Response of Young Legal Aid Lawyers to
"Transforming legal aid: delivering a more credible and efficient system" CP14/2013

Introduction

1. This is the response of Young Legal Aid Lawyers (YLAL) to the Ministry of Justice consultation paper "Transforming legal aid: delivering a more credible and efficient system" (the consultation).

2. YLAL is a group of lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL 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 protect the interests of the vulnerable in society and uphold the rule of law.

3. The consultation poses a number of questions. We have responded to these below. However, at the outset we wish to raise a number of general concerns about the impact and political motivation behind the proposals. All references are to the consultation unless otherwise stated.

The political context of the consultation

4. This consultation was published a little over a week after the sweeping cuts and changes to legal aid contained within the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force. In the foreword to the consultation, Justice Secretary Chris Grayling evinces an intention to put an end to legal aid lawyers "racking up large fees", clamp down on "frivolous claims", and to generally restore the credibility of the system in the eyes of the public.

5. Against this backdrop, firstly, we strongly object to the timing of the consultation. The cuts contained within LASPO constitute some of the most radical changes to the legal aid scheme since its inception in 1948. It is wholly inappropriate to propose further systemic change one week after these cuts came into force. Until the new changes have had time to bed-in it is simply not possible to accurately gauge the money which these latest proposals will save or the impact which they will have on access to justice for those who cannot afford to pay.

6. Secondly, we reject the notion that these proposals are designed to clamp down on "fat cat lawyers". Ultimately these proposals will harm the vulnerable clients who we work with on a daily basis more than anyone else. Where the proposals do directly address the level of remuneration for lawyers, it is more likely that the effect will be felt most keenly by low-earning junior lawyers at the beginning of their careers, either by

direct cuts to their fees (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 in the paper, will 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. 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. These proposals will make a bad situation worse. As YLAL has maintained in responses to previous consultations on legal aid, 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.

7. Thirdly, we do not accept the Government's assertion that legal aid is being used to subsidise frivolous cases at the expense of the taxpayer. Legal aid is subject to a strict merits test meaning that it is not available to fund frivolous cases. The Government has produced no evidence to support its assertion. Any attempt to curb citizens' access to justice should only be based on a sound body of evidence. Such evidence is distinctly lacking from the consultation.

8. In any event, cutting legal aid does not stop litigants bringing frivolous cases. It just means that they will bring them without lawyers. In fact, without the benefit of sensible, robust legal advice litigants in person are far more likely to bring bad cases, to the detriment of the administration of justice. This observation has recently been made in trenchant terms by the highly experienced former Lord Justice of Appeal, Sir Alan Ward in the case of *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234:

> *2. What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed. The first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. <u>We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid</u>.* (Emphasis added)

We endorse these sentiments unequivocally.

9. Finally, we do not accept that the proposals contained within this consultation will promote the credibility of the legal aid system in the eyes of the public. Quite the

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

> *Our shared values as a nation are not the same thing as our national character and characteristics… 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.*[1]

10. The legal aid scheme is fundamental to the rule of law and for ensuring that justice is properly administered. Lord Clarke, former Master of the Rolls has said,

> *[T]he State should properly understand that properly funding the civil and family justice systems is as essential a part of a society committed to the rule of law and to open democratic ideals, as is properly funding the criminal justice system. It is essential in this way because the three systems are in fact no more than three facets of an indivisible whole and it is that whole that is or should be the living embodiment of our commitment to the rule of law*[2]

11. 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. With this in mind we highlight the words of Lord Neuberger, now President of the Supreme Court of the UK, in his keynote address to the Law Society and Bar Council 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. It must play a part in any future reform. 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?*[3]

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[1] Speech to the Foreign Policy Centre, 24 August 2008 http://fpc.org.uk/fsblob/560.pdf
[2] Lord Clarke of Stone-cum-Ebony, "*Hope springs eternal: The Mary Ward Legal Advice Centre Annual Lecture*", 15 July 2009, paragraph 19
[3] 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

12. Against this backdrop it is self-evident that any proposals which undermine the rule of law – as these do – can only undermine the credibility of the legal aid system. Take the example of the proposed residence test. Under this proposal, groundbreaking cases which involved holding the State to account for the unlawful acts of the armed forces while abroad, such as *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26 (involving the death of Baha Mousa the Iraqi hotel receptionist, beaten to death while in British custody) could not have been brought.

13. Alternatively, another case which puts these reforms into context is that of *Somerset v Stewart* 98 ER 499. This landmark case of 1772 is a central part of British constitutional history. James Somerset was a black slave detained in the UK on a ship bound for Virginia. On an application for Habeas Corpus. Lord Mansfield held:

> *The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.*

14. The case was a milestone on the road to the abolition of slavery. Yet under the current proposals, James Somerset would fail the residence test and not be eligible for legal aid. If the Government thinks that changes such as this will do anything other than damage the credibility of legal aid and the wider justice system in the eyes of the public, then they are gravely mistaken.

15. For these reasons and for the reasons set out in our responses to the specific questions, below, we oppose these changes.

16. Should the Government elect to proceed with these changes regardless, we would take the view that they should be implemented by primary legislation to allow for an appropriate level of scrutiny, in view of the constitutional significance of the reforms.

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.

17. We do not agree with this proposal. In addition to the points made below we endorse and support the responses of the Howard League for Penal Reform and the Association of Prison Lawyers.

Impact on Prisoners:

18. First, it is our view that the effect of this proposal will be to undermine the rehabilitation of prisoners meaning that many will stay in the prison system longer than is necessary, at increased cost to the tax payer.

19. Under the proposal it will no longer be possible to carry out the legal work necessary to assist vulnerable and child prisoners in rehabilitating and reducing their risk of reoffending. For example, resettlement work which typically might entail obtaining safe accommodation under the Children Act 1989 for a young person to be released to. On a technical level, a challenge by way of judicial review could still be brought were a Local Authority to fail to provide such accommodation, but the present system of legal help at a fixed fee of £220 allows solicitors to undertake this work without having to rush to court at far greater expense. If judicial review is the only effective remedy – and that will be the effect of the proposal in many instances – this will inevitably result in further costs to the taxpayer and will cancel out any savings purported to be made by the proposal. In any event if this resettlement work were to be removed from the ambit of the legal aid work which specialist prison law practitioners can undertake, then these issues will go unnoticed. And the stark reality is that if prisoners and young people do not have a safe place to live on release, they are far more likely to reoffend.

20. By the same token, legal aid to provide assistance and representation at Parole Board hearings will still be available but the vital work which is needed to make them meaningful will no longer be possible. For example, where an individual has wrongly been refused access to an offending behaviour course which is a necessary precursor to parole. Without legal aid to remedy this, at minimal cost, the individual would have a minimal chance of gaining parole. This has an obvious human and economic cost as prisoners will languish in the prison system longer than is necessary.

21. Second, we are concerned about the impact this proposal will have on very vulnerable prisoners such as those with learning difficulties or mental health issues and detained children and young persons. These groups are particularly vulnerable and are in most need of independent representation and legal advice. The consultation suggests that the National Offender Management Service (NOMS) can ensure that vulnerable individuals can access prison complaints systems etc. We do not accept this. NOMS is not a sufficient safeguard because: (i) it is not responsible for all young people in custody (e.g. children in secure children's homes); (ii) by definition legal work is only justified where something has gone or is going wrong and no system is perfect for example, the individual's legal issue may be with NOMS itself; (iii) case law recognises the inherent power imbalance between a detained person and the authorities, giving rise to the constitutional right to legal assistance for such persons (see for instance, *McGowan (Procurator Fiscal, Edinburgh) v B* [2011] 1 WLR 3121, at paragraph 68).

