Birmingham Law Society Response to Consultation on Transforming legal aid: delivering a more credible and efficient system

The Birmingham Law Society represents solicitors working in the West Midlands area. The Society is responding to the consultation on Transforming legal aid, delivering a more credible and efficient system.

The Birmingham Law Society does not accept that the proposals contained in the consultation document will reduce expenditure in the way proposed by the Government. The proposals will have a devastating effect on the Criminal Justice System. If the proposals do not work as we anticipate they will not, it will be impossible to recover the experience and expertise which will be lost once the current providers either cease to operate or change over to other fields of work.

1. Restricting the scope of legal aid for Prison law.

On one hand the Government promotes access to justice to enable citizens to enforce their legal rights, yet on the other hand it seeks to restrict such enforcement by limiting the scope of legal aid so that legal representation is not available to the same citizens whose rights have been infringed. In the many years from the time when prisoners were locked up and forgotten, the enlightened approach is to ensure that prisoners gain respect for the rules and regulations they are required to follow. If their rights are infringed they should be able to receive advice and be represented where necessary. Such fairness enhances the public's confidence in the Criminal Justice System. In assessing whether or not to continue such representation the government should not simply compare the figures of amounts spent in previous years with figures of amounts spent in current years. It should consider the improvements which have been made and the new legislation which now applies. In this context the increase in expenditure is justified. We do not agree that the scope of prison law should be restricted as proposed. The prison complaint system or the probation service complaint system will not be able to cope with the prisoners complaints. The reference to the Ombudsman is a slow and cumbersome procedure. There is no power to enforce the implementation of recommendations which may be made by the Ombudsman. The proposed cuts to the prison and probation service budgets will further impact on the manner in which such matters are dealt with. Those prisoners who are not able to speak or write English will encounter even more difficulties. Prisoners are disproportionately affected by the proposed reduction in funding for Judicial Review proceedings. It is precisely because of the delay and inequalities arising in the present mode of resolving prisoner complaints that those incarcerated have the need to seek Judicial Review of perverse decisions which affect them. It is not uncommon that the decisions being challenged are those made by the Probation Service or on information to the Parole Board. The proposals undermine the ability of some of the most vulnerable members of society to challenge decisions affecting them when incarcerated. The Ministry is reminded that a society is judged by how it treats those who are most vulnerable and subject to its penal codes. We do not agree with the proposal to restrict the scope of prison law.

2 & 3. Imposing a financial threshold in applications for legal aid in the Crown Court.

The majority of cases which come before the Crown Court are serious cases which inevitably result in custodial sentences. In the past considerable delays have been caused with the process of considering whether or not an applicant qualified for legal aid. It was to avoid such delays and to save costs on the administration procedures for assessing legal aid applications that the current system was introduced. Instead of going back to the old system, any difficulties in the current system should be looked at improved. It is not helpful to swing back to the old system and only to find the administration costs to run the system will be more than the amount saved. In recent months legislation has been implemented to increase the speed with which cases formerly committed are sent to the Crown Court. Any delay in the grant of representation orders to those pending trial at the Crown Court will undermine the efficiencies expected by those changes. It will not be possible for practitioners to advise upon the appropriate application of the Early Guilty Plea Hearing schemes implemented at many Crown Courts. Defendants risk losing credit whilst courts face increasing numbers of cases being listed for trial rather than identified as suitable for earlier disposal.

These days there are many different ways in which financial eligibility has to be assessed. For a self-employed person who has the misfortune of being remanded in custody, to supply documents to satisfy the likely requirements, will be almost impossible. Even where the person is not in custody they will have difficulty because their accounts are not always up to date. Instead of introducing a financial threshold, it would be better if by the Government looked at measures which would strengthen the collection of costs orders made against a Defendant following a conviction. The trial judge who sentences the defendant is likely to have more detail available at the sentencing stage to be able to make an order for costs. The ways and means of collecting money following the imposition of such orders should be reviewed rather than introducing financial thresholds. In recent years the effects of confiscation orders under the Proceeds of Crime legislation has shown that comprehensive financial investigations can be carried out to ascertain a person's financial standing. Why not enforce such orders diligently and improve the collection of money. The current amount outstanding for collection is more than the savings which the Government anticipates it will make by introducing such a threshold.

