



## Young Legal Aid Lawyers' Briefing for Debate on Criminal Legal Aid Reforms and Price Competitive Tendering

Westminster Hall – 4 September 2013

**Young Legal Aid Lawyers** (YLAL), formed in 2005, is a group of lawyers committed to practising in areas of law traditionally funded by legal aid. We have around 2,000 members nationwide including students, paralegals, trainee solicitors and barristers, and qualified junior lawyers. Our members share a belief in the importance of legal aid in upholding the rule of law. We co-host the APPG on Legal Aid with the Legal Aid Practitioners' Group.

### **INTRODUCTION**

This briefing has been prepared for the debate on criminal legal aid reforms and price competitive tendering secured by Karl Turner MP, to take place in Westminster Hall on 4 September 2013. The debate centres on the proposed changes to criminal legal aid contained in the consultation paper "Transforming Legal Aid: Delivering a More Credible and Efficient System"<sup>1</sup>. However the cuts to criminal legal aid are just one part of the proposals which affect almost all aspects of legal aid from experts in the family courts to judicial review<sup>2</sup>. The Transforming Legal Aid consultation paper proposes:

- Removing legal aid for many vitally important issues for prisoners such as whether they are treated lawfully and humanely in the prison system or where they will live on release and how they will be supported to avoid reoffending;
- A discriminatory "residence" test for civil cases including those involving life, liberty and loss of a person's home;
- No guarantee of payment in the early stages of judicial review claims;
- A reduction in experts' fees including for childcare proceedings and cases involving mentally ill people;
- Further cuts to the fees paid in criminal, civil, family and immigration cases; and
- Awarding contracts for criminal defence work to the lowest bidders.

This briefing focuses on the proposals as a whole and explains why we – as junior and aspiring lawyers who want to be able deliver a quality service to clients in the future – think these proposals should not proceed.

### **BACKGROUND AND RECENT DEVELOPMENTS**

On 9 April 2013 the Ministry of Justice (MoJ) issued the Transforming Legal Aid consultation inviting responses by 4 June 2013. They received around 16,000 responses. The MoJ is currently considering these responses. The consultation proposed cuts to both criminal and civil legal aid. In his evidence to the Justice Select Committee on 3 July 2013<sup>3</sup>, the Lord Chancellor indicated that there would be further consultation on the criminal proposals starting in September 2013 and that Defendants would continue to be able to instruct a solicitor of their choosing in criminal proceedings under any new system.

<sup>1</sup> CP14/2013, Ministry of Justice April 2013 <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>  
<sup>2</sup> [www.younglegalaidlawyers.org/sites/default/files/Transforming%20legal%20aid%20-%20explanatory%20note.pdf](http://www.younglegalaidlawyers.org/sites/default/files/Transforming%20legal%20aid%20-%20explanatory%20note.pdf)

<sup>3</sup> The transcript can be accessed here <http://www.parliament.uk/documents/commons-committees/Justice/Uncorrected%20Oral%20Transcript%20HC%2091-ii.pdf>

On 18 July 2013, the Joint Committee on Human Rights put out a call for evidence in relation to the civil proposals. The deadline for written evidence is 27 September 2013. It is expected that public hearings will take place in October 2013. On 31 July 2013 various interested groups including YLAL and the Law Society wrote to the Lord Chancellor requesting that he delay making any decisions in respect of the civil proposals until the JCHR had reported. The Lord Chancellor replied on 15 August 2013 refusing to delay the timetable<sup>4</sup>.

Thus far the proposals have been debated in Parliament twice: at a Backbench debate in the House of Commons on 27 June 2013<sup>5</sup> and during a motion to take note in the House of Lords on 11 July 2013<sup>6</sup>. Since the expectation is that the proposals will be implemented by way of secondary legislation the debate secured on 4 September 2013 is likely to be one of the few remaining chances that MPs have to scrutinise the proposals.

## **OUR CONCERNS**

### **(1) False economy<sup>7</sup>**

MoJ rhetoric surrounding these proposals has focused on fees paid to “fat cat” lawyers and the high cost of the legal aid system in England and Wales. But even the Mail on Sunday<sup>8</sup> has exposed the data to be misleading. Most legal aid lawyers earn less than teachers and many of our members earn close to the minimum wage. The Lord Chancellor has since acknowledged in his evidence to the Justice Select Committee that the basis for the proposals is ideological and not economic<sup>9</sup>.

