

**Transforming Legal Aid: delivering a more credible and efficient system.**  
**Response from members of Kent Law School, University of Kent**

**Introduction**

1. We are academic and legal staff of Kent Law School, one of the most highly-regarded law schools in the UK. The Law School includes the Kent Law Clinic, an award-winning pro bono solicitor's office providing a free public service on a wide range of legal problems to local people who cannot afford to pay. In preparing this submission we have drawn upon our extensive academic expertise in the areas of law affected by the consultation, as well as our many years of experience delivering pro bono and publicly funded criminal law, social welfare law and immigration/asylum legal services at the Bar and in private solicitors' firms, Law Centres and other legal aid NGOs. While we have answered most of the consultation questions, there are some on which we do not have expertise and hence on which we have not commented.

**General comments**

2. We are concerned that the Minister has begun with a principle – that access to justice should not be determined by one's ability to pay – which is then disregarded almost completely in the subsequent proposals, on the basis of minimal supporting evidence. The Minister refers to the 'steady rise' in legal aid spending, when in fact spending peaked in 2004-5 and has declined steadily since then.<sup>1</sup> He speaks about a proposed £200m reduction from spending of over £2bn, when the Legal Aid Agency's latest business plan shows spending at £1.8bn – the cut already achieved.<sup>2</sup> The assertion that costs are spiralling out of control is therefore unfounded.

3. While it is true that the UK's (hitherto world-leading) legal aid scheme is more expensive than those in other countries, a key reason for this is the nature of the UK's (world-leading) system of justice. The British adversarial system of justice, the virtues of which we trumpet in other contexts, is premised upon each party having competent legal representation and 'equality of arms', enabling each side to put their best possible case to an impartial decision-maker, which in turn guarantees that the best possible decisions will be made. To strip away the ability of litigants to obtain competent legal representation for their case not only undermines the credibility of the legal aid scheme, it undermines the entire system of justice in the UK. If these proposals are implemented, there is likely to be an increase in the number of unrepresented litigants before the courts, with likely increases in delay and the risk of miscarriages of justice. There is also likely to be an increase in the number of people unable to bring meritorious and/or socially important legal claims, resulting in a decline in the quality and quantity of justice delivered by our courts.

4. If it is thought that the current legal system is too costly, then the solution is not to dismantle one of its supporting pillars (i.e. general access to competent legal representation). Rather, it is necessary to 're-engineer' the system so as to reduce the need for legal representation and/or the length and complexity of legal processes. If we have a legal system which is too expensive for most people to afford to be able to bring proceedings or defend

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<sup>1</sup> House of Commons Justice Committee, *Third Report: Government's Proposed Reform of Legal Aid* (2011), para 12, Table 2

<sup>2</sup> Legal Aid Agency 'Business Plan 2013/14' <http://www.justice.gov.uk/downloads/publications/corporate-reports/legal-aid-agency/laa-business-plan-2013-14.pdf> Accessed 20 May 2013

themselves, then the answer must be to tackle the system to make it more inclusive, rather than to exclude more people from it.<sup>3</sup>

5. The consultation paper states that the aim of the proposals is to “ensure limited public resources are targeted at those cases which justify it and those people who need it” as well as to “drive greater efficiency in the provider market” [2.4]. These aims are not borne out in the proposals themselves. For example, it is those most in need (such as migrants and prisoners) who are likely to suffer most if these proposals are implemented. The two aims are also potentially contradictory: cutting fees to providers, as we argue below, may have the effect of further restricting the availability of public resources to the meritorious and the needy.

6. Finally, the proposals to introduce sweeping reforms to the administration of justice via secondary legislation without debate in either House is of concern because it fails to pay due regard to democratic processes of government.

### **Comments in relation to proposed reforms to criminal defence services**

7. We are dismayed to see that criminal legal aid is to be subjected to the same process as civil legal aid, in which over a decade of providing a service through contracts based on pricing individual segments of a legal case has driven down professional standards, driven out experienced and long-established practitioners and done very little to ensure the quality of provision of those remaining. The comparison with price competitive tendering (PCT) in relation to Community Payback is not apt. Community Payback occurs after the case has concluded and is unrelated to the course of justice itself. It provides a poor example which does not relate well to the adversarial process.

8. When the report of the Rushcliffe Committee was published as the precursor to the Legal Aid and Advice Act 1949, it made clear that advocates who were funded to represent defendants via legal aid should receive “adequate remuneration” because the adversarial “system of trial depends entirely on both sides being adequately equipped to present their cases”.<sup>4</sup> The proposal to introduce PCT flies in the face of that acknowledgment. Profit margins for publicly funded providers of representation in criminal proceedings are already very slim,<sup>5</sup> resulting in a fragile market which is unlikely to be able to withstand the introduction of radical reforms. This will result in long term sustainability problems.<sup>6</sup>

9. Furthermore, there is no acknowledgement that, after the initial round of contracts and the loss of significant numbers of firms from the market, those firms that are left will be in a strong position to increase their minimum bid price disproportionately. There will be little ability for new providers to enter a market which has already been allocated among providers as a result of the significant overheads required to establish a firm large enough to cover procurement areas, and thus competitive threat from other practices will be at a minimum. Evidence exists that price based competition resulted in monopolies in civil legal aid provision.<sup>7</sup>

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<sup>3</sup> On the importance of inclusive institutions, see Lord Neuberger, President of the Supreme Court’s recent lecture delivered on 9<sup>th</sup> May 2013 at Gray’s Inn: Harbour Litigation Funding First Annual Lecture, ‘From Barretery, Maintenance and Champerty to Litigation Funding’.

<sup>4</sup>JUSTICE, *The Unrepresented Defendant in Magistrates’ Courts* (British Section of the International Cmssn of Jurists, 1971); 4. It should however be noted that JUSTICE also accepted that certain types of case, such as minor motoring offences, do not require legal representation.

<sup>5</sup> Grindley, P *Legal Aid Reforms Proposed by the Carter Report - Analysis and Commentary* (LECG Corporation, 2006)

<sup>6</sup> Ibid

<sup>7</sup> Gilmore D, ‘An expert in LSC/MOJ contracting, his perspective’ (Justice for Sale, Criminal Law Solicitors Association, London 22 May 2013).

10. The proposals fail to recognise that, via the removal of client choice and with guaranteed levels of work, there is no incentive on defence advocates to co-operate with the courts as professional reputations no longer matter. Firms may be less likely to behave in co-operative ways if PCT is introduced – there is no incentive to assist the court process. This could result in significant delays and an increase in associated costs.

11. Article 6 of the European Convention on Human Rights (ECHR) requires member states to provide access to publicly funded defence services for those accused of crimes who cannot afford to pay for representation. However, it is not just the provision of a lawyer that matters – the defendant must be able to access resources which enable effective participation in the proceedings and the proper preparation of his or her case. There is no incentive under PCT to provide a good quality service as the only thing that matters is cost. The requirements of Lexcel and SQM are management tools unrelated to actual quality of advice and representation. Peer Review was only conducted on the basis of file reviews rather than an evaluation of performance in person. There cannot be any credible suggestion that reliance on those measures would protect the defendant's ability to access good quality legal advice, only well managed advice. Therefore, the proposals place the UK at risk of breaching the provisions of the ECHR. Indeed, the European Court of Human Rights (ECtHR) has already stated concerns about the quality of advice received as a result of poor levels of remuneration.<sup>8</sup>

12. The government has failed to properly examine sources of expense in summary criminal proceedings. Cape and Moorhead note several factors which have increased cost such as increased case complexity resulting in increased trial length. Changes in prosecutorial decision making have also had an impact<sup>9</sup> which has not been properly explored. The National Audit Office recognised that the Legal Services Commission did not understand its supplier base.<sup>10</sup> It is unlikely that the fledgling Legal Aid Agency has any better understanding given its very recent inception. Instead the government seeks to impose managerial practices which represent “a challenge to the direct relationship with the client”<sup>11</sup> and will result in conveyor belt processing and deskilling.<sup>12</sup> Tata and Stephen found that remuneration changes meant that defence advocates were spending less time on face to face contact with clients which impeded the effectiveness of representation.<sup>13</sup> If more draconian measures are pursued, quality may well decrease to a level that the ECtHR would find unacceptable.

13. Reductions in the quality of legal services as a result of competitive tendering have been recorded in other jurisdictions which have introduced similar models.<sup>14</sup> In addition, Hynes and Robins found “there is evidence from the experience of contracting for criminal legal aid services in North America to indicate that there are reductions in quality and the creation of

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<sup>8</sup> Johnson J and Ronning O, 'Human Rights Standards for Quality of Legal Aid' (Rights and Wrongs? Developments in Access to Justice. Legal Services Research Centre Conference, Magdalen College, Oxford 12 September 2012).