The threshold of £37,500 per household is very low indeed. An average family where both parents are working will easily not qualify under this scheme. The hardship provisions which the Government has in place are likely to be difficult to satisfy. The Ministry is aptly placed to provide the profession with details of the number of successful hardship applications under the present system as it affects the grant of representation orders in Magistrates' Court proceedings. The experience of practitioners is that a very small minority of such applications have proved successful. The Ministry is asked to publish data pertaining to applications reliant on hardship in its response document, to better inform the discussion of this proposal for Crown Court funding.

This proposal will result in an increase in the number of defendants acting in person. Just as can be seen has happened in family law matters where the scope for legal aid has been reduced or removed. Whilst there will be special measures available to prevent Defendant from cross examining their victims in cases involving domestic and sexual assault, it is certainly going to result in increased not guilty hearings where defendants will conduct their own defence. Any savings made will easily

be lost as there will be an increase in court sitting time with hearing taking longer than where representation was available. In many such cases it will prove necessary for the court to appoint an advocate to cross examine vulnerable victims on behalf of defendants. Such arrangements exist in relation to simple summary proceedings. In reality the costs involved in those proceedings do not give rise to a saving. They do however place both defendant and advocate in a precarious position. The advocate is not provided with the ability to take full instructions or to fully appreciate the context of the cross examination within the case as a whole. In short this is a poor substitute for fulsome representations and proper representation of defendants. In many cases defence lawyers play an important part in mediating between the defendant, the prosecution and the court. They make sure that the defendant understands any conditions imposed upon him by way of sentence, as part of any community orders or as ancillary orders requiring registration on a particular register. Where representation is not available the task of explaining such complicated orders will fall on the court. By losing this important link between the court and the defendant, it is likely that such orders will be more likely to be breached. Moreover defence practitioners serve as a vital component in the sentencing process ensuring that appropriate orders are imposed and termed according to the appropriate authorities. There is ample evidence of costly review of orders arising in the judgements of the Court of Appeal. It is anticipated that the number of cases listed for appeal will rise; both due to misunderstanding of the appropriate grounds and means to challenge decisions by appellants who would otherwise be advised against appeal and as a result of inappropriate sentencing going unchallenged. The matter will then come back before the court with additional costs. We do not agree that the proposed financial threshold should be imposed on legal aid applications in the Crown Court.

4. The Residence Test

The residence test will apply to claims for civil legal aid, for example in family, housing, community care or immigration law. It will be necessary to show that the applicant had been resident in the UK at the time of the application for legal aid for at least 12 month period. However in many cases, for instance in immigration cases, applicants may not have been in UK for 12 month. It does not seem right that they should be denied access to justice purely for that reason especially where the circumstances are such that there is a risk that they would suffer violence as a consequence. Consider for example a case of a woman and/or her children subjected to domestic violence from a person resident in UK. A provision of this kind will stop her being able to apply for legal aid and seek the courts help. The proposals appear to overlook the many cases brought which arise specifically because a person's right to remain resident in the UK is in issue. Where a person's article 8 rights under the European Treaty are in issue the current proposals will deny the individual of the right to bring their case in he UK. The proposals in effect deny the article 8 rights of applicants from the outset. Such applicants are denied their very ability to argue for permanent leave to remain in the UK because they are said not to be resident.

We do not agree that such a test should be imposed.

