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Response of Young Legal Aid Lawyers to
"Transforming legal aid: next steps"

About us

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has almost 2000 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

Introduction

2. We welcome the Government's abandonment of plans to remove client choice and wholesale tendering on price competition. We are also pleased to note that prison lawyers and criminal appeal lawyers who operate without a 'main' criminal contract will be able to continue to do so.

Principle and wider context

3. Nevertheless, in our view these proposals will still sound the death knell for many hard working criminal practitioners providing a quality service for individuals throughout England and Wales. They will hit hardest small and medium sized firms, including many specialist practices, and by removing those providers the Government will remove client choice by the back door. We do not see a need for "consolidation" of the market[1] and ask for the evidence which continues to drive this view.

4. The state is under an obligation to provide effective legal representation to those who are suspected of a crime. In order to do so, the Government has an obligation to ensure that the profession itself is sustainable and that it provides for the training and development of junior lawyers, who will be the future of the profession.

[1] Consultation, para 2.29

5. Young Legal Aid Lawyers represents the junior end of the profession, who will be directly affected particularly by the cuts to fees across the board, particularly to police station and magistrates' court fixed fees as well as the "harmonisation" of the fee structure for advocates. Junior lawyers have not entered criminal defence practice for high remuneration or an easy life. Our members are committed to performing a public service and to ensuring a vital and historic right is protected and upheld. We are particularly concerned about the possible pressures on those entering the profession being given unrealistic workloads necessitated by the financial pressures on the firm or chambers aiming for the "economies of scale" desired by the Ministry of Justice. The consultation has failed to properly address this.

6. In responding to the consultation we also wish to reiterate the concerns we have already raised regarding the implementation of a new cuts regime on criminal legal aid, and specific proposals which are set out in our response to the consultation document "Transforming Legal Aid: Delivering a more credible and efficient system" and are still relevant in answer to this consultation.[2] We disagree with the Government's assertion that the previous consultation "and the responses it has generated have shown clearly that legally aided criminal defence services can be delivered more efficiently". Or that "the market for criminal defence litigation services needs significant consolidation and re-structuring if it is to function effectively at a lower cost."[3] It was the responses to the previous consultation that forced the Government to think again, so a renewed argument for cuts must be backed up with credible evidence of why they are still required.

International comparisons

7. We reject the Government's continued suggestion that the cost of the legal system in the UK can be directly compared to that in other countries. It is unhelpful to state that "even after implementation of all of our proposals, England and Wales will still have one of the most generous legal aid schemes in the world, with a budget of around £1.5 billion per annum",[4] without any contextual commentary. This cannot be used as a justification for further cuts to the legal aid scheme in England and Wales.

8. Even the Mail on Sunday[5] has acknowledged that the data used by the Government is misleading. Most legal aid lawyers earn less than teachers and many of our members earn close to the minimum wage. The Lord Chancellor has acknowledged in his evidence to the Justice Select Committee that the basis for his proposals is ideological and not economic[6]. Nevertheless, the

[2] www.younglegalaidlawyers.org/sites/default/files/YLAL%20TLA%20response_final.pdf
[3] Consultation, para 1.10
[4] Consultation, para 1.31
[5] www.dailymail.co.uk/news/article-2338231/New-face-British-justice-Eddie-Stobart-lorry-boss-judge-called-incompetent.html
[6] When questioned by Jeremy Corbyn on the importance of legal aid in cases involving the treatment of prisoners by the State, Grayling replied that "I suspect that this is simply an ideological difference between us. I do not agree." See http://www.parliament.uk/documents/commons-committees/Justice/Uncorrected%20Oral%20Transcript%20HC%2091-ii.pdf

argument about the expense of our justice system continues to be employed without comparing like with like, overlooking the higher costs that result from an adversarial as opposed to inquisitorial justice system, the size of our population, the low age of criminal responsibility and the wide range of activities which are criminalised in the UK. Figures compiled by the National Audit Office on European spending on courts, prosecution and legal aid as a percentage of GDP per capita found expenditure in England and Wales to be average[7]. Mr Grayling has been unable to give examples of systems where price competitive models work successfully, stating the Ministry of Justice has "not really sought to look at other countries".[8]

