Consultation Paper CP14/2013, "Transforming legal aid: delivering a more credible and efficient system" -: **Response on Behalf of the Bar Liaison Committee of the Honourable Society of the Inner Temple**

Executive Summary

1. This response is made by the Inner Temple Bar Liaison Committee, which is the representative body for practitioner members of the Honourable Society of the Inner Temple, one of the four Inns of Court to which all barristers must belong. The committee represents 3,949 barrister practitioners.

2. We do not believe that the proposed changes to legal aid will deliver either a more credible or a more efficient system (of justice). We are of the view that, if implemented, these changes would deliver the opposite effects to those sought, namely, a less credible, less respected system and a less efficient and more expensive system.

3. In respect of the proposed price competitive tendering for criminal legal aid services we submit that this would have the following effects –

   (a) The present system, based on free market competition, ensures quality is maintained within the justice system. The proposed monopoly of representation by bodies winning contracts, based on the lowest price, and the required lack of consumer choice will inevitably decrease, if not destroy, quality within the criminal justice system. With providers having no incentive to provide a good service to clients with no choice, with no ability to attract or retain trade based on a good reputation and with the cuts in costs which must follow the awarding of a contract, quality will obviously suffer.

   (b) Corporate bodies, whose first duties will be to shareholders and who will replace independent and specialist competing solicitors, will have

no incentive or funding to maintain quality. This will also inevitably lead to costly miscarriages of justice (in terms of money, public confidence and political capital).

(c) We believe that the removal of eligibility for legal aid to the proposed new financial threshold and the lack of choice and quality inherent in the proposed system would lead to more Defendants representing themselves. That would result in greater costs to the system caused by longer trials, more trials, more appeals and the consequent "blocking of the system" and impact on other cases.

4. In respect of the proposed withdrawal of legal aid from some areas of civil law we submit the following –

(a) Although it might be thought that only particular areas of civil practice would be directly affected by the withdrawal of legal aid, there would probably be an adverse indirect effect across the board. This is because of the inevitable increase in the numbers of people having to represent themselves in cases from which funding would be withdrawn.

(b) This would be especially acute in the County Courts. Logic and experience suggest that each of these cases would take longer to hear. Without a substantial increase in the number of District and Circuit Judges to deal with such cases there would be a knock-on effect on all cases heard in the County Courts. Considerably more judicial time would have to be spent dealing with litigants-in-person and there would therefore be less time for other matters. This would affect all users of the County Courts.

(c) Unrepresented litigants, when appearing against lawyers representing Government, local government or corporations, will inevitably be at a disadvantage.

5. In respect of the proposed reforms to legal aid for Crown Court advocacy we submit these would have the following effects –

(a) Cuts to legal aid spending for defence barristers and cuts in fees paid to prosecuting barristers in criminal cases have been made consistently over the last two decades. Cuts have already been "to the bone" and any more cuts would effectively end the viability of the independent, self-employed criminal Bar.

(b) It is envisaged that much of the work would have to be covered "in-house" by the new corporate bodies winning legal aid contracts in any event, taking away a large proportion of the work available for the independent Bar to do.

(c) The proposed incentives within this Paper to encourage guilty pleas place a clear conflict of duty on those representing defendants at all levels of the system. The lay client may be innocent and require a trial and that may be in his best interests but the financial interests of all involved would be for him to plead guilty instead.

(d) The fees paid to all members of the profession support the chambers structure which trains new members of the profession, at their own expense, many of whom join in-house government prosecution departments and many of whom go on to become the highly respected, independent Judges that we have today. The proposed fee system would make self-employed practice at the criminal Bar, for all but the privately wealthy, a financial impossibility.

(e) This Inn, in particular, has made great progress over the last decade in increasing diversity at the Bar. We proudly run outreach programmes which have been successful in encouraging those from disadvantaged backgrounds to consider and achieve a career at the Bar. We recognise that those from black and ethnic minority backgrounds and women would be adversely and disproportionately affected by these proposed changes. Retention of these groups at the publicly-funded Bar would be likely to fall drastically.

6. We are aware that responses will be made on behalf of the Bar Council, the Circuits, and a number of specialist bar associations. Our response set out below should be treated as being in addition to those responses.

Answers to Consultation Questions: -

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.

7. A difficulty with the proposed criteria is that there may well be instances where the current "Tarrant criteria" [see the Paper at 3.14], properly applied, would lead to a hearing requiring representation, but a decision would be made that the criteria do not require such a hearing and, therefore, no funding could attach. In the absence of a means to secure representation to challenge the decision under the Tarrant criteria, prisoners may be left in an unfair position.

8. The suggestion at paragraph 3.18 that decisions over issues such as allocation, categorisation, segregation, close supervision and personality disorder referrals ought not to attract representation raises real concerns. There have been instances where prisoners have been categorised, segregated or otherwise kept in conditions which made their incarceration materially more onerous than was necessary and proportionate. There could be a risk that prison governors, without the current oversight provided by judicial review, would make decisions on an arbitrary or discriminatory basis.

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.