22. Third, we have concerns about the efficacy of the proposal. It is a well-worn aphorism that justice should not stop at the prison gates. Yet this is precisely the effect of the proposal. The experience of our members is that the internal mechanisms for dealing with complaints and grievances within the prison system lack the independence,

efficiency and ability to provide a safe alternative to independent legal advice. We are concerned that the Government is content to rely on these internal mechanisms as an alternative means to access justice, without any evidence as to their efficacy. The current "sufficient benefit" test for granting legal aid in these cases requires providers to be satisfied that the internal complaints mechanisms would not be an adequate alternative. In these cases – by the very nature of the test for granting public funding – the prisoner would have no adequate remedy without legal aid. The situations in which legal aid is granted in these cases are frequently those where the internal system has failed, for example where the probation officer or another internal prison service has failed to accord that prisoner the rights to which he or she is entitled. In these circumstances it is not appropriate or realistic to expect the internal prison system mechanisms to provide adequate, impartial redress.

23. Fourth, we are unconvinced that the proposal will achieve any significant savings. There is no financial case for reliance on the complaints system as a complaint to the Prisons and Probation Ombudsman (PPO) costs on average £1,000 compared to the fixed fee of £220 payable for a legally aided case funded under the legal help regime (PPO annual report for 2012/12).

Impact on the supply and quality of services:

24. The reduction in scope for prison law work is going to reduce both the quality and supply of legal services. Providers who specialize in prison law without doing general crime will no longer be eligible to do prison law work in their own right because they will not be eligible to compete for a contract. On the other hand if a specialist firm were to be subsumed by a larger criminal firm who were then awarded a contract, the proposed fee cut of 17.5% would mean that it would still not be viable for the specialist practice to continue.

25. The result is that this niche, complex area of law will have to be undertaken by non-specialists who potentially have no experience in the area at all. Any firm awarded one of the new contracts – and potentially this will include organizations such as the Eddie Stobart haulage company – will be required to provide the remaining prison law legal aid services irrespective of their lack of expertise in this area. Where work is undertaken by non-specialists, cases take longer and mistakes happen. This is a false economy.

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.

26. YLAL is completely opposed to the introduction of means testing in the Crown Court at any level.

Principle:

27. It is a fundamental principle of our criminal justice system that individuals are innocent until proven guilty. The entire system is structured around this proposition, with the burden lying strongly with the state to prove guilt, rather than the other way around. Forcing individuals to pay for their own defence entirely undermines this principle. Requiring someone to expend potentially all their personal finances on their defence is to imply that they are in some way at fault for being an accused. This goes entirely against the principles underpinning the justice system.

Reimbursement of legal fees:

28. Being reimbursed at legal aid rates after paying privately does not amount to reimbursement at all, as private rates are invariably significantly higher than legal aid rates (on account of the exceptionally low level at which legal aid rates are set). As such, this proposal will mean that all innocent people who are above the threshold will be out of pocket. They will be financially penalized by the state, for being wrongly accused of a crime by the state. This is inimical to the principles of our criminal justice system, as laid out above.

29. If there is to be a means test, then acquitted individuals must be repaid the full cost of what they have spent on their defence.

Single threshold:

30. If there is to be a threshold, it is illogical for there to be a single threshold for every potential crime, unless that threshold is set high enough to cover the likely costs of the longest and most complex trials. The effect of a single threshold for all crimes is that in the longest and most complex trials – which are often for the most serious offences – those who are not eligible for legal aid will be less likely to be able to afford legal representation as time goes on, in contrast to someone charged with a shorter, more straightforward matter. Hence, paradoxically, individuals charged with the most serious, complex offences will be the most likely to be unrepresented.

Litigants in person:

31. The practical effect of these proposals is that large numbers of people facing criminal charges will go unrepresented, for the following reasons.

32. The way in which a defendant's ability to pay is currently assessed in both magistrates' and Crown courts, is flawed. It takes into account the person's total income, and outgoings such as housing costs and child maintenance. But all other outgoings are accounted for by a standardized annual living allowance of around £6,000 per annum (i.e. £500 per month) for each applicant. This is often far below what an applicant's outgoings actually are. An individual with a stay-at-home partner and several children will have significantly higher outgoings, and will therefore be penalized by the proposed system. Unless disposable income is measured as genuine disposable income, taking into account an individual's actual expenditure on food/heating etc, this way of measurement will always be crude and unrealistic.

33. Further, where legal aid rates are used to determine the average cost of a case, the person who does not pass the means test will be forced to pay at higher private rates. So, in the magistrates' courts, while the average cost of an entire legal aid case may be £500, that is the same as the rate for a one hearing guilty plea. Privately paid trial bills are usually around £2,000, and can be as much as £3,000. The financial eligibility threshold should be several times higher than it currently is.

34. In any event, regardless of the measurement mechanism, the level set is too low (dealing with question 3 specifically). Defending oneself privately in a contested murder trial in the Crown Court, in a case which might need expert evidence, will cost significantly (if not many times) more, than the proposed level of disposable income. Any system of means testing must, if it is to avoid the consequences below, consider the cost of the most expensive cases, rather than the seemingly arbitrary current level.

35. Even if income is properly measured, and the true cost of cases is taken into account, we do not regard it as appropriate that in defending him or herself from criminal charges, an individual should be deprived of all disposable income. The family of a defendant should not suffer because a parent or partner has been accused of committing a criminal offence.

36. For the reasons above, the consequences of setting this threshold is that the number of people representing themselves will increase, as the Crime Credibility Impact Assessment itself recognizes. The impacts of this are wide-ranging.

37. First, those who cannot afford to pay for lawyers will be denied the right to a fair trial. Where the potential consequences of this include the loss of one's liberty, this is completely unacceptable. The risk of miscarriages of justice is huge.

38. Second, finding an appropriate expert and instructing them appropriately is difficult enough for lawyers. Financial considerations aside, no defendant will be able to effectively instruct an expert. For cases which turn on expert evidence, for example psychiatric reports or forensic evidence, miscarriages of justice will be practically inevitable.

39. Third, criminal prosecutions affect people's lives on every level – family relationships, working life, finances and mental health. Representing oneself in a criminal trial will place enormous pressure on the individuals concerned and their families.

40. Fourth, equality of arms is vital to a properly functioning adversarial criminal justice system. Without lawyers to target the useful points and to address any pertinent legal issues at an early stage, trials will become incredibly protracted. The government is clearly concerned about the current length of trials, as is evident from the attempts to taper the fees for longer trials. To introduce litigants in person into the system, thus making trials vastly longer, runs counter to this aim.

41. Fifth, as an example of one of the many chaotic impracticalities which will be caused by people self-representing in the Crown court, there will be vast numbers of cases where it will be inappropriate for a defendant to cross-examine a witness themselves. The current practice in the magistrates' court is that a lawyer would have to be appointed for the cross-examination; for example in domestic cases where the defendant does not qualify for legal aid. The fee for this will often work out more than if the fixed legal aid fee had been paid, meaning any savings would be overridden.

42. The hardship fund does not provide an adequate response to any of the above points.

Costs:

43. The proposed saving from this proposal will be negligible. The anticipated saving is £3m, which does not take into account any of the following inevitable costs:

- An increased number of privately paying acquitted people claiming back their defence costs
- Costs in administering the means test
- Funding cases which are successfully granted money from the hardship fund
- Increased length of court time when individuals represent themselves, thereby increasing costs in the court system, as well as for the CPS

The saving will not be close to £3m once these factors are taken into account.

44. In any event it is our view that no saving can possibly offset the cost to society of the hugely increased risk of miscarriages of justice. To introduce a financial eligibility threshold for such a tiny saving is ill-conceived. The magistrates' court means testing system is flawed and leads to many defendants representing themselves because they genuinely cannot afford to pay a lawyer at private rates. Under no circumstances should it be extended to the Crown Court, where defendants face even more serious charges and longer sentences.

45. Contributions are collected under the current system. That system, if modified, has the potential to work more fairly than the current proposals. However, currently 90% of an applicant's disposable income is taken as a contribution. This is draconian, and would need to be assessed downward by a significant amount. It should be remembered that defendants are innocent until proven guilty, and it is not fair to deprive them of so much of their income in the months before their cases conclude. Further, contributions are taken to a point that it is five or six times the average cost of the case in relation to the offence with which the defendant is charged. This is excessive and should also be reduced.

46. We believe that other means of funding Crown Court cases should be explored for example using seized assets.

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

47. No. Please see answer to Q2.

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

48. We do not agree with this proposal. As well as the points made below we agree with and endorse the objections raised by the Immigration Law Practitioners Association (ILPA)[4].