Nevertheless, the Secretary of State for Justice has argued that the UK has one of the most expensive legal aid systems in the developed world. However this assessment fails to compare 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<sup>10</sup>. Mr Grayling has been unable to give examples of systems where price competitive models work successfully, stating the MoJ has “not really sought to look at other countries”<sup>11</sup>.

The decision to further reduce spending on legal aid following years of cuts<sup>12</sup> is, in our view, not

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<sup>4</sup> His reply can be accessed here <http://www.associationofprisonlawyers.co.uk/wp-content/uploads/2013/08/Grayling-C-15-08-13.pdf>

<sup>5</sup> Transcript available at <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130627/debtext/130627-0002.htm#13062761000001>

<sup>6</sup> Transcript available at <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/130711-0002.htm#13071154000666>

<sup>7</sup> See generally *Costing the Transforming Legal Aid Proposals*, Dr Nick Armstrong [http://www.matrixlaw.co.uk/uploads/other/25\\_06\\_2013\\_11\\_35\\_53\\_Nick%20Armstrong%20-%20Costing%20the%20civil%20legal%20aid%20proposals%20130624%20Version%202.pdf](http://www.matrixlaw.co.uk/uploads/other/25_06_2013_11_35_53_Nick%20Armstrong%20-%20Costing%20the%20civil%20legal%20aid%20proposals%20130624%20Version%202.pdf)

<sup>8</sup> [www.dailymail.co.uk/news/article-2338231/New-face-British-justice-Eddie-Stobart-lorry-boss-judge-called-incompetent.html](http://www.dailymail.co.uk/news/article-2338231/New-face-British-justice-Eddie-Stobart-lorry-boss-judge-called-incompetent.html)

<sup>9</sup> 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>

<sup>10</sup> [www.nao.org.uk/wp-content/uploads/2012/03/NAO\\_Briefing\\_Comparing\\_International\\_Criminal\\_Justice.pdf](http://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

<sup>11</sup> <http://www.lawgazette.co.uk/features/interview-chris-grayling>

<sup>12</sup> Including the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 which removed huge swathes of law from the scope of legal aid with effect from 1 April 2013.

justified. 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.<sup>13</sup> The Government’s existing estimate for criminal legal aid spend in 2013/4 is less than that in 2011/2<sup>14</sup> 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.<sup>15</sup> 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<sup>16</sup>. Claims that the budget is spiralling out of control are misleading.

The proposals will also have negative knock-on costs for the wider justice system. The Magistrates’ Association, in their response to Transforming Legal Aid said:

*Loss of expertise is all too often accompanied by a greater propensity for error and thus waste of public funds, including court time.... If the current small providers who are so crucial to effective court running are ruled out, that is likely to have a detrimental effect on the smooth running of the courts and could well lead to an increase in knock-on costs.*

The Parole Board has also raised doubts in their response to Transforming Legal Aid about the cost effectiveness of the proposals. On the proposal to cut legal aid for prison law:

*The removal of treatment, categorisation and resettlement issues from the scope of legal aid will have a dramatic effect on the ability of the Parole Board to make effective and timely decisions. There is also evidence that it will considerably increase the cost of the Criminal Justice System overall. The change in scope will increase the cost of conducting parole reviews and will increase the number of offenders who remain in prisons or higher security prisons than they might otherwise have needed, longer than previously with consequent cost of imprisonment overall.<sup>17</sup>*

We agree. Moreover, the proposals in the consultation paper are directly contrary to the rehabilitation revolution and will ultimately throw costs back on the state with likely increased reoffending rates.