9. The principle that those who can afford to pay should do so is unobjectionable in principle provided that there is an appropriate safety net. However, we make the following observations:-

10. Historically, means testing was abolished because it was established that the savings from means testing were outweighed by the administrative costs of managing the system which assessed eligibility. Means testing has since been re-introduced and presumably the cost/benefit analysis remains under review.

11. The Paper does not identify the likely costs necessarily involved in introducing such a measure. Given that the savings from this proposal are estimated at £3m, we wonder whether the costs of policing the eligibility criteria would exceed the savings. If so, it would be a wholly irrational measure to introduce. We suggest that a proper costing

exercise, and a pilot scheme to test whether the costing model is accurate, should be undertaken before such a measure is introduced nationally.

12. We propose that any restrained funds be released to allow a suspect or Defendant to pay privately for his legal representation. This would save the public purse entirely. An exception would have to be made within the current legislation preventing "money laundering" by legal representatives in order for this to happen.

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

13. See answer to Q.2

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

14. We note the proposed retention of the discretion (s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012 [LASPO]) to grant legal aid to those not meeting the residence test in exceptional cases, such as those where the welfare of a child is at stake, and the protection of legal aid for asylum seekers.

15. If those whose first language is not English and who do not fall within the exceptions above are to be forced to represent themselves, if unable to pay privately, we are concerned that this would again add to the time taken up in the courts and would, therefore, add to costs to be borne by the public purse.

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.

16. No.

17. This proposal is misconceived. The fact that permission is not granted for permission to proceed with judicial review does not mean that the proceedings were brought irresponsibly or frivolously. The Government clearly recognises, in other recent reforms published in April 2013, the difference between frivolous claims which are

"totally without merit" and those which, as a matter of reasonable judgement, may not meet the arguability test.

18. The test for judicial review is arguabiity and judgements on this test may reasonably vary even when a party is properly and responsibly advised by his "provider" [ie legal advisor]. There is no justification for penalising the provider if the claim does not obtain permission in such circumstances.

19. Furthermore, rather than curtailing unmeritorious claims, this proposal is likely to encourage further attempts to obtain permission at renewed oral hearings and onward to the Court of Appeal so that payment, for the not insubstantial work involved in bringing such proceedings, may be recovered. On the contrary, if payment is fairly made for work done at the permission stage then more pragmatic decisions may be taken regarding whether to proceed with renewed applications.

20. If any restrictions on payment for claims which do not obtain permission are to be considered, these should be restricted to those judged as "totally without merit" and which do not subsequently obtain permission and not others which simply do not meet the arguability test. If a claim is found to be "totally without merit" it is likely to have failed to meet the threshold for arguability by a considerable margin which is not so likely to be the result of differing but reasonable judgments.

21. In so far as it is claimed that costs for aborted work (where, for example, the public authority changes its stance before permission is granted) might be obtained through seeking a costs award, this entirely undermines the need to reduce satellite litigation. Satellite litigation takes up precious court time and resources.

22. In 2011, some 11,359 applications for judicial review were issued but there were only 6,264 permission decisions taken by a judge. We are aware that research carried out by the Public Law Project indicates that many claims do not reach a permission decision because they are settled[1]. It is certainly the experience of members of the Inner Temple Bar Liaison Committee that it is not uncommon for judicial review cases to settle on favourable term to the claimant before a permission determination is reached.

23. We have concerns that there is a lacuna in the proposals. Where work is done on a case following a claim being lodged but prior to permission being granted that leads to the public authority changing its position, thereby negating the need for proceedings to continue, there is no mechanism under the proposals for that work to be remunerated notwithstanding the claim was properly brought. Statistics published by

[1] Dynamics of Judicial Review Litigation: The Resolution of Public Law Challenges before final hearing;

Bondy and Sunkin PLP 2009

the Ministry of Justice ["MOJ"] in April 2013[2] indicated that for the most recent year for which figures were available, namely 2011, around 11% of claims for judicial review were granted permission and around 51% were refused. This would leave a significant proportion (around 38%) of claims for judicial review which were withdrawn, adjourned or re-submitted. Since claims which are compromised are frequently withdrawn as a condition of the compromise agreement, it can be inferred that a significant proportion of claims for judicial review are compromised by the parties before permission is actually granted. But if the proposals are followed, those cases would not attract any award of costs.

24. That situation is clearly unfair. Those cases where a claim has been brought and recognised to be valid are clear examples of cases which have properly been brought against public bodies. They are also cases where costs are kept to a minimum. There would be a perverse incentive on such claimants under the new system to decline to compromise their valid claims until at least permission had been granted, since otherwise there would be no entitlement to costs' recovery. In addition, the proposed restriction in payment would be likely to give rise to satellite litigation (in which both sides would be publicly funded) regarding the costs of proceedings that could otherwise have been resolved at relatively little expense to the tax payer.

25. It is possible to envisage situations where the permission is not granted yet the bringing of the judicial review is in the public interest. If, as in the system for appealing criminal cases in the Court of Appeal, a Judge certifies that it is a proper case to bring, then previous work could be properly reimbursed.