<sup>9</sup> Cape, E and Moorhead, R, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work*. (Legal Services Research Centre, 2005)

<sup>10</sup> National Audit Office 'C&AG Report on Accounts: Community Legal Service Fund and Criminal Defence Service accounts 2008-09' [http://www.nao.org.uk/publications/0809/lsc\\_accounts.aspx](http://www.nao.org.uk/publications/0809/lsc_accounts.aspx) Accessed 24 February 2012.

<sup>11</sup> Young R and Wall D, 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996); 23. See also Sommerlad H, 'Criminal Legal Aid Reforms and the Restructuring of Legal Professionalism' in Young, R. and Wall, D (eds), *Access to Criminal Legal Aid: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

<sup>12</sup> Young and Wall, *ibid*

<sup>13</sup> Tata, C and Stephen, F. "Swings and Roundabouts": Do Changes to the Structure of Legal Aid Remuneration Make a Real Difference to Criminal Case Management and Case Outcomes?"

[http://staff.law.strath.ac.uk/staff/cyrus\\_tata/public/Swings%20and%20Roundabouts%20Draft106.pdf](http://staff.law.strath.ac.uk/staff/cyrus_tata/public/Swings%20and%20Roundabouts%20Draft106.pdf) Accessed 10 April 2012.

<sup>14</sup> Goriely T, 'Revisiting the debate over criminal legal aid delivery models: viewing international experience from a British perspective' (1998) 5(1) *International Journal of the Legal Profession* 7.

cartels which lead to an increase in costs”.<sup>15</sup> This is because the proposals are based on “an overly simplistic belief in ‘the market’ being able to sort out the problem. But there was a failure to understand what ‘the problem’ was, that the publicly funded legal sector has evolved in a complex and haphazard fashion, and is one that will not withstand shocks”.<sup>16</sup> The difficulty exists because the criminal justice system is, quite simply, not a rational market. As Steele and Sargent note, “the need for legal advice is an imprecise concept, making it difficult to quantify the number of potential users and their level of need”.<sup>17</sup> It is for these reasons that it is not accepted that the proposals could “guarantee” levels of work to a degree that would allow for effective business planning, particularly in light of a significant decrease in volumes in criminal courts.<sup>18</sup> If the market is generally declining, income will reduce over time anyway – and PCT in those circumstances would create long term viability problems. There is no way of predicting how many cases will pass through the criminal justice system with any certainty, particularly in the present economic climate. This, again, has an effect on the ability to recruit new members to the profession.

14. Furthermore, the rapidity with which it is proposed that this scheme will be implemented will not allow the already fragile market to make the significant structural changes necessary for PCT to be sustainable in the long term, meaning that any potential savings are at risk of being offset by the problems which emerge at later stages. Indeed, the government’s own Impact Assessments note that provider response to the proposed reforms is highly uncertain.<sup>19</sup>

### **Responses to Questions:**

#### **Question 1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?**

15. No. The proposals to remove criminal legal aid for persons on remand and sentenced prisoners in respect of treatment represent a serious threat to the operation of the rule of law in prisons. The legitimacy of the State’s treatment of prisoners is expressed through procedures based on the rule of law.<sup>20</sup> Power must be exercised through law and not through the arbitrary whim of individuals. The proposals increase the possibility that abuses of power will go unchecked.

16. To suggest that treatment cases are not of sufficient priority displays a lack of understanding in relation to vulnerable people who may have psychiatric problems, drug or alcohol dependencies, learning disabilities, and so forth. These encompass wider socio-economic implications for rehabilitation and release plans. There are no exemptions for children or vulnerable prisoners. This is highly problematic in terms of ensuring that vulnerable prisoners are able to access effective means of challenging prison authorities’ decisions on issues that go to their dignity as individuals. Furthermore, the disenfranchisement of vulnerable prisoners may lead to increased risks of self harm and suicide as vulnerable people do not know how to cope with the system and cannot access independent assistance. One only needs to look

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<sup>15</sup> Hynes S and Robins J, *The Justice Gap. Whatever happened to legal aid?* (Legal Action Group 2009), 55

<sup>16</sup> Ibid, 57

<sup>17</sup> Steele J and Sargent J, *Access to Legal Services. The Contribution of Alternative Approaches* (Policy Studies Institute 1999), 67

<sup>18</sup> The Law Society, 'Procuring criminal defence services: is there a better way?' (The Law Society 2013).

<sup>19</sup> Ministry of Justice, *Transforming Legal Aid: Reforming fees in criminal legal aid* (IA No:MoJ197, 2013)

<sup>20</sup> See Lacey, N 'In Search of the Responsible Subject: History, Philosophy and Social Science in Criminal Law Theory' (2001) 64 *Modern Law Review* 350; Hart, HLA *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), Moore, MS *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997); Hart, HM 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401.

at the recent report on HMP Birmingham<sup>21</sup> to see serious flaws in treatment and concerns about treatment of vulnerable prisoners, i.e. those less likely to be able to challenge the system effectively.

17. The proposal to restrict disciplinary work is likely to lead to unfairness because appeals where representation was unfairly not allowed will be out of scope meaning that injustice cannot be remedied. Although Tarrant adjudications (where the client is considered too vulnerable or the case too complex triggering the need for representation at the hearing before a prison adjudicator) notionally remain in scope, these are (a) rarely identified by governors themselves and (b) normally secured by written representations. This means that there will be no way to secure a Tarrant adjudication on behalf of a vulnerable prisoner.

18. We also consider that restricting sentence cases as proposed is unfair because vital assistance from lawyers in ensuring progression and rehabilitation will no longer be available. The definition of what affects sentence length is too vague to be workable and puts too much risk on the provider. The proposals will, however, remove any effective funding for legal issues such as the separation of mothers and babies in the specialist mother and baby units, and any resettlement issues. Furthermore, restricting sentence cases is likely to increase the number, success and cost of parole cases.

19. The suggestion that alternative avenues of complaint are available is ill-founded. The proposal assumes a degree of efficiency and transparency in the prisoner complaints system which simply is not evidenced. It also assumes people are able to identify treatment as unlawful or unacceptable in the first place, and are practically able to use the complaints system. Vulnerable people need access to independent legal advice in order to invoke any kind of proceedings. The consultation claims that the MoJ has had due regard to the impact of these proposals on those with protected characteristics, including people with learning difficulties and/or mental health issues. However no explanation is given of what “due regard” really means. The statement that the National Offender Management Service “is committed to the provision of comprehensive screening to ensure that reasonable adjustments are made for all prisoners with learning disabilities, thereby enabling them to use the prisoner complaints system” [3.17] is a mere assertion of a commitment without any real assessment of whether those reasonable adjustments are effective in ensuring equality of access to the complaints system. There is no evidence that the complaints process is adequate generally and especially where the issue concerns a decision as to progression - e.g. categorisation, pre-tariff reviews.

20. Further courses of action suggested have very limited power to assist. In order to refer an issue to the ombudsman, the prisoner has to exhaust other avenues of complaint first. It is unlikely that the prison service will welcome assisting a prisoner in contacting the ombudsman. Moreover, Prison and Probation Ombudsman Investigations are inadequate to ensure that the most vulnerable prisoners are protected by the law. The ombudsman can only make recommendations which are sent to the complainant and the organisation they complained about.<sup>22</sup> If the proposals are implemented the Prison Service will have no incentive to comply with such recommendations since the possibility of external legal scrutiny will be extremely narrowly constrained. Limiting the availability of judicial review will mean an effective avenue of challenge is closed off.

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<sup>21</sup> HM Chief Inspector of Prisons *Report on an announced inspection of HMP Birmingham* (2012) <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-voi-inspections/birmingham/birmingham-2012.pdf> Accessed 29 May 2013

<sup>22</sup> <http://www.ppo.gov.uk/what-to-expect-when-you-make-a-complaint.html>. Accessed 3 June 2013.

21. The cost assessment in relation to the prison law proposals is based on 2011-12 figures. Has the MoJ take into account the restrictions imposed since that time? The consultation paper states that the cost of legal aid has increased markedly over time but it has actually declined significantly since 2010-11 [3.12, Table 1] following changes to legal aid in July 2010, most likely as a result of providers leaving the market after fee restrictions. It is anticipated that these figures will decline even further as pre-July 2010 cases filter out of the system. The scope of availability has also been severely limited so that provision in treatment cases must be justified to an external authority. There is therefore already an independent assessment of which cases deserve funding. The figures in the consultation paper suggest an intended cost saving of at most £2million: a very small benefit for the significant adverse consequences the proposals are likely to have.

