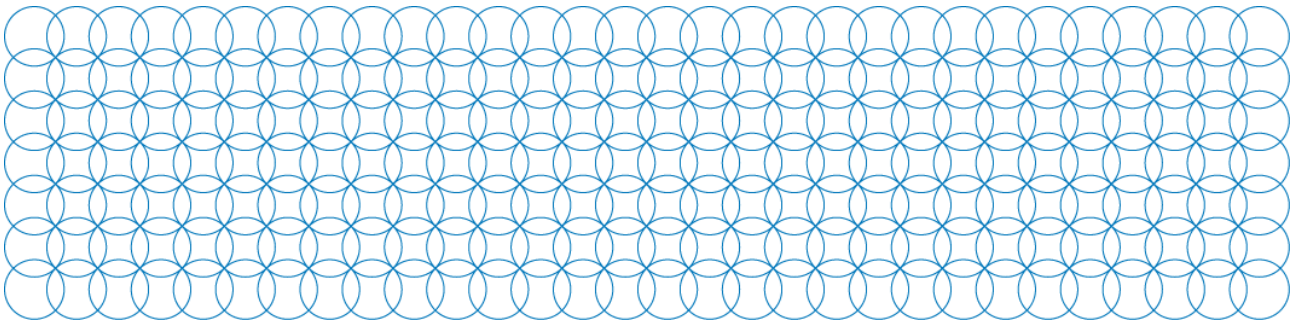
Ministry of Justice

Transforming legal aid: delivering a more credible and efficient system

Consultation Paper CP14/2013

This consultation begins on 9 April 2013

This consultation ends on 4 June 2013



Ministry
of Justice

Transforming legal aid: delivering a more credible and efficient system

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at www.justice.gov.uk

About this consultation

To:	This consultation is aimed at providers of publicly funded legal services and others with an interest in the justice system.
Duration:	From 09/04/13 to 04/06/13
Enquiries (including requests for the paper in an alternative format) to:	Annette Cowell Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Fax: 020 3334 4295 Email: legalaidreformmoj@justice.gsi.gov.uk
How to respond:	We encourage respondents to use the online consultation tool at https://consult.justice.gov.uk/. Alternatively, please send your response by 04/06/13 to: Annette Cowell Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Fax: 020 3334 4295 Email: legalaidreformmoj@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published in autumn 2013 at: www.justice.gov.uk

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Ministerial Foreword

Access to justice should not be determined by your ability to pay, and I am clear that legal aid is the hallmark of a fair, open justice system. Unfortunately, over the past decade, the system has lost much of its credibility with the public. Taxpayers' money has been used to pay for frivolous claims, to foot the legal bills of wealthy criminals, and to cover cases which run on and on racking up large fees for a small number of lawyers, far in excess of what senior public servants are paid. Under the previous government, the cost of the system spiralled out of control, and it became one of the most costly in the world.

Earlier in this Parliament, the Government took significant steps to reform legal aid, to bring costs under control particularly in relation to civil claims. In the current financial climate, it is now necessary to make further savings by embarking on the next phase of reform, mainly focused on criminal cases. The principles which underpin these proposals are simple: to ensure that those who can afford to pay do so; to make certain that legal aid is not funding cases which lack merit or which are better dealt with outside court; and to encourage greater efficiency in the criminal justice system to reduce costs. The hard-working public pay for legal aid, and we must deliver a system which commands their confidence and spends their money wisely.

Under these reforms, those with significantly higher than average incomes will no longer be eligible for financial support in criminal cases; those who have no strong connection with the UK will cease to have their civil legal costs covered too. Prisoners who wish to challenge their treatment in custody will have recourse to the prisoner complaints procedures rather than accessing a lawyer through legal aid; on Judicial Reviews, lawyers who bring weak cases will no longer be reimbursed; and cases with less than a 50% chance of success will no longer be funded. This is a comprehensive package of measures to restore the public's faith in the system.

To deliver real savings, it is necessary to drive greater efficiency in the legal aid system too. For criminal litigation, we are proposing a model of competitive tendering, where solicitors firms must compete to offer the best price they can for work in their local area. This will mean successful firms expanding or joining together, to achieve economies of scale which can be passed onto the taxpayer in savings to the public purse. For criminal advocacy, we intend to reform the fee structure, to ensure that cases are resolved as quickly as possible, which will mean less time required of lawyers, and lower costs to the legal aid bill. The impact of these changes will also help remedy the great disparity which had emerged within the legal profession by reducing the payments to that small number of lawyers earning very high fees whilst protecting the majority of barristers who should not lose out as a result of our proposals. Indeed, some of the lowest fee earners will be better off.

In short, the reforms outlined in this document both boost public confidence in and reduce the cost of the legal aid system. In the medium term, I am keen to explore further ways for convicted criminals to bear a greater proportion of their legal costs themselves, rather

than the bill simply falling to the taxpayer. Whether through deductions from future earnings, or by some other means, we should be seeking to ease the burden of legal aid on the public purse, whilst guaranteeing everyone the right to a defence.

Though in Britain today we face serious challenges, this must not undermine our determination for reform or our desire to achieve the best value for the taxpayer. These proposals are bold but fair, and I look forward to hearing your views.

Chris Grayling

Lord Chancellor and Secretary of State for Justice

Chapter 1: Executive Summary

Executive Summary

1.1 This document sets out the Government's proposals for further reform of the legal aid system in England and Wales.

1.2 As set out in **Chapter 2** (**Introduction**), against a backdrop of continuing financial pressure on public finances, we need to continue to bear down on public spending.

1.3 We estimate that the proposals set out in this consultation would, if implemented, deliver savings of £220 million per year by 2018/19.[1]

1.4 Views are invited on the questions set out below. When expressing views on those questions, respondents are advised to have the overall fiscal context firmly in mind.

Proposals for reform

1.5 **Chapter 3 (Eligibility, Scope and Merits)** sets out proposals for improving public confidence in the legal aid scheme. It includes reforms to prison law to ensure that legal aid is not available for matters that do not justify the use of public funds such as treatment issues; the introduction of a household disposable income threshold above which defendants would no longer receive criminal legal aid; a residence test for civil legal aid claimants; reforms to reduce the use of legal aid to fund weak judicial reviews; and amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success.

1.6 **Chapter 4 (Introducing Competition in the Criminal Legal Aid Market)** sets out proposals for introducing price competition into the criminal legal aid market, initially for the full range of litigation services (except Very High Cost Cases (Crime) VHCCs) and magistrates' court representation only. It details the main features and elements of the proposed model.

1.7 **Chapter 5 (Reforming Fees in Criminal Legal Aid)** sets out proposals to reduce the cost of criminal legal aid fees for Crown Court advocacy and VHCCs (both litigation and advocacy), which it is not proposed to include in competition. These include, first a proposal to restructure the current Advocacy Graduated Fees Scheme to encourage earlier resolution and more efficient working through a harmonisation of guilty plea, cracked trial and basic trial fee rates to the cracked trial rate, and a reduction in and tapering of daily trial attendance rates from day 3. Second, there is a proposal to reduce all VHCC rates by 30%. Third, there is a proposal to tighten the rules governing the decision to appoint multiple counsel in a case, changes to litigator contracts to require greater support to counsel from the

[1] This estimate does not take account of savings arising from fees not being uprated by inflation over the four years to 2018/19. It should be noted that the figures in the accompanying Impact Assessments are long run steady state savings which take account of the continued impact of the policy proposals.

litigation team, and the introduction of a more robust and consistent system of decision-making.

1.8 **Chapter 6 (Reforming Fees in Civil Legal Aid)** sets out proposals to reduce solicitor representation fees in family public law cases by 10%, to align the fees for barristers and other advocates in non-family cases, and to remove the 35% uplift in provider legal aid fees in immigration and asylum appeals.

1.9 **Chapter 7 (Expert Fees in Civil, Family and Criminal Proceedings)** sets out a proposal to reduce fees paid to experts in civil, family and criminal cases by 20%.

Impact Assessment

1.10 As set out in **Chapter 8 (Equality Impact)**, the Government has assessed the potential impacts of the proposed reforms in accordance with our obligations under the Equality Act 2010. These assessments of the potential impact are at Annex K.

Consultation

1.11 The Government would welcome responses to the questions set out in this consultation paper. We would prefer responses to be submitted online at www.justice.gov.uk. Those who would prefer to submit their responses via e-mail may send them to legalaidreformmoj@justice.gsi.gov.uk. Those who would prefer to submit views in hard copy should send their responses to Annette Cowell, Legal Aid Reform, Ministry of Justice, 102 Petty France, London, SW1H 9AJ.

1.12 The deadline for responses is midnight on Tuesday 4 June 2013. The Government will respond to the consultation in autumn 2013.

Schedule of Consultation Questions

Chapter Three: Eligibility, Scope and Merits

1) Restricting the scope of legal aid for prison law

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

2) Imposing a financial eligibility threshold in the Crown Court

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

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

3) Introducing a residence test

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

4) Paying for permission work in judicial review cases

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

5) Civil merits test – removing legal aid for borderline cases

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

Chapter Four: Introducing Competition in the Criminal Legal Aid Market

i) Scope of the new contract

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

Q8. Do you agree that, given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

ii) Contract length

Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination, is an appropriate length of contract? Please give reasons.

iii) Geographical areas for the procurement and delivery of services

Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset /Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

Q11. Do you agree with the proposal under the competition model to join the following criminal justice system areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas, aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

iv) Number of contracts

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

Q15. Do you agree with the factors that we propose to take into consideration and are there any other factors that should to be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

vi) Contract value

Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

vii) Client choice

Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

viii) Case allocation

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

- Option 1(a) – cases allocated on a case by case basis
- Option 1(b) – cases allocated based on the client's day of month of birth
- Option 1(c) – cases allocated based on the client's surname initial
- Option 2 – cases allocated to the provider on duty
- Other

Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the Legal Aid Agency or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

ix) Remuneration

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

- Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price
- Fixed fee per provider per procurement area based on their bid price for magistrates' court representation
- Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)
- 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

Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

x) Procurement process

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

Chapter Five: Reforming Fees in Criminal Legal Aid

1) Restructuring the Advocates' Graduated Fee Scheme

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;
- reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and
- taper rates so that a decreased fee would be payable for every additional day of trial?

Please give reasons.

2) Reducing litigator and advocate fees in Very High Cost Cases (Crime)

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

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

3) Reducing the use of multiple advocates

Q29. Do you agree with the proposals:

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates;
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and
- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?

Please give reasons.

Chapter Six: Reforming Fees in Civil Legal Aid

1) Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme:

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

2) Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings

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

3) Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

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

Chapter Seven: Expert Fees in Civil, Family, and Criminal Proceedings

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

Chapter Eight: Equalities Impact

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

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

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

Chapter 2: Introduction

2.1 In Britain, we have a justice system of which we can be proud and which justly deserves its world-wide recognition for impartiality and fairness. As part of that system, legal aid helps thousands of people a year to access justice and ensure fair outcomes. However, in the past decade our legal aid bill has risen dramatically, so that it is now one of the highest in the world, costing the taxpayer nearly £2bn each year. At the same time, legal aid appears to have been provided for cases that do not justify it and to those who do not need it, which undermines public confidence in the scheme.

2.2 When the Government took office in 2010, it was clear that significant reform was needed to target legal aid at those most in need and ensure that it was delivering best value for the taxpayer in challenging financial circumstances. That is why in May 2010 we made a commitment[2] to undertake a review of legal aid in England and Wales.[3]

2.3 We implemented a programme of reforms[4] comprising reductions in fees paid to criminal and civil legal aid service providers and, through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), changes to civil legal aid scope and eligibility. Those reforms should deliver savings of some £320m per annum in 2014-15. We have also strengthened the accountability of the legal aid system and introduced a more rigorous approach to financial management by creating the Legal Aid Agency for this specific purpose.

2.4 However, against a backdrop of continuing pressure on public finances, we need to continue to bear down on the cost of legal aid and embark on the next stage of legal aid reform, to ensure that we are getting the best deal for the taxpayer, and that the system commands the confidence of the public. Where our previous reforms were mainly focused on legal aid for civil matters, our primary focus this time is in relation to crime. Our aim is not just to bring down the cost of the scheme, but to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it. Our proposals are also designed to drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system.

2.5 The LASPO reforms have done much to ensure that taxpayer funding is targeted at those who need it most and for the most serious cases. However, there remain some anomalies which we believe undermine the credibility of the scheme and of the wider justice system. The legal aid scheme should be as fair on taxpayers as on legal aid applicants. In criminal matters, everyone is entitled to a defence, and legal aid should foot the bill for those who cannot afford to pay. However, we do

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2 The Coalition: Our Programme for Government, http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf, May 2010

3 Proposals for the reform of Legal Aid in England and Wales, Cm 7967 November 2010.

4 As set out in Reform of Legal Aid in England and Wales: the Government Response Cm http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf.

not believe it is right for the taxpayer to pick up the bill for those who can afford it, for civil cases that lack merit, or for matters which are not of sufficient priority to justify public money and which are often better resolved through other non-legal channels. We are also clear that someone should have a strong connection with the UK in order to benefit from civil legal aid.

2.6 It is also our responsibility to ensure that when spending public funds is justified, the taxpayer gets best value for that money. We believe the single most effective way of doing this is to move away from the current complex system of administratively set fees, through the introduction of competitive tendering, where providers compete to offer their services at the best possible price. We have already seen this approach deliver savings and better outcomes in areas of justice such 'Community Payback'. We intend to introduce competitive tendering initially in criminal legal aid work only, where we are still spending over £1bn a year, and over a longer period to introduce competition in civil and family services provided face to face.[5]

2.7 The Government's preferred approach is to introduce competition first for the full range of litigation services (except Very High Cost Cases (Crime)) and magistrates' court representation. It is clear that the current position of administratively set and unnecessarily complex fees, with over 1600 organisations delivering those services is far from being the most efficient way of procuring services. Our proposed model would result in consolidation of the market, making it easier to access greater volumes of work and allowing control of the case from end to end. Longer and larger contracts with greater certainty of volumes would give providers increased opportunities to scale up to achieve economies of scale and scope and provide a more efficient service. Firms would have the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns over a longer period of time. Whilst encouraging consolidation, the model allows providers the freedom to develop the most efficient approach in delivering the service.

2.8 We have considered whether to include Crown Court advocacy in the competitive tender as well. Subject to the outcome of this consultation, we do not believe that it is appropriate to do so. Crown Court advocacy services are delivered predominantly by self-employed barristers from within a chambers structure, and whilst some chambers may be in a position to contract as a legal entity, these will probably be too few in number for nationwide tendering. We are also conscious that any competition which included Crown Court advocacy would effectively amount to 'one case one fee', with the contractor (likely to be the solicitor) deciding how much to pay the advocate. This would likely affect the long-term sustainability of the Bar as an independent referral profession. The Bar is a well respected part of the legal system in England and Wales, and we will have due regard to the viability of the profession in reaching our final decision on the model for competition.

2.9 We are clear, however, that we do still need to take action on the cost of criminal advocacy, especially in the Crown Court, which accounts for around £220m per

[5] As set out in the 2010 consultation and in Written Ministerial Statements issued in December 2011 and March 2013.

annum of legal aid spend. The current fee structure does not sufficiently support our efforts to encourage more efficient and effective resolution of cases, whether or not they are contested. At present, the longer a case runs, the higher the payments. There is therefore little incentive to try and complete cases as early as possible. We propose to restructure the Crown Court advocacy fee scheme, by paying the same rate whether there is an early or a late guilty plea or a short trial, and by reducing and tapering the daily trial attendance rates in longer trials. We also propose to reduce the use of more than one counsel for each defendant.

2.10 These reforms would complement the work we are already undertaking with wider criminal justice system partners to ensure that cases are resolved more quickly and cheaply. We are prioritising reforms aimed directly at reducing the amount of time defence solicitors and barristers must spend on each case, and have invited the professions to contribute further ideas on how we achieve this. The new Criminal Justice Board has agreed to further work in a number of areas that should drive greater efficiency both in how cases are prepared and managed, and reduce the costly errors such as unnecessary adjournments. This should lead to greater efficiencies in particular for defence practitioners in the Crown Court, enabling them to deliver their services more cost effectively.

2.11 We also considered whether to include Very High Cost Cases (Crime) within the ambit of the competition model. These are the small number of long-running cases which attract a disproportionately high level of spend, £90m in 2011/12, currently paying rates of up to £150 per hour for preparation and £500 per day for advocacy. On balance our view is that these costs are so high that they would skew any price based competition model, and therefore, subject to consultation responses, we do not propose to include them in the scope of competition. Instead, we propose to impose a straight reduction of 30% on all litigation and advocacy fees paid in these cases.

2.12 The overall effect of our proposed reforms to Crown Court work would not deliver an across the board reduction in all advocates' fees, but instead rebalances the fee income so that those at the top end take the greatest reduction, whilst those earning the lowest fees may actually see a small increase. There has been a great disparity in the level of fee income currently received by advocates for Crown Court work. A significant amount of taxpayers' money has been paid to a small number of top barristers, who could earn over £200,000 a year from criminal legal aid, while the majority of more junior barristers have been earning considerably less.

2.13 An additional benefit of adopting this proposed approach to Crown Court advocacy and Very High Cost Cases (Crime) is that it would deliver more immediate savings than those which would flow from competition.

2.14 Given the reforms to civil legal aid which have just been implemented, we accept that there is little room for making further substantial cost reductions in that area. We are therefore proposing some limited changes to fees, to ensure, where there are discrepancies, that fees paid are fair and consistent with those for similar work. We also propose reducing the fixed representation fees paid to solicitors in public family law cases from April 2014, to better ensure value for money and reflect the expected reduction in work resulting from implementation of the Family Justice

Review[6] reforms. And, finally we propose to reduce fees paid to experts in both civil and criminal cases, to bring them into closer alignment with fees currently paid by the prosecution in criminal cases.

2.15 From Spring 2014, we will also need to make additional changes to the eligibility criteria for legal aid in light of the wider roll-out of Universal Credit, which will replace the benefits which are currently used to 'passport' recipients through all or part of the legal aid means tests.[7] We will develop a new system which is fair to everyone, whether they are in work or not, and does not cut across any incentives to be in work, and will consult on this in the autumn. However, the proposals in this consultation are free standing and are not dependent on decisions the Government may take in due course in respect of that latter consultation.

2.16 We estimate that the proposals set out in this consultation would, if implemented, deliver savings of some £220m per annum in 2018/19.

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6 Family Justice Review, Final Report, http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf

7 From 2013, during the period of phased roll-out, Universal Credit is being treated in the same way as other 'passporting' benefits. See Annex C for further detail.

Chapter 3: Eligibility, Scope and Merits

Introduction

3.1 This chapter sets out proposals for improving public confidence in the legal aid scheme by doing away with some of the anomalies which we believe undermine its credibility. Legal aid is not a limitless resource. At a time of fiscal austerity, we need to target public resources at the cases that really require legal aid to ensure that the public can have confidence in the scheme. Limited public funds should be not be spent on those who can afford to pay for their own defence, for matters that lack merit or are better resolved by other means or to pay the legal bills of those who do not have a strong connection to the UK.

3.2 Building on recent measures to strengthen the enforcement of the Crown Court means test for criminal legal aid, and on the measures currently before Parliament to allow defendants' restrained assets to be used to contribute to their legal aid costs,[8] we are proposing further amendments to the criminal legal aid scheme to further enhance confidence in the scheme.

3.3 As we made clear in our 2010 consultation *Proposals for the Reform of Legal Aid in England and Wales*,[9] taxpayer funding of legal advice and representation should be reserved for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case. The five proposals in this chapter are intended to support that aim.

1. Restricting the scope of legal aid for prison law

Case for reform

3.4 Prisoners are currently able to apply for advice and assistance, including advocacy assistance, funded by criminal legal aid for prison law matters relating to their treatment in prison, sentencing issues, disciplinary matters and Parole Board reviews (collectively referred to in this section as "prison law"). We believe that criminal legal aid advice and assistance should be available, subject to merits and means, for any prison law case which involves the determination of a criminal charge, or which affects the individual's ongoing detention and where liberty is at stake, or which meets the criteria set out in case law (see paragraph 3.14).

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8 Crime and Courts Bill, 2012-13, http://services.parliament.uk/bills/2012-13/crimeandcourts.html

9 Referred to throughout this consultation document as the "2010 consultation". http://www.justice.gov.uk/consultations/legal-aid-reform

Current practice

3.5 Legal aid is available to prisoners (on remand or serving a custodial sentence) through both the civil and criminal legal aid schemes. Civil legal aid is available for matters that are within the scope of civil legal aid (or through exceptional funding) that meet the merits and means criteria, (no distinction is made between applications from prisoners and non-prisoners). Proposals on amending the civil legal aid merits criteria are included at paragraphs 3.80-90.

3.6 Criminal legal aid is available for prisoners seeking advice and assistance, including advocacy assistance, on matters relating to treatment, sentencing, disciplinary matters and Parole Board reviews. (see Annex B (a)). These categories cover a number of issues[10] (see Annex B (b)). Applications are subject to both to a means and a merits (interests of justice) test. Since July 2010, providers have been required to seek prior approval from the Legal Aid Agency (LAA) (and formerly from the Legal Services Commission – LSC) before providing criminal legal aid advice and assistance in relation to treatment cases and this prior approval requirement has been in place since July 2010.[11]

3.7 Application of the merits criteria is the first stage in assessing whether a person qualifies for legal aid, and is delegated by the Director of Legal Aid Casework to providers in sentencing, disciplinary and Parole Board review cases. For those types of prison law case this takes the form of the sufficient benefit test which is set out as follows in the 2010 Standard Crime Contract:

"Advice and Assistance or Advocacy Assistance may only be provided on legal issues concerning English or Welsh law and where there is sufficient benefit to the Client, having regard to the circumstances of the Matter, including the personal circumstances of the Client, to justify work or further work being carried out.

There should be a realistic prospect of a positive outcome that would be of real benefit to the Client."

3.8 Should the sufficient benefit test be passed, the prisoner is then subject to a means test for both advice and assistance matters and advocacy assistance matters.[12]

3.9 For treatment matters, following a consultation in 2009 by the previous administration, the 2010 Standard Crime Contract states that funding will not be provided for matters that are suitable to be resolved through the internal prisoner complaints system, such as a complaint about regime conditions (further examples are provided in the contract), unless the provider can demonstrate that it would be practically impossible for the applicant to use the system. One reason for this might be if the prisoner has learning difficulties or mental health issues: of the few treatment cases to have received prior approval since July 2010, most concerned prisoners with such issues.

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[10] These are set out in the Criminal Legal Aid (General) Regulations 2013. For an explanation of these matter types see the 2010 Standard Crime Contract Specification Part B: http://www.justice.gov.uk/legal-aid/contracts-and-tenders/standard-crime-contract-2010

[11] Following the previous administration's 2009 consultation *Legal Aid: Refocusing on Priority Cases*.

[12] As set out in the Criminal Legal Aid (Financial Resources) Regulations 2013 http://www.legislation.gov.uk/uksi/2013/471/body/made

The prisoner complaints system and other routes to resolution

3.10 All prisoners have recourse to the internal prison requests and complaints system,[13] a robust set of procedures that aims to resolve issues in an effective and expeditious manner (see Annex B (c) for further detail). This underpins much of prison life, and is a key element of ensuring that the Prison Service meets its obligation of dealing fairly, openly and humanely with prisoners. There is also provision for selected sensitive issues (reserved subjects) to be dealt with by Prison Service HQ or the Parole Board (as appropriate) and not by the establishment in question.

3.11 The system is not the only avenue for prisoners to pursue complaints: if a prisoner is not satisfied with the response, they may refer their complaint to the Independent Prisons and Probation Ombudsman. The Ombudsman will consider the matter and may make recommendations to the prison about resolution of the matter. At any point during the complaint process a prisoner can also make an application to speak to a member of the local Independent Monitoring Board. The Parliamentary Commissioner for Administration may also be approached if the complaint has not been satisfactorily resolved via the complaints process. However, these are not decision-making bodies and are able to make recommendations to establishments only. The prisoner discipline procedures system and probation complaints system may also be used where relevant.

Cost of legal aid for prison law

3.12 Prison law makes up a relatively small proportion of the overall spend on criminal legal aid, but still costs a significant amount. In 2011/12 the LSC spent approximately £23m on prison law. 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. Table 1 below sets out spending on prison law since 2001/02 (figures are rounded to the nearest £million).

Table 1: Legal aid spend on prison law since 2001/2002

Year	Legal aid spend on prison law in England and Wales	Proportion of total legal aid spending in England and Wales	Total legal aid spending in England and Wales
2001/02	£1m	0.06%	£1,717m
2002/03	£3m	0.18%	£1,909m
2003/04	£5m	0.24%	£2,077m
2004/05	£7m	0.33%	£2,038m
2005/06	£9m	0.43%	£2,028m
2006/07	£12m	0.63%	£1,984m
2007/08	£16m	0.80%	£2,036m
2008/09	£21m	1.01%	£2,108m

[13] http://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-02-2012-prisoner-complaints.doc The process by which prisoners may raise complaints is set out in Prison Service Instruction 2/2012http://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-02-2012-prisoner-complaints.doc

Year	Legal aid spend on prison law in England and Wales	Proportion of total legal aid spending in England and Wales	Total legal aid spending in England and Wales
2009/10	£25m	1.16%	£2,149m
2010/11	£26m	1.21%	£2,134m
2011/12	£23m	1.12%	£2,039m

3.13 It was to control spending (and case volume) that prior approval was introduced by the LSC into the 2010 Standard Crime Contract for treatment matters in July 2010.

Proposal

3.14 We propose to restrict the scope of advice and assistance, including advocacy assistance, in criminal legal aid for prison law to cases that:

- involve the determination of a criminal charge for the purposes of Article 6 European Convention on Human Rights (ECHR - right to a fair trial);
- engage Article 5.4 ECHR (right to have on-going detention reviewed); and
- require legal representation as a result of successful application of the "Tarrant" criteria.[14]

3.15 We believe that these cases alone are of sufficient priority to justify the use of public money, and that the internal prisoner complaints system, prisoner discipline procedures[15] and probation complaints system[16] should be the first port of call for other issues, resulting in a more efficient and effective resolution for the prisoner. The proposal would deal with those claims which undermine the credibility of the system but criminal legal aid would remain available for prisoners for example

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[14] When a prisoner attends a disciplinary hearing before a governor he is asked whether he wants to obtain legal advice or representation. If the prisoner does not want any legal assistance the hearing proceeds. However, if the prisoner requests legal advice, the adjudicating governor will consider each of the following criteria (resulting from the case of R v Home Secretary *ex parte* Tarrant) and record their reasons for either refusing or allowing representation or a friend:
- the seriousness of the charge/potential penalty;
- a substantive point of law being in question;
- the prisoner being unable to present their own case;
- potential procedural difficulties;
- urgency being required; or
- reasons of fairness to prisoners and staff.

If the adjudicating governor allows the request they will adjourn the hearing for a reasonable time to allow the prisoner to telephone or write to a solicitor.

[15] See Prison Service Instruction 47/2011 for more information: http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-47-2011-prison-discipline-procedures.doc

[16] Complaints must be made direct to the relevant Probation Trust. Procedures vary between Trusts. See Prison Service Instruction 47/2011 for more information: http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-47-2011-prison-discipline-procedures.doc

where liberty was at stake. This would bring the level of spending down to the 2008/09 level.[17]

3.16 Providers would continue to assess whether individual matters were in scope. The provider would also continue to apply the sufficient benefit test, and the means test would continue to apply.

3.17 The proposal is likely to result in the removal of criminal legal aid advice and assistance for all **treatment matters**, including those that might currently receive prior approval. We consider that treatment cases are not of sufficient priority to justify the use of public funds. We have had due regard to the impact of these proposals on those sharing protected characteristics, including those with learning difficulties and/or mental health issues (see Annex B (c)). 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.[18]

3.18 In respect of **sentencing matters**, the application of the criteria proposed at paragraph 3.14 means that some of the cases currently included under this category would continue to be within the proposed scope of criminal legal aid advice and assistance whereas others would not. For example, we anticipate that matters related to sentence planning and minimum term review applications would continue to be funded, subject to merits and means, as they relate to a review of ongoing detention, but that matters related to categorisation, segregation, close supervision centre and dangerous and severe personality disorder referrals and assessments, resettlement issues and planning and licence conditions would not be funded as they do not engage any of the proposed scope criteria. However, as highlighted above, we believe that any matters not satisfying the proposed scope criteria should be able to be resolved satisfactorily via the prisoner complaints system or probation complaints system without the need for publicly funded legal advice and assistance funded by criminal legal aid.

3.19 Criminal legal aid advice and assistance would remain available, subject to merits and means, for **disciplinary matters** where the charge was referred to an independent adjudicator – these are cases which are so serious that an award of additional days may be imposed if the prisoner is found guilty or where the adjudicating governor determines it is necessary or expedient for some other reason for the case to be referred to an independent adjudicator. Those cases capable of resulting in extra days would continue to be funded, as there is the need to ensure the right to a fair trial. However, disciplinary cases which did not engage the Tarrant criteria, which were not referred to an independent adjudicator and which did not involve the determination of a criminal charge and so did not engage the criminal limb of Article 6 ECHR, would no longer be funded. Cases no longer funded should be dealt with via the prisoner discipline procedures system.

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[17] It is envisaged that the proposal would save approximately £4m per year in steady state.

[18] In line with the NOMS Business Plan 2012/13 equalities objective, see http://www.justice.gov.uk/downloads/publications/corporate-reports/noms/2012/noms-business-plan-2012-2013.pdf

3.20 Criminal legal aid advice and assistance would remain available for **Parole Board review** matters as these cases concern decisions about ongoing detention.

3.21 In addition, we propose imposing a requirement in the 2010 Standard Crime Contract to the effect that we would not fund sentencing matters that remain within scope if they were suitable to be resolved via the prisoner complaints system. The provider would have to provide reasons why the matter was not suitable to be resolved via the complaints system, as well as stating why the matter satisfied the revised scope criteria. As is currently the case with treatment matters, evidence would need to be provided of the complaints system having been used in the first instance. We do not propose making any changes in this regard to disciplinary or Parole Board matters, as the majority of those cases would remain within the scope of legal aid under the proposal.

Implementation

3.22 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and contract amendment.

Consultation Question

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

2. Imposing a financial eligibility threshold in the Crown Court

Case for reform

3.23 All defendants in the Crown Court are currently automatically entitled to legal aid upfront. Their means are only relevant to whether they should make a subsequent contribution toward their legal aid bill. We consider that in principle the taxpayer should no longer routinely fund legal aid costs for people who can afford to pay for their own defence. This proposal would further enhance public confidence in the scheme, building on the steps we have recently taken to clamp down on the enforcement of legal aid contributions owed by Crown Court defendants, and the measures currently before Parliament to allow defendants' restrained assets to be used to contribute to their legal aid costs.[19]

[19] http://services.parliament.uk/bills/2012-13/crimeandcourts.html

Current practice

3.24 In the Crown Court criminal legal aid is granted on the basis that it is deemed in the interests of justice to do so, due to the seriousness of the proceedings and gravity of the potential penalty.

3.25 A means test is then undertaken to determine whether the defendant is subject to a contribution from income or capital, or both. Contributions are payable and collected in instalments. This means that defendants with high disposable incomes[20] receive legal aid, with the LAA collecting any contributions over time – the cost burden remains on the taxpayer until such time as any contributions are recouped.[21]

3.26 By contrast, legal aid in the magistrates' courts operates on an "in/out" principle under which those with a disposable income of more than £3,398 are excluded from the legal aid scheme, subject to review on hardship grounds.

Proposal

3.27 We propose to introduce a financial eligibility threshold whereby any defendant with a disposable household income of £37,500 or more would be ineligible for legal aid in the Crown Court, subject to review on hardship grounds for those who exceed that threshold but demonstrate that they cannot in fact afford to pay for their defence.

3.28 As under the current Crown Court means testing scheme, the proposal would apply to all proceedings in the Crown Court, but not to appeals from the magistrates' court and onward appeals to the Court of Appeal or Supreme Court.

3.29 We consider that a defendant with this level of annual disposable income should generally be able to afford to pay for legal services in the Crown Court on a private basis. In some cases private rates will be the same as, or similar to, legal aid rates. The average defence cost of a legally aided case in the Crown Court is approximately £5,000, based on 2011/12 LSC data. The proposed threshold is 7.5 times that average figure, which is approximately the same as the multiplier between the average defence costs and the upper disposable income threshold in the magistrates' court scheme, providing a degree of consistency between the

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[20] This is the applicant's annual gross household (a partner's gross annual income is treated as if it were available to the applicant for means testing purposes) income minus specified allowable outgoings (tax and National Insurance, council tax, housing and childcare costs, and any maintenance costs) and the weighted annual living allowance (this is £5,676 and includes such items as food and non-alcoholic drinks, household goods and services and transport). The computation period is the 12 months immediately prior to making the application and must reflect the applicant's current and expected usual income. The Criminal Legal Aid (Financial Resources) Regulations 2013 (SI 2013/471) and the Criminal Legal Aid Manual contains further information on this calculation: http://www.justice.gov.uk/downloads/legal-aid/eligibility/criminal-legal-aid-manual.pdf

[21] See The Criminal Legal Aid (Contribution Orders) Regulations 2013 (http://www.legislation.gov.uk/uksi/2013/483/contents/made). See also: http://www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/means-testing-in-the-courts

schemes.[22] The proposed threshold is also approximately twice the national average annual disposable household income of £18,000,[23] which supports our view that the proposed threshold is not an unreasonable level at which to expect people to pay for their own defence.

3.30 We acknowledge that private rates vary and that in many cases they will be higher than legal aid rates. However, we consider that data we hold about private rates from cases in which those rates were assessed and reimbursed to acquitted defendants from central funds prior to 1 October 2012 are relevant. Her Majesty's Courts & Tribunals Service (HMCTS) used the Guideline Hourly Rates[24] published by the Judicial Office as the basis for assessing the reasonable costs of reimbursement. Based on the rates in force in 2008, the following are illustrative examples of cases in which defendants were reimbursed at private rates (these are the most recent data available):[25]

- Assault (cracked trial) – £8,586.
- Rape (cracked trial) – £16,856.
- Dangerous driving (contested trial) – £24,838.
- Sexual assault (contested trial) – £16,094.
- Driving with excess alcohol (appeal) – £6,938.
- Threatening behaviour (appeal) – £9,297.

