to address the real drivers of the increase in the number of prison law matters over the last decade; no consideration is given to the effect of the continued rise in the prison population, the consequent overcrowding or the opening of private prisons.

12. It will be "practically impossible" for the mentally ill to complain. Funding for treatment cases was removed for all cases except where it could first be proven that it would be "practically impossible" for the prisoner to complain. The consultation concedes that *"of the few treatment cases to have received prior approval since July 2010, most concerned prisoners with [mental health issues or learning difficulties]."* The current proposal would apply without exception to the mentally ill, youths and other vulnerable prisoners and would therefore deprive those most in need from having a voice.

13. Given the relatively footling amount, we are left wondering whether the true motive behind the proposal is not the reduction of legal aid spending but rather preventing prisoners from being able to complain about how they are treated.

14. The removal of legal aid from prison law will do nothing to discourage the poor treatment of prisoners. Independent prison lawyers shine a valuable light on the conditions and practices within prisons. Removing them not only curtails prisoners' access to justice, it undermines the rule of law within prisons as prison staff will know that their treatment of prisoners will go unchecked. The supposed safeguards are ineffective substitutes as neither independent

monitoring boards nor the prisons and probation ombudsman have enforcement powers.

15. We can offer no alternative funding suggestions. We will forebear from citing the perennial Winston Churchill quote and confine ourselves to saying that the proposal to shave this small sum from the budget will wreak social and personal harms out of all proportion to the alleged financial benefit.

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

16. No we do not.

17. We recognise the policy and economic reasons that suggest Legal Aid should not be available for all defendants accused of crime regardless of means. Thus many crimes that can have serious consequences (e.g. drink/drive) are outside scope. But in framing any such policy, two considerations should be paramount:

> That defendants should not by virtue of an income threshold be hampered or delayed in obtaining proper and appropriate legal representation to advise and defend themselves; and
>
> That defendants should not suffer financially when they are eventually acquitted.

18. It must be recognised at the outset that this proposal will not prevent what we may call career criminals obtaining legal aid since they usually have very little visible means of support and thus are able to satisfy a means test or threshold without difficulty. Much hardest hit will be working defendants who will find themselves struggling to afford the fees for private representation. The cost of private representation is much higher than legal aid rates and very much higher than the scant figures the MoJ cites in the paper, figures that do not reflect our experience. The MoJ data in this regard, as elsewhere in the paper, are not robust, being partial and out of date.

19. The paper cites a figure of £5000 as being the average cost of a legally-aided case but the costs in a significant number of cases are much higher and the figures cited at paragraph 3.30 demonstrate this. A modestly complex case, which requires a significant amount of preparation, may result in costs of tens of thousands of pounds and it may be many months before the trial commences. The trial itself may last a number of weeks and so a defendant may become liable for a very considerable sum, which will only be recoverable at the conclusion of the case. In such cases, we do not believe defendants should have to pay for the costs in advance when they may be found not guilty of all or any charges.

20. We accept that the proposal allows for a hardship review but our experience is that a review of the defendant's financial circumstances is a lengthy and uncertain process and, whilst that process is underway, the defendant who is unable to pay will not be represented. This may cause the trial to be delayed or a defendant having to represent himself: both of which are hugely undesirable and not cost neutral.

21. Any means testing introduces delay and bureaucracy both of which entail extra costs. Defendants who fail to complete the forms in time or who provide incomplete financial data may well cause their trial to be delayed. Defendants who are finally deemed ineligible may decide to represent themselves with all the problems and delays we know that creates for the trial process.

22. We are concerned that this proposal would impale on the horns of a dilemma many of those who would want to (and should) exercise their right to be legally represented but who fear they cannot afford it. These proposals may lead to defendants wrongly deciding to plead guilty simply to avoid having to pay the costs of their defence even though they are, in fact, not guilty. The paper asserts elsewhere the demonstrably false proposition that lawyers advise in accordance with their own financial interests but it is a fact that those without means will often prefer not to contest a matter even though they are not guilty, just as they will suffer ill health rather than pay for private medical

care, and so a foreseeable consequence of taking defendants out of scope this way is that there will be an increase in guilty pleas and an increase in prison costs.

23. The Impact Assessment states the proposal will save £3m per annum. Since the Impact Assessment takes no account of any of these extra costs that we have mentioned it is difficult to know whether it will in fact save any money at all and it leaves open the suspicion that this proposal is not so much financially as ideologically driven.

24. We would like to know how many millions in defendants' contributions and costs remain uncollected. We suspect there would be no need for this sort of proposal if the MoJ simply collected what it was due.

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

25. No we do not agree.

26. In addition to the reasons of principle and practicality cited above, we are in any event concerned that a threshold of £37,500 is too low for the costs of a significant number of prosecutions. Any threshold should be significantly higher to ensure that those who are on relatively modest incomes are not liable for legal proceedings at the same rate as those who earn significantly more.

27. We are also concerned that the definition of disposable income is too narrow as it fails to take account of (e.g.) debts other than mortgage, other dependents so that defendants will be deemed able to afford legal representation when in fact they cannot.

28. There is a very obvious flaw in relation to cases of domestic violence where the victim may find herself funding her assailant's defence but, on wider principle, we do not consider it fair or just to include the income of persons other than the defendant in determining what amounts to "disposable income".

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

29. No we do not agree.

30. It is appropriate that the title of this Chapter – "Introducing Competition" – sets the tone for what follows. It is a tendentious title, as it appears to assume that there is no competition in the criminal defence market at present. This assumption is flawed and as a consequence, the various propositions and assertions based upon it are often plain wrong. It is already the case that the criminal defence market is competitive and the proposals for PCT in this paper, far from introducing competition, will stifle it. PCT will also result in a CJS of poorer quality with no benefit to this country beyond a headline cost saving which will be more than offset by poorer performance and potentially larger hidden costs.

31. Prior to the publication of the Consultation Paper the MoJ were asking members of the criminal defence community for suggestions and proposals as to how PCT could be made to work in a way most acceptable to the profession. The response 25BR gave was that we could not see any way in which PCT would provide this country with an effective, efficient criminal defence service that was fit for its purpose. A careful analysis of the proposals now put forward confirms us in that view.

32. As we have outlined above, the paper is premised upon the propositions that:

    a. the criminal defence market lacks competition

    b. tendering for the right to provide service will introduce the lacking element of competition, and

    c. PCT is an effective and efficient way to do that.

33. All these propositions are wrong and we examine each in turn.

Competition in the market at present.

34. Governments of all persuasions have, in recent years, attempted to introduce an element of choice into various areas where services are provided at government expense – education and health – and have introduced tendering in others where there is no effective choice – for example rail transport. This is born out of a perception that tendering introduces competition amongst suppliers, which is good for the paymaster – the government and by extension the taxpayer – and does no harm to the service.

35. The current market in criminal defence is intensely competitive as all practitioners in it are self-employed, small business people competing against each other for clients. Because prices are administratively set, the only area in which to compete is quality of service. It is erroneous to believe that practitioners are complacent because prices are administratively set. On the contrary, because the fees paid by the government are at an historically low level there is intense pressure to cut costs.

36. However, there is an equally intense pressure <u>not</u> to reduce standards as our clients have complete freedom of choice as to whom they engage. In the case of the independent bar the competition is even more acute. We rely upon repeat business from the same expert consumers, that is to say, our instructing solicitors, and, as the saying goes, you're only as good as your last case. The MoJ is understandably concerned about quality and ensuring that it gets value for money in the payment for advocacy services. As far as barristers are concerned, our situation is analogous to that of a restaurant all of whose customers are food critics, or a builder all of whose clients are architects. We are peer reviewed every day in every case. If one adds in to that mix the fact that our lay clients, if not always sophisticated are often shrewd and highly experienced in the system, every case we do is subject to intense quality control by our clients. One should also bear in mind that our work is carried out almost entirely in public under public scrutiny, in open court, unlike that of a surgeon, or banker or car mechanic.

37. Very much the same is true of solicitors. They rely very substantially on repeat business. We believe that approximately 60% of work in London derives from 'own client' instruction and a greater proportion outside London. Furthermore, there are two powerful and compelling sanctions that can be employed against a litigator who fails to perform up to standard. Firstly, clients have the right to ask for their case to be transferred to a different firm of solicitors, although this cannot be done on a whim. The Criminal Defence Service Regulations provide for this but only where there is a breakdown in the relationship between the defendant and the solicitor such that e**ff**ective representation can no longer be provided, or for some other substantial compelling reason. Although this power is controlled by the judge and is sparingly used, if solicitors fail to perform adequately they will lose their clients and the fees. Secondly, and even more draconian, is the power of the court to award wasted costs against anyone, including a solicitor, who fails perform to a reasonable standard. This power can be exercised summarily and amounts to a substantial 'fine' for poor performance. What other professional works under that sort of scrutiny and is subject to such summary disciplinary powers?

Tendering will introduce the necessary competition

38. This is the other side of the coin. How can it possibly be suggested that by excluding everyone from providing legal services, other than the successful applicant, the quality of those services will be maintained, let alone improved?