22. Furthermore, any actual increase in cost would not be surprising given the marked increase in the number of prisoners, and problems that flow from consequent overcrowding. The assertion that “the amount spent on prison law, both in terms of total cost and as a proportion of total legal aid spending has increased markedly over time” is clearly related to the substantial increase in the prison population over time. The obvious way to decrease this spending, therefore, is to reduce the size of the prison population. This is likely to result not only in a proportional reduction in spending, but also in a reduction in complaints and litigation when the prison service does not face the same challenges of managing overcrowded and under-resourced establishments.

**Question 2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court?**

23. No. The consultation paper states at [3.23] that the financial eligibility test would enhance confidence in the system. But there is no evidence for the assertion that public confidence is low in the first place.

24. The requirement to supply detailed financial information will place a greater administrative burden on processing applications, and therefore increase cost. The system of providing evidence in means testing is already complex, and many solicitors complain about the complexity associated with the provision of documentary evidence, particularly when defendants are not necessarily particularly rational decision makers. As administrative burdens increase, delays are likely to occur in terms of court time and resources. There is also likely to be an increase in administrative costs associated with an increase in the number of Hardship Reviews. Research presently being conducted by one of the authors of this submission suggests that providers dealing with the means test in magistrates’ courts frequently experience delay in the processing of applications for legal aid. It is likely that those problems (and associated costs) would also occur at Crown Court level if the proposals are implemented.

25. The proposal at [3.37] to reimburse private defence costs only at legal aid rates when a defendant is acquitted will introduce inappropriate incentives to plead guilty, as many defendants are likely to find themselves significantly out of pocket if they maintain and manage to establish their innocence. It will decrease the level of respect people have for the criminal justice system. Not only will taxpayers no longer receive publicly funded representation but they will only be reimbursed a part of what it cost to defend themselves against the state. It is not difficult to imagine that people will quickly feel alienated from the process. Furthermore, in order to be reimbursed via central funds, the defendant will have to have applied for, and been refused, legal aid on the basis of means. Therefore, even when it is obvious that a defendant would not be eligible for funding, one would still have to go through the rigmarole of applying for

legal aid, coupled with the associated delay and cost. The proposal is bureaucratic and inefficient in the extreme.

### **Question 3: Do you agree that the proposed threshold is set at an appropriate level?**

26. No. The consultation document talks about defendants with 'high' disposable incomes without stating what is considered to be 'high', how that is calculated, or how it reflects the demographic spread of income. Kenway notes that 55% of the population is already ineligible for publicly funded representation.<sup>23</sup> There is insufficient evidence as to how the figure of £37,500 has been calculated as appropriate.

27. No evidence is provided for the suggestion that a defendant with that level of income would generally be able to afford to pay for Crown Court representation. The claim in [3.29] that "in some cases private rates will be the same as, or similar to, legal aid rates" seems fanciful, and is belied by the figures in [3.30]. Moreover, as legal aid is reduced, firms are more likely to need to rely on privately funded cases to survive and therefore fees may well increase to offset the losses resulting from PCT.

### **Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection to the UK?**

28. No. The proposal will result in significant hardship and injustice. It undermines the rule of law and will be unworkable in practice.

29. The rule of law requires equality of arms, particularly in an adversarial system. There should be no discrimination based on nationality or residence requirements, since the impact will be to create a class of people who have no means of defending themselves from the misuse of power, whether that power is wielded by individuals or departments of state.

30. The benefits of the proposal are highly questionable compared to its costs. The Consultation Paper and Impact Assessment have made no attempt to show how much would be saved by introducing a residence test. This proposal appears to be founded more on anti-immigrant sentiment than any careful comparison of the cost of providing such legal aid compared to the consequences both for the individuals and their families and for the courts and other public institutions of not doing so. There has been no attempt to consider the wider financial and social costs which would result from excluding a large number of individuals resident in the UK from meaningful access to the courts, nor to consider, whether in financial terms or otherwise, what the effect would be of decreasing accountability whether from the state or from individuals, towards a particular section of the population.

31. No evidence is provided for the suggestion that individuals are bringing their disputes to the UK in order to receive free legal advice and assistance. This appears to be pure assertion. There appear to be very limited circumstances (outlined below) in which a dispute would arise before a person arrived in the UK but nevertheless would attract legal aid, apart from the immigration case itself, and those cases are no longer within scope. On the other hand there is evidence that wealthy foreign individuals and foreign corporations choose the High Court as a judicial venue for major litigation: but none of this adds to the legal aid bill.

### ***Who may be excluded?***

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<sup>23</sup> Kenway, P 'Means-testing in the Magistrates Court: Is this really what Parliament intended?' (New Policy Institute, 2006)

32. The case for reform [3.42-3.44] identifies, “people who have never set foot in the U.K” and “visitors” as categories of people who should be excluded from legal aid. However, some people who have never set foot in the UK have significant causes of action which cannot be litigated in any jurisdiction other than the UK. Those held in UK detention facilities in war zones abroad, those subject to torture by British police and troops abroad, under these proposals would have no redress for actions taken against them while they were entirely at the mercy of British forces. Denying remedies in these circumstances could provide a perverse incentive for conflict or terrorist attacks in the UK.

33. Moreover, “people who have never set foot in the UK” and “visitors” are only some of the classes of people who will be excluded by the proposed residence test. It will also potentially deny legal aid to individuals who:

- have legal status but no means or no ready means of proving it, such as family members of EEA nationals with retained rights of residence, Commonwealth citizens with the right of abode, and children who may be British citizens or settled but not in contact with their families;
- have lawful residence status but because of the urgency of their situation and/or because of homelessness, destitution, abuse or similar circumstances may have no access to any proof;
- have lawful residence status but have no proof or documents because they are awaiting a response to an outstanding lawful application for further leave but are subject to UK Border Agency (UKBA) backlogs affecting hundreds of thousands of applicants and sometimes lasting more than a decade.<sup>24</sup>
- have no status but a strong argument under the new family migration Immigration Rules and/or Article 8 ECHR and an outstanding application to the UKBA, e.g. someone with strong family links with spouse and British children with insurmountable obstacles preventing them enjoying family life outside the UK;
- were born here of immigrant parents or brought here as children, who may have leave to remain or even be British citizens but not know it;
- are children whose asylum claims have been refused who have been granted discretionary leave of less than a year;
- are children abandoned in the U.K with no legal status, who even if looked after by Social Services often have no application made to regularise their status;
- are trafficked persons;
- are recognised refugees, i.e. those granted humanitarian protection who are within the first year of their leave;
- are individuals who for various reasons cannot be removed from the UK;
- are stateless persons.

34. Many of these people will already face additional barriers to accessing the courts such as language or educational difficulties. As mentioned above, some may be caught up in one or other of the UKBA’s many backlogs and find themselves excluded from legal aid twice over,<sup>25</sup> and excluded from pursuing meritorious and even strong cases precisely because of maladministration by a department of State.

### ***What kinds of cases may be excluded?***

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<sup>24</sup> House of Commons Home Affairs Committee, *The work of the UK Border Agency (July-September 2012) Q3* (25 March 2013); Independent Chief Inspector of Borders and Immigration Inspection Reports <http://icinspector.independent.gov.uk/inspections/inspection-reports/> Accessed 31 May 2013

<sup>25</sup> That is, firstly because their immigration case no longer attracts legal aid, and, secondly they would be denied legal aid for any other cause of action *precisely because* their immigration case has not been resolved in a timely manner.



35. A residence test would apply regardless of the merits of the case or the public interest in pursuing it. Three types of undesirable consequences may follow:

- Migrants in a precarious position themselves frequently face unlawful action by a department of state and so have strong civil claims under the law. The Government's proposal effectively makes it acceptable that the state would face no challenge for its unlawful actions, including unlawful detention as well as the documented maladministration of the UKBA, except from those migrants who could pay. A measure of the potential extent of the detriment can be seen from the large proportion of appeals against UKBA decisions which are allowed, the large number of immigration and asylum judicial reviews which are settled favourably to the applicant<sup>26</sup> and the number of claims for unlawful detention which are upheld by the High Court. If individuals living in the UK have no meaningful way to hold the state to account for unlawful actions, then we do not have the rule of law. It cannot be right to deny legal assistance for these categories of advice simply on the basis of nationality or immigration status.
- Migrants of any status, including visitors, may fall victim to the acts of another in circumstances giving rise to a very strong civil claim, the only legal venue for which would be the UK. For example, a non-EEA woman in the UK to visit her divorced husband and their child, where the husband refuses to allow her to see the child; or migrant visitors taking a short, cheap holiday letting and suffering carbon monoxide poisoning from a badly-maintained heater. The proposals effectively suggest that it would be acceptable for the perpetrators of such civil wrongs to avoid legal action if their victims are "visitors" or recent immigrants – unless the victims can afford to pay to sue them.
- As well as preventing recent arrivals from *bringing* court applications, the residence test would also prevent them from obtaining legal aid in order to *respond to* applications brought against them. There is clear scope for this provision to be exploited by the unscrupulous, knowing that a recent immigrant will not be eligible for legal aid in order to defend themselves against unmeritorious or spurious claims.