5. Applications for leave in Judicial Review Cases

Applications for leave for judicial review are an important remedy for members of the public with which they can hold public officials to account. It is not being suggested that many such applications are made without merit. In that case it shows that the procedure is effective and is clearly working. It forces officials to aspire to a new level of public behaviour which impacts on the whole country. An individual can seek a review of the decision where it can be shown that some impropriety has taken place. The most important stage of the proceedings is the application for leave stage. At this stage the legal adviser will consider the case and advise if there is any prospect for success. The applications are to the High Court. It is our experience that the High Court is extremely vigilant and if it transpires that a frivolous application is being presented, the Court has powers to order costs against the legal adviser. By removing legal aid for the permissions stage, the Government is effectively destroying this remedy. In many cases even where leave is refused and the application is renewed before the Court, the orders sought are granted after argument. To limit legal aid to cases where leave is granted will seriously undermine this remedy. Many applicants will not be able to even consider such applications.

The perception of the Government appears to be that because permission is refused in a number of cases those cases lack merit. In cases involving novel situations where previous experience cannot provide a meter to judge the likely outcome, the proposals will undermine the ability of applicants to bring cases to the test. In many such cases the application brings about further consideration by the authority under review which could not be achieved in negotiation. To place the financial risk of seeking permission to bring review on the legal profession is unacceptable at a time of further significant cuts to public funding. Practitioners are asked to bear this risk on the back of decades of swingeing cuts and at a time where the profitability of their practices is at its lowest ebb. The reality is that practitioners will simply not be able to bear that risk, nor will banks finance firms to practice in that way. The upshot will be a conservative approach to the review of challengeable decisions by authorities. The proposals risk the prevention of the proper development of the Judicial Review jurisdiction. The reality is that applicants must force home their challenges in many cases. The Government hands a new weapon to the armoury of those authorities making in appropriate decisions by curtailing the ability of applicants to fund challenges. It is quite apparent from the number of cases presently publicly funded that this process of challenging local authorities, immigration authorities, prisons and parole boards is utilised by some of the poorest in our society. They will not be able to fund applications privately. It is not acceptable that the Government expects the profession to undertake that work pro bono.

If the perception is that legal providers are making unnecessary applications, it should be possible to monitor such applications and action taken to save unnecessary costs to the legal aid fund. It should be noted that even legal aid for leave applications is not automatically granted. It is necessary to show that there is merit in the application. The loss of opportunity for advice and representation for such matters will have considerable implications for some of the most vulnerable groups in society, including those who are unintentionally homeless and have community care needs. There will be an

indirect impact on other public authorities including the police and NHS. We do not believe that legal aid at permission stage should be removed.

6. Civil Merits Test — Removing legal aid for borderline cases.

As most practitioners will tell you legal aid has never been available for borderline cases. In almost every case there has to be a higher percentage of success before legal aid is granted. It is not granted or available under current legislation in cases where there are less than 50% chances of success. There have already been substantial cuts in Civil and Family legal aid such that it is only in very limited circumstances that legal aid is available. We do not believe that is any need to have further reductions in this area.

7. Introducing competition in the criminal legal aid market.

We agree that competition is important in the criminal legal aid market. Under the present economic climate, only the efficient criminal practices are continuing to offer criminal law services. At each stage the Government has introduced reforms which have taken away payment for various types of work done be criminal law practitioners. The model proposed by the Government in this consultation will not improve competition, instead it is likely to destroy competition and thereby destroy quality which market forces encourage. The Government's objective is to limit the number of providers of criminal legal services. It will seek to provide all providers with similar amounts of work, and arrange to pay them a similar amount for each case. If the legal provider does not have to worry whether or not he will be able to get in work and does not have to worry about the quality of service provided, then it follows that the services provided will be the least possible for the lowest payment per case. The model requires providers to calculate a price per case which is 17.5% lower than the current average case cost and predict the amount work load that will be available over the next three years. In order to provide the level of service required by the Government larger providers will have to scale down and smaller providers will have to scale up. The objective is to force small provider to join together and form larger organisations in order to save administrative costs. Experienced practitioners will tell you that in most cases the hardest working fee earners are the proprietors of small practices. They put in the hours and considerable effort to build up a reputation and a client base so that they can continue to get in work for the future. If work is guaranteed as in the Government's model, and the provider is not a professional organisation, but a limited company whose objective is to turn a profit and satisfy its shareholders, it does not take too much imagination to foresee the type of service which will be provided. If a fee earner is working for such a large organisation and will get a set payment for his work, he or she is not likely to put in the effort to ensure that the defendant they represent will return recommend their organisation or return to them if he requires help in the future. Under the proposed model the particular defendant will be allocated a legal provider with no choice on his or her part. Therefore instead of introducing competition, the proposals will effectively rule out competition and provide cheapest service possible. The Government has experienced losses in similar competitions and does not appear to understand that the proposals will not work. The contracts to supply services for delivery of