3.31 We also acknowledge that the cost of cases in the Crown Court can vary considerably, for example between murder or serious fraud and a more routine case such as a theft. We have considered but rejected a series of offence-based thresholds, both for administrative reasons, and because case costs within a particular offence or category of offence also vary according to whether the case is contested, so any offence-specific threshold would not necessarily be representative of cases within that category.

3.32 In order to cater for these variations, and to ensure that applicants above the threshold who cannot in fact afford to pay the costs of their case privately are able to access legal aid, we propose to permit defendants to apply to the LAA for a hardship review. If on review an applicant is successful in satisfying the hardship test, they would be eligible for legal aid, subject to a contribution.

3.33 In both the magistrates' courts and the Crown Court means testing schemes a hardship review already exists. An application can be made where the applicant has higher than usual allowable outgoings or expenditure that have not been taken into account in the means test, such as care costs for a disabled relative, loans or

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[22] The average cost of a case in the magistrates' court is approximately £500. A person with a disposable income of £3,399 or more is not entitled to legal aid.

[23] This is based on the assessment of disposable household income as applied by the Legal Aid Agency for legal aid purposes.

[24] http://www.judiciary.gov.uk/publications-and-reports/guidance/index/guideline-hourly-rates-2010

[25] Sample data from central funds payments made by HMCTS (Manchester National Taxing Team) in 2008. Data are used for illustrative purposes, rather than as a representative sample.

fines,[26] or, under the magistrates' courts scheme, where the likely costs of their particular case cannot be met from disposable income.

3.34 We propose that a defendant excluded from receiving criminal legal aid by the disposable income threshold would be able to apply for a hardship review. The defendant would be required to supply detailed financial information which showed that they could not afford to pay the estimated full costs of their defence privately, as is the case in the current magistrates' courts scheme. This review would have two stages. At the first, the estimated costs of the defendant's particular case and any additional allowable expenditure would be assessed against the defendant's disposable income. If on that assessment the defendant's remaining disposable income falls below £37,500, they would be eligible for legal aid, but subject as other defendants to a contribution. At the second stage, the estimated private costs are disregarded (as they are no longer relevant) and the defendant's liability to a contribution is based on an assessment of their disposable income and any additional allowable expenditure.

3.35 In cases where a defendant is initially refused legal aid on the basis of their annual disposable income, but their financial circumstances change, they would be able to make an application for legal aid. If they could show that they could no longer afford to pay privately, or that their disposable income no longer reached the threshold level, then they would become eligible for legal aid, subject to a contribution if appropriate.

Payment from central funds

3.36 Prior to October 2012, Crown Court defendants who had paid for their legal representation privately and were then acquitted were entitled to reimbursement of reasonable defence costs from central funds. However, since 1 October 2012 those who choose to pay privately in the Crown Court are no longer reimbursed. This change was made on the basis that all defendants are provided with legal aid in the Crown Court, and need not therefore incur these costs.[27]

3.37 We propose to reimburse at legal aid rates the private defence costs of those acquitted defendants who had applied for criminal legal aid and been refused as a result of this proposal. As now, we would not reimburse defendants who simply chose to pay privately. Capping the amount reimbursed at legal aid rates would prevent high net worth individuals receiving significant sums from the public purse and ensure that the impact on the savings expected from the 2012 reforms was minimised.

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[26] Additional expenditure that may be taken into account includes secured or unsecured loans, medical costs, rent arrears, student loans, mortgages on a second property, pension payments and credit card payments. For more information see the Criminal Legal Aid Manual: http://www.justice.gov.uk/legal-aid/criminal-legal-aid-eligibility.

[27] New section 16A of the Prosecution of Offences Act 1985 was inserted by section 62 of, and Schedule 7 to, the Legal Aid, Sentencing and Punishment of Offenders Act 2012, commenced on 1 October 2012.

Restrained assets and Universal Credit – further eligibility considerations

3.38 Amendments are currently before Parliament in relation to the Proceeds of Crime Act 2002 (POCA) to allow restrained assets to be used to pay toward legal aid contributions in circumstances which will be prescribed in further legislation. However, POCA will still prohibit using restrained assets to fund private defence costs, in order to prevent restrained assets from being unnecessarily dissipated. Accordingly, defendants whose restrained income would otherwise put them over the threshold should continue to receive legal aid, subject to any prescribed contributions. Any unrestrained income would still be taken into account for the purpose of this proposal.

3.39 We propose to consult in the autumn on additional changes to legal aid eligibility criteria in the light of the wider roll-out of Universal Credit (see Annex C for further detail). We are also exploring the scope to increase the current level of recovery of criminal legal aid from convicted defendants. We do not expect those proposals to affect the principle that those who can afford to pay privately should do so. We therefore invite views on that principle, and on the proposed threshold, accordingly.

3.40 We are due to undertake a post-implementation review of the Crown Court means testing scheme. It was originally envisaged that this would take place in 2012 and would help to inform future changes to criminal legal aid eligibility. However, since that time we have made changes to the operation of that scheme and have therefore decided to carry out the review in longer time once the changes introduced on 1 April 2013 following the October 2012 Crown Court means testing consultation have bedded down.[28] In the light of the revised timetable, and noting that this proposal has its basis in the credibility of the legal aid scheme, we do not consider it necessary to await the outcome of that review before consulting on the present proposal, and then, subject to responses, implementing the new threshold. If relevant, we would welcome views from consultees on any issues arising from their experience of the operation of the Crown Court means testing system.

Implementation

3.41 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and contract amendments.

Consultation Questions

Q2. Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court? Please give reasons.

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

[28] Crown Court Means Testing of Criminal Legal Aid consultation, October 2012.

3. Introducing a residence test

Case for reform

3.42 We are concerned that individuals with little or no connection to this country are currently able to claim legal aid to bring civil legal actions at UK taxpayers' expense. These may be people who have never set foot in England or Wales, or those who have never paid taxes in the UK, but who are yet able to benefit financially from the civil legal aid scheme. Alternatively these may be people who are in the country but whose connection is tenuous because they are simply here on a visa as visitors, or because they have temporary admission.

3.43 We need to introduce a common sense test to address this anomalous situation, which we believe is currently unfair to the UK taxpayer. We believe that limited public funds for civil legal aid should be targeted at those who have a strong connection to the UK.

3.44 We are also concerned that the availability of legal aid for cases brought in this country, irrespective of the person's connection with this country, may encourage people to bring disputes here.

Current practice

3.45 Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO),[29] civil legal aid does not generally include services relating to any law other than the law of England and Wales. There are no nationality restrictions or residence restrictions on accessing civil legal aid.

3.46 Foreign nationals who are in England or Wales can apply for civil legal aid for cases taking place here. This applies both to those foreign nationals who are here on a visa (from tourists to students), and to those who are here and have obtained indefinite leave to remain.

3.47 Foreign nationals who reside outside England or Wales can also apply for civil legal aid if they are bringing or defending proceedings within this country.

Proposal

3.48 Our proposal is to require applicants for civil legal aid to satisfy a residence test in order for civil legal aid to be available under the England and Wales scheme. The test would comprise two limbs.

3.49 First, the individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made. This would have the effect of excluding both foreign nationals

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[29] See section 32, Legal Aid, Sentencing and Punishment of Offenders Act 2012. http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted

and British nationals applying from outside the UK, Crown Dependencies or British Overseas Territories from receiving civil legal aid. It would also have the effect of excluding, for example, illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid.

3.50 Second, the individual would also be required to have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for 12 months. This 12 month period of lawful residence could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past. However the period should be continuous. The fact that the residence period could have been in the past would mean, for example, that people who had previously lawfully resided within the UK, Crown Dependencies or British Overseas Territories on a visa for 12 months, or British nationals who had lived within the UK, Crown Dependencies or British Overseas Territories for 12 months, would immediately satisfy this limb of the test on their return.

3.51 The residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. They would need to see evidence[30] that the client was lawfully resident and had previously been lawfully resident for 12 months, and they would need to retain copies of this evidence on file for audit purposes.

3.52 We consider that a 12 months' lawful residence requirement indicates that the individual has more than just a passing connection to the UK, Crown Dependencies or British Overseas Territories, but also represents a test which is not unduly restrictive for those people who are present in this country.

3.53 We would ensure that legal aid would continue to be available where necessary to comply with obligations under EU or international law.

3.54 Under LASPO,[31] there is a power for legal aid to be granted in exceptional circumstances where a case is excluded from the scope of the civil legal aid scheme. This would continue to be the case, including in respect of persons who did not meet the residence test.

Exceptions to the residence test

Armed forces personnel

3.55 We consider that an exception should be made for serving members of Her Majesty's UK armed forces and their immediate families. Serving members of the armed forces may be posted overseas, sometimes with their family members. We do not think it is appropriate to exclude them under the residence test, because these individuals are acting in accordance with their duties and in defence of the

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[30] For example, evidence of a right to reside lawfully in the country, such as evidence of British nationality (e.g. a passport), evidence of a right to reside (e.g. a valid EEA Passport), evidence of a right of abode (e.g. a certificate of entitlement as a result of Commonwealth ancestry) or any other evidence of being here legally (e.g. a visa).

[31] Section 10, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

UK, and therefore clearly maintain a strong connection to the UK, notwithstanding their being outside the jurisdiction.

Asylum seekers

3.56 We propose an exception to allow asylum seekers[32] to be exempt from the residence test for all civil proceedings (including family proceedings, as well as asylum matters).[33] Asylum seekers are "lawfully present" in this country rather than "lawfully resident" and would not otherwise qualify under the proposed test. Although asylum seekers do not have a strong connection to this jurisdiction, they are seeking refuge from their country of origin, and by virtue of their circumstances this group tends be amongst the most vulnerable in society. We therefore propose that a general exception to the lawful residence test is made for asylum seekers.

3.57 Where an asylum seeker is successful in their asylum claim, they will normally be given 'leave to remain' for five years. At this point they will be 'lawfully resident' rather than 'lawfully present', but will not qualify under the second limb of the test until 12 months have passed. We propose that where an individual is an asylum seeker and granted legal aid for a civil or family case, if they are successful in their asylum claim legal aid should continue to be available for that civil or family case. To expect the individual who was an asylum seeker to have to wait a further 12 months to comply with the second limb of the lawful residence test would disrupt the ongoing court proceedings. For any new claim for which the individual who was asylum seeker wished to obtain legal aid, they would need to satisfy the residence test in full like any other applicant.

3.58 If an asylum seeker had their claim for asylum rejected and their appeal rights had been exhausted, they would cease to qualify for legal aid under the asylum seekers exception, and funding would cease. Only where they had made a 'fresh claim'[34] for asylum would they once again benefit from the exception for asylum seekers.

3.59 There is a risk that such an exception to the residence test for asylum seekers, might be exploited by some, who might make spurious claims for asylum simply as a means of obtaining legal aid. However, we consider this risk is low, as it is unlikely that, for example, illegal visa overstayers would wish to bring themselves to the attention of the authorities in this way. Nonetheless, we would monitor the operation of this exception and if it appeared to be being abused we would consider bringing forward secondary legislation to revise the exception.

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[32] By an asylum seeker, we mean a person claiming rights described in paragraph 30(1) of Part 1, Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[33] See article 15 of the EU Procedures Directive (Council Directive 2005/85/EC of 1 December 2005) on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[34] Paragraph 353, Immigration Rules (HC 395 as amended).

Implementation

3.60 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation, to be laid in autumn 2013.

Consultation Question

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

4. Paying for permission work in judicial review cases

Case for Reform

3.61 We continue to believe it is important to make legal aid available for most judicial review cases, to ensure access to a mechanism which enables persons to challenge decisions made by public authorities which affect them. However, we are concerned that legal aid is being used to fund a significant number of weak cases which are found by the Court to be unarguable and have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme.

3.62 We think it is important that we take steps as part of the legal aid scheme to address this issue, in order to preserve valuable court and judicial time, drive greater efficiency and focus legal aid resources on cases that really require it. We consider that the appropriate way in which to address this issue is to build into the civil legal aid scheme a greater incentive for providers to give more careful consideration to the strength of the case before applying for permission for judicial review, through transferring the financial risk of the application to the provider.

Current practice

3.63 Legal aid is generally available for judicial review cases, subject to a number of exceptions.[35] An applicant requires permission from the High Court to proceed with a judicial review application. The Court will only grant permission if it thinks the case is "arguable" and merits full investigation by the Court. Most permission decisions are made on consideration of the papers.

3.64 If the High Court refuses permission, the applicant can seek a "renewal" at an oral hearing to reconsider their application for permission. If the High Court still refuses permission, the applicant can appeal to the Court of Appeal for reconsideration of the permission decision.

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[35] Under paragraph 19 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

3.65 In 2011–12 there were 4074[36] cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court.

3.66 Of the 1799 cases which did apply for permission, 845[37] ended after permission was refused, either on application or on renewal.

3.67 In 330 of these 845 cases, the provider recorded that the case was of 'substantive benefit to the client'. This might have been because the public authority had modified its decision to some extent as a result of the proceedings or had conceded the position in advance of the Court's consideration (and the application was not withdrawn, perhaps for costs reasons). Or it might have been because the challenge was for a delay in reaching a decision and the relevant decision had been taken by the point that permission was considered by the Court.

3.68 Therefore there were just over 500 cases funded by legal aid which did not settle, applied for permission and failed, and ended without benefit to the client but with potentially substantial sums of public money expended on the case. These figures suggest that there are a substantial number of cases which benefit from legal aid, but are found by the Court to be "unarguable".

Proposal

3.69 We propose that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court.[38]

3.70 Currently a similar system exists for immigration and asylum Upper Tribunal appeals.[39] In an immigration or asylum appeal case, (subject to some exceptions)[40] where an application for permission to appeal to the Upper Tribunal is refused, then funding for the permission application is not payable.[41]

3.71 Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings, as is required by the

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36 Based on data from the Legal Aid Agency. Excludes 111 cases lacking codes.

37 This number may be higher because it may include some proportion of a further 243 cases, but these cases are not recorded in sufficient detail to determine if permission was refused.

38 This proposal sits separately from those set out in the consultation paper 'Judicial Review: Proposals for Reform' published in December 2012. The proposals in this consultation are freestanding and are not dependent on decisions the Government may take in due course in respect of that consultation.

39 Also see Chapter 6 on a proposal in relation to immigration and asylum Upper Tribunal appeal case payment.

40 UKBA detained fast track cases or an application for permission to appeal to the Upper Tribunal lodged by the UKBA.

41 Standard Civil Contract Specification, Section 8: Immigration, Part D, para 8.99-8.104.

Pre-Action Protocol for Judicial Review.[42] Where a permission application was made the claimant would continue to be technically in receipt of legal aid for the permission stage of the case, and so would continue to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful.

3.72 We recognise that the merits criteria are in place to help weed out weak cases, however we do not consider that these are sufficient by themselves to address the specific issue we have identified in judicial review cases. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case and specialist understanding of the law in the relevant area. The LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding. 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.

3.73 We also recognise that this proposal would affect the 330 cases identified where permission was refused but a benefit to the client was recorded. Our approach would tackle the large proportion of cases (61% in 2011–12) in which permission is refused and which have no benefit to the client, thereby incurring unnecessary costs for public authorities and the legal aid scheme. We do not consider it would be appropriate to retain funding for such cases simply in order to retain funding for the minority of cases in which permission is refused but which are recorded by the provider as having substantive benefit to the client. In the immigration and asylum Upper Tribunal appeal system, costs are not paid if permission to appeal is refused even if the provider records that there is a substantive benefit to the client.

3.74 We do not consider that it would be sensible to make an exception and allow funding to be provided where a provider says the case was in any event of substantive benefit. Providers have been incentivised by LAA contract key performance indicators to record substantive benefit as part of their management information. Allowing providers to decide whether or not they get paid for the permission work of failed cases would not provide a robust control of funds.

3.75 In addition, depending on the circumstances, it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court. For example, if the challenge is to a failure by a public authority to make a decision, and the decision is taken after the permission application is made, permission may well be refused because the case is academic, however, the claimant can pursue a costs order and the court can grant any costs reasonably incurred by the claimant if, arguably, the proceedings have brought about the making of the decision.

3.76 The same reasoning applies in relation to cases where an application for permission for judicial review is made and the case is withdrawn because the defendant concedes or the parties settle the case. Again, depending on the

[42] This work is usually carried out under the Legal Help or the Investigative Representation form of service.

circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court.

3.77 Therefore we consider that this proposal is the appropriate way in which to ensure that legal aid is not used to fund a significant number of weak cases and is focussed on cases that really require it.

Exceptions

3.78 Reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the Court. This reflects the exceptions made for the payment of interpreters and experts under the immigration and asylum Upper Tribunal remuneration scheme.

Implementation

3.79 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and, if necessary, contract amendment.

Consultation Question

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

5. Civil merits test – removing legal aid for borderline cases

Case for reform

3.80 In our view it is a reasonable principle to adopt that in order to warrant public funding through legal aid, a case should have at least a 50% prospects of success ('moderate' prospects of success or greater). As a matter of principle we believe that limited public funding should be directed to cases with at least 50% chance of success. We are concerned that the current merits criteria regarding cases assessed as 'borderline' are too lax.

Current practice

3.81 In order to be granted civil legal aid, an applicant's case must satisfy the merits criteria. Broadly speaking, the merits criteria provide a formula for deciding whether it is justified to provide, or continue to provide, public funds in an individual case.

3.82 For cases which require some form of legal representation, the criteria generally look at the likely costs of the case, the prospects of success, and the outcome sought in the case.

3.83 In relation to prospects of success, the LAA is required to assess the likelihood that an individual who has made an application for civil legal services will obtain a successful outcome at the final hearing in the proceedings to which the application relates. Usually the LAA will require the applicant's solicitor to give an estimate of the prospects of success, which is then endorsed or rejected by the LAA.

Cases where 'prospects of success' test do not apply

3.84 There are certain categories of case where the prospects of success test does not apply (and the proposal below will not be relevant).[43] For all other cases, the LAA must place the case in one of the following prospects of success categories:

i. "very good", which means an 80% or more chance of obtaining a successful outcome;

ii. "good", which means a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome;

iii. "moderate", which means a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome;

iv. "borderline", which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to (a) decide that the chance of obtaining a successful outcome is 50% or more; or (b) classify the prospects as poor;

v. "poor", which means the individual is unlikely to obtain a successful outcome; or

vi. "unclear", which means the Director cannot put the case into any of the categories in paragraph (i) to (v) because, in all the circumstances of the case, there are identifiable investigations which could be carried out, after which it should be possible for the Director to make a reliable estimate of the prospects of success.

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[43] Under the Civil Legal Aid (Merits Criteria) Regulations 2013 ("Merits Regulations"), these are:
- Certain family cases under regulation 11(9);
- Mental health cases under regulation 51;
- Public Law children cases under regulation 65(2)(a);
- Certain family cases (where the individual has benefited from legal aid in the country of origin) under regulation 65(2)(b);
- EU Maintenance Regulation cases under regulation 70; and
- Hague Convention 2007 cases (concerning international recovery of child support and other forms of family maintenance) under regulation 71.

3.85 Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, there are certain types of housing or family cases which will receive funding with borderline prospects of success.[44] In other cases funding will be available if there is a borderline prospect of success and the case has special features (that is to say it is a case of significant wider public interest or a case with overwhelming importance to the individual).[45] Funding may also be granted in public law claims,[46] claims against public authorities.[47] and certain immigration[48] and family claims[49] which have these special features or if the substance of the case relates to a breach of ECHR rights.

Proposal

3.86 We propose to abolish the 'borderline' prospects of success category, which would mean that these cases would cease to qualify for civil legal aid funding.

3.87 We recognise that the cases to which the "borderline" exception applies are high priority cases, for example cases which concern holding the State to account, public interest cases, or cases concerning housing. However, even for such cases there must be an assessment of merits and a decision must be made as to whether the prospects of success justify the provision of public funds. For example, under the existing merits criteria any case, even if it concerns an important issue such as domestic violence, which is assessed as having "poor" prospects of success is refused legal aid funding. Therefore it is already a principle of the current scheme that all cases, even those which concern issues of great importance, must be sufficiently meritorious to warrant funding.

3.88 This proposal means that "borderline" cases would be treated in the same way as cases assessed as having "poor" prospects of success. Any applicant refused civil legal aid funding on the basis of a merits assessment could appeal against that refusal. The appeal would be heard by an Independent Funding Adjudicator – an independent lawyer in private practice. The decision of the Independent Funding Adjudicator about the prospects of success of a case is binding on the LAA. We consider that this provides an appropriate safeguard to prevent meritorious cases being wrongly refused under the proposed reformed merits test.

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44 See regulation 61 of the Merits Regulations (housing) and regulations 66, 67 and 68 (family).

45 See regulation 43 of the Merits Regulations (general merits criteria for full representation in civil cases).

46 See regulation 56 of the Merits Regulations (public law) and the definition of "public law claims" in regulation 2 of the Merits Regulations.

47 See regulation 58 of the Merits Regulations (claims against public authorities).

48 See regulation 60 of the Merits Regulations (immigration cases before the First-tier Tribunal or Upper Tribunal). Funding may also be granted such cases with an "unclear" prospects of success.

49 See Regulation 69 of the Merits Regulations (other family cases to which specific merits apply). Funding may also be granted such cases with an "unclear" prospects of success.

Asylum cases

3.89 This proposal would apply equally to asylum cases assessed as having 'borderline' prospects of success. The Government recognises its responsibilities under Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. This requires the Government to provide legal assistance for those refused asylum. However article 15(3)(d) of the Directive makes clear that this obligation only extends to those appeals which are 'likely to succeed'.

Implementation

3.90 Subject to the outcome of the consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013.

Consultation Question

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

Chapter 4: Introducing Competition in the Criminal Legal Aid Market

Introduction

4.1 This chapter sets out proposals for the introduction of competitive tendering for criminal legal aid contracts in England and Wales.

4.2 Legal aid remuneration for litigation and advocacy has been subject to a number of fee reforms and reduction in fee levels over recent years. As we set out in our 2010 consultation, while it is possible over the short term to address the financial pressures on public expenditure, we recognise that it is unlikely to be sustainable in the longer term to continue to tighten remuneration indefinitely within broadly the current fee and market structures.

4.3 We therefore announced our intention in the longer term to replace the current system of administratively set rates with a model of competitive tendering. The 2010 consultation stated that the immediate focus would be on criminal legal aid, with civil and family legal aid to be addressed over a longer period. In a Written Ministerial Statement in December 2011, we confirmed our belief that competitive tendering was likely to be the best way to ensure long-term sustainability and value for money in the legal aid market.[50]

4.4 We set out an outline timetable for the development of a competition strategy and indicated that we would publish proposals for consultation in autumn 2013. In March 2013, we highlighted in a further Written Ministerial Statement[51] the need to find further savings from all areas of public expenditure as quickly as possible, and announced the decision to accelerate the timetable for consultation on competitive tendering in criminal legal aid. In that statement we gave a revised indicative timetable for the development and implementation of our competition strategy, subject to the outcome of the consultation.

4.5 We have therefore decided in principle to introduce competitive tendering for criminal legal aid services and are now seeking views on the proposed model.

4.6 We recognise that this would require a major structural change in the market, but it is our view that competition is the best way to promote value for money, innovation and efficiency.

4.7 Under our proposed model, we believe the opportunity for access to greater volumes of work and control of the case from end to end would encourage providers to scale up to achieve economies of scale and provide a more efficient

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[50] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/wmstext/111201m0001.htm#11120140000199

[51] http://www.parliament.uk/documents/commons-vote-office/March-2013/5-3-13/6-Justice-LegalAidReform.pdf

service. We anticipate applications would be submitted by a mixture of types of business structure (including individual firms, joint ventures, alternative business structures (ABS), partnerships etc). Increased use of digital evidence service and video links should offer applicants further opportunities to develop efficiencies in the delivery of their own services over the life of the contract. The Government, as commissioner of legal aid services, would have the assurance that it was paying as much as necessary to secure sustainable provision in the longer term, and that the prices it paid achieved best value for money for the taxpayer.

Case for reform

4.8 In 2006, Lord Carter's Review of Legal Aid Procurement[52] recommended a move away from administratively set rates for legal aid work in favour of best value tendering. The Review envisaged the competitive selection of legal aid providers based on their ability to deliver a sufficient quantity and quality of work at the most economically advantageous price. The Review made a compelling case for moving to a market-based approach to legal aid procurement. It highlighted the need for market restructuring, and for increasing the average size of providers through growth, mergers and rationalisation. It recommended that this should be accompanied by moving towards a system of fixed pricing where possible while retaining graduated pricing for more complex work.

4.9 It is our view that the same conclusions presented by Lord Carter still apply. We believe a competitive tendering approach which allows providers to offer their services at a price that reflects the costs of delivery in their local area and represents a fair market price for the work carried out is the way forward for criminal legal aid.

4.10 There is experience of operating price competitive tendering in other criminal and civil legal aid services, including the award of the Defence Solicitor Call Centre (DSCC) contract, Criminal Defence Direct (CD Direct)[53] contracts and the Civil Legal Advice contracts. These tendering exercises have delivered improved value for money for the taxpayer.

Proposal

4.11 Under our proposed model, we would invite tenders for all criminal legal aid services with the exception[54] of:

- Crown Court advocacy (see paragraph 4.35); and
- Very High Cost (Crime) Cases (VHCCs)[55] (see paragraph 4.37).

4.12 We also propose excluding some discrete areas such as the work delivered by the DSCC and CD Direct providers which operate under separate contracting arrangements and are already subject to price competition.

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52 http://www.legalaidprocurementreview.org.uk/publications.htm

53 Formerly known as Criminal Defence Service Direct or CDS Direct.

54 See Chapter 5 for proposals on Crown Court advocacy and VHCCs.

55 Only cases classified as VHCCs where trials are likely to last in excess of 60 days. Cases classified as VHCCs but are remunerated under the current Litigators Graduated Fee Scheme would be included in the scope of the contract.

4.13 In order to secure a minimum level of savings from the competition, we propose to impose a price cap for each fixed fee and graduated fee (see paragraphs 4.99-4.123).

4.14 The key elements of the proposed model for competitive tendering are summarised in paragraph 4.28, with further details on the component elements of the model at paragraphs 4.29-4.153.

Key features of proposed competitive tendering model

Economies of scale

4.15 The proposed competitive tendering model would result in consolidation of the market, making it easier to access greater volumes of work. Providers would have increased opportunities to scale up to achieve economies of scale and provide a more efficient service. Our proposed model would give firms the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns.

4.16 Cost reductions have been achieved within the confines of the applicable contract terms in other areas of the legal services market (for example, conveyancing) through standardisation, and the greater use of paralegals where appropriate. For example, office overhead costs can account for up to 30% of costs for small organisations, and these could be reduced through consolidation of back-office tasks in larger organisations.

Economies of scope

4.17 Whereas economies of scale would drive structural, efficiency and overhead cost savings from access to larger volumes of work, economies of scope would be generated by requiring providers to deliver the full range of litigation services, as well as advocacy in the magistrates' courts, to the client from police station to the completion of the case. This would give providers the benefit of greater certainty of work, enabling them to resource their contract in the most efficient way. It would also remove the duplication of cost involved in the transfer of clients to and from providers, and the costs associated with each new provider taking instructions at every stage of the case.

4.18 We propose that these economies of scope should be further supported by removing client choice when allocating and by restrictions placed on changing provider throughout the case (see paragraph 4.79).

4.19 We discuss at paragraph 4.87 below a number of case allocation options available to maintain the economies of scope derived by one provider representing the same client in relation to a number of offences.

Simplification and greater flexibility

4.20 We acknowledge that in order to give successful providers the best possible opportunity to deliver criminal legal aid work at lower cost, we need to make sure the systems and processes for operating the scheme are as simple as possible with the lowest acceptable level of bureaucracy.

4.21 Giving providers the opportunity to be more flexible in the way they structure their business and in doing so deliver the service, whether that is through joint ventures, use of agents or ABS, is also essential if a more efficient and cost effective criminal legal aid system is to be established.

4.22 We have designed a competition model that simplifies the criminal legal aid system. We have looked at ways to reform the current fee schemes to introduce fixed fee arrangements as far as possible and, subject to the outcome of this consultation, we will continue to develop both the procurement process and the contracting and reporting arrangements for providers post contract award to minimise unnecessary bureaucracy.

Savings objective

4.23 Price competition in criminal legal aid is one of a number of proposals set out in this consultation paper seeking to reduce expenditure of the whole legal aid system.

4.24 In order to ensure the price competition delivers a saving to the legal aid fund, we propose to apply a price cap under which applicants will be invited to submit price bids. We propose to set the price cap at 17.5% below the rates paid in 2012/13 for each class of work in each procurement area (see paragraphs 4.99-4.123 for further details).

Compliance with the Government's Small and Medium Sized Enterprise (SME) agenda

4.25 The majority of current criminal legal aid providers satisfy the definition of either a micro or small enterprise (as defined under the Companies Act 2006). There are a small number of providers that are classified as medium sized enterprises.

4.26 The Government's SME agenda sets out the aspiration to deliver 25% of central Government procurement spend through SMEs by the end of this Parliament.

4.27 We believe that the majority of applicants are likely to be drawn from existing providers in the market or groups of providers joining together to form a new single legal entity. Those legal entities are still likely to be classified as a small or medium sized entity but we may contract with some large provider organisations. Under any of the above options, we believe that there will still be a large proportion of smaller providers in the market.

Summary of proposed competitive tendering model

4.28 We set out in Table 2 below the key elements of the proposed competitive tendering model. Each element is discussed in detail in the rest of this chapter.

Table 2: Key elements of proposed competitive tendering model

(i) Scope	Investigations, Proceedings, Appeals and Reviews, Prison Law, Associated Civil Work, Crown Court (non VHCC) litigation and higher court representation (A full breakdown of the types of classes of work delivered under each of these headings is included at Annex [E])	Para Refs. 4.29-4.38
(ii) Contract length	Three year contract term with the option for the Government of extending the contract term by up to two further years	4.39-4.41
(iii) Geographical areas for the procurement and delivery of services	Criminal Justice System (CJS) Areas (subject to two proposed mergers of areas) with an exception for London, to be further subdivided into three procurement areas	4.42-4.57
(iv) Number of contracts	Applicants allowed to apply to deliver services in more than one procurement area but only one share in each area. The number of contracts to vary by procurement area. Illustrative contract numbers based on 2010/11 LAA data suggests a range between 4 and 38 in each procurement area with the total number of contracts around 400.	4.58-4.71
(v) Types of provider	Providers could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an ABS. New entrants may apply provided they form a legal entity and are appropriately regulated by the contract start date (indicative timetable proposes June 2014, see paragraph 4.153).	4.72-4.75
(vi) Contract value	Successful applicants in a procurement area to be awarded an equal share of access to cases in the procurement area	4.76-4.78
(vii) Client Choice	Clients would generally have no choice in the provider allocated to them at the point of requesting advice, and would be required to stay with that provider for the duration of the case, subject to exceptional circumstances in which clients might be permitted to change their allocated provider (either at the point of requesting advice or during a case)	4.79-4.86
(viii) Case allocation	Cases to be allocated equally. Options for method of allocation: • Case by case • Duty slots	4.87-4.98

(ix) Remuneration	Police station work	Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the provider's bid price	4.105-4.108
	Magistrates' court work	Fixed fee per provider per procurement area based on the provider's bid price	4.109-4.111
	Crown Court cases with less than 500 pages of prosecution evidence (PPE)	Introduce fixed fee per provider per procurement area based on the provider's bid price	4.112-4.118
	Crown Court (non-VHCC) cases with more than 500 PPE	Maintain current graduated fee scheme but rates set per provider per procurement area based on the provider's bid discount against the current rates under the Litigators' Graduated Fee Scheme	4.119
(x) Procurement process	Two stage application process: • Pre Qualification Questionnaire – evaluating an applicant's suitability to contract with a public body and its experience and capability of delivering the services • Invitation to Tender – Split into two parts – the first evaluating the provider's quality and capacity to deliver the specific service in the procurement area and the second evaluating the bid price.		4.124-4.152
(xi) Contract Award / Implementation	Competitive tendering process to start in all procurement areas in autumn 2013. Contracts would be awarded in summer 2014 with the service commencing in autumn 2014		4.153

(i) Scope of the new contract

4.29 The new contracts would only apply to new cases starting on or after the service commencement date. We propose that the new contract should include the following classes of criminal legal aid:

- Investigations – includes all work undertaken for a client during the criminal investigation of a matter up to the point at which a client is charged, discharged or summonsed for the matter under investigation;
- Proceedings – includes all work undertaken for a client during the magistrates' court criminal proceedings in a matter or case from the date of charge or summons;

- Appeals and reviews – advice and assistance on appeals against conviction or sentence (where a newly instructed representative is not covered by an existing Representation Order) or applications to the Criminal Cases Review Commission (CCRC);
- Prison law (subject to the proposals set out in Chapter 3);
- Associated Civil Work - legal advice and representation for matters concerning public law challenges arising from any criminal case;
- Crown Court (non-VHCC) litigation (excluding confiscation proceedings[56]); and
- Representation for appeals heard by the Court of Appeal or Supreme Court.

4.30 A full breakdown of the types of classes of work delivered under each of these headings is included at Annex E.[57] Whilst all classes of work set out above would be within scope of the new contract, only the rates of pay for the following classes of work would be subject to the price competition:

- Criminal Investigations
  - Police Station Attendance
  - Police Station Attendance (Armed Forces)
- Criminal Proceedings
  - Representation in the magistrates' court
- Crown Court
  - Crown Court (non-VHCC) litigation.

4.31 Work delivered under all other classes of work (see Annex E) is subject to separate means and merits tests and is relatively low volume compared to the proposed price competed areas set out above. We therefore propose to set these rates administratively, reducing the rates by 17.5%. The current rates of pay for each of the classes of work with administratively set rates are set out in regulations.[58] Only providers awarded a new crime contract following the competitive tendering process would be eligible to undertake this work and to deliver these services across all procurement areas.

4.32 At present, the Legal Aid Agency (LAA) operates a duty solicitor scheme in the magistrates' court. The duty solicitor is able to offer free legal advice and representation to people on their first appearance at court (not at trial), regardless of their financial circumstances, where they are charged with an imprisonable offence only or where the client is in custody and, in both cases, where the client has not previously received advice from the duty solicitor on the same matter.

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[56] Work delivered by litigators in relation to confiscation proceedings is currently remunerated in accordance with regulations.