36. Other examples of actions for which legal aid would be unavailable to those excluded by the residence test would include:

- Applications for non-molestation orders, occupation orders or prohibited steps orders by women subjected to domestic violence;
- Access to legally-aided family mediation in order to attempt to resolve family disputes;
- Representation for parents and children in care proceedings;
- Seeking advice and assistance to make fresh asylum claims ([3.58] implies that only once a fresh claim has been recorded or accepted as such would legal aid be available, whereas legal aid is needed to advise on and prepare the fresh claim application and advise on the merits of a judicial review of a refusal to accept it as a fresh claim. Once the fresh claim has been recorded the person becomes an asylum-seeker and qualifies anyway);
- Challenging unlawful detention through applications for bail or judicial review;

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<sup>26</sup> The Public Law Project and ILPA among others are responding to this Consultation providing evidence to show that a significant proportion of judicial review applications in immigration and asylum claims are settled favourably to the claimant before permission is considered – and in fact the Administrative Court, knowing this, often makes interim orders requiring a response from the UKBA in abridged time rather than granting permission, knowing that the matter is likely to settle.

- Challenging refusal of housing as homeless, refusals to provide social care under community care law, refusals of support for those who are victims of trafficking or domestic violence, and wrongful refusal of section 4 support for those who cannot be removed;
- Actions against the police;
- Children challenging local authority age assessments.

37. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), exceptional funding has been retained for those matters which, although out of scope, require funding in order to avoid a violation by the UK of the ECHR. Since the proposed residence test would apply regardless of how urgent or compelling the person's legal problem might be, there would appear to be clear scope for violations of the ECHR in respect of individuals rendered ineligible by the test, in addition to the other problems identified above and below.

***Practicalities of the residence test***

38. It is not explained how the residence test will work in practice. As noted above, immigration status is complicated and often a matter that is in dispute in legal proceedings.

39. First, it is incontrovertible that the UKBA is not able to provide conclusive evidence of a person's status on demand. The following are a non-exhaustive list of issues and problematic categories:

- The recent Home Affairs Report<sup>27</sup> showed that around 55,000 applications had not even been logged onto the UKBA database, and so the UKBA cannot confirm even that an application has been made.
- Scores of thousands more applications are in backlogs in unlabelled crates in various offices around the country, and the UKBA can confirm only that an application has been made.
- Employers checking immigration status require lengthy and detailed guidance, and the UKBA's Employer Checking Service does not provide accurate or up-to-date information.
- For EEA nationals and their family members, their right of residence exists in law and is not required to be evidenced by any specific documents or application, yet it is often not accepted by the UKBA or by the DWP for the purposes of accessing benefits and therefore becomes the subject of legal dispute.
- Many younger people, especially those who arrived as children, but also some who were born here, may not know their status, and, if not in touch with their parents, have no practical means of discovering it.<sup>28</sup>
- Many elderly first-generation immigrants from the Commonwealth have permanent residence dating from before the Immigration Act 1971, but would be most unlikely to have documents to provide this, and because of the different entitlements to entry in the 1950s and 1960s there will be no record of their original entry into the UK.

40. Second, as with the debates over evidential requirements for the exceptions under LASPO, any proposed tick-list of required evidence is likely to exclude the very people who need urgent help. It can be seen from the lists given above that there are several categories of people who are lawfully in the UK but who are either not required to make applications or obtain documents to show their entitlements, or who for other reasons are unlikely to be able to prove

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<sup>27</sup> House of Commons Home Affairs Committee, *The work of the UK Border Agency (July-September 2012) Q3* (25 March 2013)

<sup>28</sup> Immigration practitioners have seen many cases of families arriving as refugees with young children, and, many years later one of the children finds out that he or she for some reason was not included in the family's application for indefinite leave or British citizenship. Similarly for children born here to a person with limited leave whose parents failed to apply for leave in line for them.

their entitlement. For example, an elderly Trinidadian disabled man, who came here in the 1950s, lived in rented rooms all around the UK, worked for years on building sites, never voted, and never visited a doctor or a dentist until he reached pensionable age, and who has long since lost the passport he travelled on, will have nothing to show. No tick list can be designed to establish his entitlement, only lengthy interviews and professional judgement (as applied by Social Services in this particular client's case) could determine, on the balance of probabilities, that he was a settled person and therefore entitled to community care services.

41. By making lawful residence a prerequisite for legal aid, there is a risk that such people will be wrongly refused access. Individuals with legal residence who are in a precarious situation may be in need of immediate assistance (homelessness, domestic violence, social care services etc) and may not be in possession of any evidence which might show their entitlement. Without the ability to undertake several hours of careful work, including making formal request for the individual's Home Office file, medical records, tax and NI records etc, there is a risk that providers will turn away eligible applicants unless their immigration status is immediately obvious for fear of making an error and having the legal aid work on the case nil assessed.<sup>29</sup> This will lead to discrimination against individuals from black and minority ethnic groups including those who are settled and British.

42. In summary, the proposed residence test will be destructive of the rule of law, will result in severe injustices, discrimination and violations of the ECHR, and is fraught with practical difficulties and administrative complications, while its possible benefits to the legal aid fund are unquantifiable. We therefore strongly urge the government not to persist with this proposal.

**Question 5: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review...if permission is granted by the Court?**

43. No. The proposals comprehensively fail to appreciate the historic, significant constitutional and legal purpose of judicial review: to enable individuals hold public bodies to account for their decision-making according to law. We have had sight of the Public Law Project's draft submissions in relation to this question and support all of the points put forward in that document.<sup>30</sup>

***Inappropriateness of transferring risk to the provider***

44. Outside of the sphere of acting for a claimant in an action for a substantial award of damages, the market has not found a way of offering legal services on a no win no fee basis to consumers. Yet this business model is effectively the one that the proposal forces on to providers where members of the public seek to challenge actions of the State in a claim for judicial review. In proposing this de facto model, no regard appears to have been paid to the greater inherent difficulties of identifying merits, forecasting the outcome, the uncertainties of whether costs will follow the event, and inappropriateness of such cases for a success fee or contingent fee as damages are rarely the outcome of a claim.

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<sup>29</sup> The baleful effect of these kinds of requirements can be seen from the impact of the Legal Services Commission's 2007 introduction of the 40% success rate on immigration and asylum appeals. The Devon Law Centre research project reported that, fearful of failing the 40% success rate and facing this kind of contractual punishment, providers routinely wrongly refused legal aid to appellants: it was estimated that 80% of appellants denied legal aid were excluded wrongly: Devon Law Centre, *Asylum Appellate Project* (2010).

<sup>30</sup> Public Law Project, *Response to the Government's consultation paper: Transforming Legal Aid: Delivering a more credible and efficient system* prepared by the Public Law Project (2013) [http://www.publiclawproject.org.uk/documents/Draft\\_response\\_re\\_legal\\_aid\\_for\\_jr\\_conditional\\_on\\_permission.pdf](http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf). Accessed 25 May 2013

45. Both substantively and procedurally, judicial review is a cause of action in which it is inherently more difficult at the outset to achieve an accurate assessment of merits at date of issue than, say, an action for damages. The consultation paper asserts that “We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client’s case and the likelihood of it being granted permission.” We do not accept, however, that this is the case. The factors which make it singularly difficult in judicial review cases to arrive at a decisive view of the prospects of success of an application for permission at the initial stages of the case include:

- legal uncertainty about the test the court will apply at the permission stage;
- the concept of arguability in judicial review, which is highly fact and context sensitive;
- uncertainty caused by disparity in different judges’ approaches to permission. The fact that higher court judges do not always agree on whether a particular case is arguable or not can be seen from the number of cases where permission is refused on paper but which are granted permission at an oral hearing;
- uncertainty (particularly in cases of urgency) caused by the defendant’s failure to respond to a protocol letter or to make their position known;
- uncertainty caused by claimant lawyers’ lack of access to relevant information which is held by the defendant until an Acknowledgement of Service is provided;
- uncertainty caused by the unpredictable and flexible approach which the court takes to issues of delay;
- uncertainty caused by the discretionary nature of the remedy; and
- uncertainty caused by the prospect of good claims being rendered academic through no fault of the claimant, due to the approach taken to settlement or reconsideration by the defendant after the grant of legal aid or after the lodging of an application for permission.