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

26. It is difficult to see why the current assessment of "borderline" should be removed. There will always be cases where the prospects are borderline because there are disputed issues of fact, law or expert evidence, the determination of which will dictate the outcome of the case. The analysis in the consultation documentation is simplistic on this issue. If the current assessment criteria are regarded as "too lax" on this point, the answer is to require further and better details at the funding stage as to why the disputed issues will be determinative of the claim and why it is not possible to predict the outcome rather than wrongly categorising such claims as "poor" when they may not be. It is also difficult to see how an appeal to an Independent Funding Adjudicator would assist if the claim is to be refused funding on the basis that it is not possible to

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190991/jr-adhoc.pdf at p. 7.

predict the percentage prospects of success as it has the characteristics of a borderline case.

27. A further problem with the proposal is that there are some cases where there is a strong public interest in pursuing the matter and where it is impossible to assess the merits at an early stage until there has been proper disclosure etc. Likewise, the paper accepts that this will often apply to cases of the utmost importance to the individual (and possibly society) in holding the state to account.

28. Given that the total estimated savings to such a measure are assessed as being in the region of £1m, the savings do not justify such a serious interference with the right to access to justice/redress for some of the weakest in society. It may also be material that in housing cases, where those who risk losing their home if they are unsuccessful in the proceedings, not only is the issue one of overwhelming importance for the applicant (and one which engages Articles 8 and 1 of the first protocol of the first Protocol of the European Convention of Human Rights) but it is one in which any decision adverse to the applicant is likely to result in a greater cost to the public sector through the necessity to provide publicly funded housing.

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

29. No.

30. In section 1 of the Legal Services Act [2007] Parliament laid down a number of objectives seen as essential in relation to the provision of legal services, including, "*improving access to justice...protecting the interests of consumers...encouraging an independent, strong, diverse and effective legal profession*" upholding the rule of law. These proposals offend each of those objectives ratified by Parliament and it seems to be envisaged that these proposals will be introduced under secondary legislation, thus without the need for full Parliamentary debate on primary legislation.

31. The proposals turn the State from simply prosecutor of crimes to the selector of the accused's representative.

32. It is noted that the application process for tenders is due to be opened very soon after the consultation period ends – this will allow no time for any account to be taken by those tendering of any changes which may be made.

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.

33. No.

34. The cut of 17.5% is only a starting point and is likely to be more in order to win the contract.

35. The cuts are excessive and disproportionate (particularly in light of the cuts already suffered by criminal practitioners). Moreover, the cuts will necessarily drive standards downwards, causing irreparable damage to the quality of the criminal justice system. The justification for the savings is wholly undermined by the fact that the "savings" will inevitably result in the overall cost burden to the taxpayer increasing. Accordingly, the taxpayer will end up paying more for less. This is not, and cannot be, in the public interest.

36. We submit that the costs to the public would rise because:

    (a) The lack of choice, quality and eligibility would mean more defendants and litigants appearing in person. This would mean more trials, more hearings and longer cases taking up more court time which would increase the public costs.

    (b) The lack of quality as envisaged under this proposed scheme would mean more miscarriages of justice which would increase costs to the public.

    (c) The long-term lack of adequate remuneration would lead to the loss of an independent Bar and many specialised solicitors who currently act and decrease the length of trials by focussing the issues and agreeing admissions etc.

    (d) Once experienced practitioners were lost from the system it would be impossible to replace them.

37. In addition, if the advocates working under the proposed new scheme were of an inferior quality, which the Paper appears to accept would be the case, the miscarriages of justice which flow would cost the government dearly in terms of compensation claims for the innocent being imprisoned and also in terms of the loss of public confidence in the system.

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.

38. It is noted that there is to be provision for the Government to terminate a contract on a no fault basis. This would preclude all but the largest of organisations (Capita, G4S etc) from tendering as, even if firms of local solicitors with years of experience were able to find funding to comply with the tendering process and seek to open or change

premises so that they had wheelchair access etc, with no guarantee that a contract would last for the stated duration, only the foolhardy or those with other means of raising income would invest time and money in securing a contract in the first place.

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.

39. We do not agree that price competitive tendering ["PCT"] is in the public interest.

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.

40. We do not agree that price competitive tendering is in the public interest.

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.

41. We do not agree that price competitive tendering is in the public interest.

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.

42. Having stated that we do not agree with the proposal for competitive tendering, we are of the view that, if this proposal were to be made law, there should be provision for other work to be remunerated by those not holding a contract. Whilst it must be accepted that, if price competitive tendering is introduced, it is hard to see how any other providers would be available in the market there is always the chance that the holder of a contract would not be able to provide representation for any number of reasons.

43. By way of example, if there were to be a multi-handed cut-throat murder case in the Thames Valley catchment area, where only four contracts are proposed, and more than four Defendants were to be in conflict due to their cut-throat defences, representation

would be needed for the fifth Defendant. There would have to be provision for others to provide those services. It is envisaged that such representation, not under the contract, would be at considerable expense to the public as commercial rates would have to be paid without the current vast pool of legal aid solicitors to act.