9. The decision to further reduce spending on legal aid following years of cuts[9] is, in our view, unjustified. Legal aid is a tiny proportion of the national budget. These proposals would cut a further £220 million from the criminal legal aid budget regardless of cuts already made or in motion, or the wider context of falling crime levels. The Office of National Statistics has recorded a "statistically significant" reduction in crime over the past five years, with the police recording 8% fewer crimes in 2012 than 2011 alone.[10] The Government's existing estimate for criminal legal aid spend in 2013/4 is less than that in 2011/2[11] and the Legal Aid Agency business plan for 2013/4 acknowledges that changes already implemented (including the introduction of fixed fees for early guilty pleas and cracked cases which elect to the Crown Court) have already brought and will continue to bring costs down.[12] Further, statistics released by the Ministry of Justice on 25 June 2013 indicate that the overall legal aid spend in 2012/3 was £1.917bn; a significant reduction in comparison to expenditure over the last six years (to 2007/8) considered in the report[13]. Claims that the budget is spiralling out of control are therefore misleading.

10. We endorse the recent comments of the President of the Supreme Court, Lord Neuberger:

> *The Government cites the high cost of lawyers. It is true that lawyers acting for multinational companies and wealthy individuals can earn a great deal of money; it is also true that there are one or two lawyers who make quite a bit of money out of legal aid work. But the great*

[7] www.nao.org.uk/wp-content/uploads/2012/03/NAO_Briefing_Comparing_International_Criminal_Justice.pdf p.38, para 3.3 Figure 19, p.39

[8] www.lawgazette.co.uk/features/interview-chris-grayling

[9] Including LASPO which removed huge swathes of law from the scope of legal aid with effect from 1 April 2013.

[10] www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/index.html

[11] £1.1bn is the audited spend on criminal legal aid for 2011/2 (Ministry of Justice Annual Report and Accounts 2011/2 www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/2012/moj-annual-report-accounts-2011-12.pdf p92 table 2.1), and £9.41 million is the projected spend on criminal legal aid for 2013/4 (Legal Aid Agency Business Plan 2013/4 p.23 www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf)

[12] Legal Aid Agency Business Plan 2013/4 p.24

[13] http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf table 1 page 27

> *majority of lawyers who do government-funded work do not make very much money – especially when one allows for their expenses. And comparisons with the cost of legal aid in other countries is dangerous. Our trial lawyers do much more work than most of their European counterparts, because the mainland European judges are much more hands-on than they are here. So it is unsurprising that the judicial system costs more in Europe while the legal aid system cost more in the UK.*[14]

Timing

11. It is acknowledged in the impact assessment that:

> *Over the last five years the criminal legal aid market has already faced declining fees and volumes of business that has put incumbent providers of criminal legal aid under increasing pressure.*[15]

12. For this very reason we consider these proposals to be unnecessary. Government statistics show that there was a fall in legally aided work at the police station of 8% in 2012/13 from the previous year and 8% for work in the magistrates' court for the same period, with a fall of 24% if magistrates' work is compared to levels in 2007/08.[16] There was an 11% drop in the grant of representation orders in the Crown court in 2012/3 from 2011/2.[17] As the Government acknowledges, criminal work is demand led, and there has been a fall of 11% in the number of criminal providers under contract since 2007/8 as demand (i.e. numbers being arrested and prosecuted) has fallen.[18]

13. In our view the proposals in this consultation should at the very least, be put on hold pending the outcome of other substantial reviews and implementation of strategic proposals that could radically change the landscape of criminal justice, for example, Lord Carlile's review of youth justice system which will report in spring next year,[19] "Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System", which introduces a timetable that will take effect from the end of 2013 into 2014,[20] and the research by Andrew Otterburn and Vicky Ling into duty work, looking at the minimum level of work needed for businesses to remain viable[21].

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[14] Lord Neuberger, "Justice in an age of Austerity", Tom Sargant memorial annual lecture, 15 October 2013 www.justice.org.uk/data/files/resources/357/Neuberger-2013-lecture.pdf para 45
[15] Procurement of Criminal Legal Aid Services - impact assessment,IA MoJ IAno199, para 3
[16] Legal Aid Statistics in England and Wales, Ministry of Justice Statistics Bulletin, 25 June 2013 pp.10-11 www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf
[17] Ibid, p.9.
[18] Ibid, p.20
[19] www.ncb.org.uk/yjinquiry
[20] www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf
[21] www.justice.gov.uk/legal-aid/newslatest-updates/crime-news/moj-and-law-society-commission-duty-work-contract-survey

Chapter 3: Procurement of Criminal Legal Aid Services

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

14. No. We welcome the recognition of the importance of client choice by the Government in the consultation paper, and the statement that "providers will be expected to demonstrate that they have the right capacity to deliver services at the right quality".[22] However, in our view, these proposals do not secure that aim at all. The proposed contracts will inevitably, as is intended, result in a far smaller market and radically reduce opportunities for junior lawyers to gain and keep work in quality practices.