39. On what basis, other than price, would it be possible to judge the quality of bids – even if this were proposed which it is not? There will be no past record on which to judge the applications, other than the provision of legal services under an entirely different model from that which it is suggested will be introduced. We are sorry to have to say that the paper is economically illiterate. The terms 'competition' 'market-based' and PCT are used almost interchangeably and yet these are wholly different concepts.

40. We have already addressed the issue as to why the present system functions extremely effectively as a competitive environment in which the best possible service is supplied for the price paid; tendering for a fixed share of a market is the antithesis of that.

PCT is an effective method of tendering

41. This is the most astonishing aspect of the proposals. The only competition that tendering will introduce is competition on price; in other words, all other things being equal, the cheapest offer will secure the contract.

42. Once secured, the only hurdle the provider will have to overcome is the need to perform to a basic standard that it will be impossible to monitor effectively. Thus there is every incentive on the provider to cut costs to the bone to absolutely maximise profit whilst just skating along above the minimum standard required.

43. Ever since Lord Carter produced his review of the market in legal services, governments have threatened at various times to introduce some form of tendering although previously there was some thought given to Best Value Tendering, which did at least pay lip service (and we stress merely lip service) to the issue of quality. But time and again 'cheapness' has been confused with 'value'. Even in a market as unsophisticated as the supply of beef burgers this confusion does not exist. Every consumer knows that you will not get a high quality product from the 'Best Value' range; what you will get is something that is cheap, even if it is not always what the packet says it is.

44. In various places in Chapter 4 expression is given to the belief that *"competitive tendering was likely to be the best way to ensure long-term sustainability and value for money in the legal aid market."*[1] and *"the single most effective way of ensuring the taxpayer is getting value for money for criminal legal aid services is to move away from the current complex system of administratively set fees, through the introduction of a system of competitive*

[1] Paragraph 4.3 Written Ministerial Statement in December 2011

tendering, whereby providers themselves determine the best price at which they can offer their services."[2]

45. In order to justify or support this belief, the MoJ provides quotations from the Carter Review. For example in Paragraph 4.8 it says that *"The Review made a compelling case for moving to a market-based approach to legal aid procurement."* This is misleading by being selective and quoting out of context. The Carter Review acknowledged that there was money to be saved by tendering for the provision of legal services – it is axiomatic that you can do that by encouraging people to offer to do the job for less money – but, and it is an important but, Lord Carter couched this self-evident proposition in terms that make it clear to all who have read the review that firstly tendering would have to include Best Value Tendering (not PCT) to be even worthy of consideration

46. As Lord Carter said*: "3.5 There are **significant** risks associated with purely price-based competition. Some suppliers might set unrealistic prices for their services so as to gain market share and subsequently have to breach their contract and leave the market. This could lead to supply problems. There is also a **significant** risk associated with quality; …"* [3]

47. These significant risks are acknowledged in the Impact Assessment to this paper, but nowhere are there any coherent proposals as to how to manage them.

48. Lord Carter did at least attempt to grapple with this problem by considering the concept of BVT. But no one has been able to come up with a workable proposal to build quality – which is after all an essential element of value for money – into a tendering process. The reasons why are simple; quality in the provision of legal services is hard to measure by any form of economically justifiable basis. It can, and is, ensured however by the current system of administratively fixed prices paid to providers who are continuously monitored

[2] Impact Assessment Paragraph 5
[3] Carter Review Para 3.5-6

and assessed by the market. This is the purest form of market-based competition that can be achieved in a publicly-funded system.

49. Given that as even the simplest consumer knows that service providers who bid low in terms of price have to economise on quality, it seems very odd to us that the Paper proposes such a bad idea.

50. Competition can drive down standards as the Secretary of State for Education told MPs last year during the exam boards disaster. It is doubly incomprehensible that where competition has been introduced into the provision of health services these understandable concerns have resulted in administratively set prices so that all competition is based upon quality to attract customers, or patients as they are called in that market. Does the MoJ not talk to its colleagues in other Departments to learn from their mistakes?

51. We have not overlooked the proposed safeguard of quality assurance. The problem with this is three-fold.

    a. Firstly, as we have already pointed out, this is a base-level standard, which must be met, not the open-ended pursuit of excellence that true competition encourages.

    b. Secondly, the expense of monitoring it effectively is prohibitive; only the most egregious examples of failure to meet the standard will be detected and even that may not happen, as the regular and depressing scandals in the field of defence procurement show and as the recent appalling saga of the Mid-Staffs NHS Trust all too eloquently attests.

    c. Thirdly, the length of the proposed contracts means that the incentive to maintain even the barely adequate standard required to pass muster is unlikely to persist throughout the entire life of the contract.

52. PCT in fact will produce the very opposite of effective competition to provide legal services and is contrary to the public interest.

53. A further proposal that will undermine quality and thus reduce value for money is the inevitable consequence of block contracting: depriving the client of any choice in his or her representation thus removing most of the incentive for the provider to provide a good service.

54. We are extremely disappointed that a department that carries the name the Ministry of Justice seems to care so little for the quality of the criminal justice system. But even if an appeal to principle is fruitless the government should bear in mind that a change to the CJS that is designed to cost less in the short term but which will do such damage to it in the medium and long term does not represent value for money. It is the equivalent of paying a cheap builder a cut-price to fix the roof despite being warned that it will be a botch job. We can provide various examples.

55. For instance, it seems inevitable that providers either will not be able to afford to send representatives to a police station or will choose not to and will instead give telephone advice. We can guarantee, as experienced trial advocates, that at best this will almost invariably result in controversy at trial about what advice was given, how it was understood and whether this invalidates the contents of an interview under caution. The legal argument over that will cost more in wasted court time (irrespective of the advocates' fees) than the savings at the outset. At worst, the defendant may be wrongly convicted. The tone of the Consultation Paper suggests the injustice of that will not weigh heavily in the argument, but as it costs the state £50,000 a year to keep someone in prison, that is a heavy financial price to pay for a wrongful conviction.

56. We therefore oppose PCT as a bad idea in principle and in practice in a market as sophisticated and complex as the provision of criminal legal services.

57. We also question the assertion that savings from economies of scale will enable contract holders to provide the same level of service at a cheaper price. The Paper is short on any evidence to support this assertion and the evidence

collected by the Carter Review[4] found no convincing evidence of economies of scale and no evidence at all of a significant effect on costs. Why, if this is a central plank of the Ministry's proposal is the opposite now claimed in the absence of any evidence to the contrary?

58. There is also the inevitable problem that the larger the organisation the less responsive it is likely to be to its customers' needs, unless there is a financial incentive. As Larry Elliott, the Economics editor of the Guardian recently wrote

> *"The fact is, of course, that the world has moved on since Smith wrote the Wealth of Nations. There are examples of businesses that operate "in the light in which others see us", but as a general rule of thumb they tend to be* ***small, local, non-transnational, non-PLC and open to the full blast of competition****.*
> *But perfect competition does not exist. The corporate world is not dominated by small shopkeepers who worry what their customers might think about them,* ***but by large corporations generating revenues that get channeled upwards to executives and shareholders."*** *[our emphasis].*

59. By removing from the marketplace the small providers who have to compete on quality and converting it to one where larger corporations will seek out contracts to maximise profit, the tendering process will inevitably take money away from the immediate provider of the service and transfer it to the pockets of the executives and shareholders of the contractors: if there are any savings to be made without sacrificing quality – which is doubtful – why does the MoJ believe they will be converted into anything other than profit for the contract holder? To believe otherwise is to fly in the face of economic and commercial reality.

60. And all this optimism about achieving economies of scale and thus providing 'value for money' without seriously degrading quality exists in the context of a

[4] Otterburn Legal Consulting survey of Criminal Firms

proposed minimum reduction of 17.5% in the level of payment for these services.

61. The Paper does at least recognise that the market for which it is proposing to invite bids may be an unattractive one. Paragraph 46 of the Impact Assessment says *"There is a risk that a 17.5% price cap and a reduction in administratively set rates will discourage providers to bid for the work. To mitigate this, the LAA and representative bodies propose to run a series of market engagement events to help providers to identify efficiencies and also facilitate the networking of providers of all sizes to scale up and consolidate*."

62. If the MoJ and LAA have this store of business acumen available to explain to the already hard-pressed suppliers of criminal legal services, why have they waited until now to share it with the providers, especially given that the current providers have had to deal with a steady decline in income from publicly-funded criminal defence work for many years?

63. Or is the case that the MoJ has no realistic concept of how to achieve the simultaneous provision of a better service while slashing fees but is naively expecting predatory business interests to openly advise their competitors as to how they should go about it?

64. We also note that there seems to be no evidence that the MoJ has considered another of Lord Carter's warnings – the necessity to manage any change of the sort proposed and support the profession to avoid a catastrophic meltdown of legal services. At Paragraph 34 he pointed out: -

> *"There is a need to provide suppliers with clear signals about the future direction of procurement arrangements. This involves providing suppliers with:*
> • *A clear vision of what they need to do to be in a position to provide services in the future; and*
> • *The time and support to take the necessary steps to remain viable and sustainable under the new arrangements*

65. And further, at Paragraph 95

> *"As discussed earlier in this chapter, the process of restructuring and transition towards steady state must be managed carefully. The government is under a duty to ensure that there are sufficient good quality suppliers available to provide a service to all clients in all areas. There is also a duty to make sure those specific needs, such as among black and minority ethnic clients and communities are served fairly and adequately."*

66. None of this has been done.[5]

67. And Lord Carter's recommendations to *"put in place a series of measures that mitigate market fragmentation and allow firms to begin the process of restructuring"* including reorganising the duty solicitor work, before even considering a tendering process? This too has not been done.