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

44. The different areas of the jurisdiction have always had different needs. That must surely remain so.

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*****.**

45. We cannot see how the criminal Bar will survive these proposed changes. The self-employed Bar relies on referral work from solicitors for its existence. We cannot see that the types of business competing for these contracts would employ any but the very cheap in order to fulfil their own business-economic briefs.

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*****.**

46. The question is otiose as it presupposes that competitive tendering is, or could reasonably be, in the public interest.

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.***

47. No.

48. The MOJ has confirmed at its consultation events that the deprivation of customer choice is a necessary ingredient of price competitive tendering [“PCT”] on commercial grounds as a necessity to attract what is seen as the right sorts of bidder. That it is so evidently wrong in principle and practice neatly illustrates all that is wrong with PCT.

49. Despite questioning at the MOJ events, no credible explanation, other than that set out above, has been given as to why choice is to be removed in this area of public service where, in nearly every other area such as health and education, the Government sees choice as a key component in improving services, public confidence and reducing costs. [See the Prime Minister's speech on 11th July 2011 at https://www.gov.uk/government/speeches/speech-on-open-public-services.]

50. The MOJ is the sponsor department for the Legal Services Board, having recently completed the triennial review of the organisation. The removal of choice seems counter to the focus of the Legal Services Board to promote competition to encourage quality in legal services provision. In it recent Draft Business Plan, it states, "*it's competition...that acts as the best guarantor of high standards*" [LSB, Draft Business Plan 2013/2014, p6]. This seems entirely at odds with this recommendation.

51. We note that the proposal to abolish choice of representative appears, prima facie, to be contrary to section 27(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 [LASPO] which states, "*An individual who qualifies under this Part for representation for the purposes of criminal proceedings...may select any representative or representatives willing to act for the individual...*".

52. The removal of competition and choice is part of the guarantee of falling standards, and also would be likely to cause substantial inefficiency costs. A recent example of this in the criminal justice system can be seen in the monopoly granted to Applied Language Solutions, part of Capita, to provide interpreter services in the Crown Court. On 29th April 2013 it was announced that the contract had resulted already in a 22% increase on the original bid price, which the Government is being required to pay. The Justice Committee has reported on this situation, which may be termed a "fiasco", on the decrease in quality and on the delays caused by interpreters not turning up at court.

53. Elsewhere, at the Central Criminal Court, Serco, the monopolistic provider of custody services to that court, is currently facing a significant wasted costs order in respect of disruption caused to a nine-handed murder trial where it failed, on a number of occasions, to get Defendants to court on time or to have enough staff at court to bring them into the courtroom.

54. The removal of choice necessarily equates to the removal of specialist providers being able to represent Defendants in the highly specialist areas of law coming before the courts on a less frequent basis. For example, defending allegations of murdering a baby by shaking it to death requires highly specialised and competent solicitors. Such expertise is likely to be without the skills of the lowest bidder under the proposed system.

55. Many Defendants, with no choice and a fall in standards, would choose or be forced to represent themselves. What provision is to be made if vulnerable witnesses are cross-examined by Defendants? We suspect that few victims of any crime would relish

being cross-examined by Defendants themselves. The problem would be exacerbated for those Defendants for whom English is not their first language. Defendants in those circumstances are unlikely to help their own case either.

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***

56. The absurdity of a situation whereby customers are denied their choice of representative and could be allocated to a provider by surname, month of birth or some other quirk of nature shows that it would make no difference how they are allocated if they can no longer choose.

57. For the reasons set out in response to Question 17, any model which denied consumers the opportunity to choose their representatives, subject to the competence of the representatives to undertake the case and willingness of representatives to work at appropriate rates, would be necessarily flawed. For a system of representation to work, we are also of the view that a measure of trust and confidence in those providing legal advice is crucial.

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.

58. As indicated, we do not agree with the competitive tendering proposals.

59. The solution mentioned in this question looks superficially attractive but may well fall far short of what is required. The MOJ has accepted that large organisations might bid in more than one area so it might be that the next door area only contains providers who are already conflicted. It might also mean that Defendants would live hundreds of miles away from the next available non-conflicted provider.

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.

60. It is already the case that legal aid can only move to a new firm in exceptional cases and yet it is not at all infrequent in the Crown Court. It must, therefore, be envisaged that this will still occur with the same frequency as the test will remain the same.

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.***

61. No.

62. The inequities of a system based on historical data and volume makes no allowance for the actual work performed and builds in a further element of unknown risk sure to deter all but the largest organisations.

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.***

63. No.

64. An organisation can be responsible for the efficiencies and costs within its own business but over the lengthy period of a contract, especially when asked to cover such a wide geographical area, cannot be responsible for all other matters. For example, the reimbursement of rail fares is a standard business position [although no longer allowed for the Bar except in rare cases]. If allowance for this has to be made in the lowest bids of the new tendering process, then the amount of money available for the provision of legal services will be that much more reduced.

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.

65. We do not agree that price competitive tendering is in the public interest. We can add nothing to this answer.

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.

66. We do not agree that price competitive tendering is in the public interest. We can add nothing to this answer.

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.

67. We do not agree that price competitive tendering is in the public interest. We can add nothing to this answer.

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.