The proposal will undermine the rule of law:

49. First and foremost, this proposal will undermine the rule of law. The proposal is predicated on the ideology that "limited public funds should be targeted at those who have a strong connection to the UK". We do not accept this. The laws in this country apply to everyone irrespective of their immigration status and those subject to those laws should be able to have access to the courts to enforce or defend their rights. It is regressive to think otherwise. That is what equality before the law requires. As Lord Scarman put it in *ex p Khawaja* [1984] A.C. 74, 111:

> *[h]e who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed "the black" in Sommersett's Case.*

[4] http://www.ilpa.org.uk/data/resources/17792/13.04.29-Transforming-Legal-aid-ILPA-intial-response-public.pdf

50. The UK is signatory to a number of international conventions to protect fundamental human rights such as the European Convention on Human Rights, the Convention on the Rights of the Child, the Convention to Eliminate All Forms of Discrimination Against Women and the Convention Against Torture, to name a few. These conventions are all based on the concept of universality; the idea that the State must guarantee the fundamental rights of everyone within its jurisdiction, and not just those who are popular. The proposed residence tests is contrary to this principle, since it will have the practical effect of denying access to justice to many migrants and some British nationals.

51. The proposal will also undermine the rule of law by making it increasingly difficult to hold the State to account for unlawful actions. For example, the following important cases would not have attracted public funding if the residence test had been in place:

    a. The Jean Charles de Menezes inquest, brought by his Brazilian family;
    b. The inquest investigating the death of Jimmy Mubenga, the Angolan man who died while being restrained by G4S security guards on the flight intended to deport him from the UK;
    c. Binyam Mohamed's judicial review claims against the State involving the UK Government's complicity in torture abroad;
    d. Judicial review claims brought by Iraqi citizens, who were mis-treated by UK armed forces whilst in their custody (i.e. the Baha Mousa case);
    e. Unlawful detention and habeas corpus claims brought by migrants detained by the State.

52. In addition there will be numerous cases where individuals are denied access to justice by virtue of the second limb of the residence test, whereby individuals must be lawfully resident in the UK for 12 months before they can be eligible for legal aid. For example, in employment law a discrimination claim must be brought within 3 months minus 1 day from the date of the act or acts of discrimination complained about; in other civil cases a claim for discrimination must be brought within 6 months minus 1 day of the act or acts of discrimination; judicial review must be brought promptly and in any event within 3 months of the act or omission under challenge; a claim under the Human Rights Act 1998 must be brought within one year of the alleged breach of the claimant's human rights. In these cases there is a serious risk that the limitation period will have expired before individuals become eligible for legal aid. These individuals will be denied the protection of the law.

The proposal will impact on the most vulnerable:

53. Migrants living in the UK, either without status or newly arrived, and surviving on a low income are often the most vulnerable and most likely to be targeted by unscrupulous landlords or criminals aiming to force these people into prostitution or other criminal activities. They often do not have the means or the voice to challenge or escape this exploitation. They remain hidden and unheard until their situation becomes so extreme or they have nowhere else to turn that they come to the attention of the authorities. It is often in those extreme circumstances such as children being taken into care by local authorities, or families being thrown out onto the streets by landlords looking to save on court costs, that people are (currently) able to access lawyers. Taking legal aid away from this very vulnerable group of people will have the effect of compounding their extreme circumstances and causing knock-on costs either for local authority social services or the NHS.

54. The proposal will have a significant detrimental effect on many vulnerable groups such as:

    a. British national children less than a year old (who may be the subject of care proceedings or have a potential claim for clinical negligence);
    b. Victims of trafficking;
    c. Detained foreign nationals (who often suffer from mental health problems, or are victims of torture);
    d. Homeless migrant children who are owed duties by social services under the Children Act 1989;
    e. Parents whose children have been abducted;
    f. Victims of domestic violence;
    g. Disabled migrants who are owed community care duties by social services, including in some cases accommodation under the National Assistance Act 1948;
    h. Foreign national parents whose children are the subject of care proceedings by local authorities;
    i. Homeless refugees whose housing and financial support has come to an end following a grant of asylum.

55. For the avoidance of doubt, we object to the residence test in principle. We regard any measure which prevents or hinders access to justice on the basis of immigration status as discriminatory and inimical to the rule of law. On this basis we would still object to a "watered-down" residence test with exceptions included for these vulnerable groups. This notwithstanding we feel it is important to point out the impact which the current proposal will have on these groups.

The proposal is unworkable:

56. Determining what constitutes "lawful residence" is far from straightforward. It is not realistic to expect practitioners to determine what constitutes "lawful residence" under the new scheme with any ease, especially if they are not familiar with immigration work. Our members who work in immigration law are frequently contacted by clients and practitioners working in other areas of the law to ask about the particular meaning of residence documents. Government departments also often fail to recognise the validity of documentation provided to them.

57. This proposal also fails to take adequate account of the many people who may not have easy or immediate access to documentation of their immigration status. For example:

    - How will historic questions of lawful residence be determined by non-immigration practitioners, for example, where someone claims that they were lawfully present here in the 1960's?
    - How will practitioners determine whether lawful residence has been granted by operation of law, for example, under section 3C of the Immigration Act 1971 or as a result of the *Zambrano* litigation? These residence rights vest automatically and are not based on documentary evidence.
    - How will an EEA national exercising treaty rights and not obliged to obtain proof of residence in the UK prove their 12 months' continuous lawful residence? What if they have had combinations of periods in work and as a jobseeker?

58. The evidence required to satisfy these requirements could be fiendish to negotiate. In these circumstances, providers may be reluctant to take on cases if they are unsure whether the documentation will meet the requirements of the residence test. This will disproportionately impact on non-British and Black, Asian and Minority Ethnic (BAME) individuals.

The exceptions to the proposal are arbitrary:

59. An exception to the residence test has been made specifically for serving members of Her Majesty's UK armed forces. We can see no adequate justification for why this exception would not apply to other British nationals working abroad, e.g. charity workers. Equally, we can see no justification why members of the armed forces serving abroad should be eligible for legal aid, while victims of unlawful acts perpetrated by members of the armed forces abroad should not be.

60. In addition, there is an exception for asylum seekers who may be eligible for legal aid to cover their asylum claim and for other legal issues while their claim is processed. However, once an individual is granted asylum, they will no longer be eligible for legal aid to deal with any new issues that may arise within the subsequent 12 months. Our view is that this is an arbitrary rule; it makes no sense that an individual who is seeking asylum is deemed to have a sufficient connection with the UK to be awarded legal aid, yet if the same individual were then granted asylum they would be presumed not to have a sufficient connection. This outcome is capricious and unfair, particularly when one bears in mind that the nature of asylum means that an individual does not have a safe home country where he or she could return to try and resolve their legal problems. It also leaves asylum seekers without recourse to assistance from legal advisers at the point at which all of their support from the Home Office is coming to an end. This threatens the safety and wellbeing of asylum seekers who may be refused suitable accommodation for unlawful reasons.

The cost of the proposal:

61. The Government has been unable to quantify either the cost of implementing this proposal or the savings (if any) which this proposal will make. The Impact Assessments are silent on this, recording the costs and savings as N/Q (not qualified)[5]. In Parliament Jeremy Wright MP has confirmed that:

> *We do not currently collect data on the nationality or immigration status of civil legal aid recipients, so it is not possible to quantify how many people will be affected by this proposal or any associated cost savings.*[6]

62. However, the Government acknowledges that this proposal may lead to an increase in litigants in person; *"*Individuals who no longer receive civil legal aid may choose to address their disputes in different ways. They may represent themselves in court…*"*[7]). Despite this acknowledgement, the Government has not attempted to quantify the knock-on costs to the court system of an increase in litigants in person. In fact the Impact Assessment envisages a reduction in Her Majesty's Courts & Tribunals Service (HMCTS) expenditure[8].