[57] For a full explanation of the services delivered under each type of work, please see the 2010 Standard Crime Contract at http://www.justice.gov.uk/downloads/legal-aid/crime-contract-2010/2010-standard-crime-contract-terms.pdf?type=Finjan-Download&slot=00000309&id=00000308&location=0A644211

[58] Criminal Legal Aid (Remuneration) Regulations 2013.

4.33 We propose to maintain such a service under the proposed model, requiring successful applicants to provide court duty solicitor coverage in their procurement area (see paragraph 4.111 for proposals on how this work would be remunerated).

4.34 We propose to exclude the following three areas of criminal legal aid from the scope of the new contract entirely.

Exclusions from contract scope

a) Crown Court Advocacy

4.35 There is a strong argument for including Crown Court advocacy in the scope of the competition in order to achieve long term efficiencies through One Case One Fee, where the contractor (likely to be the solicitor) would decide how much to pay the advocate. However, we are not currently minded to do so. We do not consider that the Bar is in a position to participate in a process of competitive tendering for the following reasons:

(i) Crown Court advocacy is currently delivered either by self-employed barristers, employed barristers or solicitor higher court advocates. Whilst increasing volumes of advocacy work are being delivered by advocates employed by organisations, approximately 75% of Crown Court advocacy is still delivered by self-employed advocates. To include Crown Court advocacy in the scope of the competition would require self employed advocates to be in a position to apply for the full range of competed work, not just Crown Court advocacy. There are two distinct issues with such an approach:

a. Whilst some chambers and organisations led by barristers may be in a position to enter into a contract as a legal entity, this would not be the case for the majority of self-employed advocates. They are not part of an organisational structure nor do they have the experience of managing an organisation to deliver the full range of criminal legal aid services or to understand their costs so as to enable them to bid. We do not consider that they are likely to be in such a position by the time we award contracts. Very few members of the self-employed bar have restructured their businesses for example, through the new opportunities presented by ABSs.

b. Publicly funded clients cannot, at present, access self employed barristers directly and self employed barristers cannot deliver litigation services to publicly funded clients. Therefore, barristers are currently reliant on referral of work from solicitors who themselves are able to deliver the full range of services, both litigation and advocacy. Self-employed barristers would not be on an equal footing as solicitors' organisations when applying for a contract to deliver the full range of services (both litigation and advocacy). The Bar Standards Board is looking to amend the Bar Code of Conduct to enable publicly funded clients to access barristers directly, without having to first instruct a solicitor. However, this development will not have been implemented in time to fit in with our indicative competition timetable.

(ii) Crown Court Advocacy services are, with the exception of VHCCs, not currently managed under a contract. In this first round of competitive tendering, we propose only to compete services which are currently delivered under our existing standard crime contract. However, future rounds of competition may

extend the scope to Crown Court advocacy. Chapter 5 sets out our proposals in respect of Crown Court advocacy.

4.36 We are also conscious that any competition which included Crown Court advocacy would effectively amount to 'one case one fee', with the contractor (likely to be the solicitor) deciding how much to pay the advocate. This would likely affect the long-term sustainability of the Bar as an independent referral profession. The Bar is a well respected part of the legal system in England and Wales, and we will have due regard to the viability of the profession in reaching our final decision on the model for competition.

b) Very High Cost Cases (Crime)

4.37 VHCCs account for a relatively small number of cases by volume but disproportionately high in terms of cost. VHCCs are a narrow type of case, administered separately from the bulk of criminal legal aid under rigorous contract management, and with a much greater emphasis on negotiation between the LAA and providers in order to determine payment. Whilst the majority of VHCCs are either cases involving allegations of fraud or terrorism, they vary considerably in terms of the length of a case, the amount of evidence served by the prosecution, the number of co-defendants and the complexity of the issues. On balance our view is that the cost of VHCCs are so high that they would distort any price based competition model owing to the unpredictability and the relatively low number of these cases. We therefore propose to maintain the current arrangements whereby they are contract managed on a case by case basis. Chapter 5 sets out our proposals in respect of VHCCs.

c) Defence Solicitor Call Centre and Criminal Defence Direct

4.38 Advice delivered by the DSCC and CD Direct contractors is managed under separate contracting arrangements which have only recently been competitively tendered. The DSCC is a call centre service administering the allocation of clients to solicitors at the police station. CD Direct is a call centre service providing telephone advice to people under investigation for less serious offences, such as: drink driving offences, non-imprisonable offences, breach of bail and warrants. They offer a different type of service to those set out above both in terms of the delivery mechanism and the nature of the advice delivered. We believe that the current means of procuring these services already represents value for money for the tax payer.

Consultation Questions

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

Q8. Do you agree that given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

(ii) Contract length

4.39 We propose that new contracts would be for a three year term, with the option of extending the contract term by up to two further years. The decision on whether to extend the contracts would rest with the LAA acting on behalf of the Lord Chancellor. The LAA would reserve the right to extend contracts in some procurement areas and not others depending on the market conditions at that time.

4.40 We believe that a three year contract with the possibility of extension strikes the right balance between flexibility for both Government as purchaser and applicants with regard frequency of tendering opportunities; and the certainty and ability for applicants to plan ahead and make longer term investments in the business.

4.41 There is a no fault termination clause in the current 2010 Standard Crime Contract which gives the Lord Chancellor the right to give six months' notice to terminate contracts at no cost. We propose to modify such a clause in the new contract to include provision for compensation in certain circumstances for early termination of the contract by the Lord Chancellor.

Consultation Question

Q9. Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination is an appropriate length of contract? Please give reasons.

(iii) Geographical areas for the procurement and delivery of services

4.42 The current criminal legal aid market is divided geographically in a number of ways. Where the service is delivered determines the level of remuneration available. With the exception of police station duty solicitor work, there are currently no geographical restrictions on a provider's access to clients.

4.43 We have explored how best to divide England and Wales into procurement areas (areas within which we would invite tenders to provide the full range of services), which would be the areas within which services would be delivered. We have based our assessment of the options on current data on the volume and value of criminal legal aid defence work which exists in each specified area. The decision on the size of procurement area will influence the number of providers (see paragraph 4.58-4.71).

4.44 We have explored the following four options:

a) National – a sole provider would be required to deliver all services nationally

4.45 A competitive tendering model that requires the delivery of all services on a national basis would require a fundamental shift in the current market structure. We believe at this stage that it would rule out any existing provider from applying for such a contract based on the ability to scale up to the level required (or create a large enough consortium) to deliver a national service.

b) Regional – a number of providers would be required to deliver all services within their regional boundary (larger than CJS areas)

4.46 A regional based procurement whereby services would be delivered within regional boundaries would still in our view at this stage pose significant issues for existing providers in being able to scale up to the level required.

c) Duty schemes – providers would be required to deliver services only within police station duty scheme boundaries (smaller than CJS areas)

4.47 Continuing to use police station duty scheme areas as the basis for the procurement areas would be familiar to potential bidders, but the case volumes per duty scheme area would, in our view, be too low to enable providers to manage a simplified fee scheme based on fixed fees.

d) Criminal Justice System Areas

4.48 There are 42 CJS areas in England and Wales. Based on our analysis, the volume and value of criminal legal aid work within the vast majority of CJS areas is sufficient for providers in those areas to manage a simplified fee scheme based on fixed fees. We are also minded to align any procurement areas to those currently covered by the recently appointed Police and Crime Commissioners.

4.49 There are however two CJS areas (Warwickshire and Gloucestershire) where in our assessment there would be too little work available to use these as an effective basis for procurement. London would also need to be treated differently, in recognition of its unique make-up in terms of the volume of cases that originate there.

4.50 London is organised as a single CJS area and represents around 20% of total criminal legal aid work by value. Applicants located in and around London currently tend to work across a number of police station duty schemes while undertaking most of their work in two or three schemes. This reflects several factors that are particular to the capital including the eligibility rules for schemes, the relative ease of travel, and the way in which the criminal courts are organised.

Preferred approach

4.51 Having considered the options set out above, we propose that with the exception of London, Warwickshire and Gloucestershire, procurement areas should be set by the current CJS areas. For the purposes of competitive tendering, we propose to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas.

4.52 Given the volume of criminal legal aid work delivered in the area, we do not believe it would be feasible to require providers to cover the whole London CJS area. The current pattern of provision, and the fact that providers currently based in one duty scheme can often reach neighbouring duty schemes with ease, lead us to believe that a different approach is needed in London. Therefore, we propose to break London into three procurement areas aligned with the area boundaries used by the Crown Prosecution Service (CPS). The current CPS structure in London[59] is designed to focus resources on specific magistrates' and Crown Court work. We consider that there would be similar benefits for defence practitioners in adopting the same approach.

4.53 This means the LAA would run a separate competition for services in 42 procurement areas. Successful applicants would be required to deliver the designated share of the criminal legal aid services in that area (see paragraphs 4.76-4.78).

Consultation Questions

Q10. Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

Q11. Do you agree with the proposal under the competition model to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

Q12. Do you agree with the proposal under the competition model that London should be divided into three procurement areas be aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

Exclusivity

4.54 Under the proposed model, work would be exclusively available to those who had been awarded competitively tendered contracts within the applicable CJS areas. This differs from current arrangements under the 2010 Standard Crime Contract, whereby, subject to office location and with the exception of police station duty solicitor work, providers are able to work across CJS area boundaries.

4.55 A contract to deliver criminal legal aid defence services in one procurement area would not permit a provider to deliver services in another procurement area except where a case crossed procurement area boundaries. Where a case crossed the procurement area boundary (for example, where a case is transferred to a court in a different procurement area) the provider allocated to that client would be contractually obliged, subject to exceptional circumstances, to follow that client to

[59] http://www.cps.gov.uk/london/contacting_cps_london

the other procurement area. The fees paid would be those determined by the contract for the allocated provider in the procurement area where the arrest originated.

4.56 This approach is to ensure that there is exclusive access to an equal share of work available to those successful providers in the applicable procurement area. Applicants would be able to apply for a contract in more than one procurement area.

4.57 Under the current system, it is possible for a defendant to select the solicitor of their own choice to represent them. Under the proposed model, defendants would be allocated to one of the contract holders in the relevant procurement area unless they fell within one of the exceptional circumstances categories (see paragraphs 4.79-4.86 for further detail.)

Consultation Question

Q13. Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

(iv) Number of contracts

4.58 The LAA currently contracts with over 1,600 separate organisations to deliver services under the 2010 Standard Crime Contract.

4.59 The proposed model ensures that providers would have exclusive access to a significant share of the work available (and control of the case from beginning to end). By awarding longer and larger contracts with greater certainty of volumes, providers would have increased opportunities to grow their businesses and invest in the restructuring required to achieve economies of scale and scope and provide a more efficient service at a price that offers a saving to the public but is also sustainable. This model would result in a reduction in the number of contracts available but gives providers the freedom to develop the most efficient approach in delivering the service (e.g. the extent to which they use agents). This approach would also deliver a reduction in administrative costs to the LAA.

4.60 In considering the number of contracts available, different approaches have been assessed. At one end of the spectrum is a sole national provider model, whereby services are commissioned through one provider and that provider controls how the service is delivered across England and Wales (for example, through the use of agents or joint venture arrangements). At the other end of the spectrum is the existing market of approximately 15,488 providers per CJS area delivering the services and contracting individually with the Lord Chancellor.

4.61 As indicated in paragraph 4.44, our current proposal is to discount the sole national provider model, on the basis that:

- while it may be capable of delivering a significant level of savings, it creates difficulties in managing professional conflict of interest issues;
- it is extremely uncertain with regard to sustainability and the ability of the market to respond;
- it significantly reduces the likelihood of strong competition in future procurement processes; and
- it raises questions about the level of quality control the commissioner would have over the provider actually delivering the service to the client.

4.62 To continue with a market which is so highly fragmented has also been discounted. We accept that asking the market to engage in price competition while not facilitating rationalisation and reform of the supplier base would limit opportunities for economies of scale and efficiency savings. Our aim is to encourage more cost-effective delivery of criminal legal services, which in our view can only be achieved through consolidation of the market, with fewer and more efficient providers accessing greater volumes of work, whether delivered directly by providers or through some other business structure, for example a joint venture.

4.63 Having reviewed data on both volume and value of work, we consider that a 'one size fits all' approach (that is, adopting the same number of providers in each proposed procurement area) would not be practicable. Therefore, we propose to vary the number of providers per procurement area.

4.64 In determining the optimum number of contracts in each procurement area we consider that the following are the key factors:

- **Sufficient supply to deal with potential conflicts of interest** –There need to be enough providers in each procurement area to cover most, if not all, cases where a conflict of interest exists.

  In order to determine the minimum number of contracts per procurement area, we will use the LAA data showing the number of police station cases and Crown Court cases with multiple defendants in the most recent financial year. Based on an assessment of LAA data for 2010/11, it is clear from the data that the vast majority of cases have four defendants or less. The data indicates that there should be a minimum of four contracts in each procurement area. Subject to the outcome of this consultation, we would revise the number of contracts in line with the most current data available prior to any procurement process commencing.

Table 3: number of police station cases and Crown Court cases compared with number of defendants

Number of defendants per case	Number of police station cases		Number of Crown Court cases	
1	637,142	99.83%	81,313	99.95%
2	13,768		6,046	
3	3,964		772	
4	1,355		140	
5	540	0.17%	27	0.05%
6	199		12	
7	74		5	
8	46		0	
9	39		2	
10+	204		1	

- **Sufficient case volume to allow fixed fee schemes to work** – A series of fee schemes that are largely based on fixed fees (as proposed in paragraphs 4.105-4.119 below) mean that providers might make a profit on the fixed fee because relatively little work was required on the case. However, in other cases which required more work, they could make a loss.

  In order to manage the level of risk of financial loss faced by providers contracts need to offer sufficient volume in order for them to cope with variations in case mix.

  Our judgement is that based on 2010/11 claim data, for any given allocation of cases to providers, it would be reasonable to expect providers to absorb up to a 3% change in revenue,[60] in any one year, relative to what they would have received on the same mix of cases. For example, based on the LAA claim data for the period October 2010 to September 2011,[61] for an area with a current average claim value of £400, we have aimed to be statistically confident[62] that under the proposed fixed fee schemes, the average claim value would be no less than £388 (-3%) and no more than £412 (+3%). We will use the most up to date LAA administrative data to calculate the number of contracts in each area required to achieve this equivalent level of confidence.

- **Market agility** – The extent to which existing providers in each procurement area would need to scale up in order to take on increased volumes of work. Current providers could do so by growing their business or joining with other providers to create sufficient resource to deliver the expected caseload. To achieve this, existing providers would need to consider new forms of business structures, such as forming ABSs or joint ventures with other organisations, to achieve the capacity that would be required to tender for and operate the new contracts successfully. There may also be other providers that have experience

[60] Before adjusting for recent fee changes and the results of the competitive tendering process.
[61] Based on LAA administrative data on legal aid claims from October 2010 to September 2011 for claims at the police station, the Magistrates' Court and Crown Court (under 500 pages of evidence).
[62] At the 95% level.

of managing contracts of this size, from outside the existing market, interested in applying for a contract.

- **Sustainable procurement** – We have also considered the need to ensure the market is competitive in future tendering rounds. One obvious source of future competition is the ability for applicants to bid in multiple areas. Another is ensuring a sufficient supply of legal aid practitioners who could be recruited by a potential new entrant in the next tender round. On the expectation that most successful applicants would be joint ventures or a legal entity using agents, there is scope for those agents or members of the joint venture to join with others to form new legal entities next time, which would help to sustain a dynamic and competitive market.

4.65 Based on our assessment of the factors outlined above, the LAA claim data for the period October 2010 to September 2011 would suggest approximately 400 contracts with providers across England and Wales. This would mean current providers would need to grow their business on average by around 250% (or join with other providers to create sufficient resource to deliver the expected caseload).

4.66 This approach would entail a significant reduction in the number of contracts in each procurement area. A detailed breakdown of the illustrative number of contracts based on the LAA administrative data on legal aid claims in the period October 2010 to September 2011 in each procurement area is set out in Table 4 below. Subject to the outcome of this consultation, we would revise the number of contracts in line with the most current data available prior to any procurement process commencing.

Table 4: illustrative number of contracts per procurement area based on October 2010 to September 2011 LAA claim data

Proposed procurement area	**Number of Contract**
Avon and Somerset and Gloucestershire*	12
Bedfordshire	7
Cambridgeshire	4
Cheshire	9
Cleveland	6
Cumbria	4
Derbyshire	7
Devon and Cornwall	10
Dorset	4
Durham	6
Dyfed-Powys	4
Essex	7
Greater Manchester	37
Gwent	4
Hampshire	9
Hertfordshire	7
Humberside	4
Kent	5
Lancashire	14
Leicestershire	5
Lincolnshire	4

Proposed procurement area	Number of Contract
London West and Central	38
London North and East	27
London South	18
Merseyside	14
Norfolk	4
North Wales	4
North Yorkshire	4
Northamptonshire	4
Northumbria	10
Nottinghamshire	6
South Wales	9
South Yorkshire	8
Staffordshire	7
Suffolk	4
Surrey	4
Sussex	8
Thames Valley	4
Warwickshire and West Mercia*	9
West Midlands	20
West Yorkshire	25
Wiltshire	4
Total	**400**

* As discussed at paragraph 4.51, we propose to merge four CJS areas to form two procurement areas. The number of contracts in each of these CJS areas have been added to form the number of contracts in these two procurement areas.

Public Defender Service

4.67 The Public Defender Service (PDS) was established as a pilot scheme in May 2001 to be the first salaried criminal defence provider in England and Wales, with all staff directly employed by the then LSC. The initial aims of the service were, amongst others, to:

- be a test bed for methods of delivery
- model the effects of criminal legal aid policy
- act as a safeguard against market failure
- provide a benchmark for legal aid delivery

4.68 Currently, the PDS delivers the full range of criminal litigation services, magistrates' court advocacy services and some Crown Court advocacy services. The PDS obtains work in the same way as for any other 2010 Standard Crime Contract holder. They are expected to fill duty slots at the police station and magistrates' courts.

4.69 We believe that it is important to maintain a role for the PDS because of the part that the service plays in benchmarking and the development of quality standards in

criminal defence work. The PDS stands as "an essential guarantor for quality standards [and] minimum costs …in a more 'managed market' for such services."[63]

4.70 Under the proposed model, in those areas where the PDS is currently established, we would ringfence one share of the work available in the area. We would therefore ask applicants to apply for the remaining shares. Based on the analysis, on the same LAA data for the period October 2010 to September 2011, the PDS would be allocated the following shares:

Table 5: share of work for each PDS office (based on LAA data for the period October 2010 to September 2011)

Current office location	**CJS area**	**Procurement area**	**Share of work available**
Cheltenham	Gloucestershire	Avon and Somerset and Gloucestershire	1/12th
Darlington	Durham	Durham	1/6th
Pontypridd	South Wales	South Wales	1/9th
Swansea			

4.71 We acknowledge that the PDS might have to scale up to be able to meet the case volume demands of an equal share in the respective areas but expect this to be manageable on the basis of volume and value analysis carried out in the areas in which they operate and would be expected to meet the same efficiency demands as other providers.

Consultation Questions

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

Q15. 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? Please give reasons.

(v) Types of provider

4.72 We acknowledge that in order for the model to operate effectively, the contracting approach needs to be more flexible, to enable applicants to determine how they can deliver services in the most cost-effective manner. We do not propose to limit the types of organisation that may bid for a contract provided that they form a legal entity by the contract start date (the indicative timetable proposes June 2014, see

[63] Bridges et al, Evaluation of the Public Defender Service in England and Wales, 2007, TSO, Norwich.

paragraph 4.153) and meet all the Pre Qualification Questionnaire (PQQ) and tender requirements.

4.73 Under the proposed model, applicants could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an ABS. Applicants could choose to deliver the service themselves and/or through the use of agents. The model would not preclude any new entrant to the market, in whatever form that took, provided they were appropriately regulated.

4.74 Providers would be permitted to use agents, but they would need to provide, as part of their tender, details of the agents with whom they had a relationship or intended to have a relationship by the start date of the contract. Providers would need to take responsibility for the quality of the work carried out by their agents.

4.75 Applicants that were awarded contracts would therefore be expected to have the capacity and capability to undertake all of the categories of work within the scope of the contract or use appropriately qualified agents.

(vi) Contract value

4.76 Applicants would submit a tender for an equal share of the volume of police station attendance work allocated in the given procurement area over the life of the contract. Applicants would have access to the subsequent criminal proceedings in the magistrates' court, and where applicable, the Crown Court.

4.77 By way of example, if there were to be ten contracts in Northumbria, applicants bidding in that procurement area would be applying for one tenth of the work allocated at the police station, and if there were four contracts in Suffolk, they would be applying for a quarter of the work allocated at the police station.

4.78 We believe the proposed division of work would offer a greater degree of certainty as to the volume of work which would be allocated to a provider. All providers would be limited to undertaking the same share of the cases generated in a procurement area. As we propose to limit the number of contracts in each area, this should ensure that the volume of work available over the life of the contract is at a level which would enable the service to be sustainable. For clarity, we could not guarantee a specific number of cases for each provider; simply that they would have access to an equal share of the work available that flowed through their procurement area.

Consultation Question

Q16. Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

(vii) Client choice

4.79 The proposed model of competition relies on providers having exclusive access to a greater share of work in a procurement area and retention of the client's instructions from the start of the case to the end, enabling them to exploit economies of scale and scope and in turn offer their services at a lower price than we currently pay. If client choice were retained as now as a part of this model – both at the outset or allowing clients to switch providers at different stages of the process – this would introduce a level of uncertainty over the case volumes a provider would be allocated. An approach that removed client choice entirely would, on that basis, deliver the greatest level of certainty.

4.80 Under the proposed model of competition, a client would generally have no choice in the provider allocated to them at the point of request for advice, and would be required to stay with that provider for the duration of the case. However, we recognise that in some instances there might be particular circumstances (for example, a professional conflict of interest existed) where the allocated provider might not be in a position to offer effective representation.

4.81 We therefore propose providing for some exceptional circumstances in which clients might be permitted to change their allocated legal representative (either at the point of request for advice or during a case). We have considered the circumstances in which currently the Court may permit an individual to change their provider in criminal proceedings.[64] We propose that similar circumstances should apply for allowing changes of provider under the competition model, as follows:

Table 6: proposed client transfer exceptional circumstances

Situation	**Change requested by**
Provider considers themselves to be under a duty in accordance with their professional rules of conduct (a) not to take on the case; or (b) to withdraw from the case – for example, where there is a conflict of interest	Provider
There has been a breakdown in the relationship between the client and provider (a) in a previous case, so that effective representation could not be provided in the new case by that same provider; or (b) during the case such that effective representation can no longer be provided	Provider or client
Through circumstances beyond their control, the provider is (a) not able to take on the new case; or (b) no longer able to continue to represent the client in the case – for example, the provider is unable to perform its functions under the contract as a result of receiving an unsatisfactory Peer Review rating	Provider

[64] Regulation 14 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013.

Situation	Change requested by
Some other substantial compelling reason exists why that provider should not be appointed or why a change in provider is needed. For example, where a client who is detained at the police station has particular needs which cannot be addressed by the allocated provider, a change in provider may be authorised	Client or provider

4.82 In the first instance, no matter the stage of the case, we propose the allocated provider manage the client's interests in accordance with their professional code of conduct. Where, for example, there has been a breakdown in the relationship between client and a particular representative in the organisation, the provider might, in consultation with the client, agree to assign a different representative. In this scenario, a transfer to a different provider would not be necessary.

4.83 However, in the event the allocated provider were not able to manage the client's interest through the provider's internal processes, we propose the following process:

- as at present, following the grant of the representation order by the magistrates' court, the Court (magistrates' court or Crown Court depending on the stage of the proceedings) would hear and determine applications for the transfer of a client to another provider based on the exceptional circumstances criteria outlined above;
- transfer requests made at the pre-magistrates' court stage would be considered by the LAA on those same criteria (there is currently no similar mechanism for dealing with requests made at this stage).

4.84 No matter the stage of the case, where the client was able to satisfy the criteria above (as determined by the LAA or by the Court), the LAA would determine the provider to which the client should be transferred.

4.85 Where the LAA decided to transfer the client to another provider, it would, in the first instance, allocate the client to another provider in the procurement area taking into consideration the client's needs and preferences. If the other providers in the area were not in a position to offer effective representation to that client, the LAA would allocate a provider from another procurement area.

4.86 In the event the LAA had exhausted all contract providers, the LAA would consider granting an exceptional case contract to a non-contracted provider, taking into consideration the client's needs and their preferences.

Consultation Question

Q17. Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

(viii) Case allocation

4.87 Greater certainty about the volume of work, with each successful applicant gaining an equal share of the work in the relevant procurement area, should give applicants more confidence to make competitive tenders. We have explored two options of how to allocate police station work in order to achieve this aim:

1) Allocate on a case by case basis; or
2) Allocate by way of duty slots (whoever is on duty receives all cases that occur in that period).

4.88 We do not currently favour one particular option and welcome views as to which might be more practicable.

Option 1: Allocate on a case by case basis

4.89 Under this option, police station work would be allocated by the DSCC to each of the providers in the relevant procurement area on a case by case basis. This might be done by:

(a) allocating strictly on a case by case basis, for example, in an area where there were five providers, the first case would be allocated to provider one, the second to provider two and so on until the fifth case was reached. The sixth case would then be allocated to provider one and the allocation cycle would start again; or

(b) allocating clients to a provider based on the day of month of birth (for example, all clients born on 9 April would be allocated to provider one, 10 April to provider two and so on); or.

(c) allocating clients to a provider alphabetically by surname initial.

Options 1(b) and 1(c) would mean that the same client would be allocated to the same provider for offences in the procurement area.

Option 2: Allocate by way of duty slots

4.90 Under this option, we would retain the current system of allocating time slots to each provider for which they would need to provide sufficient coverage.

4.91 We would need to ensure each provider were allocated an equal share of slots and an equal share of busy compared with less busy slots. For example, a duty slot on a Saturday night would offer significantly more work than a slot on a Tuesday morning.

4.92 The provider on duty during the duty slot would be responsible for ensuring criminal legal advice were delivered to anyone (subject to exceptional circumstances set out at paragraph 4.81) seeking such advice at all police stations in the procurement area during that period, whether the advice was delivered by the provider themselves or through an agent.

Advantages/disadvantages of either option

4.93 Allocating work on a case by case basis would enable the process to deal more easily with problems which might arise in relation to potential client conflicts or where there were multi-handed cases than would the use of a block allocation of cases where only one provider was on duty.

4.94 However, it is acknowledged that allocation on a case by case basis would require providers to make available suitably qualified and experienced employees or agents on a twenty four hour basis, seven days a week. Therefore, this might not be as efficient as a duty slot method of allocation whereby providers would only need to ensure coverage for a specified time period.

Cases with multiple clients/defendants

4.95 Further to the potential conflict of interest scenarios described in paragraphs 4.79-4.86 above, cases where there are multiple defendants would also be affected by the proposed restrictions on client choice and might be more difficult to deal with in areas where there were a lower number of providers. For example, if there were six defendants in a case and five contracts let in an area, then there might be a conflict of interest for the provider who potentially would be allocated two defendants under Option 1, the case by case basis. Allocation by duty slots would cause even greater problems as there would only be one provider or their agent on duty at the time.

4.96 We therefore propose that in the scenario described above, any client who could not be represented by one of the providers in the procurement area would be allocated to a provider from another procurement area. Allocated providers in the police station, having identified a conflict or potential conflict of interest, would return the case to the LAA for reallocation. This is akin to the current process operating in the police station.

Case allocation outside police station attendance

4.97 Under the proposed model, the majority of client requests for legal advice would be made to the LAA directly, as occurs at present for those people held in police custody who request advice through the DSCC. This approach would be extended to cover all requests for pre-charge and post-charge advice. Currently, there are a small number of clients who access free standing advice and assistance outside of the police station.[65] We propose that those clients should request advice through a LAA managed call centre that would assess the client's eligibility and match these requests to the appropriate provider. This would be the same process for those clients who request advice after the police station stage. Clients wishing to access prison law and appeals and reviews work would continue to make requests directly

[65] This advice is provided in connection with a criminal investigation to people who are not being interviewed by the police. This can include investigations by authorities other than the police, and free standing advice and assistance can also be provided to witnesses in some cases.

to firms. Only providers with a contract would be eligible to undertake prison law and appeals and reviews work nationally.

Consultation Questions

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

- Option 1(a) – cases allocated on a case by case basis
- Option 1(b) – cases allocated based on the client's day of month of birth
- Option 1(c) – cases allocated based on the client's surname initial
- Option 2 – cases allocated to the provider on duty
- Other

Q19. Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the LAA or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

Principle of continuing representation

4.98 We propose that, once a provider has been allocated a client at the police station, they would be required to continue providing representation for that client for all further work within the scope of the competition – i.e. magistrates' court representation and Crown Court litigation – subject to the client changing provider in the exceptional circumstances as set out in Table 6 at paragraph 4.81. If the client were transferred at any stage to a police station, magistrates' court and/or Crown Court located in a different procurement area, the allocated provider would be required to follow that client across procurement boundaries. The fee paid for that work would be the same as if the client had remained in the original procurement area. Applicants would therefore need to consider carefully their overall capacity to manage cases through to their conclusion, including across procurement boundaries where necessary.

Consultation Question

Q20. Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

(ix) Remuneration

4.99 At present, providers delivering criminal legal aid services are remunerated by way of a mixture of different fee schemes. These range from fixed fees (varying by area) to standard fees, graduated fees and in some exceptional circumstances, hourly rates.

4.100 One of the aims of the competition model design is to simplify and streamline the administration of the scheme, to help drive efficiencies for the benefit both of providers and the LAA. The LAA is currently reviewing its claiming processes to reduce the administrative bureaucracy placed on providers and the LAA. In order to achieve greater simplification, we propose to change the way in which criminal legal aid services are remunerated.

4.101 We have therefore, as far as reasonably and economically practicable, designed a model that is based on fixed fees. In general, each provider would be remunerated for each stage of a case (police station, magistrates' court and most of work in the Crown Court) by way of separate and unique fee based on their bid price. For the magistrates' court and most of the work in the Crown Court, the provider would be paid their unique fixed fee for the particular stage for any and all cases falling within that stage. For example, the provider would be paid their same fixed fee for all cases at the magistrates' court stage, regardless of how long or short the case. For work at the police station, the provider would be remunerated in a block payment rather than per case, but the block payment would be based on the provider's unique fixed fee.

4.102 Table 7 below sets out both the current fee scheme and the proposed revised scheme for each stage in the CJS process.

Table7: current and proposed new fee scheme under competition model

Stage in CJS process	**Current fee scheme (prices set administratively)[66]**	**Proposal (prices set according to a successful bidder's price bid)**
Criminal Investigations: Police Station Attendance	Combination of fixed fees and hourly rates variable by duty scheme area	Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and on the provider's bid price
Criminal Proceedings: Representation in the magistrates' court	Combination of standard fees and hourly rates variable by urban/rural split	Fixed fee per provider per procurement area based on the historical volume in area and the provider's bid price

[66] Further detail on current fee scheme is set out at Annex F.

Stage in CJS process		Current fee scheme (prices set administratively)[66]	Proposal (prices set according to a successful bidder's price bid)
Crown Court (non-VHCC) litigation	Cases with less than 500 pages of prosecution evidence (PPE) (approx. 95% of cases)	Graduated fee scheme (same scheme nationally)	Introduce fixed fee per provider per procurement area based on the historical volume in area and the provider's bid price
	Cases with 500 or more PPE (approx. top 5% of cases)		Maintain current graduated fee scheme but rates set per provider per procurement area based on the provider's bid discount against the current Litigators Graduated Fee Scheme

4.103 As discussed at paragraph 4.31 above, the rates of pay for all other classes of work would be set administratively and we propose to reduce those rates by 17.5%. The current rates of pay for each of the classes of work with administratively set rates are set out in regulations.[67]

4.104 The following paragraphs provide further detail on the proposed fee scheme for each stage in the CJS process.

a) Police station attendance block payment

4.105 The current fee scheme for police station work varies depending on which of the 245 police station duty scheme areas applies. We propose to introduce a 'block payment' approach to remuneration for police station attendance. Providers would, subject to reporting requirements as set out in the contract, receive a payment for all police station attendance.

4.106 In order to determine the police station attendance block payment for each provider, we would apply the following process:

(i) From 2012/13 claim volume and value data, calculate the average police station attendance claim in each procurement area by taking the total expenditure in the procurement area on police station attendance and dividing that total by the volume of claims in that area;

(ii) Set a price cap at 17.5% below the average police station attendance claim value;

(iii) Invite applicants to submit a bid price at or below the price cap value;

(iv) Multiply the bid price by the provider's share of the total volume of police station cases in the procurement area. This becomes the provider's block payment for police station attendance for each year of the contract term.

[67] Criminal Legal Aid (Remuneration) Regulations 2013.

4.107 There would be no escape mechanisms outside of the block payment scheme. Providers would therefore need to take account of possible events (e.g. duty solicitor involved in a lengthy police interview) which might require flexible resourcing (e.g. availability of agency resources) to ensure continued coverage and explain that as part of their Delivery Plan (see paragraphs 4.137-4.140 below).

4.108 If there were a significant increase in police arrests and proportionate increase in the number of people seeking legal advice within a threshold (to be determined), we would consider retendering the additional work in that area.

b) Representation in the magistrates' court fixed fee

4.109 We propose replacing the Standard Fee scheme in the magistrates' court with a fixed fee scheme. Each provider would be paid a different fee depending on their bid price. However, we would no longer distinguish between different types of magistrates' court case outcome and there would be no escape mechanisms outside of the fixed fee scheme.

4.110 In order to determine the magistrates' court fixed fee for each provider, we would apply the following process:

(i) From 2012/13 claim volume and value data, calculate the average magistrates' court representation claim in each procurement area by taking the total expenditure in the procurement area on magistrates' court representation and dividing that total by the volume of claims in that area;

(ii) Set a price cap at 17.5% below the average magistrates' court representation claim value;

(iii) Invite applicants to submit a bid price at or below the price cap value. This becomes the provider's unique fixed fee for magistrates' court representation.

4.111 As described at paragraph 4.33 we propose to maintain the magistrates' court duty solicitor scheme under the model of competition, but require providers to provide duty solicitor coverage in their procurement area on a rota basis. However, there would be no separate payment for the attendance. Instead, applicants would be required to include the cost of providing such a service in their price bid.

c) Crown Court litigation fixed fee (cases with less than 500 pages of prosecution evidence)

4.112 The most significant change to the fee schemes as proposed under this model is to replace the current Litigators Graduated Fee Scheme (LGFS), applied nationally, with a fixed fee for each provider in each procurement area.