68. No.

Conflicts of Interest

69. It is important to note that for a barrister to advise a lay client to plead guilty due to a financial incentive would be contrary to the underlying requirement of criminal justice, reinforced by amongst other things Article 6 of the European Convention of Human Rights and the human right that a Defendant is entitled to have his case determined by the court. The advice and assistance he receives must be actuated

solely to that end. For the Bar this is ensured by the Code of Conduct and failure to comply with that would have very serious consequences for the barrister concerned. The Solicitors' Regulation Authority Handbook applies similar principles to solicitors. This Paper suggests that it is a stated aim of the Government to cut costs by expecting advocates to act in this way. That is manifestly wrong.

70. Barristers advise on pleas based on the evidence, including unused material (which they are no longer paid to read, whether prosecuting or defending), and on the case and circumstances of a Defendant. They cannot and should not force a Defendant to plead guilty to save money and to earn themselves more money. Whether to plead guilty or not should be and is the choice of a Defendant and to punish barristers financially for a choice which is not theirs would be manifestly wrong.

71. The preparation and conduct of a trial justifies better remuneration than that paid for conducting a guilty plea hearing.

72. Thus the problem with the proposed approach is that it is wrong on every conceivable level:

    (a) The approach pre-supposes that lawyers choose the client's plea. This is false, and rightly so;
    (b) It would be serious professional misconduct for a lawyer to advise his client to plead guilty for personal financial reasons, just as it would be professional misconduct for a lawyer not to advise the client of the merits of pleading guilty when the evidence so requires;
    (c) Assuming lawyers remain true to their professional obligations (a failure to do so would rightly result in their being struck off), the proposal would not result in an increase in guilty pleas and reduction in contested trials;
    (d) If it is the case that the harmonisation did not achieve the stated aim, the fees system would be left on an imbalanced and illogical footing such that lawyers would be irrationally penalised for the decisions of their clients over which they had no control;
    (e) Furthermore, even if lawyers did stick to their professional obligations, the proposals would create a perception that any advice is tainted by self-interest.

73. This would have a number of consequences adverse to the public interest. Firstly there would be a general loss of public confidence in the system. Secondly Defendants would stop trusting the advice of their representatives to plead guilty based on the perception that they would be acting in their own financial interests.

74. This would be likely to result in Defendants losing faith in their representatives and sacking them. (Experience dictates that this is the normal reaction to the belief that representatives are not on their side.) Since the PCT model would not allow them to

go to a firm of their choice (with practitioners who would have their confidence), this would mean that there would be an upsurge in unrepresented Defendants.

75. This has obviously adverse consequences for the public interest - increased delays, increased costs and the unhappy experience of Defendants cross-examining their victims to name just three.

76. Likewise, the idea that lawyers deliberately spin out the length of trials is simply wrong. The fees structure is such that lawyers are already better off finishing trials quickly and getting on to the next one. The reasons why trials can last a long time are manifold but are rarely the decisions of lawyers. These reasons can include :

    (a) court listing and judicial commitments,
    (b) jurors being delayed or being ill,
    (c) SERCO and G4S failing to get Defendants to court from custody on time or at all,
    (d) interpreters arriving on time, or at all, being able to speak the language of the Defendants, witness or indeed the jury,
    (e) CPS not being ready to proceed,
    (f) witnesses not arriving on time or at all,
    (g) Defendants or Co-Defendants failing to attend on time or at all,
    (h) court equipment not working [very frequently the case since the abolition of stenographers],
    (i) having an unrepresented person as a co-Defendant.

77. Thus, sometimes it is due to problems with witnesses, sometimes it is due to problems with jurors, often it is due to the listing requirements of the Courts Service. Sometimes it is due to late disclosure by the Crown. Most often, it is simply because the case is complicated and needs time to be dealt with properly. To penalise lawyers for properly conducting cases is wrong in principle, law and practice.

78. The recent changes in criminal procedure rules have ensured that many trials are shorter than they once would have been because barristers agree more facts in admissions and can narrow down the issues with which to trouble the jury or the Judge. This is only possible with experienced, expert representation provided by the criminal Bar. With no proper remuneration it is hard to see such practitioners being prepared to devote themselves to cases ahead of their personal lives, as is often the case now.

79. Sometimes cases take longer than normal where the victim/s are particularly traumatised or vulnerable (such as in sex cases) and frequent breaks have to take place. Again, it would not be right to punish advocates for those allowances which

make it easier for victims to give evidence and thus ensure that the jury sees the best available evidence.

80. Barristers often work overnight in order to ensure that high quality legal documents are produced to allow the criminal courts to run smoothly. The self-employed Bar operates in this manner for two principal reasons: (i) because young barristers are taught that this is their professional duty and (ii) because they aspire to emulate those at the top of the profession and attain the rank of Queen's Counsel and the increase in earnings which that brings. Even if a rump of the criminal Bar were to survive these proposed cuts, what incentive would there be for the self-sacrificing co-operation which practitioners presently provide or the striving for excellence?