46. The very tight time limits for judicial review and the conditions of extreme urgency or hardship (destitution, homelessness, imminent removal from the UK, removal or refusal of essential care or education services to children or adults with disabilities) which cause many applications for judicial review to be made also militate against the ability of a practitioner to achieve full assessment of merits at the date of issue of an application for permission.

47. In relation to the fifth dot point above, the amended rules for judicial review require the court to make a determination of whether the application for permission meets the threshold of arguability, only after the respondent has filed an Acknowledgement of Service (AoS) setting out their case. Research demonstrates that the AoS is a significant stage in the case for defendants<sup>31</sup> – often the first occasion on which serious consideration is given by the Authority’s lawyer to identifying the facts relied on, the reasons why it is claimed that the decisions or actions challenged are lawful and to outlining the merits of a defence. This is often the earliest occasion on which the merits and means of settlement is addressed. The AoS is served under the normal rules 21 days *after* the claimant’s lawyer has been required to set out the entire facts, evidence, history of attempts to compromise the action, legal submissions and authorities relied on by the claimant in a paper application for permission.

48. Furthermore, the justification provided in the consultation paper for transferring risk to providers is based on unreliable data. The consultation paper states that permission was refused in 845 of the 1799 legally aided cases in which an application for permission was made in 2010-11, and asserts that 515 of those cases ended in a refusal of permission in

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<sup>31</sup> Bondy, V and Sunkin, M *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (2009) <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>  
Accessed 25 May 2013

circumstances where no substantive benefit was reported to the client [3.66-3.68]. The MoJ appears to have made its conclusions based only on information derived from the data which it holds from legal aid providers. The standard returns made by practitioners to the Legal Services Commission, however, do not permit identification of the actual outcome of the case in any way that is helpful to an examination of the outcomes of judicial review, or the benefits to the client.

### ***Urgent cases and interim relief***

49. Homeless families, children and young people, women fleeing domestic violence, vulnerable and disabled adults and children with urgent social care or educational needs and those about to be removed can often only be rescued by an injunction obtained in judicial review. But many such cases proceed no further than the successful application for interim relief. In relation to many housing or community care cases it is frequently ordered that the Authority accommodates until a decision has been made, an assessment performed or until the hearing of the application for permission.

50. In seeking such an order the burden which has to be met is that a strong prima facie case is made out.<sup>32</sup> This standard is formally higher than meeting the threshold of arguability in relation to the grant of permission itself, and will require additional preparation to satisfy this standard. The obtaining of an interim order very frequently is the only substantive relief required by the claimant. Provision of this remedy often leads the institutional defendant to reconsider the decision, or to seek to resolve the problem by the exercise of another power in the claimant's favour. Most such cases cannot proceed to permission because there is nothing left to argue about.

51. It is perverse to regard such cases as unmeritorious, or as ones where no substantive benefit has been obtained by the claimant, or to fail to detect a public interest in challenging Authorities whose standards of decision making or due process fall so far short of what is required that the court considers it appropriate to make a mandatory interim injunction on an ex parte application. It is even more perverse that the lawyer who has undertaken the extensive preparations to make such an application should not be remunerated for this work. This sets up profound conflicts of interest between the lawyer's professional duty to act in the best interests of the client by taking this step, and the realities of commercial practice.

52. The proposals will render all cases of this type uneconomic, leaving those in need of urgent remedies in great danger of unlawful destitution, danger and removal.

53. A similar issue arises in relation to claimants following behind a test case. As a test case progresses through the courts, numbers of other applications are stayed behind it, in respect of none of which is permission considered. Once the main case is won or lost, all or most of the stayed cases are settled.<sup>33</sup> Until that happens, it cannot be predicted whether the case will go ahead, but, especially in the case of immigration removals, an injunction will often be needed to protect the client, and so proceedings must be issued, knowing that permission may never be considered in that particular case. The government's proposals will make it completely uneconomic for any case to be issued where a test case has already been identified or even may be identified, since unless that particular case is chosen, it is known that permission will never be considered.

### ***Disincentives to settlement***

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<sup>32</sup> *De Falco v Crawley BC* [1981] 1 QB 406

<sup>33</sup> For example, by the time *NS* (the lead case on Dublin II removals to Greece) reached the Court of Appeal, some 400 cases were stayed behind it, all of which were settled once the Court referred the case to the CJEU.

54. The promotion of early settlement in every other arena of civil dispute is now a primary criterion of judging the effectiveness of the civil justice system. Indeed research into judicial review suggests that the main effect of the Bowman reforms has been a greatly increased number of judicial review cases settling before and shortly after the grant of permission, and a resulting higher refusal rate of those which do not settle.<sup>34</sup>

55. This seems to us to have created a dispute resolution procedure in judicial review which largely mirrors the aims of achieving early dispute resolution, proportionate costs and litigation of those cases which require judicial determination. The *Transforming Legal Aid* proposals do violence to these aims as they do not recognise that settlement is a result, indeed often the desired outcome of the litigation.

56. A very large proportion of judicial review applications in the most contested areas such as immigration and asylum, welfare benefits and homelessness do not reach permission stage, but are settled beforehand. Effectively, at least in relation to the UKBA, no amount of previous correspondence or even the pre-action protocol letter can elicit a response from that institution, and only when a sealed bundle reaches a Treasury solicitor's desk does anyone look at the case: and often, on looking at it, it can be seen that there is no defence, and so negotiations take place. Other Authorities also take steps to resolve the dispute between the issuing of a claim and the date of consideration of permission, whether by the exercise of a power or discharge of a duty in favour of the client, or by effecting the reconsideration which was sought as a remedy in the initial challenge.<sup>35</sup> This (and not the formal grant of permission) is the purpose of seeking legal advice in the first place. It is unlikely that these steps would have been taken had the challenge not been made. Even where the case is genuinely arguable, an institutional defendant may take a pragmatic decision to settle that particular case, often to the benefit of the particular claimant.

57. Under the government's proposals, once a case is issued there will be a perverse incentive not to settle but to push for a hearing, or to refuse to settle a claim other than on the basis that costs are paid in full by the opponent. There is likely to be an increase in satellite litigation over costs, and in fighting cases which have become academic merely to establish the point that the challenge originally brought was correctly made. Public money and the time of both government and legal aid lawyers will be spent in such sterile litigation. This is not a good use of scarce resources.

### ***Disincentives to making applications***

58. It is fundamental to the ability of a claimant to access justice that he or she should be competently represented in the steps required to prepare and advocate the case. Putting legal representatives at risk of not being remunerated in the event that permission is not obtained for taking these essential steps would put those representatives in the position of having to play the judge's role themselves, effectively 'refusing permission' to potential clients before they even reach court – in fact before even starting on their cases. This is because, as noted above, it is not possible fully to assess the strength of a client's case before taking instructions, obtaining documents, contacting the other side, etc., but few if any legal aid practitioners could afford to do this as a matter of course for more than a handful of clients, unless they were sure of payment for the work.

59. This point applies with even greater force where an application for interim relief has been granted and a rolled up hearing of the application for permission and substantive merits

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<sup>34</sup> Bondy, V and Sunkin, M *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (2009) <http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf>  
Accessed 25 May 2013

<sup>35</sup> Ibid

has been ordered. The level of preparation required for a rolled up hearing will often approach the level of preparation of a full trial.

60. A similar issue arises where the court directs that the application for permission should be determined at a hearing. This may signify that the issues are finely balanced or have constitutional importance, or that determination of the merits may depend largely on the further actions of the defendant or consideration of fuller argument presented by both parties. Even if the solicitor is committed to presenting the merits of the case, how is he or she to secure that counsel can be found to put forward the argument if no funding is available for that service?

61. If the Court has decided that the interests of justice require consideration of permission in a hearing, there is no reason that the provider should be at risk of being unremunerated for costs which may be substantially those of a full trial. Indeed it may be the cases which have the most profound implications for the parties and where the law is untested that a court is most likely to wish to hear substantive argument from both parties, not only in relation to whether the claim is “arguable” but in relation to substantive merits and the likely availability of a remedy.<sup>36</sup>

62. Given the high rates of settlement and cases in which interim relief resolves the matter, as noted above, and in light of the figures provided in the consultation paper, it may be as few as 10% of claims in which permission is granted and the practitioner will therefore obtain remuneration under the proposal, irrespective of the actual outcome achieved for the client. There is a very great danger that no practitioner could offer a service where the odds of being remunerated for the substantial work required in making an application for permission are so poor.