Short term “savings” cannot justify the long term cost to the justice system, one which Mr Grayling is correct to describe as “a justice system of which we can be proud and which justly deserves its world-wide recognition for impartiality and fairness”.<sup>18</sup> We should learn the lessons of outsourcing to the lowest bidder and how this leads to the state picking up the tab when providers fail to deliver, for example, the contracting of interpreting services for the court and tribunal system<sup>19</sup>. To press ahead with further change now would be a wholly disproportionate measure. The risks that the changes pose - undermining the rule of law, deterioration in the quality of legal representation and irretrievable

<sup>13</sup> [www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/index.html](http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/index.html)

<sup>14</sup> £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](http://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](http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf) )

<sup>15</sup> Legal Aid Agency Business Plan 2013/4 p.24

<sup>16</sup> <http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-stats-12-13.pdf> table 1 page 27

<sup>17</sup> [www.justice.gov.uk/downloads/offenders/parole-board/pb-response-transforming-legal-aid-consultation-june-2013.pdf](http://www.justice.gov.uk/downloads/offenders/parole-board/pb-response-transforming-legal-aid-consultation-june-2013.pdf) p.3

<sup>18</sup> Transforming Legal Aid para 2.1

<sup>19</sup> [www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/645/645.pdf](http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/645/645.pdf)

damage to the current system of publicly funded legal advice – are too great.

We believe that Lord Neuberger, President of the Supreme Court, was right when he stated in 2009:

*Today, not least because of the effects of the credit crunch, many countries are finding it difficult to fund legal aid. Economic reality must, of course, play a part... But we should still ask how we manage to find ourselves in the situation that the total (criminal and civil) legal aid budget for 2008 came to no more than the total NHS budget for two weeks. Reverting to Heber Smith, the rule of law and the defence of the realm are the most fundamental and well-established duties of government: if either fails, the more recently developed, high-profile and expensive government services, such as the provision of health, education and social security, become impossible or of little value. Why some might ask, as a society, are we willing to invest so little on legal aid, when both the unacceptably unfair effects on individuals and the fundamental risks to society of the denial of justice to many citizens are so profound?*<sup>20</sup>

## **(2) Reduction in quality**

Many of the proposals will reduce the quality of legal advice and representation provided to clients who find themselves in extreme situations (facing loss of liberty, life or their home) and who may be vulnerable (suffering from physical or mental health difficulties or due to young or old age). The Council of Her Majesty's (HM) Circuit Judges agrees. In relation to the proposals for tendering for criminal defence work, they comment:

*The prime concern of the Crown Court judiciary is the standard of preparation and representation. It is essential that these should be at a level which ensures a fair trial both for the defendant and the prosecution. In recent years, the judiciary has become increasingly concerned that in both respects, these standards are not being met. How this problem is to [be] solved is a difficult and complex issue but in our view the current proposals, whilst to an extent achieving a reduction in expenditure, will not assist in maintaining and increasing standards. Unless that happens, whilst there may be a reduction in the amount spent on Legal Aid for defendants, the cost in terms of court time and resources is likely to be greater and consequently, overall public expenditure is unlikely to reduce.*<sup>21</sup>

In our view it is essential for the swift administration of justice that advocates are skilled in cross-examining witnesses including vulnerable people such as children or victims of trafficking.

The Attorney General, Dominic Grieve, has previously commented on the principle of price competitive tendering and the impact on quality:

*I cannot see that competitive tendering in criminal legal aid makes sense – legal aid contracts do not pay market rates. If firms want to win a competitive tender, the only way they will be able to undercut each other is by steps that could open them up to potential allegations of incompetence... There are ideas creeping into the system that treat legal aid as if it is just about the economic provision of a service. That approach will lead to problems with lowered*

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<sup>20</sup> Lord Neuberger MR *Keynote address, the Law Society and Bar Council Opening of the Legal Year Ceremony* 30th September 2009 <http://www.judiciary.gov.uk/NR/rdonlyres/3FA82083-248C-4C5A-AB5F-62E30A0DBA4B/0/morspeechlawsoclegalaid300909.pdf> paragraph 18 pages 6-7

<sup>21</sup> <http://www.1itl.com/news/329/> para 41

standards.<sup>22</sup>

The Council of HM Circuit Judges has also raised concerns about further cuts to expert fees:

*We are also concerned about the impact on the quality and supply of experts... It is inevitable that a further and significant reduction in fees across the board will have a real impact on the quality and availability of current experts and a disincentive to entrants to this field. In complex cases where medical issues are central to fact finding and decision making, experts of the highest calibre are essential to avoid the risk of grave injustice. The risk more generally is of compromising the safe and efficient administration of justice and the quality of decision making in the best interests of children and their families.*<sup>23</sup>