68. Even within the context of some sort of tendering process it was never foreseen that own solicitor work would be excluded – we suggest for obvious reasons.[6]

69. Finally, Lord Carter never imagined that the market in Legal Services would be opened up to any provider without a proven track record in the delivery of quality. We quote: -

> *"There should be a minimum standard of quality for all legal aid practitioners assured through peer review…. This process alone will cause some restructuring of the market as suppliers of inadequate quality legal services are forced to improve or withdraw from the market."*[7]

70. In other words the notion that providers should be able to <u>enter</u> the market on the basis of PCT and, without any established record of providing legal services to a high enough standard, to satisfactorily meet peer review was anathema to

[5] Carter Review Recommendation 4.2
[6] Recommendation 4.6
[7] Para 10

Lord Carter. Yet the Consultation paper tries to selectively quote from the Carter Review in an attempt to convey the impression that the proposals are in line with those in the Review.

71. There were numerous other recommendation [8] within the Review, all considered both desirable and necessary before any process of tendering could take place; none of them have been implemented and yet the MoJ appears set upon embarking on a course without doing what Carter considered essential, even in the context BVT, to mitigate the substantial risk of a disastrous effect on quality. Perhaps this is why the MoJ has abandoned any realistic attempt to address the deficit of any quality controls in its proposals?

72. We have already set out our views as to why the proposals will deliver a double whammy of an inevitable decline in quality coupled with the transfer of reward away from the actual providers of legal services and into the pockets of shareholders and executives. This is not to ignore the deleterious effects upon the market of concentrating the provision of services into the hands of a small number of large suppliers.

73. One of the more distasteful aspects of the proposals is the assumption that the members of small firms currently supplying these services will be sub-contracted to do the same for the contract winners. Has the MoJ not recognised that the only way that could work economically is for the contract holders to offer only a proportion of the 'fee' paid to the sub-contractor, raking off an element to pay their own overheads as well as a further element as profit? No consideration seems to have been given to the fact that the profit margins of the sub-contractors would be far too small for them to survive as independent entities; they would inevitably go out of business.

74. The entire model of tendering seems to be based upon a huge gamble that the contract winners would then be able to hoover up enough unemployed

[8] Recommendations 5.7 et al

lawyers to make the system work. This is a gamble with our legal system that seems rather irresponsible, especially as it is a one-way gamble. Once these independent providers go out of business there is no way back. They would not exist as entities capable of being revived if the proposed model of a few big providers did not work as hoped.

75. Finally, we can see no evidence that economic model of the proposed contracts will work in the sense that the price it is intended should be paid will be sufficient to provide the public with a system of publicly-funded legal services that is fit for its purpose. The proposed fees seem to be set at levels that are entirely arbitrary and without any attempt to carry out proper research as to the cost of providing such services. Like so much else in the Paper, the proposals appear to be the product of a dogmatic application of fixed beliefs without any attempt to provide evidence to support them.

76. The Consultation Paper suggests – it does not argue as there is no evidence to support such an argument - that a 17.5% cut in the price to be paid for publicly-funded legal defence services is "unsustainable" if applied to the current system, but sustainable if the current blueprint is torn up and the same services are provided by a much smaller number of bigger suppliers who get the work by bidding under a system of PCT, despite the warnings of the Carter review of the risks that this posed to the administration of justice – even if it were implemented in a less revolutionary way than is now proposed.

77. Instead of the arguably manageable risk associated with simply cutting the fees currently paid – a risk that is considered perfectly manageable if applied to the advocates fees paid to self-employed members of the Bar – the government proposes to double the risk by applying the same cuts but to an unproven and manifestly flawed scheme of block contracting by PCT.

78. This strikes us as both illogical and foolhardy.

79. The objections set out above are based entirely upon principled arguments without any element of self-interest. However we also have objections, which are based upon the serious threat that the proposals pose to the Bar.

80. We are grateful that the MoJ could see the force of our arguments that diverting money away from paying for advocacy services in criminal justice was bad for the administration of justice, bad for the taxpayer and just bad value. In other words, the government could see the value of a lean and efficient independent Bar providing specialist criminal advocacy services, both for the prosecution and the defence. We have fought our corner for many years now, relying on our twin arguments that we provided an excellent service at an economical price. Despite changes to the market that distorted it to our disadvantage we have, if not exactly prospered, survived.

81. Since 1994 solicitors have been able to engage in Higher Court Advocacy. For many years they did not choose to do so, for the very simple reason that there was no financial incentive to. Why compete at something you have not been trained for? There was no good reason why any lawyer who wanted to be an advocate would not enter the profession as a barrister. This tended to prove the maxim that opening up a market will not change it unless there are clear financial incentives in play.

82. These financial incentives emerged with the introduction of LGFS. Suddenly solicitors firms had a financial imperative to find new sources of profit as their traditional source was reduced. Many, but not all, chose to do so by employing advocates with higher rights of audience. The firm collected the advocate's fees, paid a proportion of them to the advocate and kept the rest. It was difficult to argue that this benefited either the lay client or the criminal justice system as the quality of representation was, generally although not in all cases, poorer. This is irrefutable: what advocate would choose to work for an employer for less than the fee paid for their advocacy if they could compete in the open market and be paid the full fee?

83. However, once again financial forces came into play, especially as advocate's fees were cut by a minimum of 13.5% - and more in the case of homicide cases – and volumes of work were reduced. An under-employed advocate was a drain on the resources of the firm and the cost of retaining an employee ate into the profit margin. Besides which, from a marketing point of view, lay clients were beginning to wake up to the fact that they could be represented by a self-employed barrister who could be selected on the basis of their skill and not simply because they were the employee of the solicitor. Client choice meant that many defendants began to question if their interests were best served by a solicitor who insisted their 'in house' advocate represent them. This has taken a number of years to percolate through to client level, but the Bar has begun to re-establish it's pre-eminence on the basis of ability and skill. Why, defendants realised, should they be limited to the house wine if they could choose anything from the wine list for the same price?

84. The risks to the Bar of the MoJ's proposed scheme are two-fold.

85. Firstly, the removal of client choice means that they will have no option but to accept the advocate whom their solicitor opts to use. The Bar's hard-fought battle of the past few years to regain our market share on the basis of pure merit will have been in vain.

86. Secondly, the larger the provider the more scope they will have to absorb the caprices of the market and they will be more able to provide work for their in-house advocates; the larger the provider the easier this will be. This is the one economy of scale that we have recognized in the 'large provider' model and is ironically the one that appears to have evaded the MoJ. However, it will enable providers to supply a lower quality of advocacy service and use the advocacy fees to subsidise their bid for the litigation services. The existing problem – whereby advocacy fees are not exclusively spent on advocacy services but are dissipated in administrative costs and diverted into profits for the advocates' employers – will be exacerbated. How does that represent value for money for either the MoJ, the criminal justice system generally or,

just as importantly for the 'users' of those services – the defendants who ultimately pay the price for poor advocacy?

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

87. It is difficult to address this question given that the MoJ has itself made no attempt to argue why a 17.5% cut would be reasonable. As set out above, no consideration has been given to the costs of providing a service that is fit for its purpose. One would have expected the MoJ to consider first whether cuts of this magnitude are sustainable – and we suggest they are not.

88. Publicly-funded lawyers have not heard the phrase 'a rise in line with inflation' for decades, and indeed we have endured actual fee cuts. What other publicly-funded profession has been asked to cope with that? The fact that there are still firms of solicitors still in business and barristers still surviving at the Bar is taken as evidence that there is still some fat to cut.

89. The MoJ fails utterly to appreciate that because we are self-employed we have simply worked harder and harder for less and less pay because we love what we do, we are driven by a sense of public duty and we do not want to give up. The same old tired arguments about the 'fat cat' lawyers, backed up by the misleading statistics of the tiny minority who in any given year have bucked the trend are used to disguise the reality.

90. That reality is that the majority of publicly-funded criminal defence lawyers are at the end of their tethers trying to make ends meet.

91. If the MoJ would like evidence of how cuts can become unsustainable it need only look to the CPS, which is now struggling with its reduced budget to provide a prosecuting service that is fit for its purpose. One reason the entire CJS has not collapsed is because it is supported by the independent Bar and defence solicitors who time and again step in to make cases effective which

would otherwise become mired in the system. That does not take account of the number of cases that fail as a result of prosecution mistakes.

92. The figures contained in the Consultation Paper are out of date and misleading. Paragraph 2 of the IA states: -

> *"The legal aid scheme involves the public procurement of legal services and determines the terms and conditions of access to these services. Expenditure accrued to the Legal Aid Fund was just over £2bn in 2011/12"*

93. We understand that the Bar Council has attempted to find out why the MoJ did not include its up-to-date figures in the Consultation paper to give it more substance and validity and no convincing explanation has been forthcoming. However, we understand that the correct figure for LA expenditure in the last year is £1.98bn.