[5] Civil Credibility Impact Assessment p2
[6] Jeremy Wright MP, in answer to question put by Sadiq Khan MP, Hansard (HC Deb, 25 April 2013, c1304W)
[7] Civil Credibility Impact Assessment, p9 paragraph 24
[8] Ibid. p9 paragraph 28

63. Similarly the Government acknowledges that the Legal Aid Agency (LAA) "could face an increase in costs due to auditing providers' assessments of eligibility"[9].

64. It is our view that the minimal level of analysis behind this proposal is wholly inadequate. To put forward proposals which will fundamentally change the nature of the legal aid system and hinder the ability of significant sections of the population to access justice, without making any attempt to quantify the cost or savings that those proposals will entail make, is unacceptable. This suggests that these changes are politically rather than economically motivated. We have outlined our objections of principle above. To these we would add the following financial concerns.

65. First, the residence test will lead to an increase in litigants in person, who will have no choice but to represent themselves. We endorse the comments of the Council of Circuit Judges made on the last occasion that such a proposal was mooted under the previous Labour administration in 2009:

> *…the absence of legal aid to non residents, particularly if they need the assistance of interpreters and if they have to cope with interlocutory hearings from another country, is likely to cause considerable difficulties to a court trying to manage a case efficiently. We consider that, in the interests of efficient use of court time alone, the proposal is misguided.*[10]

66. Second, the proposal will place a greater financial burden on providers who have to obtain the necessary documentation and undertake the necessary research to establish whether the residence test is satisfied.

67. Third, the proposal will generate increased costs for the LAA who must audit the application of the residence test.

68. Fourth, if the test itself is complex and difficult to administer (see above) then this will inevitably lead to costly and undesirable litigation between providers and the LAA, in relation to the requirements of the test.

69. Our view is that this is a discriminatory proposal, which will generate unnecessary bureaucracy and knock-on costs, yet may not save the taxpayer any money. In these circumstances we urge the Government to abandon the proposal.

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)?

70. We do not agree with this proposal. As well as the concerns set out below, we adopt the objections of the Public Law Project (PLP) set out in their draft public response to the consultation[11].

[9] Ibid. p2
[10] Legal Aid: Refocusing on Priority Cases, Response of the Council of Her Majesty's Circuit Judges, 05.10.09, para 33
[11] http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf

The rationale behind the proposal:

71. The proposal is based on the idea that "legal aid is being used to fund a significant number of weak cases which are found by the court to be unarguable"[12]. The consultation goes on to assert that in 2011-2012 61% of cases were refused permission and resulted in no benefit to the client. We do not accept this. The statistics on which the consultation relies simply do not support these assertions.

72. Based on the Government's 2011-12 statistics, 515 cases out of 4,074 legally aided cases did not settle and ended with permission being refused and no "substantive benefit to the client" recorded[13]. This means that just 13% of cases resulted in no substantive benefit to the client; that is in fact a success rate of 87%. We consider this to be a reasonable proportion. In any event judicial review provides a wider function in ensuring fair, rational and lawful public administration and the 13% of unsuccessful cases may well have resulted in a benefit to the public body in question, in terms of improving its decision making.

73. It should be remembered that legal aid for judicial review is subject to a rigorous merits test. Funding is not available for those cases where the prospects of success are poor, i.e. clearly less than 50%. This is in our view a sufficient safeguard to weed out frivolous cases.

74. In any event, restricting legal aid for judicial review claims will not have the effect of reducing frivolous cases. Quite the opposite. Individuals in desperate situations are far more likely to issue claims with poor prospects of success if they do not have access to robust and independent legal advice. This will only serve to clog up the Administrative Court with litigants in person, increasing the burden on the judiciary and on the court system at a significant cost.

Impact on the ability of the citizen to seek judicial review:

75. The practical effect of this proposal is that it will not be financially viable for providers to carry out judicial review work. The result is that the citizen will lose the ability to hold the State to account.

76. It is self evident that providers will be deterred from taking on judicial review cases due to the financial risk. Under the proposal, in virtually every case firms will risk making a loss. Even where firms only take on cases with very strong merits, e.g. 80% there is a statistically significant risk that permission will be refused and the firm will make a loss. The proposal will create a conflict of interest between the lay client and their lawyers as to issuing the claim. This will create professional conduct issues for the Claimant's lawyers as they will often be in the position where the claim ought to be issued but will be forced to consider the financial consequences for them rather than the primary consideration of the interests of the client.

77. Practically, in the vast majority of cases it will not be possible to quantify the merits so precisely in any event. This is particularly so in very urgent cases where the solicitor will be working on very limited instructions and with minimal, if any, disclosure from the Defendant – for example a judicial review of a Local Authority's decision to provide accommodation for a homeless family, where the family have been refused

[12] The consultation, paragraph 3.61
[13] Ibid.paragraphs 3.65-3.68

accommodation and then sought legal advice that same day. In such cases, there will be a strong financial incentive for the solicitor to refuse to take on the case. Solicitors will be placed in an intractable conflict of interest, whereby they must balance their overriding duty to protect the best interests of that client against the financial risk that they incur which jeopardizes their long term ability to help future clients.

78. At the same time, there will be no way for firms to subsidize or offset this risk since successful cases will not attract any uplift or success fee to compensate for the losses in unsuccessful cases. While it is true that Claimants may be able to recover *inter partes* costs in successful cases, these are currently needed in order to subsidize the relatively low rate of remuneration in legally aided cases. This has been recognized by the Supreme Court:

> *It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work.*[14]

By extension, firms cannot be expected to use occasional *inter partes* costs orders to offset the financial risk that a significant proportion of their work on judicial review claims will have to be done for free. This is simply not sustainable.

79. In respect of cases which settle before the permission hearing the consultation paper relies, at paragraph 3.75, on the fact that Claimants may be able to recover *inter partes* costs either by agreement or by order of the Court. The point has already been made that the recovery of such costs is not sufficient to offset the financial risk of bringing judicial reviews. But in addition, the recovery of *inter partes* costs where cases settle is by no means guaranteed. The case of *Naureen v Salford* [2012] EWCA Civ 1795 provides a recent example of a case where, despite a settlement which was favourable to the Claimant, the Court held that was no basis to make an order for costs "since the underlying dispute between the parties never came to trial". Equally, the Defendant may insist there be no order as to costs as a condition for settling the claim. We are concerned that the consultation appears to show a fundamental misunderstanding by the Government of how litigation, particularly public law litigation works in practice. In cases where the public body withdraws its negative decision and insists on there being no order for costs the issue of costs would then usually be dealt with on written submissions. Or where the public body offers to settle with substantial benefit for the client but with no order for costs solicitors will be faced with a potential conflict of interest between the client's own best interests in accepting the settlement and the firm's interest in being paid for their work. Allied to these points is the fact that any satellite litigation in relation to costs will place and increased burden on the court service.

80. At paragraphs 3.70 and 3.73 of the consultation analogy is made with the immigration and asylum Upper Tribunal appeals where costs are not paid if permission is refused. This is not a valid comparison for a number of reasons. First, applying for permission for judicial review is likely to be the Claimant's first engagement with the justice system. Appellants at the immigration and asylum Upper Tribunal on the other hand

[14] *Re Appeals by Governing Body of JFS* [2009] 1 W.L.R. 2353 per Lord Hope

are pursuing appeals from the First Tier Tribunal where work is funded. Consequently they have already had an opportunity to seek redress. Second, an uplift is currently payable in successful cases to subsidize the risk (albeit the consultation proposes to abolish this too).

81. The combined effect of these points is that it will not be viable for firms to undertake legally aided judicial review work. Claimants who would normally be eligible for legal aid will have no choice but to litigate in person if they wish to challenge the unlawful decision of a public body. Their presence in the High Court in person will take up more time than is currently the case and will place an ever greater strain on an overburdened court service. Further, without legal advice on the law and procedure and challenging a public body (who will certainly be represented by expensive lawyers) these Claimants are very unlikely to be successful. This will fundamentally undermine the ability of the citizen to hold the State to account for illegal acts. This is anathema to the rule of law. As Lord Dyson has said, "there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review"[15].

82. It also needs to be remembered that judicial review is frequently the only tool by which very vulnerable members of society, such as homeless children, trafficked migrants or those who are detained by the State unlawfully, can gain redress. This proposal will deny these individuals the protection of the law.