Quality

81. The new proposals would not sufficiently reward knowledge, expertise or experience currently demonstrated by those at the criminal Bar. Such counsel can and do save considerable court time at trial in being able to identify matters in issue and argue them effectively, efficiently and more quickly than inexperienced and less able advocates.

82. It is to be noted that most of the in-house Government advocates were trained at the criminal Bar and at the expense of the criminal Bar. That resource would no longer be available. The Government would therefore lose a valuable resource for the free training of many of its own employees and a vibrant and talented criminal Bar from which to appoint Crown Court Judges and District Judges. (Many chambers already can no longer afford to offer pupillages or see it as unfair to offer pupillages where there is no guarantee of work.)

83. It should be noted that without a decent income to which to aspire, the criminal Bar will die from the bottom up. It will fail to attract the brightest and best and will consequently fall in quality too. That will be bad for justice and also for the perception amongst voters that we have a good and generally fair system of justice in this jurisdiction.

84. The bar will die as there will be no referral work from the large organisations holding contracts – they will employ cheap advocates to do the work and will not pay more for experience or ability. Indeed, with no competition they would be foolish in a business context to pay for either. It cannot be envisaged in those circumstances that experienced and able practitioners (solicitors or barristers) would take up such offers of work.

85. Reducing the number of providers never increases competition and only rarely reduces price. Once those practising were substantially reduced so as to become only

a few providers, they would be able to increase prices charged on the threat that there would be no one else to do the work.

86. That the self-employed criminal Bar could win on quality in any scheme as against employed advocates, if quality were to count, is evidenced for example by the possibility of a special sub-category for employed advocates (plea-only advocates) in the proposed Quality Assurance Scheme. The self-employed Bar is competitive and, therefore, subject to the usual rigours of having to be good to survive.

87. According to this Paper [at 3.37] payment from central funds at legal aid rates "would prevent high net worth individuals receiving significant sums from the public purse". However, under the present system, they would only receive such payment out of central funds if they were acquitted and judicial discretion decided that they were entitled to the money.

Cost

88. The self-employed model of most of the criminal Bar delivers real savings to the public purse. Unlike employed advocates, including in-house CPS advocates, self-employed barristers are not paid by the public purse for any overheads, any travel expenses (usually), any pensions, any sick leave, any parental leave or any holidays. They bear the cost of their offices, equipment, regulation, training, national insurance taxes and staff too. If cost is truly an issue, the self-employed Bar can only win over any model of employed advocates.

89. It is submitted that most delays in hearings are usually caused by the failure of the "system" to deliver imprisoned defendants to court, to provide qualified interpreters, to warn witnesses or officers to attend court as required etc. In those circumstances, where the fee structure is already unfair to counsel in penalising them financially for the failures of others, to cut other fees overall by a further 26-44% will result in qualified individuals, with an interest in keeping the justice system going under difficult conditions, leaving the criminal Bar. [Figures from South Eastern Circuit – please see their response.]

90. It must be remembered that these proposed cuts come on top of years of other cuts.

91. Sometimes, numerous court hearings attract no fee to counsel attending as they are deemed to be part of the overall brief fee. In 2007 there was a radical review of the system following the Carter Review. Since that date the fees paid to defence advocates in the Crown Court have dropped. It is not uncommon for the hours worked on a case to be remunerated at what amounts to less than the minimum wage if accounted for on an hourly basis after expenses are deducted.

92. For example under the legal aid defence fee schemes:

(a) The table below shows the cuts in fees between 2007 and 2013.

2007 Crown Court Fees	2013 Crown Court Fees
Category C brief fee for trial **£1038**	**£810.50**
Conviction Appeal in the Crown Court **£150**	**£130**
Sentence Appeal in the Crown Court **£125**	**£108**
Committal for Sentence **£150**	**£130**
Mention (standard appearance fee) **£100** per hearing (first 4 hearings no separate fee)	**£87** (first 4 hearings have no separate fee, but the sentence hearing is now included within those 4 hearings)
Deferred Sentence in Crown Court **£200**	**£173**
Advising in conference **£45** per hour [capped at 2 hours for trials lasting up to 5 days and capped at 4 hours for longer trials]	**£39** per hour [still capped as before]
Listening to interview tapes **£10.90** per unit	No separate fee

93. If the Bar withdrew its current "goodwill" and willingness to work without pay on a regular basis, the system would fail completely in a short time.

94. The criminal Bar works hard to ensure fair representation, working significant hours on short notice. Criminal barristers currently work the longest hours of their colleagues and take the fewest number of holidays, providing a high level of value for money [The Barristers' Working Lives Biennial Survey, Bar Council, 2011] . This, coupled with the low level of pay has led to a large number of criminal barristers leaving self-employed practice. A recent survey found that nearly half of criminal barristers leaving self-employed practice in the last decade worked in crime and the main reasons for leaving were financial [Bar Exit Survey, 2001 p40].

95. One of the stated aims of the Paper is the preservation of the Bar. We do not agree that the reasons given for the survival and sometimes better payment of the Bar are considered or correct. The Bar is largely a system of chambers whereby the higher earners in chambers subsidise those at the bottom, for example with the weighted payment of chambers rent and clerks fees, with loans for travel and with pupillage payments. With the cuts at all levels, and especially at the top levels, we submit that the chambers system would collapse.