Impact on junior lawyers

15. In our view there is no way that existing businesses will be able to survive under these cuts. They will inevitably result in a direct cut to junior lawyers' take-home pay, and vastly decreased opportunities as firms and chambers close or can afford to take on fewer staff to train for the future.

16. As has been the trend in recent years, firms will increasingly use more junior staff if cuts are introduced, as they are cheaper. While YLAL welcomes the recruitment of junior staff into legal aid, this must be done responsibly. It is essential both to the economic sustainability and professional development and experience of the junior end of the profession that they are able to undertake magistrates' court work and police station attendances. However, under the Government's new model, firms will not be able to afford to take on staff to adequately train or supervise over the medium or long term, as this will involve and outlay of time and resource. They will not offer training contracts at a decent wage or newly qualified solicitor positions if they can instead hire low paid paralegals, trainees on the minimum apprentice wage, or subcontract to police station agency firms to do the work instead.

17. Under reduced fees, more mistakes will occur. This is serious because when mistakes go unnoticed or are noticed late, clients, victims, and the courts suffer; social justice is undermined. We will see more mistakes for three principle reasons. Supervisors will need to spend more time on fee-earning work rather than on unremunerated supervision. Junior lawyers, paid less and more poorly trained than they are at present, will be forced to prioritise doing a higher volume of work over doing a better quality of work as they put in longer hours to meet fee targets. In the longer term, the poorly-supervised fee-earners of today will be the supervisors of tomorrow, which will lead to a decline in the quality of lawyers that the system produces.

18. When it comes to out of hours work, it will be junior lawyers who are likely to be most affected. It is already a regular trend for firms to employ agents or more junior staff to undertake out of office hours work. As junior lawyers, we have no objection to doing these hours, but strongly believe that we should be

[22] Consultation, para 1.13

paid reasonably for our efforts. There is no longer an "unsociable" hours uplift for police station work under the fixed fee scheme. If firms are to have their police station fees reduced even further they will only be able to allocate an even smaller percentage of that fixed fee to a fee earner to get out of bed at 3 am for a lengthy interview in the police station, which we do not think gives any recognition to the difficulty and skill involved in such work. If junior lawyers are unable to be paid fees that recognise the work they put in, they will have no choice but to look for work in other areas that will allow them to pay off substantial student loans.

19. Trainee barristers (pupils) are currently protected only by a £12,000 minimum pupillage grant. From 2014 trainee solicitors will be in a similar position (protected only by the national minimum wage, rather than the minimum salary for trainees). Particularly for those training in the large cities of England and Wales (who will be in the majority), such salaries are unsustainable when considering the outlay required in order to reach that position (fees for university and further vocational training). Following the decision of the Solicitors Regulation Authority from August 2014 it will be possible for firms to pay trainee solicitors the minimum wage for a demanding, highly skilled job which involves making decisions that directly affect the lives of their clients. Junior criminal lawyers rely on supplementing their income with out of hours work. It must be made clear that this overtime work is not a lucrative "bonus". It often involves long, sleepless nights (during a busy working week) with a risk of no pay whatsoever. The combination of fee reductions and an ever-increasing workload puts the future of the profession at risk if the life of a junior lawyer becomes unsustainable. The coalition government is seeking to decentralise rates of pay in many areas of the public sector (for example, for teachers) but is not applying this rationale to legal aid lawyers whose pay is much more directly affected by the cuts, and whose salaries are not protected.

Loss of specialist lawyers

20. We have had sight of the response to the consultation prepared by the National Association for Youth Justice (NAYJ) and would endorse their concerns as they highlight the negative impact of these proposals on a particularly vulnerable group and on practitioners. We have a number of members who work with young people and have learned from specialist and more senior practitioners in the field. Without their example, young people would not have the protection and specialist service they deserve, and there would not be adequately trained junior lawyers to continue this specialist work.

21. We are particularly concerned for more vulnerable groups such as young people or those with mental health problems. Their cases can be more complex and rely on relationships of trust and knowledge about clients built-up over time, as well as the ability to deal with such clients in a sensitive way. This expertise will be lost if firms supporting specialist practitioners can no longer carry more expensive cases and fee earners.

Reduction in fees/market consolidation

22. A fee reduction of 8.75% will lead to the closure of many providers; a further reduction of 8.75% will mean the death of most. The vast majority of providers operate on single-digit profit margins. Clearly, they will be unable to absorb a double-digit fee cut.