4.113 The fixed fee would apply to the majority of Crown Court cases, but we recognise that some cases are of such length and complexity that their inclusion in a fixed fee scheme would be hard to accommodate without requiring providers to bear an unreasonable level of risk, and therefore where a different approach is required.

4.114 In order to arrive at this proposal, we first examined whether it would be possible to introduce a fixed fee for all Crown Court (non-VHCC) cases. Crown Court cases and ultimately the fees paid are wide ranging depending on the type and length of case. One of the most strongly correlated factors of the current cost of a Crown Court case is the number of PPE. The chart in Annex D illustrates the correlation.

What is also clear from the chart is the steep incline in the value of the most expensive 5% of cases. This incline correlates to cases with more than 500 PPE.

4.115 To establish one fixed fee for all Crown Court work would, due to the unpredictability in the amount of work required in the top 5% of cases, create an unacceptable level of risk for providers. We therefore propose to maintain the current graduated fee scheme for cases with more than 500 PPE.

4.116 We propose one exception to this fixed fee scheme. In October 2011, following the 2010 consultation, we aligned the fees in the magistrates' court and Crown Court schemes in cases which magistrates had determined were suitable for summary trial but where the defendant had elected trial by jury and subsequently pleaded guilty. This was to reflect our view that we should not pay more for a guilty plea simply by virtue of the change in venue.

4.117 We propose to maintain such a structure in the fixed fee scheme described above. In such a scenario, the fee paid would be equivalent to that received if the case had remained in the magistrates' court.

4.118 In order to determine the Crown Court litigation fixed fee for each provider (for cases with 500 PPE or less), we would apply the following process:

(i) From 2012/13 claim volume and value data, calculate the average Crown Court litigation claim (for cases with 500 PPE or less) in each procurement area by taking the total expenditure in the procurement area on Crown Court litigation (for cases with 500 PPE or less) and dividing that total by the volume of claims in that area;

(ii) Set a price cap at 17.5% below the average Crown Court litigation (for cases with 500 PPE or less) claim value;

(iii) Invite applicants to submit a bid price at or below the price cap value. This becomes the provider's unique fixed fee for Crown Court litigation (for cases with 500 PPE or less).

d) Crown Court litigation graduated fee (cases with 500 PPE or greater)

4.119 For the reasons set out above, we do not believe a fixed fee for all Crown Court cases would be a viable scheme. Therefore, we propose maintaining the current LGFS for cases where the PPE is 500 or greater. Applicants would be expected to submit bids based on a percentage reduction on the current scheme provided that bid was at least a 17.5% discount (see paragraphs 4.141-4.143).

Historical management information

4.120 We propose providing applicants with sufficient information on current average claims in each procurement area. We expect applicants would find such information useful in helping to determine where an appropriate price bid might be set.

4.121 For illustrative purposes, we set out in Annex D the average claim values for each stage of the CJS in each procurement area for claims paid between October 2010 and September 2011. We would update these values with the most current data

available in advance of any tendering exercise and make such information available to applicants.

Combined CJS areas

4.122 For the four CJS areas we propose to combine to form two procurement areas (Avon and Somerset with Gloucestershire) and (Warwickshire with West Mercia) (see paragraph 4.52), we would determine the current average fixed fee and graduated fee values by taking a combined average in these areas. In London, where we propose to divide the CJS area into three procurement areas, the current average fixed fees and graduated fee would vary by area, based on claim averages in each area**.**

Disbursements

4.123 Under the current system, travel and subsistence disbursements are paid separately. In order to further streamline the current fee schemes, we propose that applicants be required to include the cost of any travel and subsistence disbursements under each category above when submitting their bids. However, disbursement costs for experts, which are often unpredictable in type and value, would continue to be paid separately.

Consultation Questions

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

- Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price
- Fixed fee per provider per procurement area based on their bid price for magistrates' court representation
- Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)
- 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

Q22. Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

(x) Procurement Process

4.124 Subject to the outcome of this consultation, the purpose of this section is to explain how the LAA currently intends to run the competitive procurement process to procure new crime contracts.

4.125 The LAA make no express commitment in this section with regard to the final version of the procurement process (including the terms and conditions that would

govern the process, the final criteria, any method for evaluating tenders and/or any scoring mechanism applied).

4.126 The procurement process would consist of the following two stages:

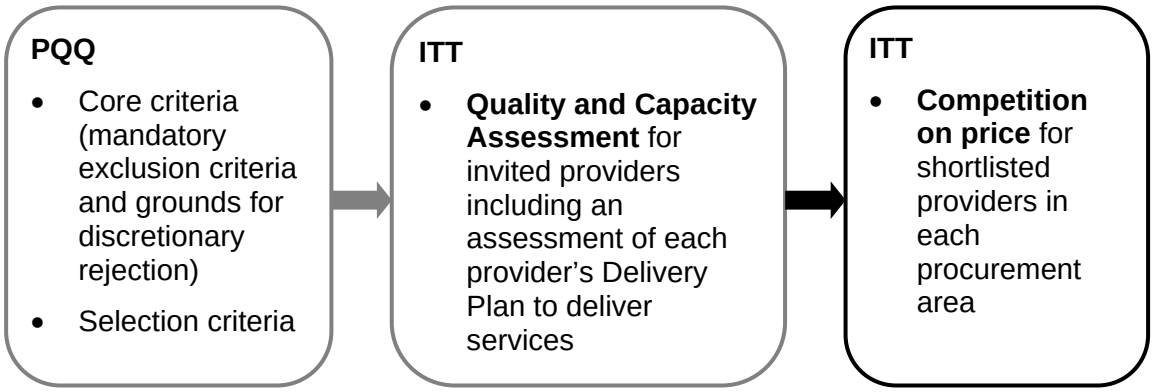
(1) Pre-Qualification Questionnaire (PQQ):

The evaluation of an applicant's suitability to contract with a public body and its experience and capability of delivering services of similar type or volume (not specifically legal aid services). Applicants would be shortlisted to progress to the next stage based on the evaluation of responses to the PQQ.

(2) Invitation to Tender (ITT):

This would be divided into two parts. Part one of this ITT stage would consist of a Delivery Plan, designed to evaluate the quality of the tender and capacity of applicants to deliver the specific service in the procurement area. Those applicants shortlisted on the basis of this quality and capacity assessment would then go on to have their price bid evaluated. Those applicants tendering the lowest price bid would be awarded a contract.

4.127 The proposed procurement process is illustrated in the following diagram:



Pre-Qualification Questionnaire

4.128 Applicants would respond to a PQQ that evaluated their suitability to contract with a public body and their experience and capability to deliver services of similar type or volume in each procurement area for which they wished to submit a tender. Applicants would not be permitted to tender for more than one share of work in a procurement area.

Mandatory and Discretionary Criteria

4.129 We propose that the PQQ would, as far as possible, follow Cabinet Office guidance. This means that as in procurement exercises run for legal aid work, the PQQ would include the standard PQQ core questions covering grounds for mandatory rejection (for example, convictions for bribery) and grounds for discretionary rejection (for example, fulfilment of tax obligations). Discretionary criteria would also include LAA specific considerations (for example, whether the applicant has previous contract terminations).

4.130 Responses to grounds for mandatory rejection would be absolute and where an applicant indicated that it was unable to meet the requirement, it would fail the PQQ.

4.131 Under the PQQ questions relating to discretionary grounds for rejection, applicants would have the opportunity to present information that should be taken into account in evaluating why requirements were not met outright. This information would be assessed by the LAA as part of its evaluation of PQQ responses.

PQQ Experience and Capability Criteria

4.132 These PQQ criteria would evaluate an applicant's experience and capability of delivering services of similar type or volume. Applicants would be scored against a number of criteria. Those we are currently considering include:

- Experience of staff;
- Experience of the management team in managing a comparable service; and
- Experience of having delivered comparable volumes of work (not necessarily legal services work).

4.133 To ensure that responses provided to the PQQ were accurate, the LAA would reserve the right to carry out further due diligence of responses in accordance with terms and conditions of the procurement process.

4.134 Those applicants passing the PQQ and scoring a higher number of points would be shortlisted to progress to the ITT stage. The number of shortlisted applicants at the PQQ stage would be determined by the number of contracts required in each procurement area.

Invitation to Tender (ITT)

4.135 This ITT stage would evaluate quality, capacity and price of an applicant's tender. Only those shortlisted from the PQQ for a particular procurement area(s) would be invited to respond to the ITT.

4.136 Our current intention is to evaluate tenders based on a Delivery Plan and price bids that applicants would be required to submit as part of their tender.

a) Delivery Plan

4.137 In providing a Delivery Plan, we propose that applicants would be required to set out how they intended to deliver the service against defined areas such as recruitment, premises and other aspects of mobilisation.

4.138 As a part of the Delivery Plan, providers would also be required to submit a financial plan showing how they intended to finance any expansion or robustly manage the financial implications of running the service.

4.139 The LAA would evaluate Delivery Plans to ensure that those applicants that went on to have their price bid evaluated had capacity to deliver the service. This might

include, where applicants were tendering to deliver services in more than one procurement area, the LAA's confidence in the applicant's ability to deliver services simultaneously in all procurement areas.

4.140 Following evaluation of the Delivery Plans, applicants would be ranked and a final shortlist drawn up. Only those on the shortlist would have their price bid evaluated to determine who would be awarded a contract.

b) Price bid

4.141 The price bid element of the ITT would require applicants to submit a price at which they would deliver each area of work covered. The price bid would cover:

- Fixed fee for all police station attendance work (on which block payment would be based);
- Fixed fee for magistrates' court work;
- Fixed fee for Crown Court litigation work (where the PPE did not exceed 500); and
- A percentage reduction on the graduated fee scheme for Crown Court litigation work (where the PPE was in excess of 500).

4.142 The overall price bid for each applicant would be calculated as follows:

Table 8: overall price bid calculation

	Annual case volume (based on historic case volumes in area)	**Price/ discount bid**	**Total value**
Police station	A	£A	A x £A
Magistrates' court	B	£B	B x £B
Crown Court litigation fixed fee	C	£C	C x £C
Crown Court litigation graduated fee	D	D%	D x (X-D%)*
Overall Price Bid			**Sum values above**

* X = the average claim on a Crown Court case with more than 500 PPE in the procurement area.

4.143 The LAA would develop its model with regard to how it would evaluate price bids. The LAA currently intends to rank price bids based on applicants' Overall Price Bid (OPB) as described above. On this basis, the applicant offering the lowest OPB would be ranked the highest. Contracts would therefore be offered according to ranking position and the number of contracts required in a procurement area. For example, in an area where there were to be five providers, the five highest ranked bids based on price would be offered a contract.

Price caps

4.144 Applicants would therefore be asked to submit as part of their tender a price bid for each fixed fee and a discount on the Litigators Graduated Fee below the relevant price cap.

4.145 We consider that a price cap for each fee is preferable over a price cap on the OPB in order to discourage any loss leader bidding (or abnormally low bids) on the police station and magistrates' court fees, in order to obtain the follow-on Crown Court work (see paragraphs 4.146-4.147 below).

Abnormally low bids

4.146 We are mindful of a number of responses to the earlier Best Value Tendering consultation, which raised concerns that applicants might submit seemingly unsustainable bids for crime lower work in order to access more profitable Crown Court work.

4.147 In accordance with general practice, we would reserve the right to conduct a due diligence assessment of the price bids from applicants. In the event that abnormally low bids were received, applicants would be required to provide more detailed information on how their price bid would be sustainable.

Conditions of tender

4.148 In addition to criteria used to assess tenders, there would be various conditions of tender that we propose applicants would need to meet in order to be awarded a contract. These would include (but not be limited to):

- Entities wishing to tender (and any agents they propose to use) should be subject to regulation by one of the legal sector regulators by contract start date (the indicative timetable proposes June 2014);
- Applicants should hold (or commit to acquire within a specified time period) a relevant quality standard (either the LAA's Specialist Quality Mark or the Law Society's Lexcel standard or an equivalent quality standard agreed by the LAA);
- Applicants should not have received a confirmed Peer Review rating (i.e. after all appeal routes have been exhausted) of 4 or 5 and must commit to obtaining at least a Peer Review 3 rating within nine months of service commencement date;
- Applicants should have or commit to acquiring premises that are accessible for clients and that are compliant with the requirements of the Equality Act 2010; and
- Applicants should have or commit to have and use a CJS Secure Email Account to accept service of electronic evidence from prosecution agencies.

4.149 These would not be the only contractual or tender requirements; there would also be certain ongoing service standards. The details of these requirements would be made available when the competition opened.

4.150 It is proposed that the LAA only contract with single legal entities but these would be able to use agents to deliver the advice. However, providers would be responsible for advice, assistance and representation delivered by agents.

Contract mobilisation

4.151 In order to have assurance that successful applicants were making satisfactory progress towards being in a position to deliver the services, the LAA would aim to sign contracts in advance of the service commencement date. Where a successful applicant was not considered to be making satisfactory progress, the LAA may have to take the decision to terminate the contract.

TUPE

4.152 It would be each applicant's responsibility to form their own view (taking legal advice as necessary) as to whether or not the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied and, if so, the financial implications for their tender.

Consultation Questions

Q23. Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

Q24. Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

Q25. Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

(xi) Implementation

4.153 We propose that competition would commence in all procurement areas. We consider that it would be impractical and inconsistent for providers, clients, the CJS and the LAA to operate with the existing criminal legal aid scheme in some areas and the new contracting scheme in others. As set out in the Written Ministerial Statement of 5 March 2013, the revised indicative timetable for the development and implementation of our competition strategy is, subject to the outcome of consultation, as follows:

Indicative timetable (subject to this consultation)

Close of consultation		4 June 2013
Publish response to consultation		autumn 2013
Tendering process	PQQ stage	October 2013 – November 2013
	ITT stage	February 2014 – March 2014
	Award contracts	June 2014
	Service commences	September 2014

Chapter 5: Reforming Fees in Criminal Legal Aid

Introduction

5.1 This chapter sets out proposed reforms in criminal legal aid remuneration in order to deliver further savings. As set out in Chapter 4, we intend to introduce competition to set legal aid prices for criminal legal aid. Subject to responses to this consultation, we are minded not to include within the competition Crown Court advocacy services and litigation and advocacy services in Very High Cost Cases (Crime) (VHCCs) initially. Nonetheless, we need to take action on costs in these areas.

5.2 The criminal fee reforms implemented as a result of the 2010 consultation went some way both towards reducing spend and restructuring fees to promote swift, efficient justice. However, Crown Court advocacy still represents approximately £215 m per annum or 22% of spend on criminal legal aid, and the current fee structure does not do enough to support efficient resolution of cases.

5.3 VHCCs constitute a small proportion of legal aid funded cases, but they are long running cases which cost the scheme a disproportionately large amount, around £592m, or approximately 8% of total spend on criminal legal aid in 2011/12.

5.4 These reforms would complement the work we are already undertaking with wider criminal justice system (CJS) partners to embed the principle of 'right first time', ensuring that cases are resolved more quickly and cheaply. We have prioritised CJS reforms aimed directly at reducing the amount of time defence solicitors and barristers must spend on each case, and have invited the defence to contribute further ideas. Further work agreed by the new Criminal Justice Board should lead to greater efficiencies in particular for defence practitioners in the Crown Court, enabling them to deliver the services for which they receive their fee more cost effectively.

5.5 We accept that these proposals are in addition to the series of fee reductions implemented between April 2010 and April 2012, but we need to continue to bear down on the cost of criminal legal aid to deliver further savings, including in Crown Court advocacy and VHCCs.

5.6 These proposals are dependent on the decisions we may take as a result of this consultation on the scope of competition. They are not dependent on any wider reforms to the CJS.

1. Restructuring the Advocates' Graduated Fee Scheme

Case for reform

5.7 Following the 2010 consultation, we did not alter the general fee structure for Crown Court cases, which provides for a trial to attract a higher fee than a cracked trial, which in turn pays more than an early guilty plea. Where cases are contested, the current system of daily attendance fees also does little to encourage early resolution.

5.8 We accept that decisions on the question of plea are ultimately for the individual defendant, and that the length of the trial is not dependent on the defence alone. While the existing graduated fee scheme provides some incentive for advocates to achieve efficiencies, we remain concerned that it still does not sufficiently support the aim of efficient justice and may discourage the defence team from giving early consideration of the question of plea or working towards the earliest possible resolution of contested matters.

Current practice

5.9 Remuneration rates for legal aid advocacy work in the Crown Court are currently set administratively under the Advocates' Graduated Fee Scheme (AGFS).[68] It is intended that the AFGS be comprehensive – the Legal Aid Agency (LAA) may pay advocates in Crown Court cases only in accordance with the relevant Schedule of the Regulations.

5.10 The current fee structure has developed over time, but has become complex and cumbersome to administer. Fees are calculated according to the level of advocate and the following proxies for complexity:

- the nature of the alleged offence;
- the type of case (for example, if there is a guilty plea or if the case goes to full trial);
- the length of trial;
- the number of pages of prosecution evidence (PPE); and
- the number of prosecution witnesses.

5.11 The basic fee for a case is a proxy for preparation work. There are different basic fees for cases where a guilty plea is entered early, where a late guilty plea is entered (classified as a cracked trial), and where the case goes to trial. Different fees are payable to different categories of advocate, for example, Queen's Counsel (QC) and juniors. The basic fee for trials covers the first two days only, and daily attendance fees are added to the basic fee from day three onwards to provide additional payment for advocacy. The current daily attendance fee is paid at a flat

[68] Criminal Legal Aid (Remuneration) Regulations 2013, http://www.legislation.gov.uk/uksi/2013/435/schedule/5/made

rate for days 3 to 39, but reduces at 40 days (by approximately 40%) and rises slightly again at 50 days. These differences in rates were designed to discourage under-reporting of potential VHCCs when the threshold for such cases was set at trials expected to last for 40 or more days.[69] There are also hourly rates for 'special preparation' or 'wasted preparation', though those are payable only in limited circumstances and cannot be claimed in addition to the fixed fee.

5.12 There are considerable differences between the basic fees paid for an early guilty plea, a late guilty plea or cracked trial and a trial in the Crown Court. These differences do not necessarily reflect the amount of work done on a particular case. For example, the basic fee for a low value dishonesty offence varies as set out below, depending on outcome; the final example, (five day trial), also includes daily attendance fees for days 3 to 5).

Guilty Plea	£408
Cracked trial	£508
Trial (up to two days)	£694
Trial (five days)	£1,149

5.13 As a result of our 2010 consultation, we introduced a new fixed fee for either way cases in which the defendant elected Crown Court trial and went on to plead guilty or the case cracked before trial. Our rationale for doing so was based on the premise that there was no reason to pay more for a guilty plea offered later in proceedings than one offered earlier merely on the basis of the venue in which proceedings took place. In addition, we sought to avoid the fee structure inadvertently leading to delay or potentially discouraging the defence team from considering plea with the defendant early in the proceedings**.**

5.14 Since then the proportion of either way cases being committed to the Crown Court has fallen by 27%, whereas the number of indictable only cases sent for trial has remained broadly the same. There may be a number of different reasons why fewer either way cases are going to the Crown Court. Nonetheless it is notable that Crown Court committals have fallen significantly following a change in the fee structure that eliminated the difference in the fees payable for certain guilty pleas or cracked trials in the magistrates' courts and the Crown Court.

Proposal

5.15 We propose to harmonise the basic fees for early guilty pleas, cracked and contested trials into a single basic fee, equivalent to the current basic fee for a cracked trial, payable in all cases (other than those that attract a fixed fee, that is elected either way cases that result in a guilty plea or cracked trial), replacing the current separate fees payable for guilty pleas, cracked trials or a trial.

5.16 The new basic fee would work on the same basis as the current cracked trial fee, so would include offence group and PPE as proxies for complexity, but not the

[69] There are also additional fixed fees that are payable for example for non-routine additional hearings or for appearances in excess of the five included within the basic fee.

number of prosecution witnesses. Remuneration for guilty pleas would therefore be higher than at present, cracked trials would be remunerated at the same rate and the basic fee for trials would be lower than is currently the case. This would simplify the current AGFS, as the three separate tables of rates for guilty pleas, cracked trials and trials would be condensed to a single table of rates determined according to the nature of the offence and pages of evidence in all cases. The proposed new rates payable under AGFS are set out in Annex G.

5.17 In addition, we propose to reduce the daily attendance fees from their current levels and further taper them for trials from day 4 onwards. We will do this by a combination of reducing the initial level they start at on day 3 of the trial and then tapering them for trials from day 4 onwards. The tapering from day 4 onwards will mean a decreasing fee would be payable for every additional day of trial. We recognise that different offence groups have different average trial lengths, so we propose to reduce the daily attendance fee and set the taper at different levels for each offence group – with steeper reductions and tapers for those offence groups that typically have shorter trials. This is intended to ensure that trials for offences that typically run for longer periods of time are not disproportionately affected by our proposal. The proposed initial reduction in daily attendance fees on day 3 of the trial is between approximately 20% and 30% of their current levels, depending on the offence group. For each offence type, the combined effect of the initial reduction and taper is around a 35% overall reduction in the total daily attendance fees. The proposed reduced daily attendance fees are included in Annex G.

5.18 Harmonising basic fees and reducing and tapering daily attendance rates in this way should also help to encourage the prompt resolution of cases in a way that is consistent with our overall CJS objectives. Harmonisation is intended to ensure that the fee scheme does not inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in proceedings, because fees no longer rise the later a case is resolved. Tapering is intended to ensure that there is an incentive to complete trials in a timely manner.

Table 9: impact on fees in some example cases:

Offence Type	Evidence Pages	Witnesses	Trial Length	Case Type	Current Fees	Proposed Fees
Serious Violence or Drugs	5095	102	17	Trial	£16,482	£11,299
Burglary	27	0	0	Guilty Plea	£501	£653
Dishonest Offences	16	0	0	Guilty Plea	£500	£650

5.19 These proposals would result in a redistribution of remuneration across guilty pleas and trials. Overall they would result in an increase in payments due to harmonisation of £13m and a reduction in payments from tapering daily attendance fees of £28m.

Implementation

5.20 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013, and through contract change.

Consultation Question

Q26. Do you agree with the proposals to amend the Advocates' Graduated Fee Scheme to:

- introduce a single harmonised basic fee, payable in all cases (other than those that attract a fixed fee), based on the current basic fee for a cracked trial;
- reduce the initial daily attendance fee for trials by between approximately 20 and 30%; and
- taper rates so that a decreased fee will be payable for every additional day of trial?

Please give reasons.

2. Reducing litigator and advocate fees in Very High Cost Cases (Crime)

Case for reform

5.21 Very High Cost Cases (Crime) (VHCCs) are long, complex Crown Court cases which meet particular criteria. In most cases the principal criterion is simply one of trial length, though for some cases the type of offence is also relevant. VHCCs are high value, long duration cases that bring certainty of income for providers.

5.22 Our 2010 consultation resulted in some restructuring of fees paid under the Crown Court graduated fee schemes, but in only a very limited change to the way certain providers are remunerated (as a result of a restriction of the scope of VHCCs paid under hourly rates).[70]

5.23 In light of the continuing pressure on public finances, we are clear that further savings are required and that the rates at which VHCCs are paid should be looked at afresh. We are also concerned that the level of public spending on these cases is adversely affecting the credibility of the legal aid scheme as a whole. We consider that our proposal to reduce the costs of these longest running and most expensive cases would improve public confidence in the scheme, as well as delivering substantial savings to the public purse. We do not propose amending the

[70] By aligning the criteria for litigators with those in place for advocates so that 40–60 day trial cases are now paid under the LGFS. Prior to the 2010 consultation reforms, there had been a reduction of 5% on the top rate as a result of the then LSC's 2009 consultation, and a reduction of 6% in 2007 (but this was in force before any current case was started).

fee structure for VHCCs in civil cases as the civil scheme covers a broader range of cases that are less expensive than criminal VHCCs.

Current practice

5.24 In most circumstances where the relevant criteria are met, VHCCs are managed and funded in a different manner to non VHCCs, and paid at hourly rates (see Annex H for further detail). Both litigators and advocates may receive payment at hourly rates, dependent on the type of VHCC. All VHCCs which are paid at hourly rates for preparation and daily rates for advocacy are within the scope of our proposal. All other Crown Court litigation is proposed to be within the scope of competition (as set out in Chapter 4). There are approximately 150 new contracts awarded each year relating to 15 new cases. The average contract length is three to four years.

5.25 In order to undertake a VHCC current practice is that the provider must be accredited by the LAA; accreditation involves satisfying a number of criteria regarding experience and business processes.[71] As a result of the accreditation process there are a restricted number of providers able to undertake VHCCs (though new providers satisfying the qualifying criteria can become accredited at any point). Earlier contracts had a similar set of criteria incorporated into the tendering process.

5.26 If a case is likely to be a VHCC the provider must notify the LAA with an estimation of expected trial length. The LAA then validates the provider's assessment of expected trial length before the case is officially designated a VHCC and a contract awarded.

5.27 Once designated a VHCC, the case is assigned an LAA case manager who actively manages the work undertaken by the providers. Before undertaking any work, the instructed provider and each self-employed advocate must negotiate any proposed work with their case manager in advance. The proposals are usually broken down into stages lasting 12 weeks, and payment is made on this basis. This is to ensure adequate oversight by the LAA and stable turnover for the provider over what is potentially a long period.

5.28 Providers in VHCCs are paid hourly rates for preparation based on the category of case (four categories based on offence type and complexity) and the level of the litigator or advocate working on the case (Levels A to level C for litigators, and QC to pupil/junior for barristers and solicitor advocates). Current categories and levels are set out in the 2010 VHCC Specification.[72] There are daily and half daily rates for advocacy. Disbursements, for example mileage, may also be paid out but are not within the scope of this proposal.

5.29 In order to provide some further context on the cost of VHCCs, the following figures set out the cost of three more recent and typical cases. These figures include costs

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[71] See Annex A of the 2010 VHCC Arrangements: http://www.justice.gov.uk/legal-aid/areas-of-work/crime/crime/vhcc-accreditation

[72] See: http://www.justice.gov.uk/legal-aid/areas-of-work/crime/crime/vhcc-accreditation

up to, including and post-trial, for both advocates and litigators, and miscellaneous disbursements (for example experts and travel).[73]

- Cost of defending two defendants in a 16 week fraud trial (with two other defendants), category 3 with no QC – £997,607.
- Cost of defending one defendant in a 18 week fraud trial (with five other defendants), category 2 with no QC – £505,032.
- Cost of defending 1 defendant in a 15 week VAT fraud trial (with 5 other defendants), category 2 with a QC – £572,040.

Proposal

5.30 We propose reducing all the rates for work paid in VHCCs by 30%, for both litigators and advocates, in all active contracts.

5.31 This proposed reduction would apply to any case classified on or after the implementation date, as well as to all existing cases. Work conducted prior to implementation would be remunerated at current rates. The reduced rates would therefore apply not only to all new VHCC contracts which start after implementation, but also to future work on existing contracts given that these cases can sometimes run for several years and we need to deliver savings as soon as possible. The LAA would manage the application of rates and payment in individual contracts and would not apply the new rates retrospectively to work done prior to any change of rates. Contracts awarded after implementation would have the new rates applied throughout. This gives an overall savings estimate of around £20m for this proposal.

5.32 A comparison between current and proposed new rates can be found at Annex H.

Implementation

5.33 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and contract amendments.

Consultation Questions

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

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

[73] Only one of these cases had confiscation proceedings; cases involving litigated confiscation proceedings are likely to increase the overall contract cost.

Combined impact of proposed AGFS restructuring and VHCC fee reductions on advocates

5.34 The distribution of criminal legal aid fee income across advocates is very polarised. Indicative analysis[74] from merging fee income data from AGFS and VHCC cases from 2012, currently suggests around 65% of advocates receive legal aid fee income of £50,000 in a year or less, 12% receive more than £100,000 and 3% receive more than £200,000. Data from 2010/11, focussing on those with the highest fee income, showed there were 6 barristers receiving fee income in excess of £500,000 in a year.[75] While we recognise that individual advocates' fee income reflects both the volume of work and case mix, we think it right that our reductions should affect the highest paid advocates.

5.35 The following indicative analysis based on the same data,[76] attempts to show the combined distributional effect of the restructuring of the AGFS and the VHCC reduction. The proposed restriction of multiple advocates (paragraphs 5.39-5.48) has been left out of this analysis. We have very little way of knowing which two counsel cases would be changed to single counsel, and for those that do, we could not be sure which advocate would remain on the case. This means our analysis shows the impact of fee reforms based on the current levels of work. The distributional analysis also excludes solicitor advocates.

5.36 The analysis estimates the combined AGFS and VHCC changes would have a greater impact on advocates in receipt of high fee payments from criminal legal aid. Those with relatively low fee income would see a small increase in fees as there would be less impact on shorter trials and there would be increased fees for guilty pleas. Although those with a lower fee income have the same sort of case mix as those with a higher fee income[77] (i.e. similar proportions of guilty pleas, cracked trials and trials), the former deal with less expensive cases and shorter trials. The new basic fee structure should therefore promote the viability of the profession as well as encouraging the efficient resolution of cases.

5.37 According to our indicative analysis, the overall effect of the AGFS and VHCC changes would mean that 53% of advocates would either be better off or see income unchanged. We estimate that those receiving relatively lower legal aid fee income (under £50,000 in one year) would on average receive a modest nominal increase in annual fee income of 1%. This is not to suggest that every advocate in this bracket would be better off, as the impact on individuals would depend on their mix of cases. We estimate that for those with legal aid fee income under £50,000 in one year approximately 65% would be either better off or see income unchanged. The average legal aid fee income for those receiving between £50,000 and £100,000 in one year would be reduced by 8%, and for those receiving between

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74 This analysis is indicative only due to two reasons. Firstly, difficulties merging the AGFS and VHCC data systems, meant not all VHCC cases were included. In terms of value, approximately 90% of the spending on VHCCs had a match. Secondly, the analysis used the most recent 6 months worth of data, which was doubled to gross up to an annual figure. We used this approach on the most recent data to try and take account of recent legal aid reforms as fully as possible.

75 House of Commons, Deposited Papers: DEP2012-1850.

76 Ibid

77 See Annex G for further information.

£100,000 and £200,000 by 15%. The average legal aid fee income for those on incomes of over £200,000 in one year would be reduced by 26%. That is not to suggest that there would not be individual advocates who might receive a higher legal aid fee income in a given year as, again, actual income depends on the number and mix of cases that they undertake.

5.38 Table 10[78] shows what barristers who have previously been paid legal aid fees in excess of £500,000 would be paid under the revised fee schemes in steady state.[79]

Table 10: Impact on very high fee earners of proposed new fee schemes

	Actual annual payments 2010/11 (£ 000s)	Future annual payment under revised fee schemes (£ 000s)
High fee earner 1	550	370
High fee earner 2	530	340
High fee earner 3	520	360

3. Reducing the use of multiple advocates

Case for reform

5.39 While an assessment of the need for more than one advocate to defend a case will always depend on the facts of the case we are concerned to ensure that the appointment of multiple counsel is allowed only where it is absolutely necessary in order to ensure that an individual receives a fair trial. A single advocate should be sufficient in almost all cases (with the single advocate being a "senior junior" where necessary or a QC if granted).

5.40 In recent years we have grown increasingly concerned that the appointment of leading, or multiple counsel is being permitted in cases where it is not absolutely necessary in order to ensure that the defendant receives a fair trial. In the twelve months from March 2012 to February 2013, there were 1,709 cases in which two advocates were instructed, of which 50% were heard in just 15 Crown Court centres, with specialist court centres such as the Old Bailey accounting for a significant proportion of these.[80] While this distribution is of course dependent to a large extent on the nature of the caseload in the respective centres, we consider that there is a need to introduce greater consistency and robustness into the process for determining whether more than one counsel is required.

5.41 We recognise that in some cases, particularly in those involving multiple defendants, there will be a significant amount of work to be done by the defence.

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78 Figures rounded to nearest £10,000.

79 Not all of the reduction is due to the reforms in this consultation. Reforms introduced since 2010/11 will also have an impact.

80 Derived from LAA Payment Data.

However, depending on the nature of the work required, we do not believe that this should necessarily require the involvement of more than one advocate for each defendant or defence team, but rather argues for greater involvement of the litigation team.

Current practice

5.42 The normal rule in legally aided criminal cases is that defendants should be represented by a single junior advocate in the Crown Court.[81] However, the Court does have the power to allow the instruction of multiple advocates in certain circumstances. In the Crown Court, QCs or multiple advocates may be allowed by the trial judge, a High Court Judge, a Resident Judge (or his/her nominee).[82]

Currently there are three criteria that might allow enhanced representation:

A – Exceptional

Case is exceptional compared with the generality of cases involving similar offences

B – Counsel

The prosecution have instructed QC or Senior Treasury Counsel

C – Prosecution

The prosecution have either:
a) instructed two or more advocates, or
b) more than 80 witnesses, or
c) over 1000 PPE

The criteria are applied as follows:

	Criteria that must be fulfilled
Three advocates	Exceptional and be a Serious Fraud Office prosecution; or Prosecution criteria (set out above). Prosecution brought by Serious Fraud Office and the Court determines three advocates are required
QC and junior	Exceptional; or Counsel and Prosecution criteria (set out above). The Court determines there are substantial novel or complex issues of law or fact that cannot be adequately presented except by QC and junior

[81] Regulation 18 Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 http://www.legislation.gov.uk/uksi/2013/614/contents/made

[82] Regulation 19 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 http://www.legislation.gov.uk/uksi/2013/614/contents/made

	Criteria that must be fulfilled
Two juniors	Exceptional, or Prosecution criteria (set out above). The Court determines there are substantial novel or complex issues of law or fact that cannot be adequately presented by a single advocate including a QC alone
QC alone	Exceptional, or Counsel criteria (set out above). The Court determines there are substantial novel or complex issues of law or fact that cannot be adequately presented except by QC

5.43 In 2008 a new form, with new evidential requirements, was introduced for applications for a QC or more than one advocate in the Crown Court, supplemented by guidance from the President of the Queen's Bench Division. This resulted in some reduction in the grant of more than one advocate,[83] but we still consider that multiple defence advocates are being allowed by judges in cases where they are not needed. Our 2010 consultation proposed to raise the number of PPE needed for multiple advocates to be permitted from 1,000 to 1,500. However the responses to the consultation indicated that the benefits of doing so would likely be limited, so it was decided not to proceed with that proposal. In 2012-13, 3,000 payments were made to multiple advocates at a total cost of £65 million.