83. In the 2010 Green Paper that preceded LASPO, the Government acknowledged that judicial review should be ringfenced on the following basis:

> *In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*[16]

We agree with this sentiment, which holds as true in 2013 as it did in 2010. By means of the current proposals the Government is reneging on this commitment. And it is doing so by means of a proposal which will save only £1mn – a comparatively modest figure in the context of the budget as a whole – that is based on dubious statistics, and which will be implemented by way of secondary legislation thereby avoiding proper Parliamentary scrutiny. We urge the Government to abandon this ill-conceived proposal.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success?

84. We do not agree with this proposal. The current system in our view strikes the appropriate balance between the need to focus funding on cases with reasonable prospects of success, and the need to provide funding for cases where there is a significant amount at stake for the client. Funding is only granted when the prospects of success are assessed as borderline in the following cases:

    a. those with significant wider public interest or of overwhelming importance to the individual (Regulation 43 Civil Legal Aid (Merits) Regulations 2013);

[15] *R (on the application of Cart) v The Upper Tribunal* [2010] EWCA Civ 859 paragraph 122
[16] Proposals for the Reform of Legal Aid in England and Wales, CP12/10, November 2010 paragraph 4.16

b. investigative help for public law claims (Regulation 56);
c. for immigration cases, where the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of Convention rights (Regulation 60);
d. the case relates to possession of an individual's home (Regulation 61);
e. the case is a public law children case (Regulation 66);
f. the case is a family case where domestic violence is an issue (Regulation 67);
g. the case is a private law children case or involves breach of international treaties relating to children (Regulation 68);
h. in other family cases, the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of Convention rights (Regulation 69).

In these cases it is clear that 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. In our view it is appropriate that a slightly lower merits test should be applied to such cases, as distinct from cases where only money is at stake for example.

85. Removing funding from borderline cases where there is significant wider public interest is also likely to restrict the development of new and/or evolving areas of the law. Public funding should be available to further public interest cases where novel points of law are to be determined.

86. Further, because funding is so rarely granted in borderline cases, this proposal will not significantly reduce the cost of legal aid. The consultation paper suggests that there are only 100 such cases *per annum*, estimating that removing these cases from the scope of legal aid would save a maximum of £1m.

87. The proposal ignores the changing nature of litigation whereby a case may be classed as borderline at the beginning of funding but the merits become clearer through disclosure and the general progression of the case. In cases in which there are significant disputes of law, fact or expert evidence, it may be impossible to assess accurately the merits at the outset. For example, housing possession proceedings brought on grounds of anti-social behaviour could be said to be borderline if the client is awaiting the outcome of a related criminal case. It could be difficult to state that the prospects of success were under 50% (poor) or above 50% (moderate) for so long as the outcome of the criminal matter is pending. However, following an acquittal or a discontinuance of the criminal proceedings it may be that the merits of the civil case increase. It is appropriate that funding should remain available in such cases.

88. This is another proposal which we feel will increase the number of litigants in person in the court system. Individuals who fall into the categories outlined above – who have legal issues of overwhelming importance – will have no choice but to litigate in person if they cannot access publicly funded legal help. Ultimately this will cost more money than it saves.

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

89. No, YLAL is opposed to the introduction of price competition in any area of criminal legal aid. In the first instance, the economics behind the proposals do not make sense. The stated aim is to save money in the long term. Yet, as competition is reduced,

supply will decrease. This is the antithesis of competition. Price will inevitably go up.

90. Limiting the number of providers carries an inherent risk for the Government and the taxpayer, as it will increase the bargaining power of the providers when crime contracts are next retendered. The providers will be able to demand a higher minimum price at which they are prepared to carry out the work being tendered. This is what happened when the Legal Aid Board piloted price competitive tendering in the late 1990s.

91. That Government will not be able to rely on competition from new entrants to drive the price down. Those with the expertise to take on the existing providers will have closed their firms and left the market.

92. It is also disappointing to note that at no point does the consultation mention the training of junior lawyers. Over the last few years there has been concern with the low number of training contracts offered in criminal law. The consultation does nothing to address these concerns, and we wonder from where the Government expects the next generation of criminal lawyers to come from. With the small profit margins involved, and the lack of stability in the artificial market that would be created under the proposals, it is unknown if it would be feasible for firms to invest in training contracts.

93. The provision of criminal defence is an area of the justice system that still works well. To advocate a market that is limited and based upon price risks a breakdown in the intrinsic value and quality of the justice system. The (proposed) market will act in a fashion that is ultimately anti-competitive and will deter quality and future entrants into the profession.

94. The justice system in the UK needs to be sustainable in the long term. Once firms have been dissolved, there will be no option to turn the position around.

95. The structural change in the market place envisaged will lead in the longer term to inefficiency, a large increase in miscarriages of justice and irreparable damage to the qualities of the criminal justice system.

96. Defence lawyers are the main channel through which information about the defendant is put before the court. This is crucial to the smooth running of the criminal justice system. A properly challenged prosecution case gives a trial court more information on which to decide whether to acquit or convict. A better informed sentencing tribunal is much more likely to impose the appropriate sentence.

97. Price competition will destroy quality, and lead to wrong outcomes, as the quality of the information gathered by contract winners decreases, so that they can conduct cases for less money. No provider can sustain the current standard of work for less money.

98. Wrong outcomes will lead to the innocent being convicted, and the convicted receiving more onerous community sentences and going to prison for longer than is appropriate. Confidence in the criminal justice system will fall, and the potential savings of price competition will be mitigated by the cost of administering longer sentences.

99. Contract winners will spend less time on thoroughly testing the defences of their clients. This will lead to more cases going to trial, when the defendant should have been advised to plead guilty. This will cause greater expense and delay in the criminal justice system, further mitigating the potential savings of price competition, and will lead to heavier sentences as defendants lose credit for not pleading guilty at the earliest opportunity.

100. Both in the short-term and over time, a fall in the quality of the representative will further add to the fall in quality of representation. This is because a cut in fees will mean a huge reduction in salaries. A generation of practitioners will leave the profession, and their expertise will be lost forever. In the future, lower salaries will lead to a fall in the quality of lawyers choosing to practise criminal law.

101. The impact of this will be felt not only by defence practitioners and the bar, but also in terms of the quality of prosecution advocates, as many at the criminal bar may leave the profession. Quality of advocacy and specialism are of heightened importance in cases involving sexual offences and the cross-examination of vulnerable complainants. The standards required will not be reached in a price competitive system that is inherently anti-quality.

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 reasons.

102. No.

103. A 17.5% reduction in fees is completely unsustainable, and will drive the vast majority of firms out of business. Many criminal firms are already struggling to maintain financial viability. More widely, firms are operating on the breadline, with single digit profit margins. Fees from criminal defence work are already low. Hourly rates have not increased in over two decades and firms have been expected to absorb the cost of inflation. The introduction of fixed fees in magistrates' court case and the graduated fee scheme in crown court matters have further decreased firms' income.

104. The idea that firms could absorb a 17.5% reduction in fee income by increasing economies of scale is implausible.

105. Further cuts in fees will undoubtedly lead to mass redundancies. The impact on junior lawyers cannot be understated. Junior lawyers will face mass redundancies, at a time when unemployment among the young is already so high. Some will end up relying on unemployment benefit, which will cause higher cost to the taxpayer.

106. A survey of YLAL members in 2012 found that 65% of respondents have had or will have over £15,000 worth of debt as a result of their education, with 15.1% having over £35,000 worth of debt. Although not exclusively, this debt included student loans from graduate degrees, law school fees and the costs of living whilst studying. This is a very large burden to carry for any young professional. However, for legal aid lawyers, already subject to low incomes the proposal to further reduce fees paid to their firms is likely to lead to unsustainable lowering of salaries.

107. Further, the number of training contracts on offer is already decreasing. Firms cannot afford to train new staff. We fear that a 17.5% reduction in fees will kill off the remaining training contracts on offer.

108. Many within the junior criminal bar already survive on an income that is below minimum wage. The proposals will decimate the junior bar, leaving only those few who can support themselves with independent wealth. Social mobility at the junior bar will die a death.