23. The suggestion that firms will be able to absorb the fee cut if they expand in size ignores the reality. As businesses, providers are already driven by profit. If expansion and introduction of efficiencies could deliver savings of 17.5%, the market would not be arranged of so many smaller providers, especially when so many are on the breadline. Even the largest providers receive only a small proportion of the overall criminal legal aid budget, and in the round their criminal departments do not deliver double-digit profits. If cuts are introduced, the few providers that may be able to operate in profit will do so by cutting staff, cutting current levels of pay, and increasing the volume of cases that those fee earners who remain will have to conduct. Essentially, fewer people, being paid less, for doing more work. Quality will suffer and this risks miscarriages of justice.

24. The expansion of the fixed fee system, especially when taken together with a proposal to reduce the fees by 17.5%, will incentivise lawyers to only do the bare minimum when preparing cases. The structuring of the current magistrates' court fee system means that higher fees are paid in cases where more work is required, with three separate categories of case. If the same fee is paid for a basic case as for one requiring expert reports and a complex defence for a client with mental health issues, there will be a perverse incentive to do as little work as possible for a client – which clearly conflicts with a solicitor's duty to act in their client's best interests.

25. Criminal defence is crucial in protecting fundamental rights, and ensuring the right outcome. It is important that providers feel able to go the extra mile, where that preparation is merited. Yet, as so often happens in Graduated Fee cases in the Crown Court, criminal defence will be reduced to a tick-box exercise if fixed fees are introduced to magistrates' court work.

26. The hourly rates at which Non-Standard Fee cases in the magistrates' court are paid have not increased in 20 years. A decrease in these rates is simply unsustainable. We fear that the only way providers could absorb these costs is by delegating the case preparation to more junior fee-earners. However, magistrates' court cases are important; when cases are decided against defendants, prison sentences often result, and people of good character end up with criminal records. It is vital that cases are prepared by fee-earners who are suitably experienced.

27. We are gravely concerned by the calculation of fees based on a national average.[23] Crime rates, costs of running a firm or chambers, and costs of living for lawyers and support staff, all vary widely across England and Wales.

[23] Consultation paras 3.60 and 3.63

The 17.5% cuts are made from a national average but in those areas where the fixed fee is higher (areas which coincide with a higher cost of living) the fee cut is over 20%.

28. To give the figures as inclusive of VAT hides just how low they will be. For example, once VAT and travel expenses are taken off the proposed fixed fee for police station work this will leave a national fee of £160.00 (exclusive of VAT and disbursements) if the fee is £192.45 inclusive of VAT.[24]

29. We believe that fees should fall no further than current rates and the escape fee mechanism be retained in its current form for police station and court work.

Client choice

30. Reducing the number of the providers through market consolidation, limits the right of client choice. While we welcome the retention of client choice in principle, the value of this decision will be limited if the client's provider is forced to shut down.

Crown Court litigator fee proposals

31. The payment of a magistrates' court fee where the defendant elects to have a Crown Court trial but the case concludes before trial creates perverse incentives. The proposal clearly encourages lawyers to advise clients in either-way cases not to elect jury trial, as providers run a financial risk of the case collapsing before trial. This includes where the defendant pleads guilty because the prosecution decides at a late stage to accept a guilty plea to a lesser offence, and where the prosecution decides to discontinue the case. This is fundamentally objectionable, as lawyers must be free from financial considerations when advising their clients on how best to exercise their constitutional rights.

32. As has always been the case, it is the role of a lawyer to advise on the advantages and disadvantages of having a trial in the magistrates' court or the Crown Court, but the final decision is always that of the defendant. Providers should not be financially penalised because the defendant has chosen to exercise his right to a trial by jury, but the case fails to reach trial for reasons invariably out of providers' control.

33. At present we have a recently introduced system that penalises providers where clients elect jury trial but subsequently plead guilty. This puts undue pressure on junior solicitors and barristers in the magistrates' court, who are open to criticism from senior lawyers for "allowing the client" to elect jury trial. There is a growing culture of playing it safe and keeping the matter in the magistrates' court. This is a threat to the fundamental right of trial by jury in all either-way offences.