prisoners from prisons and to provide interpreter for courts are two areas in which similar proposal clearly have not worked. The government believes by introducing price competition it will ensure the long-term sustainability of the criminal legal aid scheme. We believe the by introducing price competition along the model proposed the government will destroy the clients bases firms have built up over many years and irreparably damage the Criminal Justice System. If its proposals do not work or at the end of the three year period the limited number of legal providers say that they cannot supply the services required at the price offered by the government, there may well be an increase in costs far in excess of the current amounts.

The Government fundamentality misunderstands the relationship between the defendant and practitioners. To the defendant the practitioner representing them is the only point of intervention in the process in which they are prosecuted by the state. It is fundamental to that relationship that they are able to rely upon an independent, confidential and objective evaluation of the evidence they face. The present mistrust by some in the community of Duty Solicitors will be amplified significantly if defendants are forced to be represented by practitioners whom they would not choose. This proposal produces a disincentive to firms to provide the best quality service available under public funding at the very time that it removes the defendant's choice of practitioner. The proposal risks an increase in the number of litigants in person which places a further burden on the Criminal Justice System.

The current proposals undermine both the smaller and the larger practices. Earlier consultations, in particular the input provided to the previous administration by the report produced by Lord Carter, encouraged the larger practices in the belief that the Government valued the investment made by the larger practices. That resulted in considerable investment by those practices to improve their infrastructure and gain efficiency by economies of scale. Those practices invested in particular in Information Technology, seeking to bridge the gap between the investment made by the Government in the digital working of the Crown Prosecution Service, Courts and that which could be afforded by publicly funded practitioners. Those practices understandably anticipated that their investment would be met with increased volume at a time of reduction in the unit price of the work. They have been met by significant reductions in volume due to falling numbers of defendants brought before the courts. The proposals in their present form undermine that investment causing those larger practices to have to restructure and downsize to what would be, in some cases, significant reductions in the work allocated to them. The upshot for defendants and the Criminal Justice System as a whole is to have a practitioner base which is not able to afford to meet the challenges presented by new technology. As has been seen in many areas the efficiencies which can be gained by the implementation of new technology within the Crown Prosecution Service and Courts, reaches a stopping point when defence practitioners can not engage in the process.

As professionals all solicitors, barristers and legal executives are taught to fight for their client's legal rights. In Criminal law practice such a fight requires determination and commitment. The consequences of lack of preparation means the defendant will suffer because he or she may receive a custodial sentence. If it means working through the night for the benefit of their client then that is what most lawyers will do. It takes years of practice to acquire the skills necessary to practice at the top end of the profession. By introducing the proposed model the Government will wipe out at a stroke all that experience. The time scale proposed for the changes shows that the authors of the

proposals have no idea of the way in which criminal law practices work. They mistakenly believe that their proposed system will be better and have chosen to ignore similar projects in other countries where the results have been negative. Larger organisations are not necessarily the best service providers. Have we not seen in recent months that large organisations which we were told to trust and hold in high esteem, were in fact prepared to bend the law to such an extent that they were feeding us horse meat instead of the meat we expected them to supply. All in the name of making a profit. We may end up getting "GUILTY PLEA FACTORIES" than law practices which are prepared to develop particular skills to fight for their clients and do what is right. Many of the proposals provide a perverse incentive to persuade defendants to plead guilty. A fixed fee for Magistrates' Court proceedings irrespective of whether the case involves a trial or simple sentencing exercise will disincentivise the hard work presently applied to the defence of contested cases.

We do not believe that the proposals for price completion are workable.