63. The effect will be that very few judicial reviews will be brought, leaving public authorities virtually unaccountable for their decisions, especially those such as the UKBA (as was), the DWP, and local authority housing and social services departments, who are charged with making large numbers of decisions a year on individual rights and entitlements, and which, especially in the case of the UKBA, are documented as acting unlawfully in a substantial proportion of cases. If citizens are unable to find any provider to pursue a legitimate claim which concerns their rights against the state there will be a great failure of justice.

64. The Impact Assessment acknowledges the risk that providers may refuse to take on judicial review cases because the financial risk of the permission application may in the future rest with them, but states that these are likely to be cases that would not be considered by the court to be arguable in any case. For the reasons given above, we fundamentally disagree with this assessment. The measure is very likely to cause providers to refuse to take on judicial review cases which are arguable and are most likely to settle. This would amount to the exclusion of a very large group of claimants, often drawn from the most marginalised and vulnerable sections of society<sup>37</sup> from having access to the same redress that is available to a person of moderate means in questions concerning their rights vis-à-vis the state.

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36 See for example *R v Inner London Education Authority, ex parte Ali* [1990] COD 317 [1990] 2 Admin. LR 822, 828B: a two day (unsuccessful) hearing of an application for leave in which both parties were represented by a QC and junior to consider whether the LEA was in breach of its duty to secure sufficient schools in its area. Evidence that between 500 and 700 children (almost all of Bengali and Somali origin) were out of school and receiving no education on account of a lack of places was largely unchallenged but argument concerned whether a remedy could be given for this wrong in the event that a breach of duty was established at a substantive hearing.

37 Sunkin, M. Calvo, K. Platt, L. Landman, T ‘Mapping the Use of Judicial Review to Challenge Local Authorities in England and Wales’ [2007] *Public Law* N<sup>o</sup> 3 (Autumn) 545-567

### ***The cost of litigants in person***

65. Those representing institutional defendants have already noted how a withdrawal of legal aid does not wholly eliminate appeals and judicial reviews issued by desperate applicants. Some individuals, unable to obtain legal representation to bring judicial review proceedings, may opt to bring their application as a litigant in person. In the High Court with a permission list of 10 or 12 claimants, a judge faced with a litigant in person with no court bundle or skeleton argument will often adjourn the hearing and require the institutional defendant effectively to prepare the claimant's case, so that a semblance of adversarial procedure can take place. Besides being unsatisfactory for the claimant, and a poor shadow of equality before the law, it simply shifts the resources burden from the legal aid budget to the institutional defendant's legal bill.

### ***Better decision-making***

66. The quickest and most effective way to reduce the number of judicial reviews would be to improve the quality of first-time decision-making and achieve efficient, timely case processing, particularly in the UKBA, since immigration/asylum is the single largest legal issue in judicial review claims. Instead, the government's proposal amounts to permission to the UKBA to carry on being 'not fit for purpose' to the detriment of some hundreds of thousands of applicants, and creates no incentive for other authorities to conduct their business in accordance with their statutory duties and best administrative practices.

### **Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?**

67. No. The justification for this proposal appears to involve an inaccurate conflation between 'borderline' and 'unmeritorious' cases. But these are not the same thing. Unmeritorious cases are those which have "poor" prospects of success whereas borderline cases may be meritorious or unmeritorious but it is impossible to decide because of a dispute of law, fact or expert evidence.

68. The ability for an applicant to appeal against a funding refusal to an Independent Funding Adjudicator does not deal with the issue of 'borderline' cases at all. This mechanism is designed to ensure that cases which ought properly to be assessed as having greater than 'borderline' prospects of success are not wrongly refused. It does nothing to address the issue of cases that truly are 'borderline'.

69. 'Borderline' cases, as defined, are precisely the kind of cases that need to be litigated in order to allow for the development and clarification of the law. Successful cases in this category arguably count amongst the most important cases that an individual could bring to court. It is difficult to envisage many more deserving cases than a successful 'borderline' case, let alone the consequences for the common law's development at the cutting edges.

70. These are the exact type of cases where good legal advice is needed since it is here that it can make the most difference to the prospects of success. Such cases require the extra assistance, preparation and research that allows a borderline case to be successful. These cases may well be complex (hence the uncertainty in prospects of success) and as such the courts will benefit from having competent representatives who have identified, explored and presented the legal issues that need to be determined.

71. Every case which has established new precedent in the Court of Appeal or Supreme Court/House of Lords would at one stage have been classified as 'borderline'. This includes



cases brought by government as well as those brought by private individuals. If only public sector, corporate and well-resourced individual litigants were able to bring 'borderline' cases the result would be a significant skew in the development of the law towards the interests of the wealthy and powerful, which would undermine the credibility of our system of justice.

72. There are a number of examples, from immigration and asylum as well as from other areas of social welfare law, where the binding authority from the Court of Appeal was eventually overturned in the House of Lords or Supreme Court.<sup>38</sup> This can only happen if cases in the tribunals or lower courts are enabled to proceed. The 'second appeals test'<sup>39</sup> already restricts the numbers and seriousness of appeals to the Court of Appeal, and cases of other applicants, appellants or claimants with similar cases are generally stayed behind a small number of selected test cases. In relation to borderline cases in the higher courts, whether judicial reviews or statutory appeals, the cases must pass through at least one judicial permission stage: and, in relation to statutory appeals, the 'second appeals test' is explicitly intended to reduce significantly the numbers of appeals to the Court of Appeal down to those which involve a major issue of public interest, or 'some other serious and compelling reason'. If permission to appeal is not granted, the borderline case will not proceed. However if the issue is of genuine public importance then from the point of view of the rule of law it would surely be preferable for the decision on whether to allow an appeal to proceed to be made by senior judges rather than by officials in the Legal Aid Agency. An analogous issue arises in relation to appeals to the upper tribunal.

73. The removal of legal aid for 'borderline' claims in asylum cases is particularly concerning since asylum claims require the most anxious scrutiny, given the real risks that an incorrect decision could have on the lives and liberty of those concerned. The consequence of allowing incorrect decisions to stand will be individuals returned to face persecution, as well as individuals with genuine fears of returning, remaining in the UK unlawfully with all the resulting problems that this entails.

74. It is healthy in a democracy, and the very essence of the development of the common law, for test cases to be taken to the higher courts. And where the subject matter of the litigation is a right or entitlement as against a public body, it is, generally, only by providing legal aid that such development will take place.<sup>40</sup> Moreover, such cases can have substantial 'knock-on' effects in enabling many other similar cases to be resolved without the cost of litigation.<sup>41</sup> It is therefore a highly appropriate use of public resources for borderline cases to be litigated in order that the law is properly tested and developed. The government should be encouraging such development, not seeking to restrict it.<sup>42</sup>

### **Question 7: Do you agree with the proposed scope of criminal legal aid services to be competed?**

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<sup>38</sup> Eg. *Huang [2] Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11; *Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer* [2009] UKSC 16; *Chikwamba v SSHD* [2008] UKHL 40; *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31

<sup>39</sup> *Cart v Upper Tribunal* [2011] UKSC 28

<sup>40</sup> A few charitable bodies occasionally act in, or act as interested parties in, major public law litigation (such as *Cart* itself), but, without a very clear general protection from risk of costs, this could not be seen as a way forward in development of public law.

<sup>41</sup> E.g. *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31; *NS* (European Union law) [2011] EUECJ C-411/10 (21 December 2011)

<sup>42</sup> For example the Upper Tribunal has ruled against the UKBA in 3 cases dealing with the new family migration rules and Art 8 ECHR. In the High Court one judge has made a ruling supporting the Secretary of State. Absent new primary legislation, only the higher courts can decide which is the correct interpretation, and few private litigants could fund such a case to the Supreme Court.

75. Chapter 4 of the consultation paper is entitled '*Introducing* competition in the criminal legal aid market'. As the government well knows, choice is the guarantor of competition in service provision. The criminal legal aid market has operated in a competitive way for decades. The proposals simply commodify clients into units of work.

76. We do not agree with the proposed scope of services to be competed for the reasons stated at the beginning of this submission. We do not believe that any form of PCT will produce a sustainable market for criminal legal aid services at a level which is compatible with the requirements of the ECHR or the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

**Question 8: 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?**

77. No. While there may be a need to reduce expenditure in some areas, the proposal groups a diverse range of services without any individual assessment of the need to reduce funding in the specified areas and without any real assessment of the likely effect on those services. In the area of prison law, for example, further cuts will make it impossible to provide a good enough service that will enable prisoners to rehabilitate and resettle effectively into the community. Prison cases are invariably complex and time consuming if a positive outcome is to be achieved for the client and so they are not suited to a reduced fixed fee payment for good quality lawyers. Furthermore, there are extensive hidden costs in prison law work which make it inherently expensive due to the bureaucracy of the prison system and the fact that it is time consuming to get instructions from detained clients. Similar considerations apply to criminal appeals and review work.