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 reasons.

109. We do not accept the proposed model in principle. Therefore we do not wish to comment on the proposed length of contract within this question, but we note the following: volumes of crime work are falling. This is clear from the MoJ's own Volumes and Values Reports. It is unclear what would occur if providers with contracts were to find themselves unable to sustain either the work output, or indeed operate at such low fiscal returns.

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.

110. We do not agree with the proposed model in principle and so, have no further comment to make on this question.

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.

111. We do not agree with the proposed model in principle and so, have no further comment to make on this question.

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.

112. We do not agree with the proposed model in principle and so, have no further comment to make on this question.

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.

113. YLAL is opposed to the introduction of restrictions to the geographical areas in which providers may offer criminal defence services. These proposals are anti-competitive. It is the ability of providers to offer their services across the country that incentivises other providers to remain competitive, as they compete on quality and efficiency. A lack of outside competition, combined with a limited number of local competitors, will result in a much lower standard of work.

114. Criminal charges engage fundamental rights. They carry the prospect of long prison sentences. Criminal defence lawyers must be allowed to offer their expertise wherever it is required and to whomever requests it. The proposals will prevent that from happening.

115. Within criminal law, there are many different specialisms such as protest law or white collar crime. It is particularly important that niche specialisms such as this are able to offer their services wherever they are required.

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

116. YLAL does not agree with a proposal to limit the number of contracts in each procurement area.

117. In the longer term, we believe these cuts are a false economy. Concentrating greater market share in the hands of fewer providers will give contract winners a much stronger bargaining position when the Government seeks to retender criminal legal aid contracts. The proposals will create oligopolies within each procurement area. This will mitigate any savings of price competition realised in the first round of tendering.

118. It is unclear why the Public Defender Service is not being subjected to similar competition in a procurement area, as this goes against the very ethos of open competition.

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.

119. We oppose the competition model in principle.

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.

120. We do not agree with this proposal. It is artificial and anti-competitive to insist on each provider having an equal share of the market.

121. The proposals do not represent a good idea for any existing provider. The big firms would need to scale down their businesses, as their market share under the proposed contract would be smaller than that which they currently have. Smaller firms would need to scale up. However, in the current climate, no firm will receive the financial/bank loan that would be needed in order to scale up.

122. Only an outside corporate provider could potentially work with the current proposal. We are extremely concerned about how the junior end of the profession will fare if the criminal legal aid market is handed over to a corporate provider. We fear that training contracts will disappear.

123. Junior lawyers work long hours, and are often poorly paid. Under a corporate provider seeking to affect a cut of at least 17.5% from current rates, it is likely that junior lawyers will be faced with having to work even longer hours and for less money.

124. The proposals leave no room for the expertise provided by niche practices, such as those specialising in protest cases. They would also spell the end for BAME firms, destroying relationships built up over decades with citizens in their areas.

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?

125. YLAL is strongly against the adoption of a model where an individual has no choice in the representative that is allocated to them. This goes against the very essence of a free market approach and the rule of law.

126. An important aspect of criminal law is "own client choice"; namely the consumer having a right to choose the legal representative of their choice. The cost price for this selection remains the same, regardless of which firm. But the principle is of profound importance. A large number of individuals caught up in the criminal justice system are highly vulnerable, suffering from drug addiction issues, or having a background of mental health. What own client choice enables and ensures is that there is consistency and continuity of representation.

127. Any member of the judiciary, from the magistrates' court up to the Court of Appeal, can identify the need for clients to have consistent representation and how this assists expediency of court proceedings. Otherwise, for example, a vulnerable client with paranoid schizophrenia may well have two different firms representing him at the same time, if the offences are in different areas, and neither firm may have knowledge of his mental health background and may seek two separate psychiatric reports. The current system works and safeguards against such duplication of work and, ultimately, saves money.

128. Client choice is also one of the best safeguards of quality. A client who has received poor representation will not return to that firm. Without this safeguard the quality of defence work will decrease.

129. An area such as protest law within criminal defence work is mainly carried out by niche firms. The experience built up by such firms over a number of years is hard to quantify and by limiting work to a duty rota with geographical boundaries, such firms would no longer be able to exist. Consequently, that expertise and those specialist skills will be lost. The impact of this is not merely on defence firms, but also on the quality of representation and efficacy of correspondence with the prosecution. The prosecution of offences is hindered by inefficient or low quality service by defence representatives.

130. There are a number of black and ethnic minority firms that have been at the forefront of improving community relations and representation of minority groups in their local communities. Savings are already built into the current market based system, as those firms are able to offer specialist services to their communities and save funds when it comes to matters such as interpretation costs. These savings will be lost if clients lose the ability to choose these providers.

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

131. We do not agree with the proposed competition model.

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 Legal Aid Agency or the Court),

the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

132. We do not agree with the proposed competition model.

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.

133. We do not object to this; the proposal is not a new one. The "exceptional circumstances" proposed mirror the existing provisions that apply within regulation 16(A) of the Criminal Defence Service (General) (No 2) Regulations 2001.

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

134. Please see answer to Q22 below.

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.

135. YLAL remains of the view that tendering is not an appropriate, efficient or easy model to attempt to implement in the criminal justice system. There are far too many variables, which mean that the costs of proceedings cannot be reduced to a single figure per case, desirable though it may be for financial and administrative reasons.

136. YLAL would seek consideration that competitive tendering proposals be withdrawn and a process of interaction with all agencies in the criminal justice system be looked at to ensure sustainable savings can be made in a fashion which will not erode the quality or the principles that underpin our criminal justice system.

137. The fee structure advocated is designed to encourage guilty pleas, and would undermine the justice system. Within this there is an implication that lawyers seek to prolong cases, as this will make the lawyer more money. We reject this implication. To allow any such consideration to influence advice given would run contrary to a lawyer's professional obligations to act in the client's best interests and to uphold the administration of justice.

138. If the Government believes that lawyers are prolonging cases for their own financial interest – and no evidence has been provided to substantiate this – this is a matter of professional discipline. As such, it is most appropriately dealt with by way of reporting to the relevant regulatory body, and not by sweeping proposals to reduce fees for all lawyers.

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.

139. Please see answer to Q25 below.

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.

140. Please see answer to Q25 below.

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?

141. No. Sustainability and quality cannot be adhered to if fees are capped to such an extent that a business, let alone an effective, and trusted criminal justice system, would simply not exist. In our view, the model if introduced would result in a total collapse of the market and justice system.

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to: 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; reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and taper rates so that a decreased fee would be payable for every additional day of trial?

142. We welcome any efforts by the Government to support junior members of the profession and to ensure that we retain the highest quality advocates from all backgrounds. However, the belief that advocates seek to draw out trials is flawed. Trials are a dynamic process, and there may be issues of disclosure that arise mid trial, witness difficulties, jury difficulties, all of which often cause trials to be extended.

143. The issue of trial length ought to be one canvassed with members of the judiciary who regularly deal with Crown court cases.

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

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

144. In the Impact Assessment, it is anticipated that more junior lawyers will increasingly conduct Very High Cost Cases (VHCC), if fees are reduced by 30%. We do not think that this is fair for junior lawyers or for clients. By their very nature, these cases are serious, document-heavy, and time-consuming. As a group of junior lawyers we do not agree with the assessment that junior lawyers by themselves are capable of conducting such cases. VHCCs require the experience, knowledge and time-management, among other qualities, of senior lawyers.

145. Lawyers of different levels of experience conduct the case preparation tasks by prior agreement with the contract manager overseeing the case. This suggests that they are

conducted very efficiently, with senior lawyers only allowed to perform those tasks which are deemed to be necessary for a practitioner of that level. As more than one fee-earner will be involved, it is necessary to delegate work. Effective delegation is a quality that comes with experience. In cases as complex as VHCCs, it is not appropriate for a junior lawyer to be charged with delegation.

146. If junior lawyers were given conduct of VHCCs, we believe that they would have no choice but to work longer hours in order to try to complete the case work to an adequate standard. They would be placed under unacceptable pressure. Ultimately, the quality of the work would suffer, and cases would suffer. This would represent a tremendous risk to the client, who may face a miscarriage of justice, to the taxpayer, who pays a lot of money for these cases, not only on the defence side, but also in the prosecution of such cases and the extremely high court costs. VHCCs must be prepared well in order to ensure an effective trial.