94. Given that the proposed aim is to save £220 this a small but significant indication that the figures quoted as to the savings required are to a degree entirely arbitrary.

95. The actual need to make savings is a politically contentious issue outside the scope of this response, but we do query the case for the savings figure quoted.

96. Furthermore, as the spotlight is now turned upon criminal legal aid it is necessary to examine both the need to make and the practicality of making further savings of the scale quoted in this area.

97. The Legal Services Commission's "*Volume and Value Figures Report*" of March 2013 reveal the total spend on crime has actually fallen in most areas from 2009 to 2012. That is no surprise. From 1997, there has been a constant downward trajectory in the fees paid to lawyers, with the AGFS scheme, followed by the LGFS, which produced huge savings in administration and huge cuts in fees. The fee cut by the time of Lord Carter's review was 26% in real terms since 1997. Since 2009 there have been even more cuts. If there were an

increase in the overall cost of running the criminal justice system that could only be attributable to:

a. The increase in processing various forms of criminal behaviour outside the court system – the efficiency of which is open to question;
b. The conduct of criminal prosecutions the efficiency and efficacy of which is also open to question as a result of cuts in the budgets of the various agencies;
c. The exorbitant cost of 'initiatives' within the Court Service such as the XHIBIT system, which again are of questionable value.

98. As far as the expenditure in publicly -funded defence work is concerned, the LAA's own figures[9] speak for themselves – it is all downwards: -

a. Investigations down from 865,000 in 2009/10 to 796,000 in 2011/12 – and a corresponding cut in cost of 10%
b. A reduction in prison law cases from 646,000 to 540,000 - and a corresponding cut in cost of 20%
c. Lower crime cases down from 1,511,000 to 1,336,000 - and a corresponding cut in cost of 16%
d. Since 2010 in the Crown Court, a modest reduction of 2.38% in the number of cases for which advocates claimed, but a corresponding cut of 10.73% in expenditure

99. Even more telling is the reduction in the cost **per case** in the Crown Court. By 2012 it was £1464.56 per case for advocacy, compared to £1999.38 per case in 2010/11, a whopping 26.75% reduction. In the case of litigation, the corresponding reduction was 10.98% in less than one year from 2011/12 to December 2012

100. Given these reductions in both volume and value, what steps has the MoJ taken to establish whether further cuts are necessary? Or viable? None so far as we can tell.

[9] LAA Volume & Value figures, March 2013

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

101. No

102. The problem here, again, is that the MoJ has apparently not carried out any research into:

    a. the potential costs of restructuring to bid
    b. the potential costs of investing to service the contracts
    c. the effect on profitability and thus the viability of the proposed cuts
    d. the consequences of a contractor failing to honour its contract (a highly likely outcome we suggest).

103. The proposal has the appearance of a leap in the dark or act of faith rather than a reasoned outcome.

104. We reiterate that a longer contract period, coupled with the widespread destruction of the current supplier base and the absence of any Plan B should the proposed system not work, are likely to result in the establishment of local monopoly suppliers who will then be able to dictate both the form and price of supplying these service in the future. This is the not the creation of a market able to provide proper competition, it is the destruction of one.

105. As for the proposal to include provision for compensation "in certain circumstances" on early termination of the contract by the Lord Chancellor, what are these "certain circumstances"? This is a curious provision. Contrast this with the present crime contracts, which are simply terminable upon 6 months' notice without financial penalty. Is this an acknowledgement that the scheme may be unworkable and is a carrot to large corporate potential bidders that the taxpayer will have to fund the failure of this scheme? If it is a scheme

based upon free-market competition then there should be no need of such clauses.

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

106. No we do not agree.

107. We of course have little experience of providing legal services at a low level over a large area, our members only occasionally travelling distances to Crown Courts, but even without that experience the following problems are obvious.

a. Current providers can operate across CJS boundaries without any difficulty, being perhaps equidistant between two or more police stations or courts spread across two or more CJS areas. Under these proposals, they would have to completely re-organise simply to fit in with the new arbitrary contractual areas.
b. Little or no thought has been given to client access. At present clients can attend the office of a small provider near where they live. The 'economies of scale' trumpeted in the Paper would suggest that they will have to travel long distances to the office of their contracted provider. This proposal demonstrates a cavalier and out-of-touch attitude towards the poor and those who are vulnerable by reason of age, physical infirmity or mental health, who simply do not have the resources to make these journeys.
c. No data have been provided to substantiate how commercially sustainable these areas are. Such data as we have seen demonstrate wide discrepancies between the potential value of contracts with no obvious justification.

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

108. No we do not.

109. As the answer to question 10 indicates, the absence of data makes it impossible to answer this question positively.

110. At first blush, it would appear that the proposed areas are far too big to work satisfactorily from a client point of view. This tends to support the view that the proposals are based upon the 'economy of scale' belief which, lacking any evidential basis, seems designed to attract large commercial organisations with no experience of, and little interest in, providing the client care that is both necessary and appropriate for the sort of citizens with whom we are used to dealing – the poor, the disadvantaged and the vulnerable.

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

111. No we do not.

112. The reasons for this response are broadly the same as for questions 11 and 12, although we have some experience of dealing with CPS offices corresponding with these areas – which strongly suggests bigger is not better.

113. If the proposal is based upon the notion that it could work because it works for the CPS, then it demonstrates a fundamental misunderstanding of the crucial differences in defence and prosecution work.

114. The police and CPS are organisations with a fully developed IT system and resources in the form of transport which enable them to travel easily and communicate freely; suspects, defendants and solicitors are not.

115. CPS representatives do not have to travel to police stations and stay there for hours at a time while investigations into detained persons are carried out and solicitors are called upon to repeatedly advise and make representations; attendance at a police station is not a 'one-off' action, but a protracted one requiring continual input over long periods.

116. Again the absence of data, and the unexplained cut from the four areas proposed in 2010 to three now strongly suggests the proposal is arbitrary in its nature.

Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

117. No we do not.

118. As we have explained above, the proposals are anti-competitive, provide perverse incentives to supply a poor service and retrograde. The proposals once again display a fundamental lack of knowledge and understanding of how the CJS works.

119. All users of criminal defence services are citizens and entitled to proper representation, but it would be foolish to ignore they are of many different types; yet the MoJ proceeds on the basis that there is a generic kind of defendant – an habitual criminal who has to be presumed innocent for the sake of appearances but is mere raw material for the system.

120. Many suspects have never been arrested before and when they are ask around amongst family and friends for a recommendation based upon experience – just as you would if you were looking for any other provider of a service. Under these proposals there is no incentive for the provider to offer a good service as work will not flow from recommendations – it is guaranteed under the monopoly of the contract.

121. Other suspects are accused of something in which specific expertise is required; terrorist cases are a good example. It was only specialist representation by publicly funded lawyers that caused the wrongful convictions of the Birmingham Six, the Guildford Four, Judith Ward and many others to be overturned. Under the kind of system proposed in the Consultation Paper they would have died in prison – as will future victims of miscarriages of justice.

122. From a more cynical perspective, many of our clients are repeat offenders with whom a relationship of trust has been established. If we tell them that their case could be resolved by talking to the police because of a judgment that this will result in the case being dropped, they will take that advice and a prosecution with all its attendant costs is avoided. If on the other hand we advise them that their case can best be resolved by a plea of guilty which is negotiated with the prosecution, they trust and believe in our judgment. We can assure the MoJ that will not happen in future between a recidivist offender and a lawyer whom they will perceive as imposed upon them by the government and in whom they have no faith. The MoJ simply does not understand how our clients – the innocent and the guilty ones – regard the system in which they are entangled and the extent to which trust in a legal adviser whom they have been able to select plays an important part in making that system work efficiently.

123. The MoJ may be forgiven for being unaware, as a result of lack of experience, of how the system operates in practice but ought not to be forgiven for ignoring the advice of those who do and will not be forgiven for failing to heed the reasonable warnings about the potential unintended consequences of the proposals.

124. We are aware of experienced police officers and custody sergeants who have signed the petition against this proposal because they of all people know how defence solicitors who are known to and trusted by their clients are invaluable in helping to manage the sometimes difficult clients in police stations. We

invite the MoJ to canvass the opinion of police officers at the sharp end of this difficult business.

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

125. No we do not.

126. The absence of any data or reasoned basis for the proposal makes this question, as with many others, largely meaningless.

127. The favoured proposal has been arrived at simply on the basis that the other alternatives either "pose significant issues for existing providers in being able to scale up to the level required" or the volumes provided "would, in our view, be too low". So the preferred approach is based upon the Goldilocks approach: it's about right. On the basis of what data?