8. 17.5% reduction in work not covered by price competition

The figures used by the Government are now out of date and there have already been considerable cuts made in the Criminal Legal Aid. We do not agree that there should be a 17.5% reduction in work not covered by price competition. Already there are not enough young lawyers coming into the profession looking to do criminal law work. Any further reductions will result in even fewer new entrants to the profession. It will not be possible to work with a reduction of 17.5%. The Government should review this proposal having looked at the current figures and release those figures for discussion.

Cuts to funding of this significance undermine the ability of firms to invest inwardly. The Criminal Justice System is reliant on the ability of firms to employ paralegal staff and to provide training contracts to aspiring lawyers. The cuts experienced over the last twenty years have already had a significant impact on the ability of providers to train the next generation of lawyers. The Government risks an ageing provider base dwindling in ten to fifteen years and not being replenished with appropriately qualified replacements.

9. 3 year contract, option to extend by 2 years

The amount of financial expenditure which will be required to prepare to tender work for as proposed will be beyond most criminal law practices. The new organisations which the Government hopes will enter the market will be able to absorb losses in the initial years and then will either hold the Government for ransom once the existing practices have gone out of practise or else will shut shop and leave. Most banks will not lend on the basis of a three year contract with an option to extend by another two years. We do not agree that this is sufficient having regard to the expenditure which will be required to service a contract of the size anticipated by the Government.

10, 11, & 12. Size of the Procurement Areas

All areas are not similar and if is difficult to make any such recommendations until we know which police stations and courts are likely to remain. Under its proposals many police stations and courts are likely to close.

The proposal to offer contracts covering the existing Criminal Justice Areas ignores the geographical constraints and marked differences in those areas. That in turn gives rise to a disincentive to firms to bid in neighbouring Criminal Justice Areas. For example compare the difference in the West Midlands and West Mercia Criminal Justice areas. Firms in West Mercia face a considerable challenge in being expected to represent defendants as far afield as Hereford and Nuneaton. Those in the Southern part of that Criminal Justice Area do so whilst losing their client base in Gloucestershire. To stick rigidly to the Criminal Justice Area in this instance ignores the proximity of Nuneaton to Leicestershire. Practitioners have long suffered the difficulties arising from the removal of payment for travel between court centres.

The majority of practices operate within a centralised area. They have been required to focus their efforts on serving a client base in those areas by the strictures of Duty Solicitor scheme rules. That has in turn led to investment in property and the provision of service in proximity to the client base. Those investments are commitments which are not lightly changed. It is not possible to obtain short term commercial leasing of property or to invest in freehold purchases for the short term periods of the current contract proposed. Practitioners will experience considerable difficulty in the need to service a considerably expanded geographical area. In the case of the smaller firms that will require significant investment in personnel and premises. In the case of the larger practices that will require downsizing as the present proposals do not increase the overall volume of cases, yet require them to represent defendants over a much broader geographical area. It is submitted that contracts should be offered to a larger number of providers in smaller geographical areas. The current proposal based on the existing Criminal Justice Areas is too crude a tool by which to apply the proposed contracts.

Until it is certain where the services will be required we are not able to offer any opinion.

13, 14, 15, & 16. Work exclusively to those with contract, limit number of contracts, factors, share equally

For reasons mentioned above on the question of price competition we do not agree that work should be given exclusively to those providers with contracts. The number of contracts proposed for West Midlands is too low and not workable. By sharing work equally the effect of market forces will be removed as will the need to be competitive and to provide a quality service.