147. If corners are cut on the defence side, proceedings will be prolonged and trials will collapse. Defence, prosecution and court costs will multiply. Given the high-profile nature of these cases, any such collapse will be well publicised in the media.

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

148. No, YLAL does not agree with this proposal.

149. The consultation proposes that the public family law representation fee should be reduced by 10% from April 2014, based on the assumption that it will take less time to do the work as a result of the family justice reforms reducing the case duration. At present the national average for the duration of care cases is 45 weeks[17]. The aim of the family justice reforms is to conclude cases within 26 weeks. This will not be brought in until April 2014. It is not yet known whether this aim will be achieved. YLAL has previously expressed concern over public family law cases being squeezed into 26 weeks[18]. The effect of the family justice reforms is that solicitors will be required to work within shorter time frames under increased pressure, and with greater demands placed on them owing to a reduction in the use of expert evidence.

150. The proposed reduction in both the representation fixed fee and hourly rates payable in escape threshold cases is based entirely on assumptions as to the impact of the family justice reforms. The assumptions are based on proposals impacting the duration of cases which are not in force yet. It is therefore impossible to assess how it will work post April 2014, when the family justice reforms come in, as there is no evidence of how the reforms will play out in practice and, as stated above, we do not believe that the assumptions made in terms of the reduction of work for solicitors are correct. It is therefore premature to make assumptions about the impact of the family justice reforms on the unit cost of cases. Further information is needed.

151. In addition, we object to the fact that further changes to family law are being consulted upon before it is known whether legally aided family work will be sustainable in light of the cuts to family legal aid in LASPO. To make the family justice reforms work, the system needs to retain sufficient skilled and highly focused legal practitioners who are able to act quickly and proactively. YLAL is concerned that further reduction in fees

[17] The consultation para 6.6
[18] YLAL response to the Family Justice Review in June 2011 www.younglegalaidlawyers.org/files/YLAL reponse to FJR.pdf

will mean an increase in the numbers of junior members of staff expected to undertake larger volumes of work. This is particularly concerning due to the sensitivity of care proceedings and the high level of attention that is required when acting for a Respondent (mainly parents) in care proceedings. A further decrease in fees could see a rise in the number of paralegals expected to manage their own caseload in an area of law which requires significant skill in advising often vulnerable clients. To retain quality in this area of law it is important that payment rates remain at a viable level to ensure that quality remains high and that there is appropriate supervision of junior legal staff.

152. Further, solicitors undertaking public law children work have suffered a cut in fee levels on an annual basis for a number of years. As well as the introduction of fixed fees, there have been percentage cuts in 2010, and the full impact of the arbitrary 10% fee reduction in 2012 has not yet been felt. The current proposals assume that the providers concerned can sustain a further 10% cut. We regard this as unlikely given the difficulties many firms have been placed in due to the existing fee reductions. As the consultation paper itself acknowledges that the number of care cases has increased by 50% since 2007 (paragraph 6.9), the inevitable reduction in the number of available solicitors that would result from further fee cuts will result in sub-standard, if any, representation for Respondents in these cases.

153. We also note that there is no discussion in the consultation of the impact of various associated reforms on the amount of pre-proceedings work required by solicitors acting for parents. This, in our view, is likely to increase. Shorter and more effective care proceedings will be dependent on the pre-proceedings work conducted by local authorities, including work around engagement with parents and families.

154. YLAL is extremely concerned over the impact that further cuts will have on both family practitioners and the vulnerable clients they represent. As with many other proposals within this consultation, if it is no longer viable for family practitioners to carry out this work, then we will see an increase in litigants in person with the associated costs which that entails.

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts?

155. No we do not agree with this proposal.

156. Under the first wave of reforms running alongside LASPO, rates of pay to barristers handling legal aid work were cut by 10% or more on all work done in civil legal aid cases where legal aid applications were made after 3 October 2011. From 1 April 2013, the rates of payment to barristers in civil legal aid cases have been prescribed by the Civil Legal Aid (Remuneration) Regulations 2013. The Government now proposes to “align” the fees paid to self-employed barristers appearing in civil (non-family) proceedings to bring them into line with fees paid to other advocates. This harmonization amounts to a further cut of approximately 50% to the fees paid to barristers appearing in the County Courts, Upper Tribunals and the High Court. QCs will be exempt from any cuts. The cuts would be mitigated in part by the availability of an “enhancement fee” (paragraph 6.25). The enhancement fee system is currently used for payment of other advocates and is awarded on a discretionary basis by the Legal Aid Agency (LAA). To receive an enhanced fee for a legally aided case, a self-employed barrister will be required to make an application to the LAA which evidences

that the work required "exceptional competence, skill or expertise"; was done with "exceptional speed"; or involved "exceptional circumstances or complexity" (Annex I). The enhancement fee in the County Court will be capped at approximately 50% of the new reduced fee in the County Court. Consequently, the maximum hourly rate for any advocate in a civil (non-family) legally aided case in the County Court, regardless of training or expertise, will be £94.50 (Table 16). This roughly equates to a 30% reduction in fees.

157. The proposal is projected to save £3m per annum and is predicated on the twin assumptions that the supply of advocates will be sufficient to meet demand for legal aid work and that the same quality of services will be supplied by advocates[19].

158. The Government envisages that the proposals are most likely to impact on junior barristers (who appear more often in the County Courts) The Government acknowledges that numbers of Black, Asian & Minority Ethnic (BAME), female, and younger barristers are highest in the junior end of the Bar. Therefore these junior barristers are likely to be disproportionately affected by the proposals[20].

159. Contrary to the Government's assessment, YLAL believes that the proposals will have an adverse impact on clients by reducing the supply of quality legally aided services.

160. First, the consultation does not give sufficient weight to the fact that these cuts will be felt most acutely by the junior bar. Individuals at the start of their careers are frequently saddled with tens of thousands of pounds of debt arising from tuition fees and fees for professional courses. Individuals who are in the early years of their careers may well be receiving fees that equate to less than national minimum wage. Anecdotally, a number of our newly qualified junior barrister members starting out in independent practice report receiving between £500 and £1,000 per month in fees, while working 50-60 hour weeks. Should fees be halved (or reduced by a third) it seems inevitable that these individuals will not be able to continue in practice. Alternatively, they will be forced to increase their workload significantly which would likely lead to a reduction in the quality of that work.

161. Much of the political and media commentary accompanying the consultation has questioned the very high fees which are earned from legal aid work by a minority of senior "fat-cat" barristers[21]. We do not make any attempt to justify these fees. Rather our point is that these cuts will not stop this from happening. Instead the cuts will impact on junior lawyers earning comparatively little.

162. By reducing the size of the junior bar, these proposals will cause a reduction in diversity since the junior bar contains the highest proportion of female and BAME members[22]. This would be a retrograde step. It is important to society as a whole that the legal profession, which entails significant responsibility, should be diverse and reflective of society as a whole. Over recent years, the bar has made slow but steady progress toward this goal. The Government proposal would undermine this progress. People from lower income backgrounds will be less likely to consider a career in the profession because they will not be able to earn a living which allows for repayment of student debt. Prospective legal aid barristers will not consider a career at the publically funded bar and will instead choose either another area of law or another profession

[19] Civil Fees Impact Assessment p3
[20] The consultation Annex K, para 5.11.1
[21] See for example The Daily Mail "Legal Aid payouts to fat cat lawyers will be slashed by a third, says justice secretary" 10 April 2013 http://www.dailymail.co.uk/news/article-2306630/Legal-aid-payouts-fat-cat-lawyers-slashed-says-Justice-Secretary.html
[22] consultation Annex K, paragraph 5.11.1

which offers a better level of remuneration and reflects their investment in education. The pool of talented good quality applicants will diminish. The bar will become less diverse. Both of these developments will impact on the quality of advocacy for individuals caught up in the justice system and so are of serious concern.