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

128. The sole basis for this proposal as far as we can see is set out in Paragraph 4.62, and we quote: -

> *"To continue with a market which is so highly fragmented has also been discounted. We accept that asking the market to engage in price competition while not facilitating rationalisation and reform of the supplier base would limit opportunities for economies of scale and efficiency savings. Our aim is to encourage more cost-effective delivery of criminal legal services, which in our view can only be achieved through consolidation of the market, with fewer and more efficient providers accessing greater volumes of work."*

129. There are no data or cost benefit analyses in the paper to support this conclusion. Instead the Paper adopts nothing more than a 'back of the fag packet' approach and says: -

> *"A series of fee schemes that are largely based on fixed fees (as proposed in paragraphs 4.105-4.119 below) mean that providers might make a profit on the fixed fee because relatively little work was required on the case. However, in other cases which required more work, they could make a loss.*
> *In order to manage the level of risk of financial loss faced by providers contracts need to offer sufficient volume in order for them to cope with variations in case mix."*[10]

130. Because the MoJ has no idea of the amount of work involved in the cases it can have absolutely no idea that the proposed volume, **coupled with the proposed cut in fees** will be sufficient to cope with the "variation in case mix" and thus whether the volume and value are sufficient to provide a viable profit margin.

131. The most serious defect in the model proposed is the use of old data from 2010/11. They showed a cut of 2.98% in the cost per case over the year before and it cannot be a coincidence that the Paper suggests a further 3% reduction is viable.[11] The 2011/12 figures are available and have been for quite a while. Why does the paper ignore the fact that the 2011/12 data show a marginal increase in the cost per case and the figures to date for 2012/13 show a slightly higher figure still? Is it because this data is simply inconvenient for the MoJ to address?

132. We also question the favoured status given to the PDS in the CJS areas in which they exist; why are they guaranteed a share – 1/6th in the case of Darlington – of the work? There is one quotation at paragraph 4.69 from Bridges et al 'Evaluation of Public Defender Service in England and Wales 2007 TSO' to justify this proposal. Perhaps a more careful consideration of that

[10] Paragraph 4.64
[11] Paragraph 4.64

publication would give better insight into the viability of the models set out in the Consultation Paper.

133. The quotation reproduced in the paper reads: -

> *"The PDS stands as "an essential guarantor for quality standards [and] minimum costs……in a more 'managed market' for such services."*

134. The actual passage in the 2007 paper reads: -

> *"We can envisage a wider role for the PDS as an essential guarantor of quality standards, minimum costs and client choice of representative in a more "managed market" for such services."*[12]

135. It is striking that the part of the quotation that the Consultation paper deliberately deleted was that referring to the need to retain client choice.

136. But there is a more worrying absence of any real consideration of the role of the PDS, how it functions in a 'mixed market and its interaction with the private sector. A better understanding of these factors would provide a better appreciation of why the proposed model of PCT is unworkable in terms of providing criminal defence legal services that offer value for money and are fit for their purpose.

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

137. No we do not.

138. This is clearly the most uncompetitive aspect of an uncompetitive proposal and places no premium at all on any provider paying anything other than mere lip service to the notion of quality. However, this element of the proposals is of course the only way in which the tendering scheme could be asked to work and illustrates why it is a badly contrived solution.

[12] At page 306

139. The Impact Assessment appears to concede as much:

> *"Client choice may in certain circumstances (where quality is easy to measure and clients have good information about the relative effectiveness of different providers) give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price. The removal of choice may reduce the extent to which firms offer services above acceptable levels"*[13]

140. The only answer to this risk is that: -

> *"We will ensure that quality does not fall below acceptable levels by carefully monitor [sic] quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level."*

141. We note the use of the words "acceptable" and unacceptable". Even if there were such things as robust quality assurance processes – which we doubt can be achieved at a cost that is economic - have they been devised and, if so, costed?

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

142. No we do not.

143. We have already addressed why client choice is a fundamental aspect of any truly competitive market-based system for the provision of publicly-funded legal services and why client choice also helps the system operate efficiently. However, there are other principled reasons why the removal of client choice should not be countenanced and is open to legal challenge.

[13] Impact Assessment, *Risks and Uncertainties*

144. Once again the Consultation Paper ignores one of the central points of the Carter Review when it considered competitive tendering, but a system which would not remove client choice: -

> *"Indeed, one of the risks of the system proposed by the Carter Review is that criminal defence work in any particular area could be concentrated amongst so few private practice suppliers as to make the LSC overly dependent on them for the continuing supply of services and to render client choice virtually meaningless."*[14]

145. We are surprised that a government that supposedly stands for libertarian principles and against the unwarranted intrusion of the state should be the author of such a proposal. This is denial of a fundamental human right to choose who defends you when your liberty and reputation are at stake although the right will only be denied to the poor and vulnerable.

146. We suggest that this proposal is open to legal challenge for the simple reason that it is a right protected by the European Convention on Human Rights, Article 6(3) (c). It is true that there are limitations on this right but we suggest that the following principles are clear from the Convention and the case law: -

    a. The right exists to choose a lawyer or have one provided **free** by the State. There is no halfway house whereby one must pay a proportion of the fee, but have no choice in which lawyer one can use.

    b. The right is not absolute and can be over-ridden in the interests of justice, not in the interests of saving money

    c. The primary responsibility for the conduct of the defence is on the client through their lawyer; this is compromised if the lawyer is chosen and imposed upon them by the State

[14] Evaluation Of The Public Defender Service In England And Wales, Bridges et al 2007

d. There must be equality of arms between the state and a defendant; if the state can choose its lawyer and the defendant can not, this principle is breached

e. A provision that adversely affects only the poor may breach Article 14. Imagine the outrage were the State to intervene to decide which lawyer should be allowed to represent someone who was paying for their representation?

f. The proposal risks great damage to race relations in this country. Black and minority ethnic groups as well as some faith groups have and continue to want to choose lawyers in whom they have trust because they are themselves members of such groups. Principle 10 of the United Nations Principles and Guidelines on Access to Legal Aid in the Criminal Justice Systems recognises the importance of special measures being taken to ensure such groups have access to legal aid and accordingly any denial of client choice in this regard is clearly contrary to this principle.

147. The only justification for pushing through such a draconian, unethical and inefficient proposal is that without it, tendering will not work. Again, principle and commonsense are sacrificed to dogma and cost-cutting.

Q18. Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

148. Given our opposition to the removal of client choice it follows that in our view none of them are acceptable.

149. There are obvious problems with all the allocation methods of Option 1:

a. Option 1(a) 'case by case': has any research been conducted to establish if the number and type of cases in any given area actually would produce a *true* random result, as opposed to what may simply

be *apparently* random? If not this method would result in clear unfairness.

b. Option 1(b) 'birth month': the same objection. Does the MoJ know if births are evenly distributed throughout the year? For example, there is a variation of 1.61% in the distribution of births in a sample as large as the USA, population c.320m. What would be the variation in a much smaller sample, for example Gloucestershire?
c. Option 1(c) 'client's surname initial': the same objection
d. Option 2 – would appear to be more rational than any of the Option 1 options but the same problem of randomness exists. Have any data been collected to establish whether this would produce a genuinely random outcome in the sense that all providers would get an equal allocation?

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

150. No we do not.

151. For all the reasons set out above. However, an enforced transfer to a provider even further away will only exacerbate the problems of a client's physical access to a provider.

Q20. 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.

152. We are not sure.

153. The proposal appears indistinguishable from the current system except that there are additional reasons provided for a transfer, such as the provider and

client have fallen out in the past or the client has particular needs which cannot be addressed by the allocated provider.

154. Quite what the last exception means is unclear; what sort of "particular needs" are there that one provider could meet but another could not?

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

Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price

Fixed fee per provider per procurement area based on their bid price for magistrates' court representation,

Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500), and

Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area.

155. The proposed remuneration mechanisms have serious and significant problems associated with them.

156. There is no reasoned case advanced for block payments but such payments are a perverse disincentive to providing a good service in all cases. It actively discourages solicitors from attending the police station with all the problems that that will create. They are also almost bound to be unfair to either the taxpayer or the provider. Given that the proposal is for "Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price" and given that the bid price will be somewhere less than 17.5% of current prices, if volumes increase the provider will have to provide a sub-standard service given the notional cost of

an "acceptable"[15] service. If volumes fall the provider will receive an unearned windfall. What is the rationale for this mechanism? Fixed fees for magistrates court representation based upon the figures in the paper would appear to be unworkable. Some summary trials are relatively expensive if complicated and if they were to be paid at the proposed fixed fee it would represent a huge loss to the provider and one would o only need a few cases that were much longer and or more expensive than average for the contract to be unviable – unless the defendant were poorly represented.

157. The proposal clearly creates a conflict of interest in that the provider will have an incentive - possibly irresistible if it is experiencing financial difficulties - to advise defendants to plead guilty.

158. In the case of either way offences, it is unethical to advise a client to elect trial simply so that the lawyer can make more money. But it would not be unethical to advise a client to elect trial if that were the only way they could be adequately represented.

159. Once again principle and a true understanding of efficiency are sacrificed to crude cost-cutting with the result that the proposed payment system is perverse. Block payments and the removal of client choice in a system where the cheapest bid wins the contract will encourage the development of a culture in which the client can only ever hope to receive a level of service that is not actually unacceptable but is far from good.