17. Removing choice

We are firmly opposed to the proposal to remove client choice. This is a very important principle. If any such change is to be made then there ought to be a full debate on this issue. Parliament should discuss it and the public should be made aware of the Government's plan to remove choice. In many other areas the Government has been keen on promoting choice. Consider for instance the Doctors, Hospitals, and Schools. So why should the public not be also be allowed to choose a lawyer of their choice? Client choice ensures practices supply a quality service. At present client's have a choice as to which solicitor or barrister they choose. If they are facing a serious charge they will take advice from their family members or others who can guide them on the appropriate reputation or skill of a particular solicitor or barrister. If a solicitor or barrister does not have the skill or experience required to deal with particular matter, and indeed has not dealt with a particular type of case before, the client is not likely to have confidence in that solicitor or barrister. Clients are not likely to employ a lawyer who is incapable of providing the appropriate level of service By removing this choice, and allocating cases either by name or date of month of their birth, the public's confidence in the Criminal Justice System will be seriously damaged. There was time when not all criminal law practitioners were duty solicitors. In those days defendants chose not to have duty solicitors because they thought that duty solicitors were linked to the police. Presently as all practitioners have to be duty solicitors in order to satisfy the requirements under the criminal contracts, we take great care to advice defendants that we are independent of the police and that we have our own practices. If choice is removed and the defendant is told that he either has the solicitors from the particular service provider for the area or he has not solicitor, he or she is less likely to feel confident that their interests are being well looked after. In serious cases many defendants turn to members of their own family for advice on choice of lawyer representing them. This is especially the case in serious matters where lengthy custodial sentences are likely. By removing such choice there will be serious loss of confidence in the Criminal Justice System. As indicated above the defendant's choice of practitioner is fundamental to their trust in that practitioner. It is common for defendants to approach more than one firm before they choose which service provider they will instruct. The Government seeks to remove choice from the public right at the time that it is extending choice in other areas of life, such as education and health care. How has a Government which has committed itself to providing choice in those areas with a specific view to improving quality of service abandoned choice in the Criminal Justice System? This appears entirely inconsistent with the Governments ethos regarding choice being vital to the future provision of public services.

18. Which model should be used? By case, client's month of birth, surname, or on duty basis

None of these should be used. The client should be allowed to choose a lawyer of his choice. Any of the proposed methods is fraught with difficulty. What will occur when a woman marries and chooses her husband's surname? How will the proposal to allocate work by date of birth or name ensure there is equal opportunity to practitioners to represent defendants in a broad spectrum of

cases? There is risk that some firms will be penalised by the ill luck of certain defendant names resulting in families involved in a particular type of crime, loading those firms with serious case work whilst others are paid equally to provide simple representation in summary cases? How will the proposal cater for dissatisfaction with the services of a provider, whether or not that satisfaction is justified or the client's expectations reasonable?

19. Where conflict of interest arises provider from a different procurement area to advice.

Conflicts will arise in larger practices covering one area. If a defendant is sent from one provider to another without being given the choice, he or she is not likely to be satisfied that their interests are being looked after. Until they are allowed to choose for themselves, with the help of people they trust, there is unlikely to be satisfaction. As indicated above practitioners in other Criminal Justice Areas asked to represent defendants due to conflicts of this nature face a disproportionate impact of the cost of providing that service in another geographical area. There is the risk that they are penalised by the inefficiencies arising and will have a disincentive to take those cases. There is a risk that defendants will struggle to find representation from practitioners in another area for whom taking on the case will prove unprofitable. Such firms will face a disadvantage compared to those representing co-defendants within the CJS area.

20. Our clients to stay with the provider for duration of the case.

We do not agree. If this is allowed to happen, then the incentive for providers to give quality advice will decrease even further. In some cases there is a need to give strong and assertive advice. If the advice is not accepted then the defendant may feel that his case is not being given the care that it deserves. He or she may feel that he has been prejudged on the allegation made in the case. If a conviction follows then there is likely to be an appeal lodged on the grounds that there had been a breakdown of trust between the defendant and his adviser.

21. Block payment, Fixed fee, current Graduated Fee.

Once the principle of how the criminal law services should be provided is dealt with the mechanics of how payments should be made can easily be considered and agreed upon.

22. Fixed fees to include travel and disbursements.

We do not agree. Some of the areas covered are so large it would not be realistic for fixed fees to include travel and disbursement. For example the parking fees in Birmingham are about £22.00 per day. If such amounts have to be included in the fixed fees then the amount paid will not cover the expense of providing the service. Especially if you consider and include other expenses such as providing premises, employing staff, training staff and including all other expenses. The proposals

appear to seek to penalise firms by encouraging them to take on board costs which are outside their control. This at a time when some practitioners will be adversely and disproportionately affected by the geographical spread of the area in which they are now required to practice.