5.44 There is also evidence that advocates are not getting optimum support from their instructing litigators. In line with advice set out in the LAA's Peer Review[84] process for assessing the quality of those with litigation contracts,[85] advocates should be supported throughout the case by the litigator team. In practice, however, litigators do not now routinely send a representative to the Crown Court.

Proposals

5.45 We propose to tighten the current criteria which inform the decision to allow multiple advocates to be instructed in all criminal courts,[86] and take steps to ensure that all the criteria are applied more consistently and robustly in Crown Court cases in the following ways.

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[83] Between 2009 and 2012 the number of cases with more than one advocate reduced by around 28% (Source: CREST system, HM Courts & Tribunals Service).

[84] Peer review is a quality assessment tool. It directly measures the quality of advice and legal work carried out by legal aid providers. The independent peer review process the LAA use is developed and managed by the Institute of Advanced Legal Studies.

[85] Improving your Quality – A guide to common issues identified through Peer Review (Institute of Advanced Legal Studies 2011) "Once a case is committed to the Crown Court, this should not be regarded as an opportunity to delegate all remaining work to Counsel. In Crown Court cases the client, caseworker, and (if instructed) junior and leading counsel should be working as a team with good lines of communication and information sharing, and an understanding of the part each has to play to bring about the best achievable outcome."

[86] Other than magistrates' courts.

5.46 First, we propose to clarify explicitly that "the prosecution condition" relating to the use of more than one prosecution advocate does not necessarily mean that each and every defendant also needs two advocates as well. The current regulations make clear the limited circumstances in which the Court may allow the use of two junior counsel.[87] There is no absolute requirement to provide legal aid to ensure total equality of arms between the parties, in terms of the number of advocates, so long as each side has a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage to the other. For example, in multi-handed cases it does not follow from the fact that the prosecution has more than more than advocate that each defendant also needs more than one. In such cases, the prosecution is faced with numerous defence advocates in any event and may need an additional advocate in those circumstances.[88]

5.47 Second, we propose to build on the LAA's current peer review guidance - developed by the Institute of Advanced Legal Studies – on the continuing involvement of the litigator in the case and, with reference to professional requirements, to develop a clearer requirement in the new litigation contracts under competition that the litigation team must provide appropriate support to advocates in the Crown Court.

5.48 Third, we propose to introduce a new, tighter decision-making system for the appointment of QCs and the use of multiple counsel in relation to the Crown Court only. We propose that Presiding Judges[89] approve the recommendations made by Resident Judges, or on the Resident Judge's delegated authority, for the use of more than one advocate. The primary consideration is best made by the Resident Judge, who would know the detail of the case, but leaving the final decision to Presiding Judges would mean that there is greater consistency of approach across

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87 As set out in regulation 18(3) of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013, the Court may currently permit an individual to instruct two junior counsel if the following criteria are met:

- The individual's case involves substantial novel or complex issues of law or fact;
- The case could not be adequately presented by a single advocate, including a Queen's Counsel alone;
- And either:
  - the individual's case is exceptional compared with the generality of cases involving similar offences; or
  - any of the following circumstances are present—
    - two or more advocates have been instructed on behalf of the prosecution;
    - the number of prosecution witnesses exceeds 80;
    - the number of pages of prosecution evidence exceeds 1000

88 As noted by His Honour Judge Peter Collier QC, the Recorder of Leeds, in R v Various Defendants (including Z, W & D) in 2008: "There is much negotiating between counsel, there are documents that have to be agreed, and all of that happens on a daily basis whilst at the same time, the principal advocate is having primarily to focus on the preparation and presentation of that day's evidence. It is then invaluable to have assistance to cope with all the out of court activity as approaches are made by (in this case 8) defence advocates. It seems to me that in multi handed cases the true parity argument is that the prosecutor needs another body to help cope with the many advocates that s/he is facing, rather than that the defence must have two to match the prosecution's two" (available at http://www.crimeline.info/case/r-v-z-and-others).

89 Presiding Judges are responsible for the deployment of the judiciary and allocation of cases on their Circuit. They also have a responsibility for general supervision of judges on their circuits.

England and Wales. In London, special arrangements for the delegation of this function are likely to be required in relation to cases heard at the Central Criminal Court and Southwark given the high volume of applications for multiple advocates at those court centres. We propose to work with the senior judiciary to consider what arrangements should be put in place to ensure the best system in London.

Implementation

5.49 Subject to the outcome of this consultation, it is currently anticipated that the tightening of the criteria would be implemented through secondary legislation to be laid in autumn 2013, with changes to the judicial decision-making system at the same time. Amendments to the Criminal Legal Aid contracts would be incorporated into new contracts awarded under competition in autumn 2014.

Consultation Question

Q29. Do you agree with the proposals:

- to tighten the current criteria which inform the decision on allowing the use of multiple advocates;
- to develop a clearer requirement in the new litigation contracts that the litigation team must provide appropriate support to advocates in the Crown Court; and
- to take steps to ensure that they are applied more consistently and robustly in all cases by the Presiding Judges?

Please give reasons.

Chapter 6: Reforming Fees in Civil Legal Aid

Introduction

6.1 This chapter sets out proposed further reforms in civil legal aid remuneration in order to deliver further savings. We have made clear in Chapter 4 our intention of introducing price competition to set legal aid prices initially in criminal legal aid and, at some point in the future, to extend it to civil and family cases. In advance of this, given the continuing need to reduce overall spending on legal aid, we believe that it is right that opportunities for further savings are considered in this area.

6.2 We recognise that given the reductions in the scope of civil legal aid through the recent implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), together with the 10% fee reduction in all civil and family legal aid fees which were made in 2010 and 2011, there is limited room for making further substantial cost reductions in this area. Nonetheless, we need to ensure that expenditure on civil legal aid remuneration represents value for money.

6.3 In particular, we are concerned to ensure value for money in public law family cases, which will account for the majority of civil legal aid spend as a result of increasing caseload and the LASPO reforms. The existing rates for representation may not accurately reflect the amount of work involved. Moreover, we consider that the benefits resulting from the streamlining and speeding up of the family justice system as a result of the current programme of reform should also be reflected in remuneration rates.

6.4 We also propose to address some differentials in payment rates which have no basis in the type or level of service provided, to ensure that fees are fair and consistent and that providers are remunerated at broadly similar rates.

1. Reducing the fixed representation fees paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme

Case for reform

6.5 Representation fees (i.e. for work excluding advocacy) paid to solicitors in public law cases are fixed regardless of the amount of work involved or the number of hearings in the case. These fees are based on the codification of the amount providers were previously claiming under hourly rates. However, that codification did not include any assessment of the amount of work actually required in these cases and the existing rates may not accurately reflect the amount of work involved.

6.6 Progress is currently being made to reduce the average duration of care cases through the implementation of the Family Justice Review reforms[90] which should have the effect of reducing the unit cost of cases by tackling delay and streamlining cases, for example through reducing the use of experts.[91] The national average duration of care cases has already reduced from around 54 weeks to around 45 weeks.[92] The aim is to achieve an average of 26 weeks in all but exceptional cases, and this time limit will be enshrined in statute subject to parliamentary approval of the Children and Families Bill.[93] Associated efficiencies in court proceedings are planned in support of this time limit. For example, the recent introduction of a new Part 25 of the Family Procedure Rules in January 2013 which requires the court to restrict expert evidence to those circumstances where it is necessary to assist court proceedings. This requirement will also be enshrined in statue through the Children and Families Bill[94] which, subject to Parliamentary approval, is expected to receive Royal Assent next year. In reducing the commissioning of unnecessary expert reports, this requirement should also reduce the related work for solicitors. It is also expected that further efficiencies currently under development might also reduce the average number of hearings required in a case.

6.7 As the fee paid to solicitors for their work on a case is fixed, the cost of dealing with fewer experts or fewer hearings would not automatically adjust to reflect the likely reduction in the work required of solicitors (whereas any reduction in the number of hearings would lead automatically to a reduction in advocacy costs, as these are calculated on the basis of hearing fees). We consider that the legal aid fee paid for these proceedings should represent value for money and therefore reflect more closely the decreasing duration of cases in this area, the amount of work involved and the further efficiencies to be gained.

Current practice

6.8 The majority of care cases are currently covered by the Care Proceedings Graduated Fee Scheme (the Scheme)[95] which pays solicitors a fixed fee for representation (excluding preparation for advocacy). There are different fees payable depending on the number of parties involved in a case, the type of client represented, the court and the geographical location of the provider. Where the

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90 Family Justice Review, Final Report, http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf?type=Finjan-Download&slot=0000030B&id=0000030A&location=0A644211, November 2011.

91 Part 25 of the new Family Procedure Rules 2013 introduced in January 2013 should reduce the commissioning of unnecessary expert reports. This will be placed on a statutory basis through clause 13 of the Children and Families Bill, subject to Parliamentary approval. See http://www.justice.gov.uk/courts/procedure-rules/family

92 HMCTS Court statistics Q4 2012 compared to Q4 2011, see http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly

93 Clause 14 of the Children and Families Bill, subject to parliamentary approval. See http://services.parliament.uk/bills/2012-13/childrenandfamilies.html

94 Ibid

95 http://ftp.legalservices.gov.uk/civil/remuneration/care_proceedings_graduated_fee_scheme.asp

case is complex and the time and cost involved exceeds two times the fixed fee, providers are able to escape the fixed fee regime and claim hourly rates instead.[96]

6.9 Since 2007 the number of public law family cases has increased by around 50%.[97] This was accompanied by an increase nationally in the average case duration for care and supervision proceedings. It is not clear if this required providers to undertake additional work as a result of the increased length of cases or simply the same amount of work over a longer period. However, the market has continued to provide services, with relatively few cases being paid under hourly rates. While the most recent data from the LAA shows that the total number of certificates[98] authorised has continued to increase, Her Majesty's Courts and Tribunals Service (HMCTS) data also indicates that the average duration of care cases has fallen throughout 2012.[99]

Proposal

6.10 We propose to reduce the representation fee paid to solicitors in public family law cases by 10%. We consider that this is a reasonable reflection of the decreasing duration of cases in this area, the amount of work involved and the further efficiencies to be gained.

6.11 This proposed reduction would apply to the current fixed fees under the Scheme. In addition, to promote efficient resolution of cases and avoid creating any incentive to delay, it would apply to the hourly rates that are payable where a case reaches the escape threshold. The proposed new rates are set out in Tables 11 and 12.

Table 11: Proposed fixed rates for representation – Section 31 Children Act 1989 Care of Supervision proceedings only (subject to proposed 10% reduction in fee)[100]

Party	Court	No of Clients	Midlands		North		London & South		Wales	
			Current fee	***10% reduction***	***Current fee***	***10% reduction***	***Current fee***	***10% reduction***	***Current fee***	***10% reduction***
Child	Other	1	£1949	£1754	£1598	£1438	£2237	£2013	£2183	£1965
Child	Other	2+	£2922	£2630	£2396	£2156	£3355	£3019	£3275	£2947
Child	High Court	1	£2591	£2332	£2125	£1913	£2975	£2677	£2903	£2613
Child	High Court	2+	£3887	£3498	£3188	£2869	£4461	£4015	£4354	£3919
Joined party	Other		£1033	£930	£798	£718	£1201	£1081	£1301	£1171
Joined party	High Court		£1374	£1237	£1602	£956	£1597	£1437	£1730	£1557
Parent	Other	1	£2556	£2300	£2123	£1911	£2907	£2616	£2633	£2370

[96] The fees are set out in Schedule 1, Part 1 (Table 2c) and Part 3 (Table 9(a)) of the Civil Legal Aid (Remuneration) Regulations 2013. See http://ftp.legalservices.gov.uk/civil/remuneration/care_proceedings_graduated_fee_scheme.asp

[97] HMCTS Court statistics Q4 2012, see http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly

[98] A certificate represents the funding provided per person and there may be several certificates in a single case.

[99] HMCTS Court statistics Q4 2012 compared to Q1 2012, see http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly

[100] See table 2(c) of Part 1 to Schedule 1 of the Civil Legal Aid (Remuneration) Regulations 2013 see http://www.legislation.gov.uk/uksi/2013/422/contents/made

Party	Court	No of Clients	Midlands		North		London & South		Wales	
			Current fee	***10% reduction***	***Current fee***	***10% reduction***	***Current fee***	***10% reduction***	***Current fee***	***10% reduction***
Parent	Other	2	£3196	£2876	£2653	£2388	£3633	£3270	£3291	£2962
Parent	High Court	1	£3399	£3059	£2823	£2541	£3866	£3479	£3502	£3152
Parent	High Court	2	£4249	£3824	£3530	£3177	£4832	£4349	£4378	£3940

Table 12: Proposed hourly rates for representation – Parts IV and V of the Children Act 1989, including proceedings under section 25 of that Act (subject to proposed 10% reduction in fee)[101]

Activity	Higher Courts		County Court & Family Proceedings Court	
	Current fee	***10% reduction***	***Current fee***	***10% reduction***
Preparation and attendance (London rate)	£70.07 per hour	£63.06 per hour	£61.38 per hour	£55.24 per hour
Preparation and attendance (non-London rate)	£65.84 per hour	£59.26 per hour	£58.41 per hour	£52.57 per hour
Attendance at court or conference with counsel	£37.13 per hour	£33.42 per hour	£37.13 per hour	£29.40 per hour
Advocacy (London rate)	£70.07 per hour	£63.06 per hour	£64.35 per hour	£57.91 per hour
Advocacy (non-London rate)	£65.84 per hour	£59.26 per hour	£64.35 per hour	£57.91 per hour
Travelling and waiting time	£32.18 per hour	£28.96 per hour	£29.21 per hour	£26.29 per hour

Implementation

6.12 Subject to the outcome of this consultation, it is anticipated that this proposal would be implemented through secondary legislation to take effect in April 2014, subject to parliamentary processes.

6.13 This would allow time for the expected improvements to the family justice system, including swifter court proceedings and less use of experts to be more fully realised. It would also coincide with changes to the current Family Advocacy Scheme (FAS)[102] necessitated by the introduction of the single family court in April 2014[103] to ensure that the payments under legal aid reflect the different structures under the new regime. A number of solicitors also provide advocacy services and would be affected by any change to FAS (details of the likely changes to FAS are not currently expected to be available until the autumn at the earliest). However,

[101] See Table 9(a) of Part 3 to Schedule 1 of the Civil Legal Aid (Remuneration) Regulations 2013.
[102] See Schedule 3 of the Civil Legal Aid (Remuneration) Regulations 2013.
[103] Subject to parliamentary approval of the Crime and Courts Bill, see http://services.parliament.uk/bills/2012-13/crimeandcourts.html

this proposal is free standing and not dependent on the changes to be made as a result of introducing the single family court.

Consultation Question

Q30. Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

2. Harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings

Case for reform

6.14 In some civil (non-family) cases, barristers can be paid up to 50% more for the same type of work than other advocates. We consider that paying a higher fee may be justifiable where work differs significantly, for example if the proceedings are more complex or require different skill sets and/or more expertise. However, there is no justification for using public money to pay one particular group higher rates, where the work being undertaken is similar in nature to that undertaken by others at much lower rates, simply because they belong to different branches of the legal profession.

6.15 We made it clear in our 2010 consultation that our long term intention was to pay advocates working on civil (non-family) cases similar rates for advocacy and related tasks, regardless of whether they were solicitors or barristers. Given that self-employed barrister rates in civil (non-family) cases were not previously codified, a necessary first step in achieving that objective was the codification of those rates in October 2011 (subject to a 10% reduction in line with the reduction applied to all fixed fees and hourly rates paid under the civil and family legal aid schemes at that time). These codified rates have now been in operation for over 12 months and we are not aware of any problems with supply. Therefore, we now propose to address this anomaly.

Current practice

6.16 The hourly rates paid for advocacy services[104] in civil legal aid cases are set out in the Civil Legal Aid (Remuneration) Regulation 2013 (the Regulations). In civil (non-family) cases, these provide for different rates to be paid to self employed-barristers and other advocates.[105]

[104] See section 2(1) of the Civil Legal Aid (Remuneration) Regulations 2013.
[105] The Regulations provide for advocates working on family cases subject to the Family Advocacy Scheme (FAS) to receive the same rates regardless of whether they are a self-employed barrister or a solicitor advocate, with some exceptions.

6.17 In the case of self-employed barristers, different rates[106] are payable depending on the experience of the barrister and/or the location of the case. In contrast, all other civil advocates are paid common[107] standard rates regardless of their experience. These standard rates can vary depending on the category of work and location of the case and can also be enhanced (increased) at the discretion of the assessing authority[108]. Enhancements to the standard hourly rates are subject to specific criteria being satisfied covering such matters as the complexity of the case and the role and conduct of the advocate in presenting it (see Annex I). Enhancements are not paid to self-employed barristers.

6.18 The specified hourly rates for self-employed barristers are currently significantly higher than the standard rates payable to other advocates for the same type of service. For example, a self-employed barrister working on a homelessness case in the County Court in London could receive over 50% more than a solicitor undertaking their own advocacy services in a similar case in the same court. Although the solicitor advocate could, potentially, receive an enhanced fee above the standard rate, subject to satisfying the criteria for enhancements, the maximum level of enhancement is capped at 50% in the County Court.[109] Where payable, enhancements are likely to vary from case to case according to the particular features of each case. However, a self-employed barrister would still receive over 30% more than other advocates for the same case in the County Court even if the maximum enhancement was payable (see Table 13).

Table 13:[110] *Fee differentials between barristers and other advocates (County Court)*

Court	Activity		Barrister (£ per hour)	Advocate (Standard fee) (£ per hour)	Other Advocate (maximum enhanced fee) (£ per hour)
County Court	Preparation	London	135.00	63.00	94.50
		Non-London	112.50	59.40	89.10
	Advocacy	London	135.00	59.40	89.10
		Non-London	112.50	59.40	89.10

6.19 A barrister appearing in the Upper Tribunal and High Court could also receive more than a solicitor undertaking their own advocacy services in a similar case in the same court. As in the County Court, the solicitor advocate could also, potentially, receive an enhanced fee above the standard rate, subject to satisfying the criteria for enhancements. However, the higher maximum enhancement payable in the Upper Tribunal and High Court (at up to 100% compared to a maximum of 50% in the County Court) means that it would currently potentially be possible for the solicitor advocate to be paid higher fees than a self-employed barrister, provided

[106] See Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013.
[107] See Schedule 1 of the Civil Legal Aid (Remuneration) Regulations 2013.
[108] The assessing authority is the LAA or the Court.
[109] See section 6(3) of the Civil Legal Aid (Remuneration) Regulations 2013.
[110] The rates here are extracted from Part 3 of Schedule 1 (Table 10a) and Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013.

that the specified criteria were fully satisfied and the maximum level of enhancement awarded (see Table 14).

Table 14:[111] Fee differentials between barristers and other advocates (Upper Tribunal and High Court)

Court	Activity		Barrister (£ per hour)	Advocate (Standard fee) (£ per hour)	Advocate (maximum enhanced fee) (£ per hour)
Upper Tribunal and High Court	Preparation	London (Junior counsel)	112.50	71.55	143.10
		Non-London (Junior counsel)	112.50	67.50	135.00
	Advocacy	London (Junior counsel)	112.50	67.50	135.00
		Non-London (Junior counsel)	112.50	67.50	135.00
Upper Tribunal and High Court	Preparation	London (Senior counsel)	135.00	71.55	143.10
		Non-London (Senior counsel)	135.00	71.55	143.10
	Advocacy	London (Senior counsel)	135.00	67.50	135.00
		Non-London (Senior counsel)	135.00	67.50	135.00

6.20 Although not specified in the Regulations, the Legal Aid Agency (LAA) has confirmed that self-employed barristers appearing in civil (non-family) cases are already paid equivalent rates for travel as solicitors.

Proposal

6.21 We propose that self-employed barristers[112] appearing in civil (non-family) proceedings in the County Court, Upper Tribunal and High Court should be remunerated on the same basis as other advocates. This would mean they would be paid standard rates, subject to enhancements at the discretion of the assessing authority

6.22 The proposed standard rates that would apply to both self-employed barristers and other advocates are shown in Table 15.

[111] The rates here are extracted from Part 3 of Schedule 1 (Table 10a) and Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013.

[112] A self-employed barrister here means an individual under the rank of Queen's Counsel.

Table 15: Proposed standard rates payable to all advocates[113]

Court	Activity		Current barrister rates (£ per hour)	Proposed standard advocates rates (£ per hour)
County court	Preparation	London	135.00	63.00
		Non-London	112.50	59.40
	Advocacy	London	135.00	59.40
		Non-London	112.50	59.40
Upper Tribunal and High Court (Junior counsel)	Preparation	London	112.50	71.55
		Non-London	112.50	67.50
	Advocacy	London	112.50	67.50
		Non-London	112.50	67.50
Upper Tribunal and High Court (Senior counsel)	Preparation	London	135.00	71.55
		Non-London	135.00	67.50
	Advocacy	London	135.00	67.50
		Non-London	135.00	67.50

6.23 This proposal would not apply to the Court of Appeal or the Supreme Court where we are satisfied that the nature of the proceedings is sufficiently different to those in the lower courts that different rates are justified. Nor does it apply to Queen's Counsel (QCs), who are only permitted to appear in civil cases where their use is necessary to ensure adequate representation and where explicit prior authority to do so has been given by the LAA. We take the view that the skills brought by QCs and the strict criteria that apply to their appointment justify the payment of higher fees.

6.24 The effect of paying self-employed barristers on the same basis as other advocates would be to reduce the minimum guaranteed level of fees that self-employed barristers could potentially receive for such work. However, as is currently the case for other advocates, the assessing authority would be able to allow an enhancement of that fee where they were satisfied the specified criteria are met (see Annex I).

6.25 This proposal would ensure that self-employed barristers and other advocates were remunerated on the same basis, reflecting the service provided and the circumstances of the particular case. Broadly speaking, we expect that self-employed barristers would be more likely to be engaged in more complex cases which would be more likely to satisfy the criteria for the award of enhancements. This would go some way towards mitigating the impact of the lower minimum guaranteed rates. The maximum hourly rates that would be payable for such work under this proposal – assuming that the criteria for the maximum enhancement payable were satisfied – are shown in Table 16.

[113] The rates here are extracted from Part 3 of Schedule 1 (Table 10a) and Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013 (as footnote 85).

Table 16: Proposed maximum enhanced rates payable to all advocates[114]

Court	Activity		Current barrister rates (£ per hour)	Proposed maximum advocates rates (£ per hour)
County Court	Preparation	London	135.00	94.50
		Non-London	112.50	89.10
	Advocacy	London	135.00	104.10
		Non-London	112.50	89.10
Upper Tribunal and High Court (Junior counsel)	Preparation	London	112.50	143.10
		Non-London	112.50	135.00
	Advocacy	London	112.50	135.00
		Non-London	112.50	135.00
Upper Tribunal and High Court (Senior counsel)	Preparation	London	135.00	143.10
		Non-London	135.00	135.00
	Advocacy	London	135.00	135.00
		Non-London	135.00	135.00

6.26 To avoid potential future confusion, we also propose to codify the current LAA practice of paying self-employed barristers appearing in civil (non-family) cases equivalent rates for travel as solicitors. The rates that would apply to all advocates are set out in Table 17.

Table 17: Proposed rates for travel and waiting time payable to all advocates[115]

Activity	Upper Tribunal and High Court (£ per hour)	County Courts (£ per hour)
Travelling and waiting time	29.93	£26.28

Implementation

6.27 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013.

Consultation Question

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

[114] The rates here are extracted from Part 3 of Schedule 1 (Table 10a) and Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013.

[115] The rates here are extracted from table 10(a) in Part 3 of Schedule 1 of the Civil Legal Aid (Remuneration) Regulations 2013.

3. Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

Case for reform

6.28 Providers currently receive uplifted legal aid rates of payment for immigration and asylum Upper Tribunal appeals. The higher rate was put in place under an old scheme of retrospective funding where work on the whole appeal was 'at risk', and was intended to compensate providers for carrying the risk of non-payment throughout a case. Under existing arrangements only work on the permission application is 'at risk' and payment is made after a successful application. However the higher rate of payment still applies. Given the different arrangements in place since the higher rate was introduced, we do not consider continued payment of the higher rate to be justified.

6.29 In order to obtain permission to appeal to the Upper Tribunal, a case must be deemed to be "arguable". We consider it is appropriate that all of the financial risk of the permission application should be on the provider. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case and the specialist understanding of the law in the relevant area. In deciding whether the claim should receive funding, the LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed claim. The provider is in the best position to know the strength of their client's case and the likelihood of it being granted permission. For this reason also, we do not consider that an uplift is required to compensate for working "at risk" on the permission application.

6.30 We consider that there is no justification for the continuing payment of the higher rate, and that it may potentially incentivise applications to appeal in weaker cases.

Current practice

6.31 The current civil legal aid contract for immigration and asylum work provides[116] that where an application for permission to appeal to the Upper Tribunal has been refused, funding for the permission application will not be payable. Where permission is granted, a higher rate of payment (incorporating a 35% uplift) is paid to the provider for the permission work and for the substantive appeal. Once permission is granted, the provider is guaranteed payment. It is therefore only the work on the permission application itself which is 'at risk', but the higher fee applies to the whole of the Upper Tribunal case.

6.32 This higher rate (incorporating the uplift) was first put in place under a system introduced in April 2005 for retrospective funding in immigration and asylum appeals. Under that scheme, legal aid for the application for reconsideration of a ruling of the Asylum and Immigration Tribunal (AIT) and the reconsideration hearing was awarded by the judiciary at the end of the process. The uplift was intended to compensate providers (to some extent) for the risk of non-payment in respect of work from the beginning of the application for reconsideration to the end of the case when the Costs Order was awarded. The aim of the scheme was that it

[116] Standard Civil Contract Specification, Section 8: Immigration, Part D, para 8.99-8.104.

would reduce the number of weak challenges of AIT decisions reaching the Tribunal and Administrative Court. However, Cost Orders were made almost as a matter of routine. The scheme therefore failed to transfer any financial risk of applications to providers, resulting instead in a 35% uplift being routinely awarded.

6.33 This AIT scheme, with its system of retrospective payment was abolished in February 2010 when a First-tier and Upper Tribunal structure for the AIT was established, but the uplift was retained.

Proposal

6.34 For the reasons given above, we propose to remove the 35% uplift in the rate for immigration and asylum Upper Tribunal appeal cases. This means that providers would be paid at the rates set out in Table 18.

Table 18: Proposed fees for immigration and asylum Upper Tribunal appeal cases

Immigration and Upper Tribunal cases where permission is granted				
	Current		***New***	
	London rate	Non-London rate	London rate	Non-London rate
Preparation and attendance (per hour)	£74.36	£69.56	£55.08	£51.53
Travel and Waiting time (per hour)	£36.82	£35.78	£27.27	£26.51
Routine letters out and telephone calls (per item)	£5.35	£4.99	£3.96	£3.69
Advocacy (per hour)	£84.56	£84.56	£62.64	£62.64

Implementation

6.35 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and, if necessary, contract amendment.

Consultation Question

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

Removal of regional price differentials

6.36 For some types of civil and family legal aid work, there are currently regional differences in rates depending on whether the case is inside or outside of London. In care proceedings there are four different regional fees for representation, introduced in 2007 on an interim basis to ensure the sustainability of market supply ahead of potential price competition. We do not make any proposals in relation to these regional differences as part of this consultation. However, we intend in future to introduce national rates for all providers for all areas of civil and family work, where there are currently regional differentials.

Chapter 7: Expert Fees in Civil, Family and Criminal Proceedings

Introduction

7.1 This chapter sets out a proposal for further savings to be made from expert fees in civil, family and criminal proceedings.

7.2 Following the introduction of the changes to the scope of legal aid through the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) on 1 April 2013, the number of expert services funded by legal aid is expected to reduce. As a result of the Family Justice Review reforms, we also expect to see significant reductions both in the need for expert services in public law family cases (which remain in scope of legal aid post LASPO) and in the amount of work required of them in such cases, with shorter reports focussed solely on those matters requested by the Court. This should result in lower legal aid spend per case in public law family cases, which account for the highest proportion of all legal aid expert spend. However, we also need to consider whether the current level of fees for experts across the board represents value for money.

7.3 Following the 2010 consultation, we took initial steps to codify and reduce the level of fees paid to experts. In our response to that consultation, we confirmed that we would work with the then Legal Services Commission (LSC) to monitor the effect of the new fees. Overall this has confirmed that the market has adjusted to the new codified hourly rates. We also said that work would be taken forward with affected groups on the ongoing development of a more detailed scheme based on fixed and graduated fees and a limited number of hourly rates. This has proved difficult to achieve as the LSC, and now the Legal Aid Agency (LAA), does not contract directly with experts and therefore does not currently collect robust data on their use. This data gap is being addressed, with the introduction in February 2012 of new forms for applying for prior authority to exceed the specified rates for experts, and with planned improvements to the LAA's case management systems at the end of 2013.

7.4 Pending the collection of robust data on which to base a new fee scheme for legal aid experts, we have explored comparative expert fee rates paid by the prosecution in criminal cases[117] and concluded that there is no sufficient justification for paying generally higher fees under the legal aid schemes.

[117] Under the Crown Prosecution Service's Expert Witness Fee Scheme.

Case for reform

7.5 The codified rates were based on benchmark rates that had been developed by LSC caseworkers drawing on experience of the charges most typically paid for expert services, subject to a 10% reduction in line with the general 10% reduction applied to all fees payable in civil cases at that time. This codification, however, did not include any analysis of the prices paid for similar services elsewhere.

7.6 Under the Crown Prosecution Service (CPS) scheme,[118] for example, experts are paid individual hourly rates which are negotiated on a case by case basis within a set minimum and maximum price range, although there is provision for these rates to be exceeded in exceptional circumstances.[119]

7.7 The CPS scheme distinguishes between the different activities that an expert may undertake on a case, with different rates payable, for example, for preparation and attendance at court. In contrast, under the legal aid scheme experts are paid at a set rate regardless of the particular activity. Although the legal aid rates for experts vary as between the criminal and civil schemes, currently the lowest hourly rates payable under the CPS scheme are substantially less than the lowest standard rates for comparable professionals under the legal aid scheme. Similarly, the highest hourly rates payable under the CPS scheme are generally significantly lower than most standard rates payable under the legal aid scheme. For example, the normal maximum rate for a consultant psychiatrist for advocacy under the CPS scheme is £100 per hour,[120] compared with £135 per hour in a public family law care case under the legal aid scheme. The current legal aid rates for some other medical professionals are even higher with the effect that such experts may currently receive substantially higher payments when working on legal aid cases than they would when providing evidence for the prosecution in a criminal case.

Current practice

7.8 The current specified rates paid for expert services in legal aid cases are set out in the Civil Legal Aid (Remuneration) Regulation 2013 and the Criminal Legal Aid (Remuneration) Regulations 2013. These apply to any cases funded through the civil, family and criminal legal aid schemes,[121] as appropriate. They consist of a number of fixed and hourly rates that apply to different types of services, including those where factual evidence is required, for example a DNA test or the provision of a report from GP records, and those where an expert, such as a psychiatrist, is

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[118] Under the CPS scheme, experts are usually engaged directly by the police force conducting the investigation, often through contracts with local NHS trusts.

[119] These are not currently defined. However, he specified rates can only be exceeded with the express authority of the National Finance Business Centre, Chief Crown Prosecutor (CPS London Legal Directors) or designated officer who has the necessary delegated financial authority.

[120] See CPSC scales of guidance – http://www.cps.gov.uk/legal/a_to_c/costs/annex_3_-_expert_witness_fees/

[121] See Schedule 5 of the Civil Legal Aid (Remuneration) Regulations 2013 and Schedule 5 of the Criminal Legal Aid (Remuneration) Regulations 2013. See http://www.legislation.gov.uk/uksi/2013/422/contents/made & http://www.legislation.gov.uk/uksi/2013/435/schedule/5/made respectively.

providing a professional opinion. The specified rates are payable to any relevant expert, regardless of their experience and can be exceeded in specified circumstances. These are where the evidence is key to the client's case and either the material is of such a specialised and unusual nature that only very few experts are available or the complexity of the material is such that a more senior expert is needed.

7.9 The current codified rates were introduced in October 2011. Prior to that time, there were no set rates for expert services, generally, and therefore little effective control over their cost. Instead, contracted legal aid solicitors, who remain responsible for engaging relevant experts as and when necessary, would bill the then LSC after the service had been provided and paid for, based on the fee requested by the individual expert in the particular case. The initial codification of expert rates therefore represented a necessary first step in providing clarity and control over spend on experts, while continuing to ensure access to necessary expert services as and when required.

Proposal

7.10 We propose to reduce the current specified standard fees for all experts by 20%. As at present, it would be possible for these rates to be exceeded in exceptional circumstances.

7.11 This would ensure that legal aid rates better represent value for money, capitalising on the efficiencies of reforms in the justice system, and ensuring that they were more closely aligned with those paid elsewhere for comparable services.

7.12 Annex J sets out the proposed standard fees that would be payable under the revised scheme.

7.13 This reform would not apply to fees paid to Independent Social Workers, who are paid with reference to the Children and Family Court Advisory and Support Service (CAFCASS) rates which do not form part of the current legal aid expert scheme.

Implementation

7.14 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013.

Consultation Question

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

Chapter 8: Impact Assessments

8.1 The Government is mindful of the importance of considering the impact of the legal aid proposals on different groups, with particular reference to users and providers of legally aided services.

8.2 In accordance with our duties under the Equality Act 2010 we have considered the impact of the proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.

8.3 Our assessments of the potential impact of these proposals can be found in Annex K, which should be read in conjunction with the proposals. We welcome any relevant information to further inform our analysis and better understand the potential impacts of the proposals. We will be updating our assessments once we have considered all relevant responses.

Consultation Questions

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

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

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

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact Sheila Morson on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ

Contact details/How to respond

We encourage respondents to use the online consultation tool at https://consult.justice.gov.uk/ . Alternatively, please send your response by 04/06/13 to:

Annette Cowell
Ministry of Justice
4.38
102 Petty France
London SW1H 9AJ

Tel: 020 3334 3555
Fax: 020 3334 4295
Email: legalaidreformmoj@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from [email/telephone number of sponsoring policy division].