78. There is insufficient information to explain how the figure of 17.5% has been calculated, or why it is considered appropriate.

79. The figure masks other costs which would have to be 'swallowed' such as the requirement to provide duty solicitor at court coverage and travel expenses at no extra charge. The combination of proposed cuts and PCT make this unsustainable. The likely result would be the greater use of paralegals, which would be akin to letting a nurse do a consultant's job.<sup>43</sup> The potential quality issues and risk of miscarriages of justice are self evident.

**Question 9: Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract terms by up to a further two years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract?**

80. No. The 'market' is too fragile and volatile to make a contract length of 3 years appropriate, especially given that the scheme is not being piloted. It would allow monopolies to develop and strengthen. It would harm competition.

81. If it is the case that the government seeks, via this method, to be able to impose further cuts in the future, it is highly unlikely that provision will remain at sustainable levels.

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<sup>43</sup> Hooper A, (Justice for Sale Criminal Law Solicitors Association, London 22 May 2013).

**Question 10: Do you agree with the proposal under the competition model that...procurement areas should be set by the current criminal justice system areas?**

82. No. In the case of Kent, the county is an extremely diverse area comprising several affluent districts alongside some of the most deprived localities in the country. To suggest that the whole county has the same level of need is inappropriate. Kent is divided into separate court administration areas and corresponding CPS areas. Division on the same lines would be more appropriate – particularly as it would avoid defence firms being required to deal with the different working practices of each local agency, which would otherwise be a hindrance to effective operations and would be likely to increase business costs as firms would be required to adapt to particular practices within different sections of the procurement area.

83. The consultation paper refers to the Criminal Justice System areas at [4.48] but fails to state what “our analysis” involved. This makes it difficult to comment on the appropriateness of the proposal. However, there is potentially gross disparity in the value of contracts across procurement areas unrelated to demand, such as exist between Manchester (£800,000) and Thames Valley (£3m).

**Question 11: 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.**

84. There is insufficient information to properly assess the propriety of this proposal, but if the area is too big the MoJ is at risk of creating an ‘advice desert’.

**Question 13: 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?**

85. No. Insufficient consideration has been given to what happens when cases/defendants cross the boundaries of procurement areas. How is the case allocated to a particular procurement area – by crime location, by defendant location or by victim location?

**Question 14: Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.**

86. No. See above comments relating to the size of the procurement area. The number of contracts suggested within Kent is too small for firms to be able to reliably predict costs and therefore make realistic bids.

**Question 15: Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model?**

87. No. See the Introduction to this submission in relation to the proposal that SQM/Lexcel and Peer Review are adequate guarantors of the quality of legal advice. Furthermore, requiring

firms to incorporate the cost of such accreditation into bids is unrealistic given the already strained profit margins which exist.

88. On the other hand, QASA only measures advocacy skills and not quality in any other way.<sup>44</sup> QASA's future is uncertain given the discord that exists about its propriety among the professions. The proposals do not offer any way to measure the quality of the whole service provided.

**Question 16: 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.**

89. No. The removal of client choice – which is key to this proposal – has serious implications for quality of service and efficiency of the system. Defendants may be more resistant to receiving advice from a lawyer that he or she has not chosen, which will result in longer term inefficiencies and a loss of confidence in the criminal justice system generally.

**Question 17: 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?**

90. No. For the reasons given earlier, we believe that client choice encourages better quality service provision, while lack of client choice is likely to be destructive of the quality of service provision, without any adequate alternative means of ensuring quality.

91. Furthermore, there is no evidence to suggest that defendants' views have been taken into consideration when making this proposal. The MoJ is referred to the work of Kemp, who found that most defendants she surveyed "valued the right to choose their own solicitor...many respondents place importance on being able to communicate well with their solicitor and for the solicitor to possess good interpersonal skills".<sup>45</sup> In relation to BME defendants, Kemp found evidence which "might suggest that culture is important to some respondents when choosing and using a solicitor".<sup>46</sup> In sum, Kemp's research revealed that "while [defendants] might lack understanding of the system of the criminal process, they consider it important to have confidence and trust in their solicitor".<sup>47</sup>

92. Where the client has trust and confidence in their solicitor, Kemp found, it is likely to encourage them to experience the process as being fair and thus to be more accepting of its legitimacy.<sup>48</sup> By contrast, her work suggests that where a lawyer is allocated rather than chosen, clients are more likely to believe that the lawyer is not independent but is simply working for the state, which will decrease the crucial trust that ought to exist in a client/solicitor relationship. This decrease in levels of trust means that it is less likely that a defendant will accept their solicitor's advice, which will create inefficiency in the system leading to increased cost and delays.

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<sup>44</sup> The Law Society, 'Procuring criminal defence services: is there a better way?' (The Law Society 2013).

<sup>45</sup> Kemp, V. *Transforming legal aid: Access to criminal defence services* (2010) 84

[http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf) Accessed 12 December 2011

<sup>46</sup> *Ibid*, 98.

<sup>47</sup> *Ibid*, 91.

<sup>48</sup> *Ibid*, 92.

93. This issue merits further research before choice is removed. If defendants are unhappy about the lack of choice, they are capable of causing considerable disruption to the system.

**Question 18: Which of the following police station case allocation methods should feature in the competition model?**

94. Neither option is satisfactory. Under Option 1 there would be significant overheads involved in effectively being on duty 24 hours a day, 7 days per week which are incalculable at present. Therefore, appropriate bids cannot be made on this basis. Moreover, it is impossible to guarantee a particular market share on the basis proposed in options 1(b) or 1(c).

95. Option 2 is slightly more practical from the perspective of the provider, but some unanswered questions remain. For example, while the consultation paper deals with possible conflicts of interest where there are multiple defendants, it does not explain what would happen where co-defendants do not have a conflict of interest. The prospect of co-defendants routinely being allocated to different providers in the absence of conflicts of interest would create major inefficiencies.

96. It is also unclear what will happen to those defendants who choose to wait until the first court hearing to instruct their 'usual' solicitor. The ensuing delay while they are allocated to a contracted provider will decrease efficiency and increase cost if the court allows an adjournment or the defendant pleads not guilty in the absence of legal advice, and risk miscarriages of justice in the event of guilty pleas in situations where the evidence has not been scrutinised.

**Question 19: 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.**

97. No. The procurement areas are too large to make this proposal realistic. Does the government really expect the average defendant to be able to travel across a county to another area to provide instructions? It is also unreasonable to expect the provider to be able to factor the risk of such occurrences into the bidding process as the likelihood of occurrence and cost is unpredictable.

**Question 20: 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?**

98. No. If a relationship of trust does not exist, effective representation cannot be given.

**Question 21: Do you agree with the following proposed remuneration mechanism under the competition model?**

99. No. Annex D sets out the average claim values for each stages of case in the procurement areas but it appears that no work has been done to determine whether the average values are justifiable on the basis of the number of hours worked and outcomes, or to determine the

reasons for the disparities between procurement areas (especially in relation to Crown Court work with >500 PPE). These arbitrary historical figures are then subject to an equally arbitrary and unjustified deduction of 17.5%. The proposed remuneration mechanism requires much more research, justification, consultation and reality testing. What will the LAA do if no or insufficient providers within a procurement area are prepared to bid at or below the specified price cap?

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

100. Historical volume does not reflect future need. Providers could end up so poorly paid as to no longer be viable if case numbers increase.

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

101. The introduction of a single fixed fee whether a case is taken to trial or a guilty plea is entered provides an inappropriate incentive to encourage guilty pleas. This potentially creates a conflict of interest under which professional providers would find it unacceptable to operate.

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

102. The same comment applies here as in relation to magistrates' court work.

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

103. It is hard to see why cases with more than 500 pages PPE are considered to bear an unreasonable level of risk while other cases are considered to be calculable. It is often these cases, from which a small number of fee earners take a disproportionate amount of funds, which are held up as the kind of practices which the government are professing to change. This therefore seems a somewhat contradictory proposal.

**Question 22: 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?**

104. No. Given the dramatic change to area coverage which is proposed, it will be impossible for firms to be able accurately to assess the likely costs of travel and subsistence in the bidding process. Moreover, given that these costs must be accommodated within the overall price cap, it effectively means that providers will be required to discount current average fees even further (above 17.5%). Again, no justification is given for this requirement and no evidence is provided that it is viable to do so.

**Question 25: 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?**

105. No. We believe that the cap is set at an unrealistic level which fails to take into account the significantly greater overheads that firms will be required to consider if PCT is implemented. See also our response to question 21 above.