160. We also note that the proposal is premised on the assumption that lawyers string out cases or their financial benefit.[16]This is as offensive as it is untrue. As we have already argued, defence lawyers contribute a great deal to making up for deficiencies elsewhere in the CJS and the greatest frustration for defence lawyers is the delay in the resolution of cases because others have not

[15] The Consultation's own preferred standard, not 'excellent' or even 'good'; merely 'acceptable' – see Impact Assessment

[16] Paragraph 33 Impact Assessment

done their job – in reviewing cases, serving evidence, warning witnesses and so on..

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

161. No we do not.

162. Given that even current providers will not have the experience or data to assess potential costs and build them into their bids they should not be expected to include them in their bids. Given the inescapable fact that the proposed areas are lager than most providers currently cover it seems inescapable that travel costs will increase. The proposal that this increased cost be included in the bid figure – which itself must be more than 17.5% below current costs –does seem to be a cynical attempt to drive the cost down even further and put even greater pressure on the already degraded quality of the service that will be supplied.

163. In other words, the proposal is simply another fee cut but one the MoJ does not quantify but seeks to inflict on the providers.

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

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

164. We have neither the experience nor the resources to answer these questions.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price

for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

165. The imposition of a price cap distorts the process to the extent that this is not a true competition to provide an acceptable service at a market price, but the use of a monopoly to impose an artificially reduced price which can only be offered by a provider who is willing to work within a system that discourages quality and encourages profit-making at the expense of the real users – the citizens who find themselves in need of legal representation.

166. This proposal is the precise opposite of that recommended by Carter. As the Evaluation Of The Public Defender Service In England And Wales pointed out: -

> *"Insofar as it has recommended that a **minimum** price be fixed below which tenders for services will not be accepted…… one of the purposes of maintaining the PDS would be to provide a basis for the LSC to determine a minimum price below which high quality criminal defence services cannot be maintained."*[17]

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

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

b) reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and

c) **taper rates so that a decreased fee would be payable for every additional day of trial?**

Please give reasons

167. We do not agree with these proposals.

[17] Page 306

168. We do reject the implied assertion that advocates deliberately encourage their clients to contest matters or delay the entering of guilty pleas for their own financial benefit. The fact that 65% of defendants plead guilty in the Crown Court suggests that they are not being advised or encouraged to do otherwise.

169. We have been representing defendants for over 40 years at the Crown Court and all who have chosen to plead not guilty will have been fully and frankly and on occasion forcefully advised as to the strength of the evidence against them and the loss of credit for so doing. We never find ourselves advising our clients to pursue a course simply because that benefits us financially.

170. One difficulty is that the Crown often does not serve important evidence until after the defendant has been arraigned, despite court orders to the contrary. We envisage that if the Crown served the bulk of the evidence on which it relies in advance of arraignment then the case against a defendant may be stronger and he would be advised accordingly. We would therefore suggest that measures are introduced to ensure that the Crown is compelled to comply with timetables set by the court and to encourage early service of evidence, meaning that defendants see the evidence before entering a plea. We have no doubt that this would increase the number of guilty pleas.

171. We disagree with the suggestion that it is appropriate to pay a single fee regardless of whether a case is resolved by way of guilty plea, cracked trial or trial. If a defendant pleads not guilty (even if he subsequently pleads guilty) then the advocate will have to prepare the case for trial. This necessitates far more extensive preparation than where the defendant indicates at an early stage that he intends to plead guilty.

172. Accordingly, any payment scheme must reflect the amount of work required and so the rates of pay for trials and cracked trials should be greater than for guilty pleas (as has previously been the case).

173. When a defendant chooses to go to trial, it is not infrequently a decision made in the teeth of advice to the contrary. We strongly oppose a reduction in the

fee paid to the advocate where the trial lasts over 3 days. The length of a trial is determined by a host of variables and it is frankly insulting to suggest that advocates prolong the trial process for their own financial gain. The MoJ has provided not a scrap of evidence to support this jaundiced view and we find it deplorable that the MoJ should suggest such a proposal radically to change the levels of remuneration without a shred of evidence.

174. The length of a trial is due to a number of factors, which are largely beyond the advocate's control, and it shows a lack of practical knowledge of the day-to-day operation of the CJS to suggest otherwise. A few examples which frequently occur:

a. Courts list cases to begin not before 2pm so that a half-day of court time is lost at the start.
b. The defendant fails to attend on time or is not produced until lunchtime.
c. A juror or is unwell or has a prior medical appointment.
d. Television equipment in the court is not working properly.
e. Having heard submissions on a point of law of importance, the judge decides that he needs to reflect before giving his ruling and the matter is adjourned overnight.
f. The prosecution serves evidence late or makes a late application to adduce bad character evidence.
g. Prosecution counsel has to appear in the Court of Appeal.
h. A witness needs the assistance of an interpreter so that evidence takes longer than would normally be the case.
i. The judge cannot sit for all or part of a day as he has judicial training or to sentence in another case or an interlocutory hearing

175. These are common events and it will be a rare trial where one or more of them do not occur.

176. Even when a trial encounters none of these problems, its length will be determined by the number of defendants and witnesses, the complexity and amount of evidence, the matters that are in dispute and the legal issues that arise for argument, all of which are beyond the control of the defendant's representatives.

177. To start reducing the fee paid after just 3 days wholly fails to recognise that most trials are beyond that length for the reasons set out in the above paragraph. Any system of payment, which penalises the advocate for the 4th day of the trial onwards, may jeopardise the proper administration of justice.

178. Ultimately, it is for the judge to ensure that court time is being used effectively and efficiently. If for example, questioning of a witness or legal argument is taking too long the judge has the power curtail them.

179. We firmly believe that considerable savings could be made to the length of trial if listings were more efficient and if judges were more proactive in ensuring court days are not wasted. In contrast, we simply do not recognise the suggestion that advocates lengthen the trial process by design.

180. In accordance with the above we strongly disagree with a cut in the rates of pay for attendance at trial. As has been stated elsewhere in this response, the AGFS has been subject to a 13.5% reduction in rates over the past three years. No other body of publicly-funded professionals has had to endure cuts of this level.

181. We note that at paragraph 5.35 the paper suggests that *"Indicative analysis from merging fee income data from AGFS and VHCC cases from 2012, currently suggests around 65% of advocates receive legal aid fee income of £50,000 in a year or less"*

182. We are unclear precisely what 'indicative analysis' means and we are none the wiser after reading the footnote which states:

"This analysis is indicative only due to two reasons. Firstly, difficulties merging the AGFS and VHCC data systems meant not all VHCC cases were included. In terms of value, approximately 90% of the spending on VHCCs had a match. Secondly, the analysis used the most recent 6 months worth of data, which was doubled to gross up to an annual figure. We used this approach on the most recent data to try and take account of recent legal aid reforms as fully as possible."

183. This appears to mean that on the basis of 6 months of unreliable data, the MoJ claims it knows what barristers earn and it also claims that 53% of all barristers would be better off and 65% of those earning less than £50,000 would be better off. And by better off they mean that some (not all) would earn as much as 1% more. Given that AGFS fees alone have been cut by at least 13.5% since 2010, the MoJ will forgive us for not thinking that it has not been generous.

184. But even this figure is entirely misleading in terms of actual earnings.

    a. It includes VAT and so is subject to a 20% reduction;
    b. An advocate will have to pay a percentage (usually between 15 and 20% to his chambers) on all earnings.
    c. From the remaining figure the advocate is responsible for the cost of his practicing certificate, professional insurance, mandatory continued professional training, legal textbooks, court attire and often for travel expenses to and from court. The total costs of all of these expenses at the very least £15,000 per annum.

185. Out of the remaining income an advocate is responsible for pension contributions and insurance in the event of being unable to work due to ill health.

186. For those who have only qualified to practice in the recent past, they will incurred substantial costs (usually in the form of debts) to pay for the mandatory Bar course and living expenses for that year.

187. In these circumstances we simply cannot envisage how a majority of those at the independent bar will be able to survive if their fee for a trial is reduced by levels of 20 to 30%. The paper claims to recognise the need for an independent bar but a cut in fees at this level for attendance at trials will, along with other changes proposed in this paper, lead to its demise.

VERY HIGH COST CASES

Q27. Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

188. No we do not agree.

189. VHCC cases are a very small minority of cases but they are the longest and often the most complex of their type. Almost invariably multi-defendant cases, they tend to be the most voluminous of all in terms of evidence and unused material. They cost the most to prosecute and defend for that reason.

190. It has always been accepted that there are cases that are unsuitable for inclusion within the present Revised Advocates' Graduated Fee Scheme (RAGFS) and its various earlier incarnations either because of the volume of unused material (which is not normally remunerated under that scheme) or the length of the trial.

191. The fees in a VHCC case are differently calculated to those under RAGFS. The fee is front-loaded and based on preparation but the daily refresher rates are considerably lower.

192. It should also be noted that the system saved a very large amount of money when it replaced the old ex post facto scheme of taxation. The most recent changes that were made, in 2010, cut the rates, tightened up the rules on case categorisation, and raised the threshold for a qualifying case from an estimated duration of two months to three.