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months time. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A – Glossary

Advocates' Graduated Fee Scheme	The fee scheme which governs fees paid to advocates (barristers or solicitor advocates) who represent clients in criminal proceedings in the Crown Court, other than in cases which have been classified as Very High Cost (Criminal) Cases. Payment is determined by proxy measures, namely, the seniority of the advocate, the type of offence, the number of pages of prosecution evidence, the number of prosecution witnesses (excluding the first 10) and the number of days that the advocate spends at court at trial.
Alternative Business Structures	A new type of law firm structure which are partly or wholly owned or controlled by non-lawyers to provide legal services (or a mixture of legal and non-legal services).
Category/area of law	The Legal Aid Agency defines areas of law (education, housing etc) thematically and contracts for the provision of advice and representation based on the categories.
Civil	The area of law that concerns the rights and relations of private citizens – for example, disputes relating to unpaid debts or the enforcement/breach of contracts. Covers civil and family law but excludes criminal matters.
Civil Legal Aid	Civil legal aid provided in accordance with Part 1, Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. This includes civil legal services to be funded under civil or family legal aid but excludes services required to be funded by criminal legal aid.
Cracked Trial	A case in which proceedings are stopped due to the defendant(s) pleading guilty or the prosecution offering no evidence after the accused is indicted but before the trial begins.
Criminal	The area of law that defines conduct which is prohibited by the Government because it is held to threaten, harm or otherwise endanger the safety and welfare of the public, and that sets out the punishment to be imposed on those who breach these laws.
Criminal legal aid	Criminal legal aid means advice and assistance (including advocacy assistance) and representation for the purposes of criminal proceedings (as defined in section 14 of LASPO and the Criminal Legal Aid (General) Regulations 2013).
Crime Higher	Legal representation in the Crown Court and higher courts.
Crime Lower	Work carried out by legal aid providers at police stations and in magistrates' courts in relation to people accused of or charged with criminal offences. Prison law is also included within this category.

Either way offence	An offence which can be tried either before the magistrates' court, or before a jury at the Crown Court. The appropriate venue is determined at a Mode of Trial hearing at the magistrates' court. If the magistrates determine that the matter is too serious or complex for summary trial, they can commit it to the Crown Court. If the magistrates determine that the case is suitable for summary trial, the defendant can elect for trial by jury.
European Convention on Human Rights	A binding international agreement. The Convention enshrines and protects fundamental civil and political rights (e.g. right to life, right to fair trial, right to respect for private and family life). The Convention was drafted in 1950 and entered into force in 1953. It is a treaty of the Council of Europe and established the European Court of Human Rights.
Indictable offence	A criminal offence that can only be tried in the Crown Court. Indictable offences are classified as 1, 2, 3 or 4. Murder is a class 1 offence.
Interests of justice test	The test is applied to criminal cases as part of the process to determine whether a client receives criminal legal aid. In the context of representation for the purposes of criminal proceedings, in deciding whether the test is satisfied, the following factors must be taken into account: • whether the individual would be likely to lose his or her liberty or livelihood or suffer serious damage to his or her reputation; • whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law; • whether the individual may be unable to understand the proceedings or to state his or her own case; • whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual; and • whether it is in the interests of another person that the individual be represented.
Judicial Review	A procedure in English administrative law by which the courts supervise the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court (a division of the High Court) for judicial review of the decision and have it set aside (quashed) and possibly obtain damages. A Court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.
Junior counsel	Any practising barrister not appointed as Queen's Counsel
Legal Aid Agency	An executive agency of the Ministry of Justice, established on 1 April 2013, replacing the Legal Services Commission. The body responsible for commissioning and administering civil, family and criminal legal aid services in England and Wales.

Legal Disciplinary Partnership	A form of recognised organisation providing legal services where the owners and managers are not exclusively solicitors of England and Wales or registered lawyers from outside of England and Wales
Legal Help	A form of civil legal services which includes advice and assistance about a legal problem, but does not include representation or advocacy in proceedings.
Legal Services Commission	The body responsible, before 1 April 2013, for commissioning civil, family and criminal legal aid services from solicitors, barristers, advice agencies, and family mediators across England and Wales. It also commissioned services to be provided over the telephone and the internet as well as in person.
Litigators' Graduated Fee Scheme	The fee scheme which governs fees paid to solicitors who represent clients in criminal proceedings in the Crown Court, other than in cases which have been classified as Very High Cost (Criminal) Cases where the trial is estimated to last beyond 60 days. Payment is determined by proxy measures, namely, the type of offence, the number of pages of prosecution evidence, and the number of days of trial.
Means test	The process by which an assessment of clients' financial eligibility for public funding is made.
Merits test	The aim of the merits test is to ensure that only cases with reasonable prospects of success receive legal aid. The test does this by seeking to replicate the decision-making process that somebody who pays privately would make when deciding whether to bring, defend or continue to pursue proceedings. The merits test is set out in the Civil Legal Aid (Merits Criteria) Regulations 2013.
Passporting benefits	The following benefits passport a client through the income side of the means test for civil legal aid (but not in respect of capital) and the whole means test for criminal legal aid: • Income Support; • Income-Based Job Seekers Allowance; • Income-related Employment and Support Allowance; • Guarantee Credit (under section 1(3) (a) of the State Pension Credit Act); and • Universal Credit.
Prospects of success test	The prospects of success test set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 assesses the likelihood of the client obtaining a successful outcome at trial or other final hearing. In civil cases this is used as part of the merits test to determine whether the client receives funding.
Universal Credit	Universal Credit is the new welfare benefit for people who are looking for work or on a low income; it simplifies the benefits system by bringing together a range of working-age benefits into a single streamlined payment.

Very High Cost Case (Crime)	A criminal case in which a representation order has been granted and which the Director of Legal Aid Casework classifies as a Very High Cost (Criminal) Case on the grounds that in relation to organisations: (a) if the case were to proceed to trial, the trial would in the opinion of the LAA be likely to last for more than 40 days, and the LAA considers that there are no exceptional circumstances which make it unsuitable to be dealt with under its contractual arrangements for VHCCs; or (b) if the case were to proceed to trial, the trial would in the opinion of the LAA be likely to last no fewer than 25 and no more than 40 days inclusive, and the LAA considers that there are circumstances which make it suitable to be dealt with under its contractual arrangements for VHCCs and: (i) the case is prosecuted by the Serious Fraud Office; or (ii) the case is a Terrorism Case. The LAA reserves the right to classify a case as a VHCC where it considers that exceptional circumstances apply and it is necessary to discharge its functions under the Act. In relation to Advocates: If the case were to proceed to trial, the trial would in the opinion of the LAA be likely to last for more than 60 days, and the LAA considers that there are no exceptional circumstances which make it unsuitable to be dealt with under a individual case contract.
Very High Cost Case (Civil)	A civil or family case where the costs are likely to exceed £25,000. The Legal Aid Agency manages these under individual case contracts.

Competition model terms:

Agent	This refers to the persons or organisations who deliver the service on behalf of the provider.
Applicant	This refers to those organisations who participate in the tender process.
Delivery Plan	Part of the Invitation to Tender stage of the proposed Procurement Process
Joint venture	This refers to groups or individuals forming new legal entities to achieve their optimum size to enable them to tender.
Peer Review	The independent audit of the standard of work delivered under a Legal Aid Agency contract
Provider	This refers to the legal entity to whom the contract has been awarded.
Specialist Quality Mark (SQM)	A quality assurance standard for legal services providers. The SQM Delivery Partnership is responsible for the SQM audit process, and will undertake any audits required to obtain or retain a future contract with the LAA
Lexcel	The Law Society's international practice management standard

Acronyms:

AGFS	Advocates' Graduated Fees Scheme
AIT	Asylum and Immigration Tribunal
ABS	Alternative Business Structures
BAME	Black, Asian Minority Ethnic
CCRC	Criminal Cases Review Commission
CDS	Criminal Defence Service
CFA	Conditional Fee Agreement/Conditional Fee Arrangement
CJS	Criminal Justice System
CLA	Community Legal Advice
CLAF	Contingent Legal Aid Fund
CPS	Crown Prosecution Service
DSCC	Defence Solicitor Call Centre
ECHR	European Convention on Human Rights
FAS	Family Advocacy Scheme
HCA	Higher Courts Advocates
HMCTS	Her Majesty's Courts and Tribunals Service
ITT	Invitation to Tender
JR	Judicial Review
LAA	Legal Aid Agency
LAR	Legal Aid Reforms
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
LGFS	Litigators' Graduated Fees Scheme
LSC	Legal Services Commission
LSF	Lower Standard Fee
LSRC	Legal Services Research Centre
MoJ	Ministry of Justice
NHS	National Health Service
NSF	Non Standard Fee
PDS	Public Defender Service
POCA	Proceeds of Crime Act 2002
PPE	Pages of Prosecution Evidence
PQQ	Pre Qualification Questionnaire
QC	Queen's Counsel
SME	Small or Medium Sized Enterprise
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
UC	Universal Credit
VAT	Value Added Tax
VHCC	Very High Cost Cases (could be criminal, civil or family cases)

Annex B – Background information relating to the proposal to restrict the scope of criminal legal aid for prison law

a) Current scope of criminal legal aid for prison law

The current scope of criminal legal aid for prison law as set out in the Criminal Legal Aid (General) Regulations 2013 is as follows (in bold):

Regulation 12: Prescribed conditions

12.— (1) The conditions set out in paragraph (2) are prescribed for the purposes of section 15(1) of the Act.

(2) The conditions are that an individual must—

(a) be the subject of an investigation which may lead to criminal proceedings;

(b) be the subject of criminal proceedings;

(c) require advice and assistance regarding an appeal or potential appeal against the outcome of any criminal proceedings or an application to vary a sentence;

(d) require advice and assistance regarding a sentence;

(e) require advice and assistance regarding an application or potential application to the Criminal Cases Review Commission;

(f) require advice and assistance regarding the individual's treatment or discipline in a prison, young offender institution or secure training centre (other than in respect of actual or contemplated proceedings regarding personal injury, death or damage to property);

(g) be the subject of proceedings before the Parole Board;

(h) require advice and assistance regarding representation in relation to a mandatory life sentence or other parole review;

(I) be a witness in criminal proceedings and require advice and assistance regarding self-incrimination;

(j) be a volunteer; or

(k) be detained under Schedule 7 to the Terrorism Act 2000.

(3) [makes further provision about volunteers].

(b) Matters covered by prison law

Under criminal law legal aid contracts for prison law, advice and assistance, including advocacy assistance, may currently be given to prisoners serving a sentence or on remand.

Advice and assistance is available under four categories described as follows by the LAA:

1. Treatment cases – the following are sub-categories of matters included in this category:

Prison Conditions – help for treatment issues like food, night sanitation, library services, silent hours, correspondence, Incentives and Earned Privileges Scheme.

Treatment By Staff – help where a prisoner allegedly has cause to complain about HMPS staff from general bullying to abuse.

Discrimination – help about discrimination in relation to rights & privileges issues.

Communications & Visits – help with issues surrounding correspondence which, on occasion, may be withheld or visits being barred from family members, friends etc.

Mother & Baby Issues – help to mothers who are refused places on the units (and therefore the ability to be with their babies).

Compassionate Release – this is where a prisoner seeks release on severe health grounds.

Behaviour Courses – help in relation to issues surrounding behavioural courses.

Other treatment issues – for cases that do not fit neatly into either of the above categories.

Since 2010 these cases have required prior authority from the Legal Services Commission (and since 1 April 2013 from the Legal Aid Agency), and as a result only a handful of cases are authorised each year.

2. Sentence cases – the following are sub-categories of matters included in this category:

Categorisations - issues revolving around a prisoner's categorisation, e.g. challenges by Category A prisoners where there has allegedly been failure to give reasons for a decision or procedural errors made when taking the decision.

Segregation - representations about a decision to segregate a prisoner and to continue his/her segregation.

Licence conditions and arrangements - any issues arising from a prisoner's release on licence: this includes release on temporary licence in which the individual is still a serving prisoner and permanent release on licence. It also covers issues in relation to licence conditions. It does not cover a prisoner's breach of licence.

Minimum term review applications - issues which arise out of the prisoner's minimum term review (following service of a minimum tariff). This can include issues such as delays to the prisoner having their review following service of the minimum term.

Sentence planning and/or calculation - issues in relation to a prisoner's sentence calculations (outside of 6 months from conviction) and any Determinate or Indeterminate sentence planning issues.

Close Supervision Centre and Dangerous and Severe Personality Disorder Units and Assessments - written representations about a decision to initially refer or, following assessment, to select a prisoner to a Close Supervision Centres or any written representations about a decision either transfer or not to transfer a prisoner to the Dangerous and Severe Personality Disorder Unit.

Resettlement Issues And Planning - issues in relation to the prisoner's release such as issues with tagging or being prevented from entering a certain area (e.g. an area which they need to enter in order to live with their family).

Other sentence issues – for cases that do not fit neatly into any of the above categories.

3. Disciplinary cases – this covers both advice and advocacy assistance in proceedings before a Prison Governor or an independent adjudicator involving a breach of prison discipline.

4. Parole Board cases – this covers advice and advocacy assistance for eligible persons subject to proceedings before the Parole Board or who require advice and assistance regarding representations in relation to a mandatory life sentence or other parole review.

Advice and assistance can be provided in all types of prison law case. In disciplinary cases and Parole Board cases, advocacy assistance may also be provided.

In 2011/12, there were approximately 44,000 prison law cases funded by criminal legal aid.

(c) The internal prisoner complaints system

Prison Service Instruction 2/2012 requires all prisons to have an internal system for handling complaints from prisoners. Most complaints raised by prisoners concern their treatment in prison and the most effective way of dealing with these is by staff in prisons. The aim is for resolution at the lowest level in the most expeditious manner.

The prisoner complaints system is available for issues that are suitable to be resolved by this mechanism. Should a prisoner not resolve their complaint adequately through this or any of the other mechanism, they are able to apply for legal aid funding for judicial review of a decision in their case in relation to a treatment matter under the civil legal aid scheme, subject to a merits and means test.

There are two stages to the internal prisoner complaints process: (i) the initial complaint stage; and (ii) the appeal stage. The response timings for initial complaints reflect the urgency of the complaint, prioritising the most critical, but subject to an over-arching maximum time period of 5 days. If a prisoner is dissatisfied with the response

to their complaint they may submit an appeal which should normally be made within 7 calendar days of having received the initial response, unless there are exceptional reasons why this would have been difficult or impossible. Appeals are answered by someone at a higher level in the management structure than the person who provided the response to the original complaint. Under the complaints procedure, a prisoner who has a complaint about a particularly serious or sensitive matter, for example where it would be reasonable for the prisoner to feel reticent about discussing it with wing staff, such as a victimisation case, has the right to make a complaint under confidential access (in a sealed envelope) to the governing governor, the Deputy Director of Custody or the local Independent Monitoring Board (IMB). At any point during the complaint process a prisoner can make an application to speak to a member of the local IMB. Prisoners are provided with a written response to their complaint

Prisons are required to make sure that information is available in formats that all prisoners can understand. This in particular means that prisoners who cannot read English either because of a learning disability, broken education or because their first language is not English, will have information given to them in another format. In many prisons this will mean that induction information (for example) is provided on a video as well as in writing.

The current prisoners' complaints system was introduced in April 2012 and is set out in PSI 02/2012. The existing formal complaints process is predicated on a paper-based system. However, the policy documentation makes clear that governors must have arrangements in place that will allow a prisoner to make a formal complaint orally to a member of staff where the prisoner has difficulty doing so in writing. Often prisoners who have difficulty expressing their complaint in writing and who prefer not to make an oral complaint will seek the help of a fellow prisoner such as a Listener to assist with the process.

Annex C – Universal Credit and cost recovery

The changes to the benefits system currently being implemented under the Welfare Reform Act 2012 mean that a number of benefits that have historically been used as an administrative marker to passport applicants through the means test to free (i.e. non-contributory) legal aid will progressively be replaced by Universal Credit over the next four years.

At present, some legal aid clients are automatically financially eligible for legal aid if they are in receipt of certain income-based benefits.[122] Universal Credit includes a wider scope of benefits than are currently passported to free legal aid and take-up is also likely to exceed that of current benefits. This would result in significant pressure on the legal aid fund if it were to be used as the basis for passporting applicants through the means test for legal aid. Therefore, in the long term we do not propose to use Universal Credit as a passport for legal aid.

Instead we propose to develop a new financial eligibility scheme for legal aid based on the following two principles:

1. Fairness between those in or out of work in particular to ensure that there are no disincentives to work;
2. Use of available data through Universal Credit to confirm financial eligibility where possible.

We will also ensure that our proposals will minimise as far as possible the administrative burden on the Legal Aid Agency and on clients and providers.

Pending the development of the new scheme, from April 2013 Universal Credit has been added to the list of passporting benefits for both civil and criminal legal aid. During the initial period, we consider that only a small number of benefit claimants will be in receipt of Universal Credit and most of these would have been eligible for an existing 'out of work' passporting benefit.

We intend to consult on the detailed proposals for the revised eligibility criteria in autumn 2013.

Recovery from convicted defendants of the costs of criminal legal aid

We have an established system to recover criminal legal aid costs incurred in the Crown Court, which requires convicted defendants to pay back some or all of their criminal legal aid costs where they can afford to do so. We have recently taken steps to strengthen that system, including tougher powers to enforce debts. We now wish to explore any options for building on that to increase cost recovery from convicted defendants, with a view to including any proposals in the consultation planned for the autumn on changes to the means testing regime to accommodate the wider roll-out of Universal Credit.

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[122] These are: Income Support, income-based Jobseekers Allowance, income-related Employment and Support Allowance, or Guarantee State Pension Credit. National Asylum Support is also a passporting benefit for immigration and asylum cases for some levels of service.

Annex D – Price competition – data analysis and management information

Introduction

This annex is divided into two parts:

- **Part 1**: sets out the data analysis to support one element of the proposed price competition model:
  - Proposed fee scheme for Crown Court litigation
- **Part 2**: provides historical management information on those areas subject to the price competition and illustrates at what level the price cap would be set for each fee in each procurement area if the calculation were based on this historical data.

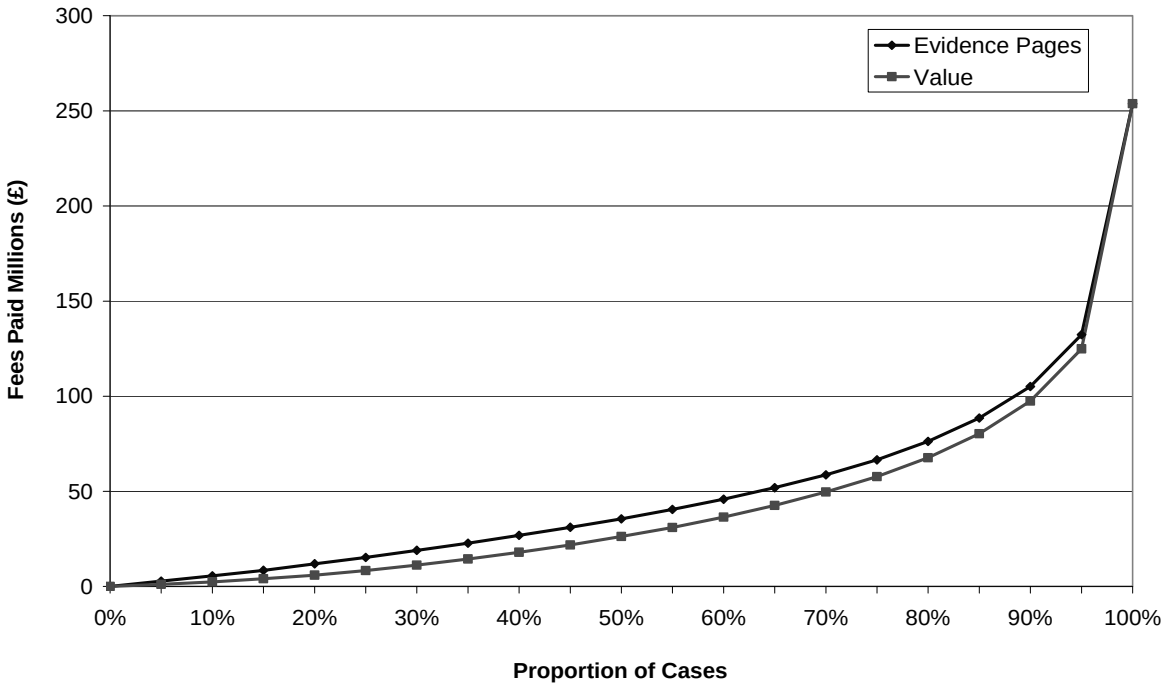
Part 1: Data analysis

Proposed fee scheme for Crown Court litigation

We propose to introduce a fixed fee scheme for cases in the Crown Court with 500 pages of prosecution evidence (PPE) or less. In order to arrive at this proposal, we first examined whether it would be possible to introduce a fixed fee for all Crown Court (non-VHCC) cases. Crown Court cases and ultimately the fees paid are wide ranging depending on the type and length of case. One of the most strongly correlated factors of the current cost of a Crown Court case is the number of PPE. The chart below illustrates the correlation. What is also clear from the chart is the steep incline in the value of the most expensive 5% of cases. This incline correlates to cases with more than 500 PPE.

To establish one fixed fee for all Crown Court work would, due to the unpredictability in the top 5% of cases, create an unacceptable level of uncertainty for providers. Taking into account the volatility of such a small number of cases in terms of value, we consider that a fixed fee for this work would require providers to sustain an unacceptable level of risk. We therefore propose to maintain the current graduated fee scheme for cases with more than 500 PPE.

Chart 1: Value and Volume of Crime Higher Litigation work sorted by Evidence Pages and Value – Data from October 2010 to September 2011



Part 2: Management information and applicable price cap

The following management information is taken from the Legal Aid Agency claim volume and value data between October 2010 and September 2011, across all current fee schemes, so they do not include the recent changes from the Legal Aid Reforms (LAR). They also only include cases in the proposed scope of price competition. This is to show what the price caps would be if they were based on pre-LAR data.

This is indicative information and purely for illustrative purposes. It would be refreshed with volume and value data for up to date financial year 2012/13 which includes the LAR reforms before any tendering documentation were issued.

Police station[123]

Proposed Procurement Area	Total claim value	Claim volume	Average claim value	Price cap value (17.5% below average claim value)
Avon and Somerset	4,390,044	17,387	£252	£208
Bedfordshire	2,110,024	8,001	£264	£218
Cambridgeshire	2,170,032	9,197	£236	£195
Cheshire	3,707,245	14,447	£257	£212
Cleveland	1,964,974	9,849	£200	£165
Cumbria	1,166,544	4,800	£243	£200

[123] Note the claim volume is the entire CJS region's volumes in scope of crime competition between October 2010 and September 2011.

Proposed Procurement Area	Total claim value	Claim volume	Average claim value	Price cap value (17.5% below average claim value)
Derbyshire	3,333,411	11,995	£278	£229
Devon and Cornwall	4,652,837	17,373	£268	£221
Dorset	1,300,924	6,681	£195	£161
Durham	3,707,326	16,149	£230	£189
Dyfed-Powys	1,463,323	5,202	£281	£232
Essex	5,310,993	17,498	£304	£250
Gloucestershire	1,236,723	5,059	£244	£202
Greater Manchester	9,273,650	36,443	£254	£210
Gwent	1,028,736	4,024	£256	£211
Hampshire	5,646,681	19,714	£286	£236
Hertfordshire	4,010,557	11,484	£349	£288
Humberside	2,630,956	12,661	£208	£171
Kent	5,219,877	16,609	£314	£259
Lancashire	4,934,103	21,987	£224	£185
Leicestershire	3,064,161	11,484	£267	£220
Lincolnshire	1,829,100	7,334	£249	£206
London West and Central	14,236,271	42,923	£332	£274
London North and East	14,340,334	43,474	£330	£272
London South	17,133,587	50,066	£342	£282
Merseyside	4,232,544	17,031	£249	£205
Norfolk	2,043,945	8,204	£249	£206
North Wales	2,019,402	7,238	£279	£230
North Yorkshire	1,914,836	7,823	£245	£202
Northamptonshire	1,976,573	7,939	£249	£205
Northumbria	2,543,842	11,669	£218	£180
Nottinghamshire	3,726,024	14,133	£264	£218
South Wales	5,414,261	19,839	£273	£225
South Yorkshire	3,548,859	14,728	£241	£199
Staffordshire	3,062,151	11,537	£265	£219
Suffolk	1,148,052	4,548	£252	£208
Surrey	1,926,972	6,477	£298	£245
Sussex	5,531,264	20,346	£272	£224
Thames Valley	7,116,482	24,349	£292	£241
Warwickshire	1,039,095	3,798	£274	£226
West Mercia	2,884,365	10,711	£269	£222
West Midlands	9,406,274	34,860	£270	£223
West Yorkshire	7,565,612	34,041	£222	£183
Wiltshire	1,851,194	6,978	£265	£219

Magistrates' court

Proposed Procurement Area	Total claim value	Claim volume	Average claim value	Price cap value (17.5% below average claim value)
Avon and Somerset	5,369,596	13,223	£406	£335
Bedfordshire	1,890,717	4,584	£412	£340
Cambridgeshire	2,253,929	6,028	£374	£308
Cheshire	3,179,390	8,616	£369	£304
Cleveland	2,708,406	9,010	£301	£248
Cumbria	1,596,820	4,501	£355	£293
Derbyshire	3,211,112	7,132	£450	£371
Devon and Cornwall	4,427,198	11,546	£383	£316
Dorset	2,431,329	5,408	£450	£371
Durham	1,893,421	5,355	£354	£292
Dyfed-Powys	2,154,895	4,654	£463	£382
Essex	4,609,606	11,072	£416	£343
Gloucestershire	1,498,260	3,053	£491	£405
Greater Manchester	12,231,271	31,973	£383	£316
Gwent	2,670,160	5,930	£450	£371
Hampshire	6,524,581	14,835	£440	£363
Hertfordshire	3,439,499	7,673	£448	£370
Humberside	3,010,876	8,200	£367	£303
Kent	4,910,384	12,333	£398	£328
Lancashire	7,117,218	19,057	£373	£308
Leicestershire	3,701,372	7,100	£521	£430
Lincolnshire	1,963,118	4,779	£411	£339
London West and Central	12,222,694	21,545	£567	£468
London North and East	15,386,344	27,071	£568	£469
London South	16,081,824	25,120	£640	£528
Merseyside	6,336,771	14,935	£424	£350
Norfolk	2,499,056	6,408	£390	£322
North Wales	3,250,482	7,313	£444	£367
North Yorkshire	2,360,478	5,941	£397	£328
Northamptonshire	3,311,147	4,937	£671	£553
Northumbria	7,162,421	19,657	£364	£301
Nottinghamshire	5,992,329	11,085	£541	£446
South Wales	6,797,804	15,648	£434	£358
South Yorkshire	4,816,624	13,206	£365	£301
Staffordshire	4,350,842	8,910	£488	£403
Suffolk	1,817,893	4,599	£395	£326
Surrey	2,648,304	4,582	£578	£477
Sussex	5,120,943	11,104	£461	£380
Thames Valley	8,656,861	16,516	£524	£432
Warwickshire	829,753	2,017	£411	£339
West Mercia	3,886,253	8,862	£439	£362
West Midlands	11,690,493	25,038	£467	£385
West Yorkshire	9,010,290	23,069	£391	£322
Wiltshire	2,064,284	5,021	£411	£339

Crown Court litigation cases with 500 pages of prosecution evidence (PPE) or less

Proposed Procurement Area	Total claim value	Claim volume	Average claim value	Price cap value (17.5% below average claim value)
Avon and Somerset	2,687,799	2,083	£1,290	£1,065
Bedfordshire	1,536,953	1,087	£1,414	£1,167
Cambridgeshire	1,131,222	858	£1,318	£1,088
Cheshire	987,397	843	£1,171	£966
Cleveland	1,552,970	1,347	£1,153	£951
Cumbria	883,251	785	£1,125	£928
Derbyshire	1,414,128	1,176	£1,202	£992
Devon and Cornwall	2,037,633	1,672	£1,219	£1,005
Dorset	920,572	739	£1,246	£1,028
Durham	1,326,619	939	£1,413	£1,166
Dyfed-Powys	667,635	408	£1,636	£1,350
Essex	2,367,734	1,901	£1,246	£1,028
Gloucestershire	515,188	373	£1,381	£1,139
Greater Manchester	8,708,572	6,849	£1,272	£1,049
Gwent	914,216	655	£1,396	£1,151
Hampshire	3,067,641	2,064	£1,486	£1,226
Hertfordshire	1,517,132	1,107	£1,370	£1,131
Humberside	2,282,810	1,802	£1,267	£1,045
Kent	2,805,195	1,890	£1,484	£1,224
Lancashire	3,690,018	3,257	£1,133	£935
Leicestershire	1,628,784	1,375	£1,185	£977
Lincolnshire	699,254	550	£1,271	£1,049
London West and Central	11,666,666	8,365	£1,395	£1,151
London North and East	7,941,506	5,820	£1,365	£1,126
London South	9,031,750	6,611	£1,366	£1,127
Merseyside	3,409,886	2,922	£1,167	£963
Norfolk	1,279,114	1,092	£1,171	£966
North Wales	908,053	770	£1,179	£973
North Yorkshire	828,244	679	£1,220	£1,006
Northamptonshire	823,771	752	£1,095	£904
Northumbria	3,122,911	2,758	£1,132	£934
Nottinghamshire	2,418,551	2,153	£1,123	£927
South Wales	3,246,495	2,662	£1,220	£1,006
South Yorkshire	3,019,832	2,316	£1,304	£1,076
Staffordshire	1,658,170	1,432	£1,158	£955
Suffolk	764,550	578	£1,323	£1,091
Surrey	1,654,019	1,186	£1,395	£1,151
Sussex	2,687,499	1,897	£1,417	£1,169
Thames Valley	3,133,005	2,176	£1,440	£1,188
Warwickshire	343,170	271	£1,266	£1,045
West Mercia	1,493,617	1,132	£1,319	£1,089
West Midlands	6,445,651	5,083	£1,268	£1,046
West Yorkshire	5,822,293	4,803	£1,212	£1,000
Wiltshire	693,109	470	£1,475	£1,217

Crown Court litigation cases with more than 500 PPE

Proposed Procurement Area	Total claim value	Claim volume	Average claim cost	Price cap value (17.5% below average claim value)
Avon and Somerset	1,640,810	127	£12,920	N/A
Bedfordshire	2,201,375	120	£18,345	N/A
Cambridgeshire	593,256	54	£10,986	N/A
Cheshire	659,813	56	£11,782	N/A
Cleveland	897,179	49	£18,310	N/A
Cumbria	434,032	41	£10,586	N/A
Derbyshire	1,507,931	44	£34,271	N/A
Devon and Cornwall	1,912,028	127	£15,055	N/A
Dorset	765,889	28	£27,353	N/A
Durham	1,100,501	72	£15,285	N/A
Dyfed-Powys	393,694	37	£10,640	N/A
Essex	1,528,635	101	£15,135	N/A
Gloucestershire	334,073	32	£10,440	N/A
Greater Manchester	13,837,672	674	£20,531	N/A
Gwent	581,049	36	£16,140	N/A
Hampshire	2,288,677	145	£15,784	N/A
Hertfordshire	2,312,726	105	£22,026	N/A
Humberside	358,511	46	£7,794	N/A
Kent	1,823,475	119	£15,323	N/A
Lancashire	4,240,373	222	£19,101	N/A
Leicestershire	1,376,299	95	£14,487	N/A
Lincolnshire	1,449,745	43	£33,715	N/A
London West and Central	23,017,965	1,122	£20,515	N/A
London North and East	12,149,063	612	£19,851	N/A
London South	16,211,761	757	£21,416	N/A
Merseyside	4,596,477	270	£17,024	N/A
Norfolk	1,210,758	75	£16,143	N/A
North Wales	1,066,704	39	£27,351	N/A
North Yorkshire	861,039	40	£21,526	N/A
Northamptonshire	535,899	29	£18,479	N/A
Northumbria	2,404,119	165	£14,570	N/A
Nottinghamshire	1,902,559	128	£14,864	N/A
South Wales	1,585,185	107	£14,815	N/A
South Yorkshire	2,435,465	145	£16,796	N/A
Staffordshire	1,608,764	75	£21,450	N/A
Suffolk	1,137,720	62	£18,350	N/A
Surrey	1,184,212	73	£16,222	N/A
Sussex	1,769,310	97	£18,240	N/A
Thames Valley	1,911,570	123	£15,541	N/A
Warwickshire	238,068	10	£23,807	N/A
West Mercia	844,282	55	£15,351	N/A
West Midlands	9,945,388	477	£20,850	N/A
West Yorkshire	7,780,733	446	£17,446	N/A
Wiltshire	647,211	43	£15,051	N/A

Annex E – Classes of criminal legal aid work proposed for inclusion in scope of competition

Criminal Investigations

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Free Standing Advice and Assistance	x		x
Police Station Telephone Advice	x		x
Police Station Attendance	x	x	
Police Station Attendance (Armed Forces)	x	x	
Warrant of Further Detention	x		x
Warrant of Further Detention (Armed Forces)	x		x
Duty Solicitor Stand-by	x		x
Police Station Post-Charge Attendance (Breach of Bail/Arrest on Warrant	x		x
Police Station Post-Charge Attendance (Post Charge ID, Referral for Caution, Recharge, Reprimand, Warning	x		x
Immigration matter	x		x

Criminal Proceedings

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Magistrates Court Advocacy Assistance	x		x
Court Duty Solicitor Session	See paragraph 4.33		
Representation in the magistrates' court	x	x	
Crown Court Advocacy Assistance	x		x
High Court Representation	x		x
Second Claim for Deferred Sentence	x		x
Pre-Order Cover	x		x
Early Cover	x		x
Refused Means Test – Form Completion Fee	x		x

Appeal and Reviews

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Advice and Assistance regarding an Appeal (excluding CCRC)	x		x
Advice and Assistance regarding a CCRC Application	x		x

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Representation on an Appeal by way of case stated	x		x

Prison Law

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Advice and Assistance	x		x
Advocacy Assistance (Disciplinary)	x		x
Advocacy Assistance (Parole)	x		x

Associated CLS Work

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Legal Help and Associated CLS Work	x		x

Crown Court

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Crown Court litigation	x	x	
Crown Court advocacy	Not in scope		
Very High Cost Cases	Not in scope		

Higher courts

Class of criminal legal aid work	In scope of contract	Price set by competition	Price set administratively
Representation for appeals heard by the Court of Appeal	x		x
Representation for appeals heard by the Supreme Court	x		x

Annex F – Summary of current criminal legal aid scheme

The Legal Aid Agency (LAA) administers legal aid in a number of crime related categories.