[24] Consultation para 3.61

34. It has also led to an undesirable but quite foreseeable consequence. Previously, regardless of whether the defendant intended to elect jury trial or not, lawyers would seek to persuade magistrates that cases were suitable for summary trial if there were arguable grounds. This would benefit the defendant at sentencing in the Crown Court, if he was convicted, as advocates could highlight the fact that the case was deemed suitable by the magistrates, and therefore should properly be dealt with by a sentence of less than six months' imprisonment. Now, if the defendant intends to elect jury trial, but it is argued by the prosecution that the case is not suitable for summary trial, lawyers will not seek to persuade the magistrates to accept jurisdiction. So one of the arguments used to persuade judges that a lower sentence is most appropriate has been lost, purely because of how such cases are now paid. This is an injustice.

Crown Court fixed fees

35. We repeat our concerns raised above with the magistrates' court fixed fee proposals. A one-size-fits-all approach to fees is not appropriate, as it does not take account of the variety of cases that come before the Crown Court, both in seriousness and complexity. An assault case that is at the lower end of the scale of seriousness and has a low page count can nevertheless take tens if not hundreds of hours to prepare, and it is rare that a page count for even a complicated case will exceed 500 pages.

36. The "swings and roundabouts" argument that providers will win on some cases and lose on others because the fixed fee is based on an average of claims does not bear out in reality. This is because providers who already run their businesses on low profit margins, simply seek to do the bare minimum in all cases and never to do too much work on any one case, so that their businesses do not go under. If the expanded system of fixed fees is introduced alongside a swingeing fee cut, quality levels will plummet even lower.

37. Rather than an expansion of the system of fixed fees, the system desperately needs the reintroduction of hourly rates, so that lawyers are not discouraged from doing the work that cases need, and to restore quality into criminal defence.

38. While we welcome the proposal to retain separate payment of travel and subsistence disbursements in Crown Court cases, it is unclear why the same rationale behind this proposal would not apply in magistrates' court and police station cases. Disbursements are not a profit but always an expense that should be reimbursed at their true value rather than a notional figure.

Duty scheme procurement process

39. We support the introduction of a revised quality standard in deciding which providers can carry out duty work. In particular we welcome the proposal to introduce a minimum ratio of supervisors to junior staff. However, if providers

are to be required to hold Lexcel or the Specialist Quality Mark accreditation, those who have not yet obtained these standards must be allowed sufficient time to adjust their business practices in order to qualify for accreditation. The accreditation process is time-consuming and can be costly. It requires senior managers (who are more often than not also fee-earners) to devote time especially towards gaining accreditation. This can result in junior staff receiving even less supervision. These factors must be taken into account when deciding how long a provider would have to obtain accreditation.

40. We oppose the proposal to separate duty solicitor slots from the solicitors who gained the accreditation. This is not the correct solution to the problem of "ghost solicitors". Junior criminal lawyers ensure their value to their employers by having duty solicitor accreditation, and work extremely hard to complete the rigorous portfolio and examination requirements for obtaining that accreditation. We accept that there is an issue over the number of duty solicitors on the rota, but the problem is not that there are too many lawyers wishing to do duty solicitor work, but rather that there are too many lawyers who do very little duty work but are still awarded slots on the rota. This could be put right at a stroke if the Ministry of Justice directed the Legal Aid Agency to enforce the rules that duty solicitors who do not personally undertake a minimum proportion of their police station and court duty slots must not be on the rota. Currently, there is not even a system of self-certification required of solicitors. The practice is that once you are on the rota, you remain on it for life. If no-one ever falls off the rota, of course it will bloat. If the rules were enforced, solicitors who in years have not been to a police station or magistrates' court as the duty solicitor would no longer remain on the rota.

41. By breaking the link between solicitors and their duty slots providers will be able to drive down wages, reduce the number of staff, and expect those who remain to do more work for less money. Linking slots to staff ensures that providers have the right number of accredited personnel to undertake the duty work, so long as the requirement to attend a minimum number of police station and court duty slots is enforced.

42. We do not agree with the proposal to use capacity as a criterion for the award of contracts, by limiting the number of contracts in each area. This idea is based on the notion that market consolidation will mean that providers can absorb a fee cut. We have set out above why we do not believe that providers would be able to absorb a fee cut even if they did expand, merge or form consortia. The minimum contract size will force many small firms who rely on the income that they receive from duty slots to close down – particularly given that, as acknowledged in the new consultation, duty work accounts for 40% of firm income. On the other hand, larger firms who win contracts will employ cheaper staff and the quality of advice will continue to decline.