96. Without the chambers system in place there would be no pupillages or viable training provisions, no system to assist those at the start of their careers and no system to share overheads and staff.

97. High-quality advocates are already leaving the profession given the drastic cuts in legal aid over the last decade. Within the self-employed Bar, 40% of respondents said that they would not opt for the Bar if they could start their career again and actively discourage others from entering the criminal Bar, mainly due to financial pressures [Barristers' Working Lives, Bar Biennial Survey, 2011].

98. The Criminal Bar Association is able to offer ways in which to save millions of pounds for the public purse by reducing various bureaucratic and unnecessary layers within the "system" instead.

99. Most importantly, the effect of these cuts will be to render the self-employed Bar financially unviable. That is clearly contrary to the public interest.

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

100. No.

101. The reason why VHCCs cost more than other trials is that they are the largest and most complex trials which require the most work. Criminals are constantly inventing more and more complex systems of fraud and criminal conspiracies. These cases require the best and most experienced advocates. In the hands of less experienced or competent advocates, the cases would last even longer and cost even more (not to mention the harm to the perception of justice in what are usually amongst the most high profile cases).

102. The cuts to the rates over the last few years have already taken the rates below that which the independent review [by Lord Carter] found to be the minimum appropriate fee. To cut fees by a further 30% would render such cases financially unviable for the sorts of advocates whose services are required to do such work.

103. The cuts would therefore materially reduce quality and increase overall costs due to delays and collapsed trials. Furthermore, the cuts would have a profound impact on the viability of the self-employed Bar through the chambers system. To hinder this practice would be contrary to the public interest and impact on the diversity of recruitment.

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

104. No.

105. Quite apart from the matters set out in response to Q.27, there are a number of practical, legal and moral reasons why it would be quite wrong to apply cuts to work under existing contracts.

106. As a matter of contract law, advocates will have agreed to undertake VHCC cases at the agreed rates. If those rates are cut, the advocate is entitled to terminate the contract at that stage. Many will, as a 30% reduction would make VHCC cases deeply unattractive from a financial perspective. This would mean that new advocates would need to be instructed, which would involve a duplication of work already done. Furthermore, the delays that would be caused by changes in representation would also be likely to cause real problems to court listings as well as the attendant increase in costs to the taxpayer. As such, it is likely that the "savings" from such a proposal would be turned into an increase in the overall burden to the taxpayer.

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.

107. No.

108. The Paper does not attempt to justify the purported need for greater consistency save to note (at paragraph 5.40) that there is a disproportionate concentration of courts which seem to grant certificates for 2 counsel. One is, of course, the Central Criminal Court (Old Bailey). The reason for this is that these are

courts which are specially designated courts which thus attract precisely the sorts of cases where two counsel are required.

109. Furthermore, the Paper notes (at 5.43) that since the new form was introduced there has been a significant reduction in the granting of two counsel. This is not because of the form but rather because the Recorder of Leeds' practice direction, (which was adopted by Judges nationwide) introduced a consistent and tough test to ensure that two counsel certificates were issued only when absolutely needed in the interests of justice.

110. Ultimately, there is nothing in the Paper to suggest that the test is not properly being applied or that certificates for two counsel are being issued in cases where the facts do not justify them in the interests of justice.

111. Bearing in mind that it was the Judges who achieved the tougher approach without the need for any action by the Ministry of Justice, and in the absence of any evidence to suggest that there is currently a problem, it is hard to see how any interference with judicial discretion can be justified.

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

112. This proposal effectively affects only care cases. The proposed reduction is not justified by the recent changes in procedure for such cases. Even if the length of cases has been reduced the amount of work and hearing preparation involved in them has not. Care cases are serious with far-reaching results. Despite the already low rates paid to those who deal with such cases, they are dealt with professionally and with a high level of concern for the welfare of the children concerned. A reduction of 10%, which represents several years of inflation, would deter young, talented barristers from entering this field and might well also encourage existing practitioners to leave this area of work.

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.

113. No.

114. Superficially the principle that advocates, regardless of whether they are self-employed barristers or other advocates, who appear in the same courts should receive the same remuneration appears attractive.

115. However, the proposal is not justified. In the majority of cases a barrister is likely to be instructed to deal with the contested and complex matters rather than the routine interlocutory hearings covered by other advocates. For instance, a case management conference may be listed solely for directions of a more routine nature, probably not attended by counsel, or it may involve complex issues relating to disclosure or the striking out of all or part of a claim, which is likely to be attended by counsel and, as a consequence, be concluded in a shortened time and more efficiently due to the special expertise that counsel bring to the hearing. If a single blanket fee is to be introduced such that it is the category of hearing rather than the type of advocate which attracts the rate, it may be necessary to differentiate between types of work which may attract different fees (e.g. preparing for and conducting a contested hearing would need to attract a higher rate than a non-contentious case management conference). This is not efficient and strongly suggests that the differential rates are justified and should not be revised.

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.