Criminal legal aid expenditure

By way of summary, the spend on criminal legal aid in the financial year 2011/12 was £1.08bn. The expenditure against each of the schemes outlined above is as follows:

Category	Class	Fee scheme	Spend in 2011/12	
Crime lower	**Investigations**	**Police station**	£161m	£410m
		CD Direct	£3m	
		Free standing advice	£1m	
	Proceedings	**Magistrates' Court**	£218m	
	Prison Law		£23m	
Crime higher	**Crown Court (non VHCC)**	**Crown Court litigation (LGFS)**	£304m	£703m
		Experts (LGFS)	£34m	
		Crown Court advocacy (AGFS)	£241m	
	Ex post facto (legacy and escapes)		£23m	
	Very High Cost Cases		£92m	
	Higher courts		£9m	
TOTAL				**£1.08bn**

The LAA also manages the Defence Solicitor Call Centre which is contracted to deliver a call centre service administering the allocation of clients to solicitors at the police station. The cost of this contract is currently £3m per year.

Crime Lower

At present, crime lower services (advice and assistance, including at police stations, and representation in the magistrates' court) can only be delivered by organisations that hold the 2010 Standard Crime Contract. There are currently over 1,600 contracted organisations.

i) Investigations

There are three main services provided to people at the investigations (police station) stage of a criminal case:

Telephone advice –

This is provided by the Criminal Defence Direct (CDD) (formerly the Criminal Defence Service Direct (CDS Direct)) call centre service to people under investigation for less serious offences, such as: drink driving offences, non-imprisonable offences, breach of bail, and warrants. Payments are made on a case by case basis. Solicitors can also bill for telephone advice.

There were just over 115,000 cases funded by legal aid in 2011/12 which are dealt with by the CDD service.

Face-to-face advice –

This is provided to people under investigation for more serious offences. This service is provided by contracted litigator organisations, which deploy a qualified advisor to attend the police station. For administrative purposes police stations are grouped together into 'duty solicitor schemes' and each scheme has a rota or panel of named advisors who can be called on to provide face-to-face advice. People held in custody at police stations can either ask for whomever is on rota for that particular duty solicitor scheme.

For each police station case a provider will be paid a fixed fee. The fee paid differs depending on the applicable duty solicitor scheme and covers all the work done on a case, including time spent giving advice, travel time and subsequent attendances at the police station on the same case.

For all cases, providers may also claim reasonably incurred disbursement costs in addition to the payment they receive for their work on a case.

In total there are just over 640,000 cases funded by legal aid in 2011/12 for face to face advice at the police station.

Free standing advice and assistance (outside a police station) –

This is provided in connection with a criminal investigation to people who are not being interviewed by the police. This can include investigations by authorities other than the police, and freestanding advice and assistance can also be provided to witnesses in some cases. Providers are paid at hourly rates for this work (up to a prescribed maximum amount).

This advice is provided by advisers face-to-face and is subject to a sufficient benefits test, which ensures that the client's case is serious enough to merit advice, and a financial eligibility test. In 2011/12, there were just over 8,000 claims for free standing advice and assistance.

ii) Magistrates' Court Proceedings

At the magistrates' court, the majority of individuals access publicly funded legal services by being granted a 'representation order'. The granting of this order confirms that an 'interests of justice' merits test has been passed. A means test is also performed, which looks at the client's income and family circumstances, and determines if they can afford to pay their defence costs.

As with police stations, magistrates' courts also have a duty solicitor available to clients at court. The duty solicitor is able to offer free legal advice and representation to people on their first appearance at court (not at trial) for a particular offence only, regardless of their financial circumstances.

Duty solicitors are paid an hourly rate for their attendance at Court and individuals do not need a representation order to access these services.

There are approximately 399,000 cases funded by legal aid in 2011/12 in the magistrates' court. Payment for these cases is by way of Standard Fees (quasi-fixed fees). The applicable fee depends on the type of the case and the number of hours worked by the

solicitor and whether the case was in an urban or more rural area (designated areas or non-designated areas).

Crime Higher

Crime higher includes remuneration for cases in the Crown Court for both litigators and advocates and for any work undertaken in preparation for an appeal to the Court of Appeal and Supreme Court. There are four main fee schemes that operate within the crime higher category.

i and ii) Litigator Graduated Fee Scheme (LGFS) & Advocate Graduated Fee Scheme (AGFS)

These two schemes cover the majority of Crown Court cases and apply nationally. The rules governing the graduated fee schemes are set out in the Criminal Legal Aid (Remuneration) Regulations 2013 and are supported by graduated fee guidance.

Litigators must have a 2010 Standard Criminal Contract to conduct work under the graduated fee schemes but the LAA does not have a contractual relationship with advocates under the AGFS.

The graduated fee is calculated using different pieces of case information known as proxies. These include:

- Case outcome (e.g. trial, guilty plea, cracked trial (where the client changes his/her plea to guilty on the first day of trial))
- Pages of prosecution evidence (PPE)
- Offence type (e.g. murder, fraud etc)
- Length of trial (if trial)
- Number of prosecution witnesses (for advocates only if trial)

Providers may also claim an hourly rate for work that falls within special preparation. This includes:

- Where evidence is served electronically
- Where the evidence exceeds 10,000 pages of prosecution evidence
- Where the case involves an unusual or novel point of law or factual issue (advocates only)

In addition, advocates may also claim for miscellaneous hearings (e.g. disclosure, admissibility of evidence, applications to dismiss). These are known as bolt-ons.

For confiscation proceedings, litigators are still paid using an administratively set hourly rate and advocates are paid either (a) daily rates for attendance if the page count is under 50 PPE or (b) if the PPE is over 50, daily rates for attendance, PPE enhancements and hourly rate preparation.

Approximately 139,000 litigator claims and approximately 127,000 advocate claims were processed in 2011/12.

iii) Very High Cost Cases (VHCCs)

Cases are classified as Very High Cost Cases (Crime) (VHCCs) if the trial is estimated to last more than 60 days. Once classified, the remuneration for those working on the case falls outside of the graduated fee schemes and instead they are remunerated under a separate hourly and daily rate scheme.

All cases classified as VHCCs operate under an individual case contract. Only those organisations that meet the applicable experience based entry criteria are offered such a contract with the LSC.

The scheme operates on a prior authority mechanism, whereby in order to secure payment for the work done on the case, litigators and advocates must seek agreement in advance from the LAA. The work requested is assessed based on necessity and reasonableness. Work is agreed every 3 months up to, including and post trial and sentence; and, where applicable includes confiscation hearings.

At the end of each stage the provider submits the claim for the work done which is assessed and paid by the LAA.

iv) Higher Courts

Legal aid is available, subject to a merits test, to those clients who have grounds to appeal against their conviction or sentence to the Court of Appeal and/or the Supreme Court. Her Majesty's Courts & Tribunals Service (HMCTS) determine the grant of legal aid and assess and pay the claims on these cases on behalf of the LAA.

HMCTS, through its Senior Courts Costs Office, also manages appeals against extradition and ancillary Administrative Court matters where legal aid is available.

Annex G – Current and proposed rates under the Advocates' Graduated Fee Scheme

Current rates under the Advocates' Graduated Fee Scheme

The current rates and fees are set out in the Criminal Legal Aid (Remuneration) Regulations 2013.[124]

Proposed new harmonised rates and tapered daily trial attendance rates under the Advocates' Graduated Fee Scheme

The consultation proposes to harmonise the basic AGFS fees paid for early guilty pleas, cracked trials and contested trials into a single base fee. The new basic fee would work on the same basis as the current cracked trial fee, so would include offence group and pages of prosecution evidence as proxies for complexity, but not the number of prosecution witnesses. It also proposes reducing the daily trial attendance fees from day 3 and further tapering them for trials from day 4 onwards.

The offence classes outlined below are as follows:

A – Homicide and related grave offences;

B – Offences involving serious violence or damage, or serious drug offences;

C – Lesser offence involving violence or damage and less serious drugs offences;

D – Sexual offences and offences against children;

E – Burglary etc;

F, G and K – Other offences of dishonesty;

H – Miscellaneous other offences;

I – Offences against public justice and similar offences; and

J – Serious sexual offences.

[124] http://www.legislation.gov.uk/uksi/2013/435/regulation/4/made

The proposed new rates are set out in the table below.

Class of Offence	*Basic Fee (B) (£)*	*Evidence uplift per page of prosecution evidence (pages 1 to 250) (E1) (£)*	*Evidence uplift per page of prosecution evidence (pages 251 to 1,000) (E2) (£)*	*Evidence uplift per page of prosecution evidence (pages 1,001 to 10,000) (E3) (£)*	*Initial Daily Attendance Fee (D)*	*Taper (T)*
QC						
A	2,324	5.07	1.27	1.68	746	98%
B	1,743	3.2	0.8	1.06	653	98%
C	1,520	2.27	0.57	0.75	622	92%
D	1,743	5.07	1.27	1.68	622	94%
E	1,232	1.63	0.41	0.54	466	94%
F	1,232	2.14	0.54	0.71	466	98%
G	1,232	2.14	0.54	0.71	466	98%
H	1,540	2.93	0.73	0.96	622	97%
I	1,598	2.87	0.71	0.94	622	98%
J	2,324	5.07	1.27	1.68	746	98%
K	2,324	2.83	0.71	0.94	746	98%
Leading Junior						
A	1,744	3.8	0.95	1.26	559	98%
B	1,307	2.4	0.6	0.8	490	98%
C	1,140	1.7	0.43	0.56	466	92%
D	1,307	3.8	0.95	1.26	466	94%
E	924	1.22	0.31	0.41	350	94%
F	924	1.6	0.41	0.53	350	98%
G	924	1.6	0.41	0.53	350	98%
H	1,155	2.2	0.54	0.72	466	97%
I	1,198	2.14	0.53	0.71	466	98%
J	1,744	3.8	0.95	1.26	559	98%
K	1,744	2.13	0.53	0.71	559	98%
Led Junior						
A	1,162	2.54	0.64	0.84	373	98%
B	871	1.6	0.4	0.53	326	98%
C	760	1.14	0.28	0.37	311	92%
D	871	2.54	0.64	0.84	311	94%
E	616	0.82	0.2	0.27	233	94%
F	616	1.07	0.27	0.36	233	98%
G	616	1.07	0.27	0.36	233	98%
H	770	1.46	0.37	0.48	311	97%
I	798	1.43	0.36	0.48	311	98%
J	1,162	2.54	0.64	0.84	373	98%
K	1,162	1.42	0.36	0.47	373	98%
Junior Alone						
A	1,307	4.52	2.1	0.69	404	98%
B	908	3.11	1.45	0.48	357	98%
C	581	2.31	1.07	0.36	311	92%
D	808	4.52	2.1	0.69	311	94%
E	508	1.34	0.63	0.2	248	94%
F	508	2.08	0.96	0.32	248	98%
G	508	2.08	0.96	0.32	248	98%

Class of Offence	*Basic Fee (B) (£)*	*Evidence uplift per page of prosecution evidence (pages 1 to 250) (E1) (£)*	*Evidence uplift per page of prosecution evidence (pages 251 to 1,000) (E2) (£)*	*Evidence uplift per page of prosecution evidence (pages 1,001 to 10,000) (E3) (£)*	*Initial Daily Attendance Fee (D)*	*Taper (T)*
H	618	2.08	0.97	0.32	311	97%
I	726	1.63	0.76	0.25	311	98%
J	1,307	4.52	2.1	0.69	404	98%
K	1,234	3.91	1.82	0.6	404	98%

The taper formula is as follows:

The amount of the graduated fee for a single trial advocate representing one assisted person being tried on one indictment in the Crown Court must be calculated in accordance with the following formula—

$G = B + (E1 \times e1) + (E2 \times e2) + (E3 \times e3) + D \times (1-T^d) / (1-T)$

Where T^d denotes T raised to the power of d

G is the amount of the graduated fee;

B is the basic fee specified in the Table as appropriate to the offence for which the assisted person is tried and the category of trial advocate;

d is the number of days or parts of a day on which the advocate attends at court by which the trial exceeds 2 days;

D is the fee payable in respect of daily attendance at court for the number of days by which the trial exceeds two, as appropriate to the offence for which the assisted person is tried and the category of trial advocate;

e1 is the number of pages of prosecution, up to a maximum of 250;

E1 is the evidence uplift specified in the table, as appropriate to the offence for which the assisted person is tried and the category of trial advocate;

e2 is the number of pages of prosecution, exceeding 250 up to a maximum of 1,000;

E2 is the evidence uplift specified in the table, as appropriate to the offence for which the assisted person is tried and the category of trial advocate;

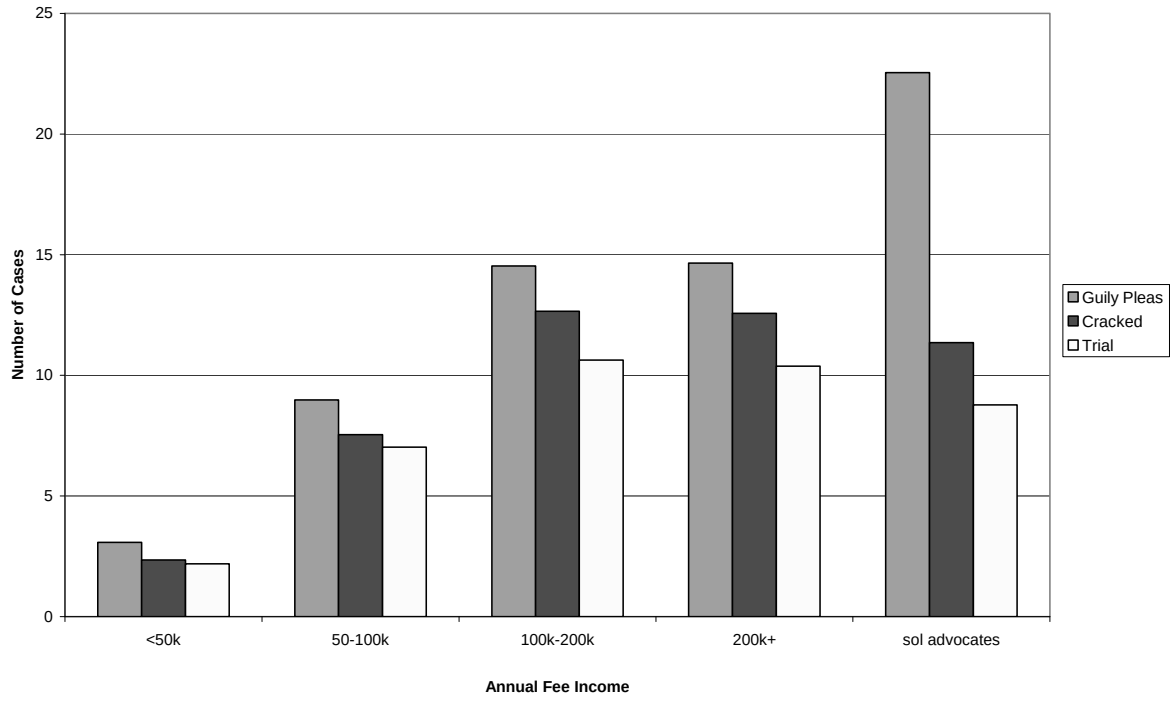
e3 is the number of pages of prosecution, exceeding 1,000 up to a maximum of 10,000;

E3 is the evidence uplift specified in the table, as appropriate to the offence for which the assisted person is tried and the category of trial advocate;

Average case composition of barristers split by their annual legal aid fee income

The chart below shows the annual case mix of barristers split by their fee income levels. It shows that lower fee earners tend to undertake fewer cases than those with higher fee income. It also shows that in terms of composition, the mix of guilty / cracked trials / trials is similar across all fee income bands. This suggests those with higher fee incomes are more likely to do the longer, more complex cases.

Average case composition of barristers split by their annual fee income (source: derived from 2012 LAA payment data)



Annex H – current and proposed VHCC fee rates (excluding VAT)

VHCC rates on Individual Case Contracts post 14 July 2010

Current VHCC rates of pay for work done on cases with representation orders granted on or after 14 July 2010 and classified as VHCCs under the VHCC Arrangements 2010.

Preparation (hourly rates)

	Category 1 (£)	Category 2 (£)	Category 3 (£)	Category 4 (£)	Standard Rates (£)
Litigator					
Level A	145	113	91	91	55.75
Level B	127	100	79	79	47.25
Level C	84	65	51	51	34.00
Pupil/junior	45	36	30	30	
Barrister					
QC	145	113	91	91	
Leading junior	127	100	79	79	
Led junior	91	73	61	61	
Junior alone	100	82	70	70	
2nd Led junior	63	50	43	43	
Solicitor Advocate					
Leading level A	145	113	91	91	
Led level A	127	100	79	79	
Leading level B	127	100	79	79	
Led level B	104	86	66	66	
Level A alone	131	109	88	88	
Level B alone	113	95	75	75	
Second advocate	63	50	43	43	

Advocacy

Advocacy rates for Advocates are paid per hearing or per day depending upon the duration of the court sitting time. Advocacy rates are non-category specific.

	Preliminary hearing (£)	Half day (£)	Full day (£)
QC	113	238	476
Leading junior	86	195	390
Led junior	58	126	252
Junior alone	67	143	285
2nd Led junior	34	64	128
Noter	29	55	109

Attendance at court with Advocate (hourly rates for Litigators)

Level A	£42.25
Level B	£34.00
Level C	£20.50

Proposed VHCC rates of pay for work done on cases with representation orders granted on or after 14 July 2010 and classified as VHCCs under the VHCC Arrangements 2010 based on a 30% reduction in fees.

Preparation (hourly rates)

	Category 1 (£)	Category 2 (£)	Category 3 (£)	Category 4 (£)	Standard Rates (£)
Litigator					
Level A	101.50	79.10	63.70	63.70	39.03
Level B	88.90	70.00	55.30	55.30	33.08
Level C	58.80	45.50	35.70	35.70	24.50
Pupil/junior	31.50	25.20	21.00	21.00	
Barrister					
QC	101.50	79.10	63.70	63.70	
Leading junior	88.90	70.00	55.30	55.30	
Led junior	63.70	51.10	42.70	42.70	
Junior alone	70.00	57.40	49.00	49.00	
2nd Led junior	44.10	35.00	30.10	30.10	
Solicitor Advocate					
Leading level A	101.50	79.10	63.70	63.70	
Led level A	88.90	70.00	55.30	55.30	
Leading level B	88.90	70.00	55.30	55.30	
Led level B	72.80	60.20	46.20	46.20	
Level A alone	91.70	76.30	61.60	61.60	
Level B alone	79.10	66.50	52.50	52.50	
Second advocate	44.10	35.00	30.10	30.10	

Advocacy

Advocacy rates for Advocates are paid per hearing or per day depending upon the duration of the court sitting time. Advocacy rates are non-category specific.

	Preliminary hearing (£)	Half day (£)	Full day (£)
QC	79.10	166.60	333.20
Leading junior	60.20	136.50	273.00
Led junior	40.60	88.20	176.40
Junior alone	46.90	100.10	199.50
2nd Led junior	23.80	44.80	89.60
Noter	20.30	38.50	76.30

Attendance at court with Advocate (hourly rates for Litigators in £)

Level A	29.58
Level B	23.80
Level C	14.35

VHCC Panel rates

Current VHCC rates for work done on cases classified under the VHCC Panel scheme on or after 13 November 2008 but before 14 July 2010.

Preparation (hourly rates)

		Category 1 (£)	Category 2 (£)	Category 3 (£)	Category 4 (£)	Standard Rates (£)
Solicitor						
Level A sol		152.50	119.00	95.50	95.50	55.75
Level B sol		133.00	104.50	83.50	83.50	47.25
Level C sol		88.50	69.00	54.00	54.00	34.00
Pupil/junior		48.00	38.50	31.50	31.50	
Counsel						
QC		152.50	119.00	95.50	95.50	
Leading junior		133.00	104.50	83.50	83.50	
Led junior		95.50	76.00	65.00	65.00	
Junior alone		104.50	85.50	74.00	74.00	
2nd Led junior		67.00	53.00	46.00	46.00	
Solicitor Advocate						
Leading level A		152.50	119.00	95.50	95.50	
Led level A		133.00	104.50	83.50	83.50	
Leading level B		133.00	104.50	83.50	83.50	
Led level B		110.00	90.50	69.00	69.00	
Level A alone		138.00	115.00	93.50	93.50	
Level B alone		116.00	99.50	78.50	78.50	
Second Advocate		67.00	53.00	46.00	46.00	

Advocacy

Advocacy rates for counsel are paid per hearing or per day depending upon the duration of the court sitting time. Advocacy rates are non-category specific.

	Preliminary hearing (£)	Half day (£)	Full day (£)
QC	119.00	250.00	500.00
Leading junior	90.50	205.25	410.50
Led junior	61.00	132.75	265.50
Junior alone	70.00	150.00	300.00
2nd Led junior	35.50	67.50	135.00
Noter	30.50	57.50	115.00

Attendance at court with counsel (hourly rates for solicitors)

Level A	£42.25
Level B	£34.00
Level C	£20.50

Proposed VHCC rates for work done on cases classified under the VHCC Panel scheme on or after 13 November 2008 but before 14 July 2010 based on a 30% reduction in fees.

Preparation (hourly rates)

	Category 1 (£)	Category 2 (£)	Category 3 (£)	Category 4 (£)	Standard Rates (£)
Solicitor					
Level A sol	106.75	83.30	66.85	66.85	39.03
Level B sol	93.10	73.15	58.45	58.45	33.08
Level C sol	61.95	48.30	37.80	37.80	23.80
Pupil/junior	33.60	26.95	22.05	22.05	
Counsel					
QC	106.75	83.30	66.85	66.85	
Leading junior	93.10	73.15	58.45	58.45	
Led junior	66.85	53.20	45.50	45.50	
Junior alone	73.15	59.85	51.80	51.80	
2nd Led junior	46.90	37.10	32.20	32.20	
Solicitor Advocate					
Leading level A	106.75	83.30	66.85	66.85	
Led level A	93.10	73.15	58.45	58.45	
Leading level B	93.10	73.15	58.45	58.45	
Led level B	77.00	63.35	48.30	48.30	
Level A alone	96.60	80.50	65.45	65.45	
Level B alone	81.20	69.65	54.95	54.95	
Second Advocate	46.90	37.10	32.20	32.20	

Advocacy

Advocacy rates for counsel are paid per hearing or per day depending upon the duration of the court sitting time. Advocacy rates are non-category specific.

	Preliminary hearing (£)	Half day (£)	Full day (£)
QC	83.30	175.00	350.00
Leading junior	63.35	143.68	287.00
Led junior	42.70	92.93	185.85
Junior alone	49.00	105.00	210.00
2nd Led junior	24.85	47.25	94.50
Noter	21.35	40.25	80.50

Attendance at court with counsel (hourly rates for solicitors in £)

Level A	29.58
Level B	23.80
Level C	14.35

Annex I – Civil fees: enhancements to hourly rates

Extract from Civil Legal Aid contract

"*Hourly Rates enhancements*

The following rules apply only to remuneration by way of Prescribed Rates under the Remuneration Regulations (but excluding for this purpose any determination as to whether a case escapes from any Standard Fee or Graduated Fee – see Category Specific Rules). No other form of enhancement or uplift is payable for such work.

The threshold test: on assessment of Licensed Work we or the court may allow fees at more than the Prescribed Rate in respect of any item or class of work where it appears, taking into account all the relevant circumstances, that:

(a) the work was done with exceptional competence, skill or expertise;

(b) the work was done with exceptional speed; or

(c) the case involved exceptional circumstances or complexity.

Where we or the court consider that any item or class of work should be allowed at more than the Prescribed Rate, it shall apply to that item or class of work a percentage enhancement in accordance with the following provisions.

In determining the percentage by which fees should be enhanced above the Prescribed Rate we or the court shall have regard to:

(a) the degree of responsibility accepted by the legal advisor;

(b) the care, speed and economy with which the case was prepared; and

(c) the novelty, weight and complexity of the case.

The percentage above the Prescribed Rate by which fees for work may be enhanced shall not exceed 50%. The exception to this is that in proceedings in the High Court, Court of Appeal, Upper Tribunal or Supreme Court, we or the court may allow an enhancement not exceeding 100% where it is considered that, in comparison with work in other proceedings in those courts which would merit 50% enhancement, the item or class of work relates to exceptionally complex matters which have been handled with exceptional competence or speed.

We or the court may have regard to the generality of proceedings to which the relevant Prescribed Rates apply in determining what is exceptional within the meaning of this provision."

Annex J – Comparison between current and proposed experts' fees and rates (with 20% reduction)

Civil fees

Experts	Non-London – Hourly Rate unless stated to be a Fixed Fee		London – Hourly Rate unless stated to be a Fixed Fee		Comments
	Current Rate[125]	***Proposed new rate***	***Current Rate[126]***	***Proposed new rate***	
A&E consultant	£126	£100.80	£135	£108	
Accident reconstruction	£90	£72	£68	£54.40	
Accountant	£50–£135	£40–£108	£50–£144	£40–£115.20	Partner £144, Manager £108, Accountant £80, General staff £50
Anaesthetist	£135	£108	£135	£108	
Architect	£99	£79.20	£90	£72	
Cardiologist	£144	£115.20	£144	£115.20	
Cell telephone site analysis	£90	£72	£90	£72	
Child psychiatrist	£135	£108	£135	£108	
Child psychologist	£126	£100.80	£126	£100.80	
Computer expert	£90	£72	£90	£72	
Consultant engineer	£90	£72	£68	£54.40	
Dentist	£117	£93.60	£117	£93.60	
Dermatologist	£108	£86.40	£108	£86.40	
Disability consultant	£68	£54.40	£68	£54.40	
DNA – testing of sample	£315 per test	£252 per test	£315 per test	£252 per test	
DNA – preparation of report	£90	£72	£90	£72	
Doctor (GP)	£99	£79.20	£90	£72	
Employment consultant	£68	£54.40	£68	£54.40	
Enquiry agent	£32	£25.60	£23	£18.40	

[125] The current applicable rates for are contained in The Civil Legal Aid (Remuneration) Regulations 2013.

[126] The current applicable rates are contained in The Civil Legal Aid (Remuneration) Regulations 2013.

Experts	Non-London – Hourly Rate unless stated to be a Fixed Fee		London – Hourly Rate unless stated to be a Fixed Fee		Comments
ENT surgeon	£126	£100.80	£126	£100.80	
General surgeon	£135	£108	£90	£72	
Geneticist	£108	£86.40	£108	£86.40	
GP (records report)	£63 fixed fee	£50.40 fixed fee	£90 fixed fee	£72 fixed fee	
Gynaecologist	£135	£108	£90	£72	
Haematologist	£122	£97.60	£90	£72	
Handwriting expert	£90	£72	£90	£72	
Interpreter	£32	£25.60	£25	£20	
Lip reader/Signer	£72	£57.60	£41	£32.80	
Mediator	£126	£100.80	£126	£100.80	
Medical consultant	£135	£108	£90	£72	
Medical microbiologist	£135	£108	£135	£108	
Meteorologist	£126	£100.80	£180 fixed fee	£144 fixed fee	
Midwife	£90	£72	£90	£72	
Neonatologist	£135	£108	£135	£108	
Neurologist	£153	£122.40	£90	£72	
Neuropsychiatrist	£158	£126.40	£90	£72	
Neuroradiologist	£171	£136.80	£171	£136.80	
Neurosurgeon	£171	£136.80	£90	£72	
Nursing expert	£81	£64.80	£81	£64.80	
Obstetrician	£135	£108	£135	£108	
Occupational therapist	£68	£54.40	£68	£54.40	
Oncologist	£140	£112	£140	£112	
Orthopaedic surgeon	£144	£115.20	£144	£115.20	
Paediatrician	£135	£108	£90	£72	
Pathologist	£153	£122.40	£540 fixed fee	£432 fixed fee	
Pharmacologist	£122	£97.60	£122	£97.60	
Photographer	£32	£25.60	£23	£18.40	
Physiotherapist	£81	£64.80	£81	£64.80	
Plastic surgeon	£135	£108	£135	£108	
Process server	£32	£25.60	£23	£18.40	
Psychiatrist	£135	£108	£135	£108	
Psychologist	£117	£93.60	£117	£93.60	
Radiologist	£135	£108	£135	£108	
Rheumatologist	£135	£108	£135	£108	
Risk assessment expert	£63	£50.40	£63	£50.40	
Speech therapist	£99	£79.20	£99	£79.20	
Surveyor (non housing-disrepair)	£50	£40	£50	£40	
Surveyor (housing-disrepair)	£85	£68	£115	£92	

Experts	Non-London – Hourly Rate unless stated to be a Fixed Fee		London – Hourly Rate unless stated to be a Fixed Fee		Comments
Telecoms expert	£90	£72	£90	£72	
Toxicologist	£135	£108	£135	£108	
Urologist	£135	£108	£135	£108	
Vet	£90	£72	£90	£72	
Voice recognition	£117	£93.60	£90	£72	

Crime fees

Experts – CRIME	Non-London – Hourly Rate unless stated to be a Fixed Fee		London – Hourly Rate unless stated to be a Fixed Fee	
	Current Rate[127]	***Proposed new rate***	***Current Rate***[128]	***Proposed new rate***
A&E consultant	£126	£100.80	£135	£108
Accident reconstruction	£90	£72	£68	£54.40
Accountant	£50–£144	£40–£115.20	£50–£144	£40–£115.20
Anaesthetist	£135	£108	£90	£72
Architect	£99	£79.20	£90	£72
Back calculations	£180 fixed fee	£144 fixed fee	£189 fixed fee	£151.20 fixed fee
Benefit expert	£90	£72	£90	£72
Cardiologist	£144	£115.20	£90	£72
Cell telephone site analysis	£90	£72	£90	£72
Child psychiatrist	£135	£108	£90	£72
Child psychologist	£126	£100.80	£90	£72
Computer expert	£90	£72	£90	£72
Consultant engineer	£90	£72	£68	£54.40
Dentist	£117	£93.60	£90	£72
Dermatologist	£108	£86.40	£90	£72
Disability consultant	£68	£54.40	£68	£54.40
DNA – testing of sample	£315 per test	£252 per test	£315 per test	£252 per test
DNA – preparation of report	£90	£72	£90	£72
Doctor (GP)	£99	£79.20	£90	£72
Drug expert	£90	£72	£90	£72
Employment consultant	£68	£54.40	£68	£54.40
Enquiry agent	£32	£25.60	£23	£18.40
ENT surgeon	£126	£100.80	£90	£72
Facial mapping	£135	£108	£90	£72
Fingerprint expert	£90	£72	£47	£37.60
Fire investigation	£90	£72	£68	£54.40
Firearm expert	£90	£72	£90	£72

[127] The current applicable rates are contained in the Criminal Legal Aid (Remuneration) Regulations 2013.

[128] The current applicable rates are contained in the Criminal Legal Aid (Remuneration) Regulations 2013.

Experts – CRIME	**Non-London – Hourly Rate unless stated to be a Fixed Fee**		**London – Hourly Rate unless stated to be a Fixed Fee**	
	Current Rate[127]	***Proposed new rate***	***Current Rate***[128]	***Proposed new rate***
Forensic scientist	£113	£90.40	£90	£72
General surgeon	£135	£108	£90	£72
Geneticist	£108	£86.40	£90	£72
GP (records report)	£63 fixed fee	£50.40 fixed fee	£90 fixed fee	£72 fixed fee
Gynaecologist	£135	£108	£90	£72
Haematologist	£122	£97.60	£90	£72
Handwriting expert	£90	£72	£90	£72
Interpreter	£32	£25.60	£25	£20
Lip reader/Signer	£72	£57.60	£41	£32.80
Mediator	£126	£100.80	£126	£100.80
Medical consultant	£135	£108	£90	£72
Medical microbiologist	£135	£108	£90	£72
Medical report	£99	£79.20	£90	£72
Meteorologist	£126	£100.80	£180 fixed fee	£144 fixed fee
Midwife	£90	£72	£90	£72
Neonatologist	£135	£108	£90	£72
Neurologist	£153	£122.40	£90	£72
Neuropsychiatrist	£158	£126.40	£90	£72
Neuroradiologist	£171	£136.80	£90	£72
Neurosurgeon	£171	£136.80	£90	£72
Nursing expert	£81	£64.80	£81	£64.80
Obstetrician	£135	£108	£135	£108
Occupational therapist	£68	£54.40	£68	£54.40
Oncologist	£140	£112	£90	£72
Orthopaedic surgeon	£144	£115.20	£90	£72
Paediatrician	£135	£108	£90	£72
Pathologist	£153	£122.40	£540 fixed fee	£432 fixed fee
Pharmacologist	£122	£97.60	£90	£72
Photographer	£32	£25.60	£23	£18.40
Physiotherapist	£81	£64.80	£81	£64.80
Plastic surgeon	£135	£108	£90	£72
Process server	£32	£25.60	£23	£18.40
Psychiatrist	£135	£108	£90	£72
Psychologist	£117	£93.60	£90	£72
Radiologist	£135	£108	£90	£72
Rheumatologist	£135	£108	£90	£72
Risk assessment expert	£63	£50.40	£63	£50.40
Speech therapist	£99	£79.20	£90	£72
Surgeon	£135	£108	£90	£72
Surveyor	£50	£40	£50	£40
Telecoms expert	£90	£72	£90	£72
Toxicologist	£135	£108	£90	£72
Urologist	£135	£108	£90	£72

Experts – CRIME	**Non-London – Hourly Rate unless stated to be a Fixed Fee**		**London – Hourly Rate unless stated to be a Fixed Fee**	
	Current Rate[127]	***Proposed new rate***	***Current Rate***[128]	***Proposed new rate***
Vet	£90	£72	£90	£72
Voice recognition	£117	£93.60	£90	£72

Annex K – Equalities Impact

1 Introduction

1.1 The Government is mindful of the importance of considering the impact of the legal aid proposals on different groups, with particular reference to users and providers of legally aided services.

1.2 In accordance with our duties under the Equality Act 2010 we have considered the impact of the proposals on individuals sharing protected characteristics in order to give due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations.

2 Methodology

2.1 Adhering with guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantage resulting from the proposals has been to identify the individuals whom the proposals would impact (the 'pool'). Looking at the pool, we have then drawn comparisons between the potential impacts of each proposal on those who share particular protected characteristics, with those who do not share those characteristics. We have in addition compared the characteristics of individuals affected by the proposals with the characteristics of the general population (England and Wales) and the appropriate legal aid client or provider population where relevant. Where there are large differences we have considered the broad equality impacts of this.