43. Receiving papers by secure email involves increased costs in printing off documents, securely storing documents, and having the technology in place to run a system whereby secure computing can be achieved. The costs must be budgeted before any such requirement is imposed. In any event, in a

climate where firms will be facing a 17.5% fee reduction, and many going under, the industry will not be able to afford such technology.

Q2. Do you agree with the proposed procurement areas under the modified model (described at paragraphs 3.20 to 3.24)? Please give reasons.

44. The procurement areas proposed have calculated the travelling time between the "most extreme two points of delivery in the procurement area" ensuring that no proposed procurement area would require a provider to travel more than 1.5 hours by car between two points of delivery.

45. We are concerned that in some places travel may take longer than 1.5 hours, depending on the geographical area that must be covered, and the methods of transport available. We are also concerned that if clients must wait 1.5 hours for a solicitor to attend they will proceed without one. Our members already have experience of police telling clients to go ahead without solicitors because it will take too long if they are called, or to just have telephone advice instead when the clients would like a face-to-face solicitor. If clients think it may take up to 1.5 hours before they see a representative they are more likely to proceed unrepresented in the hope they will leave the police station more quickly. This could prejudice their position.

Q3. Do you agree with the proposed methodology (including the factors outlined) for determining the number of contracts for Duty Provider Work (described at paragraphs 3.27 to 3.35)? Please give reasons.

46. We do not agree with a competitive tender model for duty work as believe this model is detrimental to small and medium businesses. We also think large businesses will find it hard to maintain quality and capacity at that level of pay. We believe criteria for duty work should be based on capacity and capability.

47. We repeat our view that this consultation should be stayed pending the outcome of other substantial reviews, particularly the "Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System",[25] and the research by Andrew Otterburn and Vicky Ling into duty work, looking at the minimum level of work needed for businesses to remain viable[26].

Q4. Do you agree with the proposed remuneration mechanisms under the modified model (as described at paragraphs 3.52 to 3.73)? Please give reasons.

48. No. We reiterate our concerns stated above in answer to Question 1. We are opposed to a 17.5% cut in fixed fees and hourly rates for all the reasons already stated. We would also note that introducing only one standard fee in

[25] www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf

[26] www.justice.gov.uk/legal-aid/newslatest-updates/crime-news/moj-and-law-society-commission-duty-work-contract-survey

the magistrates' court presents ethical problems that were raised in relation to the harmonisation of fee proposals for the Crown Court in the last consultation paper. Those proposals have now been amended. We do not believe the proposal for the magistrates' harmonised fee can stand in light of this U-turn on the Crown AGFS proposal.

49. The suggestion of allowing an escape fee claim will not remove the incentive to advise clients to plead guilty, and in any event it is not an adequate substitute in terms of cash flow due to the length of time taken to process escape fee claims, and the overall reduced rates that will still apply.

50. We note that this point was raised by Sadiq Khan in a debate in Parliament, when he asked the Secretary of State to clarify the proposal:

> *Will he confirm that his latest plans still lead to a single fee for magistrates courts' work, regardless of whether the case is a guilty plea or a trial? The right hon. Gentleman will be aware that this could lead to a perverse incentive to persuade a defendant to plead guilty when he or she is not guilty. Given that the Government have changed their mind on this issue for Crown courts, why not for magistrates' courts, too?*[27]

In our view the Secretary of State's reply was wholly inadequate and failed to address the question at all:

> *The right hon. Gentleman mentioned magistrates' courts, but, as he will know, our proposals were always about Crown courts.*[28]

Q5. Do you agree with the proposed interim fee reduction (as described at paragraphs 3.52 to 3.55) for all classes of work in scope of the 2010 Standard Crime Contract (except Associated Civil Work)? Please give reasons.

51. No. The government is proposing not to "help providers to adapt" but in fact to bring the cuts in *earlier* than originally proposed. This is not a compromise, this is culling sooner. It gives *less* time for firms and chambers to adjust. If the MoJ is determined to cut, there must be a review mechanism in place to ensure that the impact of any cut is properly monitored. Any further cuts should not be automatic.

Chapter 4: Advocacy fee reforms

Q6. Do you prefer the approach in:
Option 1 (revised harmonisation and tapering proposal); or,
Option 2 (the modified CPS advocacy fee scheme model)
Please give reasons.

[27] Debate, House of Commons, columns 495: www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130905/debtext/130905-0002.htm
[28] Debate, House of Commons, columns 496: www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130905/debtext/130905-0002.htm

Proposal to cut fees

52. Since 2010 advocacy fees have already been cut significantly. Cutting already low fixed fees leads to advocates spending less time preparing each case, as they have to take on more work in order to maintain their incomes. This is inevitable when advocates are paid for how many cases they do rather than the amount of time they spend on a case and the amount of preparation involved. Cutting fees further will only lead to less time spent on the case preparation and likely poorer standards of advocacy.