193. A 30% cut in fees in these cases is opposed as a matter of principle. The proposed hourly rates are unacceptably low, especially for junior counsel. Descending as low as £30.00, they compare highly unfavourably to hourly rates charged elsewhere. The proposed daily refreshers, which can drop to as low as £30.10, are also unreasonable.

194. A reduction of this nature would not assist in attracting high quality new entrants to the Bar.

195. These cases can cause considerable diary problems when they move or collapse and they prevent providers from undertaking other cases in any volume. Hence, certainty of income for providers who specialise in this sort of work is important.

196. The way that VHCC cases are administered can be bureaucratic and hourly rates can promote inefficiency. Criticism has been made of the scheme on those grounds before. Nevertheless, the government does not propose to change it, and our response is based on the questions as posed.

197. That said, we agree with the Bar Council who have written that:

> *"…. the contracting and payment processes for cases currently falling into the VHCC regime are unnecessary, inefficient, administratively consuming (of time and resources) and full of perverse incentives. The whole scheme has proved itself to be not fit for purpose"*

198. We support its replacement by a fixed fee scheme along the lines of the RAGFS. In November 2009 the Bar Council did indeed produce such a fixed fee scheme called GFS Plus. The scheme was designed by a Bar Council team (which included Professor Martin Chalkley, Paul Mendelle QC, Abbas Lakha QC, Alexander Cameron QC, Neil Hawes (now QC), Alexandra Healy (now QC)) in close collaboration with a MoJ team that included the author of this present Consultation Paper.

199. GFS Plus was designed to be cost neutral, acceptable to the professions and more efficient. The draft Scheme was published in the LSC consultation, *"LSC Very High Cost (Crime) Cases 2010: A Consultation Paper: December 2009"* as Annex 1 rather than a formal option, because the LSC claimed it did not then have a large enough data set to check the proposed figures. The illustrative rates published for GFS Plus were on a fees neutral basis (though they could of course be increased or decreased) and on that basis, there were in fact administrative savings to the LSC by reducing the number of case managers to manage and assess hours. Practitioners would also save by not having to spend unremunerated time negotiating hours.

200. With the replacement of the VHCC Scheme by GFS Plus for 60+ day cases, given that GFS Plus would not entirely replace the need for contract managers, an estimate of a reduction from 25 full time equivalent to 10 full time equivalent staff might be appropriate. The MoJ have not provided average salary figures for CCU staff but the Bar Council calculated on a broad brush conservative estimate of a cost of £50,000 per employee, a reduction of 15 full time equivalent staff would produce a saving of £0.75 million each year, without any reduction in advocates' fees.

201. The GFS Plus option was not taken forward by the LSC when the MoJ took the decision to instead extend the RAGFS from its previous 1-40 day cases, to in future cover 1-60 day cases. The potential for using GFS Plus to cover cases over 60 days was not further considered and shortly afterwards the general election was called;

    a. GFS Plus was a fully worked up scheme that was costed so far as the paucity of MoJ data allowed. One of the many advantages of it, particularly to the MoJ was the control that it gave to the Ministry to set the relevant rates (which control is so aptly demonstrated in the proposals the subject of Chapter 4 in this Consultation paper);
    b. Were the same changes made to this scheme as those that have been made to the RAGFS since November 2009 and those that are

found to be appropriate to the following the Chapter 4 consultation process, further savings will be made.

202. It is not possible to summarise the scheme herewith but the advantages of it were:

a. The abolition of the perverse incentive of hourly rates
b. Fixed fees and hence cost certainty for both MoJ and advocates
c. A taper relative to the detailed trial estimate
d. Reductions in administrative staff costs;
e. The avoidance of duplication of work

203. To be clear, we are not proposing that the original scheme put forward in 2009 should now be adopted without alteration. It would plainly have to be adapted to take account of the various changes since then and to ensure that it achieves the right balance.

Q28. Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

204. A cut of the magnitude of 30% in the rates in contracts presently running is wrong in principle and amounts to an abuse of the government's monopsony position. Providers sign contracts with government agencies in good faith and on the basis of contractual rates published at the time. Lawyers have professional duties to the court and to their clients that limit the circumstances under which they can withdraw from a case. Imposing a unilateral 30% cut in contracts already negotiated, and which might be at a sensitive stage of their preparation, is grossly unfair.

205. Such action might amount to a breach of the contracts concerned. Many of the members of chambers who act in these cases take the view that it would be fundamental breach of contract to act in this manner.

Q29 REDUCING THE USE OF MULTIPLE ADVOCATES

Do you agree with the proposals:

- **To tighten the current criteria which inform the decision on allowing the use of multiple advocates?**

206. No. We do not fully understand this question, as there does not appear to be a proposal to alter (or "tighten") the current criteria. The regulations themselves make it clear that meeting the 'prosecution condition' alone is wholly insufficient to allow for the granting of multiple counsel. There must be "substantial novel or complex issues of law or fact that cannot be adequately presented [by a single advocate]", a point that was emphasised five years ago by HHJ Collier (as the Consultation itself states).

- **to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court?**

207. No. The reason solicitors do not attend court to assist counsel is because they are not paid anything for doing so. Asserting that they are paid, as part of their total fee is not an answer when they have been deprived of the separate fee they were previously paid; and when they were paid (prior to 2008) they almost always did attend.

208. This is a paradigmatic example of what we have argued throughout this paper in relation to PCT, namely, that reducing fees inevitably reduces quality. Even if it is correct that a specific fee has not been removed but incorporated into the overall (and reduced) fee, the stark economic fact is that the solicitor is being paid less and so provides less. This is how a market works and only the MoJ could expect to get the same for less.

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

209. No. This proposal amounts to Presiding Judges duplicating work already done by Resident Judges. The reason that decisions are taken by Resident Judges is because they are in a position to consider applications consistently. The suggestion made that multiple advocates are being granted by Resident Judges in cases where they are not needed is made without any evidence to support it most of which appears to be directed to the practice at the Central Criminal Court and Southwark.

210. These courts grant more certificates for two advocates because they handle more of the most serious cases -murders and complex frauds.

IMPACT ASSESSMENT

Introduction

211. A useful starting point in assessing whether, and to what extent, the MoJ's PCT proposals are likely adversely to affect individuals sharing protected characteristics is the Government's own express acknowledgment that BAME clients and providers *"may"* suffer disproportionately as a consequence of the intended changes.[18]

212. We differ, however, with the Government's overall assessment in three fundamental respects: firstly, we are strongly of the view that such a disproportionate impact is an inevitable and entirely foreseeable outcome of the proposed changes, and not merely a potential or possible drawback; secondly, we believe the Government has seriously underestimated the extent of the impact and failed to recognise that such adverse consequences are likely to be permanent; and thirdly, we do not accept that, even on the Government's own limited (and therefore inaccurate) appreciation of the

[18] Consultation Paper, paragraphs 5.6.2 and 5.6.4

negative effects of the proposals, such effects can properly be justified in law.[19]

Criticisms of the MoJ's Methodology for Equalities Impact

213. In purporting to comply with its legal duties under the Equality Act 2010 the Government sets out its *"approach to assessing the potential for particular disadvantage resulting from the proposals"* at paragraph 2.1 of Annexe K. We believe the methodology and analysis adopted by the Government is not merely inadequate but fatally flawed. Put shortly, if the Equality Impact Assessments [EIA] are the means by which the MoJ claims to have discharged its Public Sector Equality Duty (PSED) then it has singularly failed in that obligation for the reasons set out below.

214. Notwithstanding the apparent recognition that the EIA must consider the need to advance equality of opportunity and foster good relations[20], the EIA in fact considers only negative impacts (i.e. the possibility of discrimination occurring). This is a very serious flaw having regard not just to the terms of the PSED but also to case law. Contrary to its express assurance, the EIA says nothing about promoting access to law, the higher echelons of the professions and the judiciary by BME students and lawyers (for example), whether legal aid can be used to promote such equality of opportunity, or whether it can be used to foster good relations. Indeed, the EIA is almost silent about the impact of the proposed cuts on these objectives.

215. The EIA acknowledges that the data set upon which it relies is grossly incomplete[21] yet it has neither identified any research the MoJ intends to undertake to fill the void nor the means by which compliance with the PSED is to be satisfied without a proper data set. This core weakness undermines the validity and reliability of both the analysis and conclusions made with respect to the specific impact areas. It follows that the Government's assumptions as

[19] Consultation Paper, paragraphs 5.6.5
[20] Paragraph 1.2 of Annexe K
[21] Paragraphs 3.2 and 3.3 of Annexe K

to the existence and degree of adverse impacts on protected groups are (without sufficient accurate empirical data) unsafe.

216. A further corollary of the inadequate data set is the complete absence of any consideration of the close correlation in some cases between the BAME status of clients and providers and their religion or beliefs.

217. The 'proportionality' exercise (i.e. whether any adverse impact can be justified as proportionate having regard to the aims of the proposals) is manifestly inadequate. Firstly, and most obviously, it plainly does not in substance consider, proposal by proposal, whether the impact of it is proportionate having regard to the aim; the wording is effectively the same in respect of every proposal, viz. it is proportionate having regard *"to achieving the legitimate aims set out in section 4"*. Secondly, a proper proportionality analysis would require an adequate evidential (data) base - one cannot know whether an impact is proportionate without knowing the true extent of that impact. As such, the purported justifications which have been given for any adverse impacts cannot be relied upon since they are contingent on forecasts of consequences that may have substantially underestimated the reality of BAME dependence on legal aid support.