### **(3) Impact on the sustainability of the profession**

The consultation contains no impact assessment of the changes on the future of the profession. As Lord Neuberger has said, the MoJ should be careful of driving good lawyers away from legal aid:

*It is a mistake to have a new legal aid regime with a costs structure which will drive out the best lawyers. Good lawyers save money, because they are less likely (i) to waste time in and out of court, (ii) to be responsible for miscarriages of justice, and (iii) to engender appeals and retrials.*<sup>24</sup>

It is disappointing to note that at no point does the consultation mention the training of junior lawyers, despite clearly placing the expectation of service delivery on this end of the profession.<sup>25</sup> Over the last few years the number of training contracts offered in legal aid work has dropped. With the small profit margins involved it is, in our view, unlikely that it will be feasible for firms to invest in training contracts or chambers to support new pupils, thus creating a lost generation of legal aid lawyers. Ultimately this will impact on the quality of service offered to clients. It is essential that there is a supply of committed legal aid lawyers willing to carry out crucial work for the most vulnerable people. Without a next generation of legal aid lawyers committed to carrying out this socially valuable work, the system cannot function.

Junior lawyers wanting to work in legal aid do not do so for the pay, and our primary concern with the cuts is this impact on our clients. However, where the proposals affect lawyers, it is those at the start of their careers who will be hardest hit, either by direct cuts to their fees e.g. the proposal to cut fees paid to junior civil barristers, or as an indirect consequence of the competitive tendering proposals and the reduction in fees for family and immigration work.

In our view, the proposals will also exacerbate the trend of “paralegalisation” in legal aid firms; whereby firms, in order to stay afloat, have to adopt business models which rely overly on low-paid, poorly supervised junior lawyers. Again the consequences of this are: (i) that the quality of legally aided advice and representation goes down; and (ii) that many trainee and junior lawyers, burdened with too much responsibility too soon, are forced into leaving the profession. Our members are already experiencing this.<sup>26</sup> These proposals will make a bad situation worse.

<sup>22</sup> [www.lawgazette.co.uk/news/tories-issue-warning-over-criminal-contract-tendering](http://www.lawgazette.co.uk/news/tories-issue-warning-over-criminal-contract-tendering)

<sup>23</sup> <http://www.1itl.com/news/329/> paras 120-1

<sup>24</sup> [www.supremecourt.gov.uk/docs/speech-130618.pdf](http://www.supremecourt.gov.uk/docs/speech-130618.pdf), Speech at Institute for Government 18 June 2013

<sup>25</sup> See consultation, Annex K, para 5.11.1 (equalities impact assessment acknowledging the proposals will disproportionately impact on the junior bar)

<sup>26</sup> <http://www.younglegalaidlawyers.org/sites/default/files/LETR%20general%20response%20-20Young%20Legal%20Aid%20Lawyers.pdf>

The proposals could also set back the clock on diversity in the legal profession. By creating an environment where only providers working at the lowest cost will survive, the junior lawyers carrying out that work for low salaries will only balance training debts if they are funded by other means. Lawyers from low income backgrounds do not stand a chance of entering the field. The numbers of females and those from black and minority ethnic backgrounds are highest in the junior end of the bar, and it is those lawyers who will feel the weight of the proposals.<sup>27</sup>

#### **(4) Undermine the rule of law**

Many of the proposals will undermine the rule of law; a principle which the Prime Minister has previously claimed to be committed to:

*There's a long list of things we might include in any description of our national character, or "Britishness." But I don't think we need engage in some protracted exercise to define our shared values. We can do it in a single phrase. Freedom under the rule of law. This simple, yet profound expression explains almost everything you need to know about our country, our institutions, our history, our culture – even our economy. It is why British citizens are free men and women, able to do what they like unless it harms others or is explicitly forbidden. And why no-one and nothing is above the law. These shared values, enshrined in our constitution and institutions over centuries, are the foundation of our civilised society. They are democratic, progressive and protect our human rights.<sup>28</sup>*

The MoJ proposes to introduce a residence test so that only people who are lawfully in the UK and who can show that they have been lawfully residing in the UK for a continuous period of 12 months can obtain legal aid. This will exclude, for example, homeless asylum seekers who have had their claims refused but cannot leave the UK for medical reasons, refugees who has been living in the UK for a number of years but whose leave to remain was granted less than 12 months ago and many victims of trafficking. Whilst these people will be subject to the law of England and Wales they will be unable to seek the protection also provided to them by the same law. The CSAN (the domestic social action arm of the Catholic Church of England and Wales) expressed concern in their consultation response that there are no exemptions for:

*[V]ictims of human trafficking, or for people who have entered the UK as the partner of somebody settled here, then experienced domestic violence at their hands. Legal aid for both of these groups is explicitly protected under current legislation but would be removed in a large number of cases under the proposed residency requirements. As the majority of victims are female, this risks seriously damaging the government's positive domestic and global agenda on curbing violence against women and girls.*

The MoJ also proposes to remove funding for the first stage of a judicial review claim (unless the claim progresses to the permission stage and permission is granted). Public lawyers have expressed concern that this will stop them from acting for clients in judicial review work because no firm will be able take the financial risk involved. This will inhibit judicial scrutiny of government and local authority decision-making. Statistics used by the MoJ to justify this proposal have been condemned as misleading by the Public Law Project<sup>29</sup>. Specialist counsel who act on behalf of the state raised their concern in a letter of 4 June to the Attorney General:

<sup>27</sup> Consultation, Annex K para 5.11.1

<sup>28</sup> Speech to the Foreign Policy Centre, 24 August 2008 <http://fpc.org.uk/fsblob/560.pdf>

<sup>29</sup> [http://www.publiclawproject.org.uk/documents/PLP\\_legal\\_aid\\_consultation\\_response\\_4\\_June\\_2013.pdf](http://www.publiclawproject.org.uk/documents/PLP_legal_aid_consultation_response_4_June_2013.pdf)

*Judicial review is important, not because such individuals have more rights, but because they have fewer. To deny legal aid altogether to such persons, so that even the minimal rights provided to them by the law cannot be enforced, is in our view unconscionable.<sup>30</sup>*

The MoJ proposes to remove funding for “borderline” cases. In these cases the subject matter of the case – be it the loss of the client’s home or their removal from the country – is of significant importance to the client. These are claims, where, if funding is not provided, irrevocable damage may be caused to an individual’s life.

The Council of HM Circuit Judges add their concern that:

*...access to justice will be denied to individuals who may well have a completely valid claim. It is impossible to say that their prospects are poor. They are, in effect, having regard to the definition of “borderline”, cases which need to come to court for a judicial determination on the merits... Removal of legal aid for all borderline cases will result in a denial of access to justice for a number of disadvantaged groups.*

Without a properly funded stable and sustainable legal aid system the principle of the rule of law cannot be given proper effect. While we recognise the financial context within which the Government makes these proposals, it is no more acceptable to dispense with access to justice in the name of austerity than it would be to say that we can no longer afford democracy.

## **(5) Credibility of the legal aid system**

The Secretary of State for Justice has repeatedly argued that the legal aid system has lost credibility with the public. NO evidence has been produced in support of this claim. In contrast an independent poll conducted by ComRes found that more than two-thirds (68%) of those questioned agreed with the proposition that at less than 0.5% of annual government spending, "legal aid is a worthwhile investment in our basic freedoms".<sup>31</sup> We believe that the MoJ should listen to the public on this issue and act to protect, not undermine, a good quality legal aid system that is the envy of the world.

## **MORE INFORMATION**

To access some of the 16,000 consultation responses please visit the websites of Crimeline<sup>32</sup> and illegal.org.uk<sup>33</sup>. For further information or queries please contact us:

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[www.younglegalaidlawyers.org](http://www.younglegalaidlawyers.org)

Twitter: @YLALawyers

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<sup>30</sup> <http://legalaidchanges.wordpress.com/>

<sup>31</sup> ComRes, Headline Findings from the bar council poll, May 2013, p.3

[www.barcouncil.org.uk/media/210826/headline\\_findings\\_-\\_comres\\_poll\\_-\\_may\\_2013.pdf](http://www.barcouncil.org.uk/media/210826/headline_findings_-_comres_poll_-_may_2013.pdf)

<sup>32</sup> <http://www.crimeline.info/news/pct-consultation-responses>

<sup>33</sup> <http://www.illegal.org.uk/thread/7795/transforming-legal-aid-consultation-responses>