53. We are particularly concerned about the effect that fee cuts will have on social mobility and access to the profession. Junior lawyers who come from middle-income, as opposed to wealthy, backgrounds already find it extremely difficult to service their student debt on a legal aid income. Fee cuts will make it increasingly difficult for junior lawyers to sustain a career in criminal advocacy and more will be forced to leave the sector. By definition, those who remain will be the ones privileged and fortunate enough to be able to afford to subsidise a career as a criminal advocate. In the vast majority of cases, they will be people from privileged backgrounds. The growing lack of social mobility within the sector will only be exacerbated by further cuts in fees.

Option 1 – Harmonisation

54. Harmonisation of the guilty and cracked trial fees is a flawed proposition. Firstly, it undermines the principle that the prosecution must prove its case in order for a defendant to be found guilty. Every day there are scenarios where, at the time at which the defendant is required to enter his plea there are deficiencies in the prosecution evidence that may or may not be resolved by service of further evidence before the case comes to trial. It is the ethical duty of the advocate to point out these defects to the defendant and it is the right of the defendant to enter a not guilty plea where the prosecution has not served evidence making out the elements of the offence with which the defendant is charged. That is a fundamental principle of our adversarial legal system. However, the harmonisation of the guilty and cracked trial fees will create a financial risk for the provider by whom the advocate is instructed in all cases where a not guilty plea is entered, and this in turn will pressure the applicant to advise a guilty plea in circumstances where the prosecution may yet serve evidence that significantly improves its case.

55. Secondly, it unfairly penalises advocates for decisions that may be out of their control. In paragraph 4.4 of the consultation paper, the Government recognises that "decisions on the question of plea are ultimately for the defendant". If the defendant chooses to enter a not guilty plea, which has the obvious consequence of the advocate preparing the case for trial, but later chooses to change his plea to one of guilty, it is wrong not to pay the advocate for the extra work they have done in preparing the case for trial. This also applies where the defendant chooses to change his plea because the prosecution has decided that it would accept a guilty plea to a lesser offence, or where the prosecution decides to discontinue the case before trial. The majority of cracked trials occur not because the advocate has failed to be

sufficiently robust in their advice at the plea hearing, but for reasons that are entirely out of their control.

56. Thirdly, harmonisation of fees fails to take into account another risk that advocates incur by holding briefs that crack before trial. Advocates may well have had to refuse other work for hearings that clash with the proposed trial date in expectation of being engaged during that time. In those circumstances, the advocate has incurred loss of potential earnings.

57. Just as moving from hourly rates to fixed fees was a step away from paying advocates for the actual work that they do, "harmonisation" of fees is a step further in the same direction.

Chapter 5: Impact Assessments

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

Q8. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

58. The Government has completely failed to recognise the severity of its proposals on all practitioners and particularly on junior lawyers.

Impact on providers

59. The Government has stated that there would be no adverse impact on the criminal justice system with its proposals as clients should have access to the same services and levels of choice they currently have.[29] The Otterburn and Ling study into the viability of businesses doing duty work[30] should be completed before any conclusions are drawn about whether criminal practitioners will survive under the cuts proposed overall. We strongly believe that providers are already working to tight margins and there is no more room for fee cuts without losing providers, or cutting the standards of service on offer. The Government assumes that when it comes to fee reforms, providers will deliver the same level and quality of service as at present.[31] This is by no means guaranteed when it seems unlikely that most firms will survive the fee cuts in the first place.

60. The Government quotes a study by Otterburn in support of the proposition that providers could survive an 8.75% fee cut initially before this increased to

[29] Transforming Legal Aid: Procurement of Criminal Legal Aid Services, Impact Assessment IA No MoJ199 05/09/13 p.7, para 22
[30] www.justice.gov.uk/legal-aid/newslatest-updates/crime-news/moj-and-law-society-commission-duty-work-contract-survey
[31] Transforming Legal Aid: Procurement of Criminal Legal Aid Services, Impact Assessment IA No MoJ199 05/09/13 p.7, para 25