218. The independent bar has for many years sought to redress the imbalance of the sexes within the profession. It is well known the bar has historically been a male-dominated profession. A consequence of this has directly affected the judiciary. The Bar Council and Bar Standards Board published a report entitled "Bar Barometer" in November 2012; the report confirms there has been a steady increase in the number of women at the self-employed bar since 2007. In 2011 the total number of men at the self-employed bar was 67.6%, whilst the number of women was 32.4%. The current proposals will only serve to drive the proportion of women at the independent bar arbitrarily lower. It is well known that women at the bar predominately rely upon publicly-funded work, therefore further cuts will disproportionately and unfairly discriminate against females providing a valuable public service. In the long-term this will

affect our judiciary; the resultant effect being our judiciary and publicly-funded independent bar will revert to a white male-dominated profession, which is not only discriminatory, but is not reflective of our society.

219. Finally, whilst acknowledging some adverse impact, the EIA does not appear to consider mitigating measures (as case law indicates should be done).

Adverse Impact of PCT on Clients

220. The MoJ expressly acknowledges that the proposed model would deprive clients of an initial choice of criminal legal aid lawyer. Further, given the overrepresentation of BAME people among criminal legal aid clients there would necessarily be a disproportionate impact upon that protected group.[22]

221. The MoJ nonetheless appears to believe that the deprivation of choice to BAME clients is mitigated by the possibility of changing solicitor at a later stage if the client can demonstrate *"exceptional circumstances"* such as a breakdown in the relationship between client and lawyer.

222. Our view is that the Consultation Paper fails to recognise the enhanced significance of choice to BAME clients whilst offering a wholly unrealistic hypothesis as to the likelihood of obtaining a subsequent change in the event of dissatisfaction. It is widely recognised in the market for criminal legal aid services that BAME clients not infrequently seek representation from BAME lawyers. Although the professional competence of the solicitor is a sine qua non of choice, the decisions of many BAME clients are also informed by other important factors such as whether the lawyer in question is able to speak to them in their native language or able to share their cultural perspective because of a common heritage. A shared affinity is often essential to promoting confidence in the relationship between client and lawyer and it encourages openness; something that is essential to ensuring that representation is effective in criminal proceedings.

[22] Consultation Paper, paragraph 5.6.2

223. Given that the MoJ concedes that the effect of PCT will be to reduce the pool of BAME firms available to undertake criminal legal aid work, the loss of the ability of BAME clients to choose their lawyer means that the theoretical option to change solicitor at a later stage in the life of a case will be little benefit to them even if it were achievable.

224. Where BAME clients experience genuine dissatisfaction in the representation imposed upon them it is likely that there will be an increase in the number of applications to change provider notwithstanding the stringent new criteria governing such applications. This will create increased associated administrative costs on the courts and the Legal Aid Agency. Where clients are unsuccessful (as will invariably be the case) the lingering dissatisfaction of BAME clients with their lawyer will hardly be conducive to promoting the cooperation necessary for positive engagement in the criminal process.

Adverse Impact of PCT on Providers

225. The MoJ expressly acknowledges that the proposed model would disproportionately damage the future viability of firms that are majority BAME managed. The asserted reason for this is that such firms are more likely to be small, and smaller firms lack the requisite economies of scale that will enable them to compete effectively in the tendering process.[23] In other words, small BAME firms will struggle to afford the expansion required to participate meaningfully in the procurement process or to operate at the low prices (minimum 17.5% below the current rates) demanded to win a contract.

226. Notwithstanding the anticipated loss of BAME firms from the market the MoJ regards the new procurement process to be justifiable as a means to the stated end in Section 4. It adds that the damage to BAME firms may be mitigated because future crime contracts will retain the obligation on firms to have a written equality and diversity policy that requires the provider to

[23] Consultation Paper, paragraph 5.6.4

demonstrate how it would meet the diverse needs of its clients.[24] It even suggests that the possibility of smaller BAME firms coalescing to form consortia in the bidding process may operate to promote equality of opportunity.[25]

227. Our view is that the MoJ has seriously underestimated the immediate and longer term impact of the loss of BAME firms to the market for criminal legal aid services whilst overestimating the possibility and likelihood of BAME firms mitigating the impact of the changes by forming or joining consortia in order to participate in the tendering process. Some of the more obvious concerns are detailed below.

228. Four years ago there were about 4,000 firms of solicitors who were entitled to offer criminal legal aid services to clients. In London a notable 40% of such firms were majority managed by BAME lawyers. As a result of changes introduced over the intervening years, the overall number of firms has declined from 4,000 to 1,600. A disproportionate number of those firms that have closed have been BAME majority managed. The current proposals are predicated on the expectation that there will be only 400 firms benefitting from legal aid contracts. In light of recent historical trends we justifiably anticipate that, of the 75% of firms who will lose the right to practice in criminal legal aid cases, a disproportionate number will be BAME in nature.

229. Not only will BAME solicitors lose their jobs or be forced to surrender their firms; redundancies will also be faced by those dependent upon them: the legal secretaries, clerks, administrators, practice managers, in-house accountants, etc. In these firms, many such personnel will be of BAME backgrounds themselves.

230. In our view, the further substantial loss of BAME firms will therefore have a profound effect upon the diverse communities they serve and support. Such high street firms have invariably provided an accessible, personalised service

[24] Consultation Paper, paragraph 5.6.5
[25] Consultation Paper, paragraph 5.6.5

to their clients. They operate in areas where their knowledge and understanding of the community around them is often the product of years of positive interaction. Much time and labour has been invested in building strong relationships with the local courts, police and probation services. It is through such interaction that confidence and trust is created; elements that are essential to ensuring clients engage positively in the criminal justice process once they become drawn into it.

231. Societal tensions in recent years demonstrate the crucial importance of fostering and maintaining community cohesion. Smaller BAME firms have in the past played an integral role in facilitating such cohesion often acting as the interlocutors and mediators between BAME communities and the authorities. Part of the reason why they are trusted by such communities is because they have been prepared to take on cases involving challenges to police action, the prison services or to other institutions of the executive. Access to justice and the right to redress has always posed a significant challenge and aspiration for BAME communities. The existence of local firms willing to take on that role has been instrumental in maintaining confidence in the judicial process. Without them it is likely that that confidence would have come under unsustainable strain. BAME firms have relied heavily on criminal legal aid not simply to guarantee their own commercial viability but to subsidise the considerable amount of pro bono work undertaken by many of them. The loss of revenue from criminal legal aid cases would therefore threaten the provision of pro bono work if such firms were forced to close.

232. The replacement of these community based firms by large, relatively impersonal entities driven purely by commercial expedience will, in our view, undermine many of the important strides forward that have been made in promoting community cohesion over recent decades. The procurement process takes no account of the quality of representation to be provided by the bidding firm; it is concerned only with price. Furthermore, once the large firms who succeed in the tendering process become entrenched there will be no on-going incentive to deliver minimum service standards to the clients they

are meant to serve. And any sense of obligation to the wider community will be quietly abandoned.

233. The disproportionate concentration of BAME solicitors in legal aid work of all types but particularly in crime is replicated amongst BAME barristers in independent practice. This symmetry is no coincidence. Just as BAME solicitors have gravitated towards publicly funded work for reasons both of inherent interest but also because of restricted access to employment opportunities with larger non-BAME firms doing private work, BAME barristers are significantly overrepresented at the criminal bar. In our view, these barristers play an equally crucial role in maintaining community cohesion by reflecting the diversity of the communities from which they hail and which they represent. Their visible and active presence in the criminal justice system is essential to retaining public confidence in it. But it also undoubtedly true that the continued existence of such BAME barristers can be attributed often in large measure to the professional support they have received from BAME solicitors who have instructed them. It is this latter group that has frequently provided the opportunities for BAME barristers necessary to build their practices when support from chambers clerks and non-BAME firms has been less than forthcoming.

234. It follows that the further loss of a significant number of BAME firms will have a consequent significant impact upon the practices of many BAME barristers and whether they will in turn be able to maintain their own viability as independent practitioners. The concomitant loss of such individuals to the profession will have an obvious retrograde impact on the enormous progress that has been made in recent years to improving the diversity of the bar. It will also mean that the number of successful BAME applicants for silk will necessarily decline.

235. But the potential ramifications do not end with the damage caused to the cause of diversity at the bar. Any shrinking in the pool of BAME barristers, or even a reduction in the quantum of work available to those who manage to

remain in practice, will have inevitable adverse consequences for the future diversity of the judiciary.

236. In conclusion, we have well founded concerns that, if predictions as to the loss of BAME firms are borne out, the prospects for upward mobility for BAME lawyers within the solicitors' profession, the Bar and the judiciary will all be severely curtailed. As such, the damage to cause of diversity will be readily foreseeable and the associated loss of public confidence almost inevitable.

25 Bedford Row

WC1R 4HD

4 June 2013