**Question 26: Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme?**

106. No. These proposals appear to be based on two unacceptable assumptions: that most (if not all) defendants are guilty, and that advocates are prepared to act in a quasi-fraudulent way to secure greater fees. The flat fee proposal will create an inappropriate incentive to encourage guilty pleas and result in conflicts of interest between advocates and their clients. The tapering proposal is not based on any evidence as to the actual causes of the length of trials, but clearly there are a range of factors beyond the control of the defence advocate. The proposals fly in the face of basic tenets of the criminal justice system: the presumption of innocence and the right to a fair trial under Article 6 of the ECHR.

**Question 27: Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%?**

107. No. Again, this appears to be an arbitrary figure plucked out of the air without adequate justification or supporting evidence. The consultation paper includes proposals that public family law representation fees be reduced by 10%, general criminal defence fees by 17.5%, expert fees by 20% and VHCC fees by 30%. We cannot see the logic to any of these figures.

**Question 28: Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.**

108. No. This proposal would give current providers insufficient opportunity to either adjust to the new fees or to decide whether they wish to continue as legal aid providers on the new terms. There is a high risk that providers will withdraw mid-proceedings, leaving defendants stranded, and compelling courts to stay proceedings until alternative representation can be found, or altogether if alternative representation cannot be found. This would bring the system of criminal justice into serious disrepute.

**Question 29: Do you agree with the proposal: (b) To develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court?**

109. No. This would be yet another unremunerated additional cost (along with travel and subsistence costs) which defence solicitors would be asked to absorb, making the proposed payment mechanism for Crown Court defence work even more unrealistic.

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

110. No. This proposal is based on the proposition that current rates reflect a situation in which care cases were of longer duration, involved more experts and more hearings. With anticipated reductions in these three elements of care cases, the fees paid to legal representatives should correspondingly be reduced.

111. It is a fallacy, however, to assume that a reduction in case duration results in less work and lower cost to legal representatives. A reduction in case duration usually means that the same amount of work must be undertaken more intensively over a shorter period, often with significantly greater 'front-loading' of effort. For cases that settle rather than run the full course to hearing, this can mean that legal representatives do *more* work on the case prior to settlement. This scenario appears to have been ignored but needs to be factored into the calculations.

112. Reduced commissioning of expert reports may indeed reduce the work of legal representatives in care cases, but no attempt has been made to quantify this reduction. It is, in fact, likely to be marginal. Fewer expert reports will certainly impact on the time taken to complete cases and the cost of experts, but is unlikely to have much impact on the work of legal representatives *per se* – certainly nothing approaching a 10% reduction in workload.

113. That leaves the issue of fewer hearings on average per case. This may have a more substantial impact on the workload of legal representatives, but is entirely speculative. It is not clear why fewer hearings would occur, as opposed to the same number of hearings over a shorter timescale. The number of hearings is not driven only by courts' case management pathways, but also by actions of the parties which are beyond the control of either their lawyers or the courts. No amount of "efficiencies" will prevent this. Consequently, there is, at present, no justification for a reduction, let alone specifically a 10% reduction, in public family law representation fees. When the various procedural reforms have fully taken effect and data is available from the new system, this question might reasonably be revisited.

114. If a 10% reduction is implemented now, however, a predictable consequence, as with all previous cuts, will be a reduction in the number of providers able to remain in business on legal aid rates, and consequently a reduction in skilled, experienced representatives for the very vulnerable children and the parents going through care proceedings.

**Question 32: Do you agree with the proposal that the higher legal aid civil fee rate...should be abolished?**

115. No. Looking at the last 18 years of funding for legal representation in immigration and asylum appeals, the decision to pay lower rates than in the County Court or High Court contributed to a widespread view that immigration and asylum appeals were 'less legal'<sup>49</sup> and could be carried out by less well-trained, less experienced and less qualified people. This was a major contribution to the low quality of representation both by Home Office presenting officers and many appellant representatives – which the Legal Services Commission decided to deal with by such measures as the contractual obligation to meet a 40% success rate, which in turn, as noted above, led to many appellants being wrongly denied representation. To ensure quality

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<sup>49</sup> It is true that the MoJ itself persists in regarding the immigration appellate jurisdiction as informal and straightforward and as one in which appellants are not vulnerable and do not need specialist representation (MoJ Consultation on Legal Aid Reform Nov 2010 [4.202]) but judges do not agree – see Lord Hope in *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33 [11], referring to the complexity and length of the Immigration Rules, and quoting another judge on "the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change in this field of law".



of legal work on both sides, remuneration must be adequate and commensurate with the complexity of the work.

116. Whilst the uplift may originally have been introduced as compensation for work at risk, it has since been a factor that has mitigated against the fact that legal aid rates have essentially remained unchanged for over 10 years except for the 10% cut in 2011.

117. The effect of removing the uplift will be that the remaining specialist firms still carrying out legal aid work in asylum and immigration will find it increasingly difficult to continue to operate. The two largest specialist providers of legal aid in immigration law, Refugee and Migrant Justice and Immigration Advisory Service went into administration in 2010 and 2011 respectively. Following the removal of legal aid for the majority of immigration work the remaining specialist firms are now limited to a small number of asylum matter starts and private work. At present the uplift in Upper Tribunal cases recognises the complexity of work at this level and also allows less profitable or loss-making casework to be undertaken. The removal of the uplift will simply be another cut in real terms on top of the 2011 cut.

118. No evidence has been provided for the suggestion that the uplift incentivises appealing weak cases, and this argument makes little sense. If a case gets permission to appeal from the first-tier tribunal then there is an arguable material error of law and so the case deserves to be funded. If the case does not get permission, then it is not funded and so there is already an incentive not to make weak applications for permission. As suggested above, this is another example of the proposals seeking to second-guess a formal judicial procedure.

**Question 33: Do you agree with the proposal that fees paid to experts should be reduced by 20%?**

119. No. As the consultation paper points out at [7.2], significant reductions in expert services funded by legal aid are expected to be achieved as a result of the changes to the scope of Legal Aid brought about by LASPO and as a result of the Family Justice Review. It is difficult to see why further reducing expert fees in civil and family law cases by 20% is necessary. Rationally, the cost savings achieved by the reforms that have already occurred should be assessed before further cuts are proposed.

120. Moreover, a predictable consequence of reducing fees by 20% will be a reduction in the number and quality of the experts willing to work for legal aid fees. There is already a problem, for example, in private law children matters, in obtaining sufficiently good quality risk assessments at legal aid rates.<sup>50</sup> A risk assessment provided by someone without the necessary expertise and experience has the potential to *increase* risks to children and their residence parents in contexts in which the court has found the non-residence parent to have perpetrated violence. A further 20% reduction in expert fees would only exacerbate this situation. While the need to ensure value for money is important, it is equally important to ensure that the LAA does not end up receiving too little value for too little money.

**Questions 34 and 35: Do you agree that we have correctly identified the range and extent of impacts under the proposals set out in this consultation paper?**

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<sup>50</sup> See Hunter, R and Barnett, A *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council, 2013), 47 <http://www.judiciary.gov.uk/ICO%2FDocuments%2FFJC%2FFFH+report+January+2013.pdf> Accessed 2 June 2013.

121. No. Additional impacts not identified in the IAs have been noted throughout this submission. Further:

- There has been a failure to identify the potential impact on those who are unable to travel long distances as a result of illness, family commitments and/or caring responsibilities in relation to the size of the proposed criminal law PCT procurement areas. This could affect both defendants and lawyers.
- As Cape notes, there is no mention in the consultation paper of the UN Principles and Guidelines on Access to Justice in Criminal Justice Systems which require special provision to be made in relation to children and vulnerable suspects.<sup>51</sup>
- Low levels of remuneration not only have a detrimental impact on the quality of advice and representation received, but also exacerbate the problems that already exist in attracting new trainees to the profession,<sup>52</sup> which will have an impact on diversity in the profession.
- The decimation of small firms will have a disproportionate effect on BME solicitors as they are more likely to practice in smaller firms which are unlikely to survive the proposed changes. As a result, BME suspects and defendants are likely to suffer greater hardship as they are alienated from the system.<sup>53</sup>

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<sup>51</sup> Lloyd-Cape E, 'Criminal Defence - The value and the price' (Can the criminal justice system, as we know it, survive? The Law Society 17 May 2013).

<sup>52</sup> Kemp, V. *Transforming legal aid: Access to criminal defence services* (2010) [http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/TransformingCrimDefenceServices_29092010.pdf) Accessed 12 December 2011

<sup>53</sup> Sidhu J, 'Impact on minority group lawyers' (Justice for Sale Criminal Law Solicitors Association, London 22 May 2013).