163. Second, the consultation fails to recognize that barristers, as self-employed individuals, incur significant overheads in the form of chambers fees, professional indemnity insurance, professional memberships etc. The hourly rate paid by the Legal Aid Agency does not equate to "take home" pay.

164. Third, the consultation implicitly assumes that if barristers do not undertake this work then solicitors – who are already subject to reduced rates – will step in to take their place. We regard this as unlikely. In our experience solicitors tend not to do this work: (a) because they have no desire to act as specialist advocates as that is not what they trained to do; and (b) because it is not financially viable for them to undertake the work at such low rates. For this reason we are of the view that this proposal will fundamentally undermine the supply of civil advocacy services.

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished?

165. No. We oppose this proposal. It amounts to a further measure that may jeopardize the future of sustainable and quality legal advice in immigration work and we are concerned about the options left open to clients when those providers disappear. The Government acknowledges that there is a risk that providers may not take on immigration and asylum cases because the remuneration where permission is granted has decreased[23]. This will be compounded by the cuts that have been made and are proposed in relation to judicial review work (see our response above), as judicial review is an important part of immigration and asylum work.

166. The Civil Fees Impact Assessment suggests at paragraph 38(b) that providers will be able to carry on doing this work by relying on lower paid junior members of staff. We are not convinced that this is the case. But in any event, the issue then becomes one of potential exploitation and adequate supervision. As an organization consisting of junior lawyers dedicated to legal aid work, we oppose any change which encourages over reliance on underpaid junior lawyers requiring them to take on too much responsibility too soon. Such proposals jeopardize the future of the profession and the quality of service which we offer to clients. Junior members of the legal profession should be offered the same opportunities for advancement and career progression in terms of salary, commensurate with experience and ability, as any other field of work. These proposals do nothing to protect those people and there are broader implications, such as diminishing diversity and social mobility in the law.

167. The Government expresses the view that one effect of this proposal is that individuals may choose to address their disputes by representing themselves, paying for services or not tackling the issue at all[24]. However, most clients simply do not have the means to pay for advice. Therefore we believe that it is more likely they will not progress their case if left without help. For example, one member had the experience of assisting a client to prepare an application pro bono even when the merits test was met and all the client had to do was fax it, but they were so bewildered and stressed by their position

[23] Civil Fees Impact Assessment paragraph 39
[24] Ibid

they failed to do this on time. This is not an isolated example. Many of the clients that require assistance at this level simply could not deal with this work alone. Nonetheless, given the importance of the issues as stake, it is likely that a number of them will attempt to litigate their cases in person anyway. With no discourtesy intended to those forced into this position, this will mean more poorly prepared, poorly presented cases adding to the burden placed on the court service.

168. We endorse ILPA's submission in their initial response to the consultation that underlying rates in asylum cases have been essentially unchanged for over ten years, save for a 10% cut in 2012, and rates fall far short of the guideline hourly rates in the High Court.[25] The current rate of payment compensates for all cases in which applications are genuinely assessed as having a chance of success sufficient to merit an attempt at applying for permission to appeal but are later refused by the Tribunal. It is also the case that applications for permission can be refused at the initial stage, but then be granted permission on renewal. The increased rate also compensates for additional work done to file amended grounds for renewal in those cases. We do not consider it proportionate for providers to absorb the costs and risk of all applications for permission so soon after both fee and LASPO scope cuts to this area of work. All cases at Upper Tribunal level are subject to cost assessment by the LAA and therefore the LAA can ensure that any claims are truly "reasonable" at that stage.

169. The potential savings that could be made with this proposal must be balanced against the impact on legal aid firms. The amount of the potential saving – which is quantified at £1m per annum – does not justify the risk of losing firms which can no longer afford to stay in business to provide a service at this level.

170. Like ILPA, we are concerned by the risk of losing specialist advocates who have to take on more private work or work in other fields to stay in practice. This is particularly true of the junior end of the profession. It is work in the Upper Tribunal that makes practice viable for a junior practitioner who would otherwise struggle to get by on fixed fee cases alone.

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

171. We do not agree with this proposal.

172. Before we outline our concerns, we wish to clarify a point in relation to the background to the proposal. Specifically, it is suggested at paragraph 7.9 of the consultation that prior to October 2011 there was no effective control over the costs of experts. This contextual point provides part of the justification for the current proposal. In our view, this is a misrepresentation of the situation prior to October 2011. Although solicitors were responsible for instructing the expert (as is their proper role in any legal proceedings), this expense fell within the scope of the legal aid certificate (which would need to include the relevant wording for it to be valid to cover such instructions). It was therefore one part of the costs budget within which the solicitor would have to work. Certificates were subject to strict limits and an assessment at the end of the case. Even where a solicitor sacrificed part of their own costs in order that the expert be paid within the funding limit of the certificate, the Legal Services Commission (LSC) had the power to refuse to fund part or all of an expert's fees where they were deemed not to be necessary or reasonable. The firm would still be liable for the invoice, regardless of the LSC's decision. Solicitors would therefore need to be extremely cautious when

[25] ILPA note on the "Transformation" Legal Aid consultation, April 2013, p.11

instructing an expert, ensuring that the agreed fees and scope of the expert's instructions were kept under strict scrutiny. Alternatively, solicitors could apply for prior authority before instructing an expert. The LSC would at that stage make a judgment as to the relevance of the potential expert evidence and the reasonableness of the costs to be incurred. We are concerned that the true position appears to have been misrepresented in order to justify further cuts.

173. Turning to our objections, our first concern is that it will not be possible to instruct experts of sufficient caliber under this new proposal. The high level of expertise required to carry out investigative work, to write a report or to give evidence under cross-examination in court often requires a more senior member of any given profession. Further cuts, without taking any time to consider the impact of the previous cuts on the quality and availability of experts, is deeply worrying.

174. The consultation fails to take into account the range of experts relied upon in legal proceedings. Most areas of law are already suffering from a dearth of experts who are willing to provide services under legal aid rates. For instance, in housing disrepair cases, our housing lawyer members report a dearth of surveyors in London who are currently willing to work for legal aid rates. This builds in costly delays in housing cases where there is a claim or counterclaim for disrepair, with a resultant detrimental impact on clients and on the courts system where cases must be adjourned or directions agreed with long lead-in times for obtaining expert evidence.

175. Also in housing law, our members have found that it is extremely difficult to find expert psychologists or psychiatrists to work at legal aid rates making it difficult to run cases requiring, for example, defences under the Equality Act 2010 or any case where the client's capacity to conduct proceedings is in question. This causes obvious prejudice to clients with protected characteristics such as physical or mental impairments. In these circumstances it is misguided to assert – as the consultation does – that there will be no equality impact on legal aid clients. It is clients with physical and mental disabilities who are most likely to require expert medical evidence.

176. In terms of the potential to apply for prior authority for higher rates of pay in exceptional circumstances (pursuant to regulations 2 and 10 Civil Legal Aid (Remuneration) Regulations 2013) it is likely that such applications will have to become routine rather than the exception. This will increase costs for both providers and the LAA, again causing unnecessary and costly delays.

177. We note that highly skilled and specialized experts are often instructed by the state in the most serious cases involving detention, serious injury or death. These include experts in firearms, the use of force, and post-traumatic stress disorder following torture or serious sexual assault. In such circumstances, the lawyers for the agencies of the state and their experts are paid for out of the public purse and yet there are, as far as YLAL is aware, no limits to the fees paid out to experts instructed by them. In such cases, where both parties are funded from the public purse, the state will be able to instruct an expert from the small pool of those available on competitive rates; while the legally aided litigant will be limited to an arbitrary figure, now to be cut by a further 20%. This amounts to an unacceptable inequality of arms.

178. In conclusion we are already concerned about the effect on quality and availability of experts following the cuts already introduced and are of the view that any further cuts will have a serious detrimental effect on the ability of legal aid claimants to bring or defend claims.

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

179. See above.

Q35. Do you agree that we have correctly identified the extent of impacts under these proposals?

180. See above.

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

181. We do not consider there is any mitigation sufficient to alleviate the damage which these proposals will cause.

Young Legal Aid Lawyers
3 June 2013