23 & 24. Criteria for pre-qualification questionnaire and delivery plan

Sufficient time is not available to be able to formulate a response to these issues.

25. Price cap for fixed fee.

We do not agree that there should be a cap for the fixed fee. The Government cannot guarantee the work load which it believes will be available. Over the last year far fewer defendants have been charged by the police and produced before the courts. Other ways of dealing with them have been employed. For instance by offering them cautions and in many cases simply bailing them of to future dates pending enquiries. In earlier proposals practitioners were led to believe there would be an increase in the volume of work arising under the contracts offered, only to find that guidance provided to the police enabling local resolutions reduced the numbers of defendants diverted away from the Criminal Justice System. Practitioners and indeed other agencies in the Criminal Justice System have rightly been vocal in their opposition to this means of resolving cases outside the public sphere of the courts. For the administration of justice to be seen to be fair it must be accessible to the public and understood by them.

26. Restructuring the Advocates Graduated Fee Scheme.

By paying Advocates more for guilty plea cases and by making the cracked trial fee the same as for the guilty plea case, the Government's focus appears to be to put pressure on lawyers to advise their clients to plead guilty early. In order to maintain respect of the Criminal Justice System, it is important that the evidence put forward by the prosecution is properly considered and tested. There should not be a penalty for proceeding to trial. Notwithstanding advice given some defendants proceed to trial where the practitioner has specifically advised that the evidence against them is overwhelming. It is not appropriate that practitioners should be penalised by the choices their clients make. Ultimately defendants must choose whether they contest cases. In most instances only they can know whether they have committed the offence alleged and it is not appropriate to impose a system which implicitly requires the practitioner to impose their will. There are other means to resolve the costs arising from cases inappropriately contested by defendants and it is they not practitioners who should bear that burden. These proposals appear to be designed to reduce contested trials. We do not agree with the proposals for restructuring of the Advocates Graduated Fee Scheme. In 5 or 6 years time there may well be more appeals against convictions and sentences because of the clients were advised to plead guilty early without due consideration of the evidence. Speed does not necessarily mean quality.

There appears to be an assumption made by the government that lawyers get their clients to plead guilty and then clients change their plea on the trial date. The client is the ultimate decision taker and if his or her instructions are that they intend to plead not guilty then those instructions have to be followed. In many cases the prosecution will serve evidence late which will alter the situation and a basis of plea is then agreed. Even when a trial starts the delays caused are not because of advice given by the lawyers. The courts are reluctant to adjourn matters or put of trials because of arrangements which do not suit the lawyers. There are many other reasons for the delays in trials which do not seem to have been considered. For instance no account seems to have been taken of the delays caused because of difficulties in not having interpreters for the defendants or difficulties in delivering prisoners to court. These are measures which should be working well because the Government has tendered out contracts to various business organisations who promised to supply interpreters and deliver prisoners to court on time.

There is a presumption by the Government implicit in its proposals that practitioners unnecessarily extend the length of trials. The proposals to taper attendance fees for cases inappropriately penalises practitioners. It again provides a perverse incentive for them to hurry through trials rather than ensuring that all relevant evidence is presented before and considered by the jury. The proposal to taper fees makes no allowance for the multiple factors outside the control of practitioners which in fact cause delays in trials. For example the failure of the prison service to deliver defendants to court, or on time, lateness or failure to attend by interpreters booked by the court, illness amongst jury members or on occasion practitioners, failure to attend and lateness on the part of witnesses, listing of matters in trial courts for Judges to resolve before trails can get underway or continue when part heard. None of these factors are the result of failure or poor practice by practitioners yet they bear the burden of them if their attendance fees are cut. In reality the current level of attendance fees paid to advocates is no incentive for them to stretch cases out when they would otherwise have the opportunity to obtain a separate fee if available to take on a new case. This proposal is founded on a fundamental misunderstanding of why trials sometimes extend beyond the time frames estimated when they are fixed.