3 Data Sources

3.1 We have identified the following data sources as providing the most relevant information on potential equalities impacts:

- Legal Aid Agency (formerly the Legal Services Commission) (LAA) data on clients collected through provider billing for financial year 2011/2012 (LAA Client Data). This includes records of clients' sex, age, race, and illness or disability status.
- Legal Services Research Centre (LSRC) provider data, collected to support their *Routine Diversity Monitoring of the Supplier Base* reports. The survey was most recently undertaken in 2010 and represents the diversity profile of those managing / controlling legal aid providers' offices.
- The Bar Council publications *Bar Barometer: Trends in the Profile of the Bar, November 2012*, and *Barristers' Working Lives: A Biennial Survey of the Bar 2011*. These provide information for practising barristers on age, sex, and ethnicity.
- Published 2011 Census data, to enable comparisons with the general population to be made.

3.2 All of these data sources have some limitations. None of the data cover all of the protected characteristics. Our statistical analysis therefore only considers the available data on age, sex, race and disability. In addition:

- LAA client data is recorded by providers, not legal aid clients themselves, and is therefore unlikely to be as accurate as self defined data, particularly in respect of disability / illness and race.
- As with many administrative datasets, the quality of the LAA client data is affected by the extent of missing data, particularly regarding illness / disability status and race.
- LSRC's provider equality data is based on a survey of providers which collectively have a 69% response rate.

3.3 We are currently unable to assess the extent of impact of the proposals on providers' legal aid income by protected characteristic, as the implementation of scope and fee changes under Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 will alter the 2011/12 baseline that income reduction can be assessed against, and therefore any assessment could potentially be misleading.

4 Conclusions

4.1 We have considered our duty to have due regard to the need to eliminate discrimination, harassment, victimisation and unlawful conduct, and to advance equality of opportunity and foster good relations.

4.2 The primary objective of the proposed reform package is to bear down on the cost of legal aid, ensuring that we are getting the best deal for the taxpayer and that the system commands the confidence of the public. Our aim is to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system.

4.3 These objectives are of critical importance. We believe these to be legitimate aims which we intend to pursue with regard to principles of equality and non-discrimination. These objectives underpin and motivate the package of reforms which we believe represent a proportionate means of achieving these aims.

4.4 We do not consider that the proposals give rise to direct discrimination, discrimination arising from a disability or a failure to comply with a duty to make reasonable adjustments. Nor do we consider that these proposals will have any impact on instances of harassment or victimisation. We have identified the potential for disproportionate impacts on some persons with protected characteristics (assuming for this purpose that the proposals amount to provisions, criteria or practices) and we cannot rule out the possibility of disproportionate impact as a result of the evidence gaps outlined in paragraphs 3.2 and 4.6. Where we have identified a risk of disproportionate impact, we consider that such treatment constitutes a proportionate means of achieving a legitimate aim for the reasons set out above and in the paragraphs below.

4.5 We have considered the implications of the proposals for the advancement of equality of opportunity and the need to foster good relations. Our view is that where relevant, the proposals do not undermine attainment of those objectives and are justified in all the circumstances for the reasons set out.

4.6 In relation to the protected characteristics of gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief and sexual orientation, no information is collected, for either clients or providers. It has not been possible, therefore, to assess the impacts of the proposals in respect of these protected characteristics using statistical analysis. Furthermore, the nationality or immigration status of civil legal aid recipients is not routinely recorded. Our initial view, however, is that the nature of the proposals is such that they are unlikely to put people with these protected characteristics at a particular disadvantage. Were any disadvantage to materialise, we believe it would be a proportionate means of achieving a legitimate aim and therefore justified for the reasons set out above.

For those proposals directly affecting the remuneration of providers, we do not consider that they are likely to have a direct impact on clients. As discussed in the Impact Assessments, which accompany this consultation, clients could be affected if the changes have an impact on the sustainability of the legal aid market resulting in an adverse effect on service provision, however we believe this is unlikely. Potential impacts on clients are likely to depend upon the provider response to the changes and as such remain unquantifiable.

4.7 We welcome any relevant information to further inform our analysis, and have included an equalities question in the consultation to better understand the potential impacts of the proposals. We will be updating this equalities statement once we have considered all the relevant responses.

5 Specific Impacts

5.1 Restricting the scope of legal aid for prison law

5.1.1 Impact on prisoners:

The impact of this proposal is that affected prisoners will no longer receive criminal legal aid for some claims. This may be adverse in some instances, however, we consider that many such claims are capable of efficient and effective resolution through the internal prisoner complaints system and prisoner discipline procedures. To identify the potential for prisoners to be subject to a particular disadvantage (assuming for that purpose the proposal amounts to a provision, criterion or practice), LAA data on the protected characteristics of approximately 11,000 prisoners likely to be affected by the proposed change in the scope of criminal legal aid for prison law are presented below. They show that:

- 97% were male and 3% female;
- 53% were White, 25% from a BAME group with ethnicity unknown in 22% of cases; and
- 6% had a declared disability, 66% no declared disability, with disability status unknown in 29% of cases.

The data show that the majority of those impacted will be men (97%), who are over-represented amongst the affected client group when compared to the general population (where 51% are male). Those from a Black, Asian or Minority Ethnic

(BAME) group are also over-represented. There are limitations on the availability of data on other protected characteristics of prison law users.

The LAA has indicated that of the 11 treatment cases to receive prior approval since July 2010 a significant proportion have involved prisoners with learning difficulties and/or mental health issues. The proposal could therefore potentially have an impact on this group of prisoners.

5.1.2 Impact on providers:

We anticipate the impact of this policy proposal will be adverse, as affected providers will see a reduction in legal aid income. To identify the potential for providers to be subject to a particular disadvantage (assuming for that purpose the proposal amounts to a provision, criterion or practice), data on the protected characteristics of providers likely to be affected by the proposal are presented below. We have matched LSRC survey data to 187 of the 351 solicitor firms (a match rate of 53%) who, having engaged in such work in 2011/12, are potentially impacted by the proposal. The proposal would be applied to all affected providers in the same way, however we acknowledge that the extent of impact on a given provider firm may be dependent upon how much they rely on income from impacted prison law work. Based on these data, the managerial make-up of these firms was as follows:

- 65% White-British, 30% BAME and 6% split-majority owned/controlled;
- 70% male, 13% female and 17% split-majority owned/controlled; and
- 4% of firms employed an ill or disabled manager.

There are limitations on the availability of data on other protected characteristics of providers.

There is evidence of an over-representation of BAME, male and non-ill or non-disabled majority managed providers as compared to the general population. The proposals may have a disproportionate impact on them, therefore. We consider any such impact to be justified for the reasons below.

5.1.3 Justification:

We acknowledge there may be adverse impacts on certain clients, in particular those with learning difficulties, and providers, in particular male and BAME managed firms. If the proposal does result in particular disadvantage to persons with protected characteristics, we believe the impact is a proportionate means of achieving the legitimate aims set out in section 4 above. The prison law cases taken outside of scope of criminal law advice and assistance are not of sufficient priority to justify the use of limited public funds and would be dealt with more efficiently and effectively through non-legal channels, such as the prison complaints system.

As noted above, the proposal could potentially have an impact on prisoners with learning difficulties and/or mental health issues. To mitigate any potential impacts on offenders with learning difficulties, 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 to ensure all prisoners are able to use the prisoner complaints system.

5.2 Imposing a financial threshold in the Crown Court

5.2.1 Impact on clients:

We anticipate the impact of this proposal will be adverse on those who will exceed the disposable income threshold, as affected persons will no longer be eligible to receive criminal legal aid. To identify the potential for clients to be subject to a particular disadvantage (assuming for that purpose the proposal amounts to a provision, criterion or practice), LAA data on the protected characteristics of clients affected by the proposal are presented below. They show that fewer than 200 Crown Court legal aid applicants had an annual disposable household income of £37,500 in 2011/12. We have compared the data we have on the protected characteristics of the affected group against that which we have for the characteristics of all Crown Court legal aid clients and against the general population. The data show that:

- 82% were male and 7% female (gender was not recorded in 12% of cases). 78% of all Crown Court legal aid clients were male, 10% female and 12% unknown;
- 51% were White, 28% were from a BAME background with ethnicity unknown in 21% of cases. 18% of all Crown Court legal aid clients were BAME, 58% white and 25% unknown;
- 4% had a declared disability, 42% no declared disability with disability status unknown in 53% of cases. 15% of Crown Court clients declared a disability, 56% not ill or disabled and 28% unknown; and
- 4% were aged between 18–24 yrs, 85% aged between 25–64 years and 11% aged 65 years and older. 36% of Crown Court legal aid were aged between 18–24 yrs, 63% aged between 25–64 years and 1% aged 65 years and older.

Data indicate there is a slightly greater proportion of males in the affected group when compared to all Crown Court legal aid clients. Data indicate there is a higher proportion of BAME people in the affected group when compared to all Crown Court legal aid clients. There is a smaller proportion of people in the affected group that declared a disability when compared to all Crown Court legal aid clients. The data also shows that a greater proportion of the affected group are in the 25–64 years age group when compared to all Crown Court legal aid clients. Each of these assessments must be treated with caution due to the high proportion of individuals in the affected group for which there are no data.

In common with all Crown Court legal aid applicants, men, those of BAME ethnicity and those aged 25–64 years are over-represented when compared to the general population (where 49% are male, 14% are of BAME ethnicity and 52% are aged between 25 and 64 years old).

5.2.2 Impact on providers:

As the proposed change concerns eligibility for defendants, we do not consider that it is likely to have a direct impact on providers (assuming for this purpose the proposal amounts to a provision, criterion or practice). As discussed in the Impact Assessment, providers could be affected if the changes have an impact on their income from legal aid work. However, this may be offset by a rise in demand for privately funded defence work. Were any disadvantage to materialise, given that providers with majority BAME and male managerial control are over represented among criminal legal aid providers in comparison with the population as a whole,

they may be disproportionately impacted. We consider any such impact to be justified for the reasons set out below.

5.2.3 Justification:

When compared against the Crown Court legal aid client population, we acknowledge that there may be adverse impacts particularly on men, the BAME group, and those aged 25–64. However, we believe the proposal is a proportionate means of achieving the legitimate aims identified in section 4 above. By setting the threshold at a reasonable level, at which people should generally be able to pay for their own defence, it targets limited public resources at those people who need it most. There would also be a hardship review mechanism in place available to all affected individuals, regardless of their protected characteristics.

5.3 Introducing a residence test

5.3.1 Impact on clients:

We anticipate that this proposal will have an adverse impact on those who do not satisfy the residence test (assuming for this purpose the proposal amounts to a provision, criterion or practice) as, subject to the exceptions set out in the consultation paper, those affected will no longer receive civil legal aid. We recognise that this proposal may have the potential to put non-British nationals at a particular disadvantage compared with British nationals, as British nationals will be able to more easily satisfy the test than other nationals. However, we believe this is justified for the reasons set out below.

5.3.2 Impact on providers:

We have no data upon which to base an assessment of likely impact on providers although we believe the proposals are unlikely to result in negative equality impacts on this group (assuming for this purpose the proposal amounts to a provision, criterion or practice). However, we acknowledge that the extent of impact on a given provider firm may be dependent upon the extent to which they rely on income from impacted civil legal aid work. Were any disadvantage to materialise, given that those managing firms engaged in work impacted by this proposal are more likely to be male and non-disabled when compared to the population as a whole, they may be disproportionately affected. We consider any such impact to be justified for the reasons set out below.

5.3.3 Justification:

We believe that this proposal is a proportionate means of achieving the legitimate aims set out in section 4. The requirement for 12 months of previous lawful residence at the time of the application for civil legal aid applies irrespective of nationality and targets limited public funds available for civil legal aid at those who have a strong connection to the UK, improving the credibility of the scheme.

We will ensure that legal aid will continue to be available where necessary to comply with obligations under EU or international law, and exceptional funding (where the failure to provide legal aid would breach the applicant's rights under the European Convention on Human Rights or EU law) will be available in respect of persons who do not meet the residence test. Furthermore, the proposed exception for asylum seekers will minimise any impacts on those with protected characteristics.

5.4 Paying for permission work in judicial review cases

5.4.1 Impact on clients:

Any impact on clients is likely to depend on the provider response to the reforms and the extent to which the transfer of financial risk for the application for the permission stage of a judicial review reduces availability of representation for: (i) cases which the court does not allow to proceed; and (ii) judicial review cases more generally. As such the likely equality impacts remain unquantifiable.

Where providers go ahead on a legally-aided basis, clients will benefit from cost protection and would therefore not be personally at risk of paying costs if the permission application were unsuccessful. Where a provider refuses to take a case on a legally aided basis, clients may choose to proceed privately and bear the financial risk of the application themselves.

The limited available data suggests that men and those aged 18-24 are over represented among those who might be impacted in comparison to the population as a whole and the proposals may therefore have a disproportionate impact on them (assuming for this purpose the proposal amounts to a provision, criterion or practice). We consider any such impact which may materialise to be justified for the reasons set out below.

5.4.2 Impact on providers:

We anticipate that the proposal will have an adverse impact on providers as they will see a reduction in legal aid income (assuming for this purpose the proposal amounts to a provision, criterion or practice). In common with all civil & family legal aid providers for whom data is available, those managing firms engaged in work impacted by this proposal are more likely to be male and non-disabled when compared to the population as a whole but, unlike the majority of civil and family providers, they are more likely to be BAME when compared to the population as a whole (29% amongst affected providers compared to 14% in the general population). The proposal may therefore have a disproportionate impact on those groups. However, we acknowledge that the extent of impact on a given provider firm may be dependent upon how much they rely on income from the areas of work affected by the proposal.

5.4.3 Justification:

If the proposal does result in particular disadvantage to persons with protected characteristics, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. By transferring the financial risk of the application to the provider, the proposal creates a greater incentive for providers to give more careful consideration to the strength of the case before applying for permission for judicial review. Therefore we consider that this proposal is the appropriate way in which to ensure that legal aid is not used to fund a significant number of weak cases and is focussed on cases that really require it.

5.5 Civil merits test – removing legal aid for borderline cases

5.5.1 Impact on clients:

We anticipate the proposal will have an adverse impact on civil legal aid clients in certain cases, in particular housing, family, immigration, claims against public authorities and public law where the case has a less than 50% chance of success.

The limited LAA data concerning the 100 (rounded) cases per annum that would be affected by the proposal suggests that disabled clients and those aged 25–64 are overrepresented as compared to the general population and so may be disproportionately affected by the proposal (assuming for this purpose the proposal amounts to a provision, criterion or practice). We consider any such impact to be justified for the reasons set out below.

5.5.2 Impact on providers:

We anticipate the proposal will have an adverse impact on providers as they will see a reduction in legal aid income in respect of the cases referred to above (assuming for this purpose the proposal amounts to a provision, criterion or practice). Those managing firms identified as being affected from LAA data collected (where equalities data is held) were more likely to be male and non-disabled than in the general population and so may be disproportionately affected by the proposal. We consider any such impact to be justified for the reasons set out below.

5.5.3 Justification:

We believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. As a matter of principle limited public funding should be directed to cases with at least a 50% or more prospects of success and our legal aid system is not efficient and credible as long as it pays for cases which, from the outset, are considered by the applicant's lawyer or the LAA to have borderline prospects of success. The proposal will mean that limited public funding is focused on those cases in which it is possible to say that the prospects of success are 50% or better.

5.6 Introducing competition in the criminal legal aid market

5.6.1 Impact on clients

5.6.2 We anticipate the proposed competition model may have an adverse impact on clients because they would no longer have the choice of selecting any provider with a LAA contract to deliver criminal legal aid services (assuming for this purpose the proposal amounts to a provision, criterion or practice). As men and BAME people are overrepresented among criminal legal aid clients generally in comparison to the population as a whole the proposals may have a disproportionate impact on them. However we do not anticipate that the proposal will have a disproportionate impact on persons with other protected characteristics. Where clients with protected characteristics need to request a change in allocated provider due to exceptional circumstances, including where there is a breakdown in the relationship between the client and provider, or where some other substantial compelling reason exists as to why a different provider might be better suited to the client's particular needs, it will be possible to request a change in provider. To the extent that there is any disproportionate impact, we consider any such impact to be justified for the reasons set out below.

Although there may be an indirect impact on clients if the changes have an impact on the sustainability of the legal aid market affecting service provision as set out in paragraph 4.6 above, the move to competition is designed to ensure that legal aid services are procured at a rate the market is able to sustain, and therefore we do not anticipate adverse impacts on clients in terms of sustainability. Furthermore, the quality controls which we intend to put in place in order to win a contract and

the quality measures that will be adopted to ensure that quality is maintained throughout the life of the contract will help to ensure that there is no impact on the quality of advice received by clients.

5.6.3 Impact on providers

5.6.4 The proposed model is based on the premise that there are economies of scale and market inefficiencies to be exploited by those providers wishing to expand their businesses and deliver a greater share of work in their area. We accept that the ability for current providers to grow their business to the scale required to meet the demands of a larger case volume is likely to be more challenging for some smaller providers in a procurement area compared with some larger providers. To the extent that BAME majority managed firms are more likely to be small, the proposal may have a disproportionate impact on them (assuming for this purpose the proposal amounts to a provision, criterion or practice)

Some rates of pay for work within the scope of the competed contract will be set by the price competition, others such as appeals and reviews and prison law will be set administratively.[129]The proposal to include a price cap under which applicants will be invited to submit their price bids and the proposal to reduce the rates of pay set administratively for all other classes of work will mean providers will receive less fee income from legal aid.

Providers with majority BAME and male managerial control are over represented among criminal legal aid providers in comparison to the population as a whole. The proposals therefore may have a disproportionate impact on them. We consider any such impact to be justified for the reasons set out below.

5.6.5 Justification

We believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4 above. We consider that price competition is the best way to ensure the long-term sustainability of the criminal legal aid scheme. Moving away from the current complex system of administratively set fees to one in which providers determine the best price at which they can offer their services will drive efficiencies in the provider market and ensure value for money from the significant expenditure it represents.

Moreover, any adverse impact on clients may be mitigated by the fact that the future crime contract is likely to have similar, if not the same, provisions with regard obligations for providers to have a written equality and diversity policy that, as a minimum, must include how the provider would meet the diverse needs of their clients (including making reasonable adjustments for clients with disabilities). In addition, as set out above, provision for exceptional circumstances in which a client could request a change in allocated provider would mitigate any disproportionate impact arising.

Any adverse impact on providers may be mitigated by the proposed process by which smaller organisations may form consortia or use agents in order to develop the capacity and capability to deliver a greater volume of work under a simplified fee scheme. This is intended to promote fairness in the competitive tendering

[129] For more detail on which prices will be set administratively see the Consultation Document Annex F.

approach to criminal legal aid services and, to the extent BAME majority managed firms are more likely to be small, may advance equality of opportunity.

5.7 Restructuring the Advocates Graduated Fee Scheme

5.7.1 Impact on barristers

Advocates engaged on cases resulting in a guilty plea will receive an increase in income and those engaged on cases resulting in a cracked trial will be unaffected. However, advocates will see a reduction in legal aid income when undertaking trials under the Advocates Graduated Fees Scheme (AGFS) in the future. "Barristers' Working Lives - A Biennial Survey of the Bar 2011" data on main area of practice (where barristers spend most of their working time) show that men and those of White ethnicity are over-represented amongst those engaged in criminal work when compared to the general population. As a result, they may be disproportionately impacted by the proposal. There is some evidence from the same survey that there is a greater proportion of female and BME barristers among the more junior members of the Bar.

As the proposed fee reductions have a greater impact on longer trials and as longer trials are likely to be more complex, they may be more likely to be undertaken by more experienced barristers. As those of white ethnicity at 15 years' of call are overrepresented both when compared to the general population and barristers in general, they may be disproportionately impacted by the proposal. Men with over 13 years of call are also overrepresented when compared to the general population and to barristers in general. Male barristers and those of White ethnicity may be disproportionately impacted, therefore. In addition, as there may be a correlation between age and experience, older barristers may be over-represented among those undertaking longer trials and may therefore be disproportionately impacted by the proposals. We consider any such impact to be justified for the reasons set out below.

5.7.2 Impact on Higher Court Advocates:

We have limited equality data available on individual Higher Courts Advocates impacted by these proposals, though acknowledge that in common with all those providing criminal legal aid, impacted firms are more likely to be managed by BAME, male, and non-disabled individuals than in the general population. We consider any such impact to be justified for the reasons set out below.

5.7.3 Impact on clients:

We do not anticipate any indirect impact on clients for the reasons set out in paragraph 4.6 above. We are unable to identify the protected characteristics of clients who would be affected if risks to sustainable supply were realised in order to identify the potential for any particular disadvantage. However, as men and BAME people are overrepresented among criminal legal aid clients generally in comparison to the population as a whole the proposals may have a disproportionate impact on them. It is difficult to draw robust conclusions as to any particular disadvantage for disabled persons because of the high number of criminal legal aid clients in respect of which we do not hold relevant data and therefore we cannot rule out a possible disproportionate impact relative to the population as a whole. We consider any such impact to be justified for the reasons set out below.

5.7.4 Justification:

We acknowledge that men and those of White ethnicity are over-represented amongst barristers engaged in criminal work and that men and those of White ethnicity as well as older advocates may be over-represented among those undertaking longer trials and therefore be disproportionately impacted by the proposals.

If this proposal does result in particular disadvantage to persons with protected characteristics, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. The proposal would apply irrespective of protected characteristics. The proposal targets the highest earners, restructuring fees to promote efficient resolution of cases, supporting our wider efforts to transform the justice system. Moreover, to the extent there is a greater proportion of female and BME barristers among the more junior Bar, the increase in fees for guilty pleas may further the advancement of equal opportunities.

5.8 Reducing fees in Very High Cost Cases Crime (VHCCs)

5.8.1 Impact on litigators:

We anticipate the impact of this proposal will be adverse, as VHCC (Crime) litigators will see a reduction in legal aid income. To identify the potential for providers to be subject to a particular disadvantage (assuming for that purpose the proposal amounts to a provision, criterion or practice), we have matched LSRC survey data to 150 of the 224 solicitor firms (a match rate of 68%) who, having undertaken VHCC (Crime) work in 2011/12 are potentially impacted by the proposals. Based on the data available, the managerial make-up of these firms was as follows:

- 65% White-British, 27% BAME and 7% split-majority managed;
- 77% male, 11% female and 12% split-majority managed; and
- 7% of firms employed an ill or disabled manager.

The data show that BAME and male majority managed providers are more likely to provide VHCC (Crime) work (when compared to the population as a whole) and so may be disproportionately impacted. There is no published data on the age of litigators undertaking VHCCs, however there is likely to be a correlation between age and experience. To the extent that VHCCs are more likely to be conducted by more experienced litigators, the proposal may be more likely to impact upon older litigators. We consider any such impact to be justified for the reasons set out below

5.8.2 Impact on barristers:

We anticipate the impact of this policy proposal will be adverse, as barristers will see a reduction in legal aid income when undertaking VHCCs (Crime). “Barristers’ Working Lives – A Biennial Survey of the Bar 2011” data on main area of practice (where barristers spend most of their working time) show that men and those of White ethnicity are over-represented amongst those engaged in criminal work when compared to the general population. In addition, an Equality Impact Assessment undertaken as part of the ‘Very High Cost Case (Crime) – 2009 Consultation’ identified that, where specified, the majority of advocates conducting VHCCs were white, male, aged 36–55 or non-disabled. This suggests there may be a disproportionate impact on such persons. There is no published data on years of call split by age, however there is likely to be a correlation between age

and experience. To the extent that VHCCs are more likely to be conducted by more experienced barristers, the proposal may be more likely to impact upon older barristers. We consider any such impact to be justified for the reasons set out below

5.8.3 Impact on clients:

We do not anticipate any indirect impact on clients for the reasons set out in paragraph 4.6 above. We are unable to identify the protected characteristics of VHCC (Crime) clients who would be affected if risks to sustainable supply were realised in order to identify the potential for any particular disadvantage. However, as men and BAME people are overrepresented among criminal legal aid clients generally in comparison to the population as a whole the proposals may have a disproportionate impact on them. It is difficult to draw robust conclusions as to any particular disadvantage for disabled persons because of the high number of criminal legal aid clients in respect of which we do not hold relevant data and therefore we cannot rule out a possible disproportionate impact relative to the population as a whole. We consider any such impact to be justified for the reasons set out below.

5.8.4 Justification

We acknowledge that BAME and male majority managed providers and white and male barristers may be disproportionately impacted, as well as older litigators and barristers. However, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4 above. By addressing the cost of the longest running and most expensive cases we believe the reductions we are considering will improve public confidence in the scheme and deliver value for money for the taxpayer.

5.9 Multiple Advocates

5.9.1 Impact on barristers:

We expect that a number of the cases in which two counsel are instructed currently will instead have a single junior or QC instructed as a consequence of our policy. The decision to appoint additional advocates is taken by individual courts, and equality information is not collected for advocates. We do not therefore hold information which would allow us to identify the protected characteristics of barristers working on these cases. Survey data on main area of practice (where barristers spend most of their working time) show that men and those of White ethnicity are over-represented amongst those engaged in criminal work when compared to the general population. As set out in paragraph 5.7.1 above, there is some evidence that there is a greater proportion of female and BME barristers among the more junior members of the Bar.

As QCs have to demonstrate particular skills in order to be appointed to that rank, and as there may be a correlation between age and experience, then the policy may indirectly benefit older barristers. There is likely to be less work available for junior counsel, however, if two junior counsel, or a QC assisted by junior counsel, are instructed in fewer cases. To the extent that there is a greater proportion of female and BME barristers among the more junior members of the Bar, they could be disproportionately affected by the policy. In addition, as junior counsel may be less experienced and as there may be a correlation between age and experience,

younger barristers may be disproportionately affected. We consider any such impact to be justified for the reasons set out below.

5.9.2 Impact on Higher Court Advocates

We have limited equality data available on individual Higher Courts Advocates impacted by these proposals, though acknowledge that in common with all those providing criminal legal aid, impacted firms are more likely to be managed by BAME, Male, and non-disabled individuals than in the general population. We consider any such impact to be justified for the reasons set out below.

5.9.3 Impact on clients:

The aim of this proposal is to ensure that multiple advocates are only instructed in cases where necessary. Cases which do not require such services will be undertaken by an appropriately qualified and experienced advocate. Accordingly, though we expect this policy to result in fewer cases with more than one advocate instructed, we do not anticipate that there will be any direct, negative impact on clients. As set out in paragraph 4.6, clients could be affected if the changes have an impact on the sustainability of the legal aid market resulting in an adverse effect on service provision in the market. Were these risks to materialise, clients will not be treated less favourably because of any protected characteristics.

We are unable to identify the protected characteristics of clients who would be affected if risks to sustainable supply were realised in order to identify the potential for any particular disadvantage. However, as men and BAME people are overrepresented among criminal legal aid clients generally in comparison to the population as a whole, the proposals may have a disproportionate impact on them. It is difficult to draw robust conclusions as to any particular disadvantage for disabled persons because of the high number of criminal legal aid clients in respect of which we do not hold relevant data and therefore we cannot rule out a possible disproportionate impact relative to the population as a whole. We believe any disproportionate impact to be justified for the reasons given below.

5.9.4 Justification:

We acknowledge that junior advocates are more likely to be disadvantaged by the proposals, and as a consequence younger, female and BME barristers may be more likely to be disproportionately impacted by the proposals. If this proposal does result in particular disadvantage to persons with protected characteristics, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. By achieving a more proportionate approach to the use of multiple counsel, the proposal supports our aim of targeting limited public funds on the cases where it is really required.

5.10 Reducing the fixed representation fees paid to solicitors in cases covered by the Care Proceedings Graduated Fee Scheme

5.10.1 Impact on providers

We anticipate that the impact of this proposal will be adverse, as solicitors will see a reduction in legal aid income from these cases. To identify the potential for providers to be subject to a particular disadvantage (assuming the proposal amounts to a provision, criterion or practice), we have matched LSRC survey data to 1,403 of the 2,103 solicitor firms (a match rate of 67%) that have provided

representation in public family law cases in 2011/12. These firms are potentially impacted by the proposal. Based on the data available, the managerial make-up of these firms was as follows:

- 90% White-British, 7% BAME and 3% split-majority owned/controlled
- 65% male, 17% female and 18% split-majority owned/controlled
- 5% of firms employed an ill or disabled manager.

In common with all civil & family legal aid providers for whom data is available, those managing firms engaged in public family law work (where equalities data is held) were more likely to be Male, and non-disabled than in the general population. Those providers may be disproportionately impacted, therefore. We consider any such impact to be justified for the reasons set out below.

5.10.2 Impact on clients

We do not anticipate any indirect impact on clients for the reasons set out in paragraph 4.6 above. However, were any detriment to materialise, as women, BAME persons and those who are ill or disabled are over-represented as users of civil legal aid services in comparison to the general population, they may be disproportionately impacted by the proposal. However, the assessment must be treated with caution due to the high proportion of individuals in the affected group for which there are no data, especially for race and disability. We consider any such impact to be justified for the reasons set out below.

5.10.3 Justification

We acknowledge that firms managed by a majority of persons who are male or non-disabled may be disproportionately impacted by the proposal. However, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4 above. By capitalising on efficiencies in the system, the proposal better ensures that public expenditure on legal aid represents value for money.

5.11 Harmonising fees paid to self-employed barristers and other advocates appearing in civil (non-family) proceedings

5.11.1 Impact on barristers:

Barristers undertaking civil legal aid work would see a reduction in the minimum guaranteed level of fees received for the same caseload but may receive enhancement of that fee if the specified criteria are satisfied. Affected barristers could experience different impacts depending on their location, the level of court in which a case is being heard, the level of fees they currently receive and whether or not the work they typically undertake would attract an enhancement and, if so, the level of that enhancement.

"Barristers' Working Lives – A Biennial Survey of the Bar 2011" data shows that men and those of white ethnicity are over-represented amongst the population of barristers when compared to the general population[130] and so, generally, may be disproportionately impacted by the proposal. However, this proposal is likely to

[130] https://www.barstandardsboard.org.uk/media/1385164/barristers__working_lives_30.01.12_web.pdf

impact most significantly on barristers appearing in the county courts. While there is no data on the protected characteristics of barristers appearing specifically in those courts, we consider that they are likely to be junior members of the Bar and that therefore those who are female or BAME and younger barristers are likely to be over-represented amongst the population of barristers at that level when compared to the civil Bar as a whole and may be disproportionately impacted, therefore. The extent of the impact on barristers will depend on their reliance on income from civil legal aid work. We consider any such impact to be justified for the reasons set out below.

5.11.2 Impact on clients:

We do not anticipate any indirect impact on clients for the reasons set out in paragraph 4.6 above. We consider this unlikely due to the quality assurance arrangements in place, including the role of the instructing solicitor, the court in the effective administration of justice and the availability of solicitor advocates. However, were any detriment to materialise, as women, BAME persons and those who are ill or disabled are over-represented as users of civil legal aid services in comparison to the general population, they may be disproportionately impacted by the proposal. However, the assessment must be treated with caution due to the high proportion of individuals in the affected group for which there are no data, especially for race and disability. We consider any such impact to be justified for the reasons set out below.

5.11.3 Justification:

We acknowledge that men and persons of White ethnicity are overrepresented in the affected population generally and that female or BAME and younger barristers may be disproportionately impacted by the proposal. However, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4 above. By ensuring that similar rates are paid for similar services, the proposal better ensures that public expenditure on legal aid represents value for money and promotes public confidence in the scheme. Moreover it advances equality of opportunity.

5.12 Removing the uplift in immigration and asylum Upper Tribunal appeals

5.12.1 Impact on clients:

We do not anticipate any indirect impact on clients for the reasons set out in paragraph 4.6 above. However, were any detriment to materialise, as women, BAME persons and those who are ill or disabled are over-represented as users of civil legal aid services in comparison to the general population, they may be disproportionately impacted by the proposal. However, the assessment must be treated with caution due to the high proportion of individuals in the affected group for which there are no data, especially for race and disability. We consider any such impact to be justified for the reasons set out below.

5.12.2 Impact on providers:

We anticipate the impact of this proposal will be adverse, as providers will see a reduction in legal aid income. In common with all civil & family legal aid providers for whom data is available, those managing firms engaged in work impacted by this proposal are more likely to be male, and non-disabled when compared to the population as a whole, but unlike the majority of civil and family providers, they are

more likely to be BAME when compared to the population as a whole (48% amongst affected providers compared to 14% in the general population). The proposal may therefore have a disproportionate impact on those groups. However, we acknowledge that the extent of impact on a given provider firm may be dependent upon how much they rely on income from the areas of work affected by the proposal. We consider any such impact to be justified for the reasons set out below.

5.12.3 Justification:

We acknowledge that the proposal may have a disproportionate impact on providers who are male, non-disabled or BAME. However, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. We consider it unjustified to continue to pay a higher rate (incorporating an uplift) in the current economic climate. The higher rate was put in place under an old scheme of retrospective funding where work on the whole appeal was 'at risk'. Under existing arrangements only work on the permission application is 'at risk' and payment is made after a successful application. However the higher rate of payment still applies. Given the different arrangements put in place since the higher rate was introduced, we do not consider continued payment of the higher rate to be justified.

5.13 Expert Fees in Civil, Family and Criminal proceedings

5.13.1 Impact on providers:

We anticipate the impact of this proposal would be adverse, as experts will see a reduction in legal aid income. Experts are a disparate group and the impact of any reduction in fees paid is difficult to predict. As the LAA does not contract directly with experts, no data is held from which to determine the average reduction or the protected characteristics of experts. Our initial view is that the nature of the changes is such that they are unlikely to put people with protected characteristics at a particular disadvantage. Were any such impact to materialise, we consider it would be justified for the reasons set out below.

5.13.2 Impact on clients:

A reduction in the fee paid to experts is considered unlikely to have any negative equality impact on legal aid clients. The resultant effect of the proposed reduction in expert fees would mean that clients would receive the same level of expert service but this would be at a reduced cost to the legal aid fund.

5.13.3 Justification:

Were any disproportionate impact to result, we believe the proposal is a proportionate means of achieving the legitimate aims set out in section 4. By ensuring that broadly similar rates are paid for similar services, the proposal better ensures that public expenditure on legal aid represents value for money and promotes public confidence in the scheme

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