116. We defer to the Immigration Law Practitioners Association for their observations.

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

117. No.

118. Experts are required to assist the jury with evidence outside their normal experience and are often crucial in the most serious types of cases.

119. If experts were no longer willing to work for the proposed new legal aid rates then the system would have to come up with another solution as trials would be deemed unfair if a defence expert on material evidence were to be unavailable. This would add to the cost, length and viability of trials, especially rape and serious sexual offence cases which nearly always rely on expert evidence.

120. Ultimately, in order to achieve justice, the Courts are reliant upon the best possible expert opinion. The rates are already such that many experts are unwilling to accept instructions at legal aid rates and there are now whole areas of expertise (including certain areas of medical and forensic accounting expertise) where it is impossible to instruct a suitably qualified expert.

121. The CPS has the ability to take advantage of economies of scale in instruction which are not available to firms (even to the sort of criminal defence firms envisaged in the PCT proposals).

122. Any cut to the fees payable to experts would be likely to result in expertise being lost to the courts and a risk of miscarriages of justice flowing as a result. This is could result in more appeals and an increased burden of the Court of Appeal. This potential waste of public resources could be avoided if proper fees were paid to competent experts at the trial stage.

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.

123. No.

124. The impact assessments in relation to PCT and cuts to advocacy fees make a series of assumptions about the sustainability of the quality of representation which are simply not justified.

125. Equally, whilst the assessment recognises that black, Asian and ethnic minority ["BAME"] practitioners will be disproportionately hit, it does not appear that any or any adequate consideration has been given to the impact on female practitioners (who make up a significant and disproportionate proportion of the practitioners in publicly funded criminal work).

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

126. No.

127. The extent of the impact on clients and female/BAME practitioners have been grossly underestimated and the justification for the impact that is accepted is based on unrealistic expectations.

128. The suggestion (at paragraph 5.6.5) that BAME firms would be able to survive as part of consortia is commercially unrealistic. Why would a large firm want to take on the liabilities of a smaller firm (debts, TUPE obligations, redundancy costs, leases on offices etc)? The rational business approach would be to wait for the firms to collapse (as they will under PCT) and then recruit additional staff at lower rates.

129. The Paper concludes that the cuts to graduated fees for advocacy and to VHCCs would tend to hit older, white male barristers harder whilst female and

BAME barristers (who tend to be more junior) would benefit from the increase in fees for guilty pleas. This attempt at justification is sadly misplaced.

130. The commercial pressures which PCT would impose on successful contract bidders means that guilty pleas would be kept in-house and so junior practitioners would be instructed only in the matters going to trial (where there are cuts). Accordingly, female and BAME practitioners would be hit disproportionally.

131. The income from the higher earners, who would be disproportionately hit, particularly by the VHCC cuts, is currently used within a Chambers system to subsidise the more junior members. Without that subsidy to rents, pupillage funding and Chambers fess, junior practice would be financially unsustainable. Accordingly, the impact of the cuts to higher earners would directly impact on female and BAME barristers (who tend to be more junior). Unlike their more senior colleagues, such junior barristers are less likely to be able to survive the combination of cuts to income and loss of subsidy causing their professional expenses to rise unsustainably.

132. The reduction in fees would fundamentally undermine the ability of the Bar to promote diversity. Even if the self-employed criminal Bar were to survive (which is unlikely if both PCT and the fees cuts take effect), the availability of pupillage would be significantly reduced. This is already proving to be the case, with a number of chambers (particularly those outside London) withdrawing their advertised pupillages in the current recruitment round. A dramatic reduction in the availability of pupillage, coupled with the low level of pay in practice, means that the few places available would be likely to be available in practice only to those with independent means who would be willing to undertake legal aid work as a matter of calling. This is likely to have a disproportionately adverse effect on women, BAME and other applicants from less-advantaged backgrounds who have traditionally been drawn to those areas of work in the public interest.

133. Any denial or dilution of the quality of representation is likely to prolong hearings, require more hearings and more appeals and lead to Defendants representing themselves. All of these factors increase the public cost of justice due to the increased court time and resources required. We draw attention to the dicta of Sir Alan Ward (in the civil jurisdiction but applying equally to the criminal jurisdiction) in Wright v Michael Wright Supplies Limited [2013] EWCA Civ 234, on 27th March of this year, "*What I find so depressing is that the case highlights the difficulties increasingly encountered by the judiciary at all levels when dealing with litigants in person. Two problems in particular are revealed, the first is how to bring order to the chaos which litigants in person invariably – and wholly understandably – manage to create in putting forward their claims and defences. Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved...It may be saving the Legal Services Commission which no longer offers*

legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-representing litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years' service to this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid. My second concern is that the case shows it is not possible to shift intransigent parties off the trial track onto the parallel track of mediation..." David Richard J and Hughes LJ (as he then was) both agreed with these dicta without elaboration.

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

134. See above answer.

Sara Lawson (Chairman),
Simon Baker (Vice Chairman),
Saira Kabir Sheikh,
Clifford Payton,
Zachary Bredemear,
Martin Goudie,
Christopher Bond,
Paul Infield.

On behalf of the Inner Temple Bar Liaison Committee. 29th May 2013