27. Reducing costs in Very High Court Cases.

The majority of such cases are complicated fraud or terrorism cases. The expenditure of such cases is under control. By giving individual contracts and the government is able to control the amount of work which is undertaken by in the case. The rate of pay for work undertaken has already been reduced. In such cases defendants face lengthy sentences. The lawyer instructed is duty bound to consider all the evidence served. If for instance in a fraud case some 8 or 9 businesses are involved there will inevitably a large amount of paper work to consider. By making further cuts in this area the Government risks forcing able and experienced barristers and solicitors not to undertake such work because it would become uneconomical bearing in mind the time required to prepare the case. If the experienced practitioners leave this field there will be an impact on the Criminal Justice System. Ask a senior Judge who has experience of dealing with such cases whether in his or her opinion time and costs are saved because of an experienced practitioner has had time to assess the evidence and it will soon become clear that there is no substitute for experience. Reducing costs will

drive away such experienced practitioners which will not be of benefit the Criminal Justice System. We do not agree that there should be a 30% reduction as proposed.

28. Reduction in Current and future contracts.

We do not agree that there should be a reduction in current contracts. The work has been undertaken on a contract already agreed. It seems incredible that the Government should even consider a proposal to reduce existing contracts. For future contracts we refer to the answer given above.

29. Multiple Counsel

The Government says that the aim of this proposal is to ensure that multiple counsel are only instructed in cases where it is necessary. That in fact already happens. Before implementing any further changes in this area the Government should look at the current figures for the year 2012/2013. Measures have already been taken and we believe that there has already been a reduction in the legal aid expenditure in this respect. The figures which the government has used are historical. Cases are considered on an individual basis by experienced Judges who know of the work involved and they make the decision as to whether or not multiple counsel should be allowed. The experience of practitioners is that it has become increasingly difficult to obtain the services of Queens Counsel in cases which previously would have merited that appointment without argument. Equally it is far from routine for a leader and junior to be authorised. It is not anticipated that further reductions can be made without damaging the supplier base and viability of the Bar further.

30. Reducing the fixed representation fees paid to solicitors in cases covered by the care proceedings graduated fee scheme.

We do not make comment on this issue.

31. Harmonising fees paid to self employed barristers and other barristers appearing in civil, non family proceedings.

We do not make comment on this issue.

32. Removing the uplift in immigration and asylum /// appeals

We do not make comment on this issue.

33. Experts fees in civil, family and criminal proceedings.

We do not have sufficient information to be able to make any comment on the issues raised in this section. We are however concerned that the reduction in fees will in turn reduce the numbers of suitable qualified experts who are available and prepared to report in publicly funded cases. The cap placed on expert fees already introduced has no doubt produced significant savings. It has at the same time reduced the supplier base available to practitioners. It has further increased the amount of time spent by practitioners finding suitable experts who will assist publicly funded defendants and in the justification of their fees to the Legal Aid Authority. We have a present system of review of all such fees over £100 before they are incurred and in which the Legal Aid Authority has the final say in terms of payment. The concern is that reduction in fees, particularly in those areas where limited expertise is available, will undermine the ability of defendants to marshal evidence before the court.

We seek a response to the consultation to confirm how the Government has monitored changes arising from the capping of expert fees. What proposals does the Government have to regulate the quality of the material provided by experts, rather than just the cost of the provision of service?

34 & 35. Correctly identifying the range and extent of impacts of the proposals.

We do not believe that this exercise has been carried out on the basis of proper analysis of the evidence. In the short period of time available it is not possible to make any comment on these issues.

36. Mitigating the impact.

We do not accept that sufficient consideration has been given to the impact these proposals will have on the current legal service providers. The general public has not been made aware of the dramatic changes which the Government has proposed. Sufficient time should be allowed to canvass public opinion as ultimately the effects of the proposals will directly impact on the general public.

BIRMINGHAM LAW SOCIETY

3rd June 2013