17.5%.[32] However, even if 25% firms could sustain cuts of this nature, the majority could not, so this is not a viable proposal. It is instructive to return to the actual report by Otterburn and Ling which states:

a. *The table does indicate however that 25% firms would still be profitable after such a cut and this is before any salary savings that might be made. However, there is no guarantee that these more financially viable firms will be the firms that have been awarded contracts. They may have been undercut by other firms who may have submitted un-economic bids and who may encounter financial difficulties during the contract life. Also, there is no guarantee that these firms will provide the geographic coverage the MOJ will need or that they would be able to absorb the additional work from the large number of firms that would lose their contracts.*

b. *It is also important to recognise that these figures are before the impact of the existing cuts that are still working their way through the system. In our 2011 report it was these cuts – the removal of work from scope – that had the devastating impact on firms, not the 10% cut, which weakened the viability of the supplier base but was not catastrophic.*

c. *As indicated in table 9 overall there is insufficient surplus for firms to withstand a 17.5% cut. Some may be able to reduce salaries as well but many will not. The profits, for most firms, simply are not there.*[33]

61. We have members who work in legal aid firms that have already undertaken restructuring such as that mentioned in the Impact Assessment, in order to achieve savings, for example by "rationalising back-office and administrative functions, relocating office functions to cheaper premises, reducing staff costs and other overheads, reviewing how resources are allocated to cases".[34] There is simply nowhere else to cut or make efficiencies if you have already made such changes. To survive a cut of 17.5% means taking measures like recruiting cheaper staff, getting rid of more experienced and expensive staff members, and reducing opportunities for training or progression. It is already the case that in bigger firms the opportunities for junior lawyers to advance, for example, with a position as a solicitor at the end of a training contract, or to get a training contract in the first place, are few and far between. For small and medium-sized businesses the likelihood of giving opportunities and fair treatment to junior lawyers at a living wage will be non-existent following cuts across the board of 8.75 to 17.5%. The Government acknowledges that "consolidation of the market may mean [clients] have less providers to choose from, however, under the modified model, they will still be able to choose and there are likely to be a large number of providers remaining in the market

[32] Transforming Legal Aid: Procurement of Criminal Legal Aid Services, Impact Assessment IA No MoJ199 05/09/13 p.8, para 30
[33] A, Otterburn and V, Ling, Price Competitive Tendering for Criminal Defence Services 2013 A Report for The Law Society of England and Wales June 2013, p.45
[34] Transforming Legal Aid: Procurement of Criminal Legal Aid Services, Impact Assessment IA No MoJ199 05/09/13 p.11, para 44

offering quality legal advice".[35] We question how this can be the case if even the research the Government relies on says that only 25% of firms believe they can sustain fee cuts up to 17.5%. We recommend no action is taken until the results of the independent research conducted by Otterburn and Ling is complete and then further consulted on.

62. The Government's plans will impact on diversity in the profession. The Government acknowledges in several places in the Equality assessment in Annex F to the consultation that the proposals for further cuts to legal aid might have the greatest impact on the junior bar, with potentially disproportionate effects on young barristers, women and BAME persons.[36] We regard this as unjustifiable. The legal profession should be representative of society as a whole. These cuts will undermine this objective. The Government has a responsibility which it should not shrug off so lightly.

63. The Government also seems to assume that junior lawyers can continue to work in the criminal justice system at reduced fees because they have been willing to work in legal aid in recent years. We reject this logic. Our members want to work in legal aid despite the remuneration. The willingness to be a public servant should not be used to penalise lawyers further and justify greater reductions in pay. Further, we reject the contention that junior lawyers will be able to shoulder the additional responsibility without any compromise in the quality of the service which is delivered, for the reasons which we have given above.

Impact on individuals

64. We are concerned that the Government has failed to properly evaluate the impact on clients as firms close and quality drops. The Government's own figures from Otterburn say "virtually all" providers would sustain losses under fee cuts and only a small minority (25%) could be profitable.[37] We are particularly concerned that the Government has failed to mention the impact of this on individuals who will no longer be able to access specialist practitioners, for example, who have niche experience working with the mentally ill or young people, as they are inevitably the most experienced and specialist lawyers, therefore more expensive and unsustainable to retain.

Q9. Are there forms of mitigation in relation to impacts that we have not considered?

65. n/a

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[35] Transforming Legal Aid: Procurement of Criminal Legal Aid Services, Impact Assessment IA No MoJ199 05/09/13 p.12, para 47
[36] Transforming Legal Aid: Next Steps, Annex F, 5 September 2013, para 7.2.12
[37] A, Otterburn and V, Ling, Price Competitive Tendering for Criminal Defence Services 2013 A Report for The Law Society of England and Wales June 2013, p.45