Consultation Paper "Transforming Legal Aid: Next Steps"
Response on Behalf of the Honourable Society of the Inner Temple

EXECUTIVE SUMMARY

1. This response is made by the Honourable Society of the Inner Temple, one of the four Inns of Court, to which all barristers must belong.

2. We are of the view that, if implemented, these changes would lead to the loss of the independent publicly-funded Bar which would, in turn, lead to a less credible, less respected system and a less efficient and more expensive system of justice.

3. In particular, in the context of the proposed cuts to legal aid for Crown Court advocacy, we note:

   (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 further cuts would effectively end the viability of the independent, self-employed criminal Bar.

   (b) 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. This would impact upon the diversity of the profession, from whom the majority of Judges are drawn.

   (c) The fees paid to all members of the profession support the chambers system under which new members of the profession are trained by existing members at their own expense. It is not simply the independent Bar which benefits from this. Many of those trained within chambers (at the expense of the independent Bar) join in-house government

prosecution departments (thereby providing the taxpayer highly trained lawyers at minimal cost to the public purse). Furthermore, many of those trained by the chambers system 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.

(d) The proposals for tapering of refreshers appear to be based on a wholly false belief that lawyers deliberately choose to spin out the length of trials:

(i) It should be remembered that the fees structure is such that lawyers are already better off finishing trials quickly and getting on to the next one;

(ii) The reasons why trials can last a long time are manifold but are rarely the decisions of lawyers. These reasons can include:
   (a) Late disclosure by the Crown;
   (b) Court listing issues and other judicial commitments;
   (c) Jurors being delayed or being ill;
   (d) SERCO and G4S failing to get Defendants to court from custody on time or at all;
   (e) Interpreters not arriving on time (or at all) or not being able to speak the language of the Defendants, witness or indeed the jury;
   (f) CPS not being ready to proceed;
   (g) Witnesses not arriving on time or at all;
   (h) Defendants or Co-Defendants failing to attend on time or at all;
   (i) Court equipment not working [very frequently the case since the abolition of stenographers]; or
   (j) Having an unrepresented person as a co-Defendant.

(iii) Most often, the reason that a trial takes a long time 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.

ANSWERS TO CONSULTATION QUESTIONS

Q1. Do you agree with the modified model described in Chapter 3? Please give reasons.

No. The 17.5% reduction in fees (even phased over a number of years) is unnecessary and unreasonable:

(i) We consider that the reductions in fees are unnecessary because:

(a) The "necessity" for the cuts is based upon the assertion that spending on criminal legal aid has "spiralled out of control" to £1.1 billion per year. As the table below demonstrates, this assertion is both factually incorrect and misleading:

Year	Criminal Legal Aid spend
2009/10	£1.205 billion
2010/11	£1.129 billion
2011/12	£1.08 billion
2013/14 *(expected)*	£941million

A fear that the budget has "spiralled out of control" does not appear to be borne out by a drop of £264 million over the last 3 years.

(b) The proposed cuts have also been justified by reference to the fact that the UK has a significantly higher per capita spend on legal aid spending than other EU states. This is a wholly unmeritorious and misleading comparison. The UK proudly enjoys an adversarial system unlike all other EU states. This means that the process is wholly different to the extent that meaningful comparison requires more nuanced analysis. When one properly compares the costs (including, for example, the costs of work done by investigating magistrates which would be done by the defence in this jurisdiction), the UK's per capita spend is less than many other EU states. The MoJ's own 2011 report (*International comparison of publicly funded*

legal services and justice systems) indicates that the total spend per capita on the criminal justice system was below that of all of the countries to which it was compared, namely France, Germany, Netherlands and Sweden. The Justice Select Committee have noted that Council of Europe data indicate that in England and Wales legal aid costs per inhabitant actually fell by 23% between 2004-2008 in the context of a 23% average increase across Europe. Furthermore, the report of the National Audit Office *Comparing International Criminal Justice* Systems, published in 2012, stated:

> *"For the period studied 'the average total annual public budget allocated to all courts, prosecution and legal aid as a percentage of GDP per capita across Europe was 0.33 per cent. [...] The expenditure of England and Wales, at 0.33 per cent, was average."*

(c) There have been a number of suggestions raised by the Bar (particularly the Criminal Bar Association) and others as to how savings could be found without the fees cuts envisaged by the Paper. These include amending the Proceeds of Crime Act to allow defendants to pay privately out of restrained funds (thereby relieving the legal aid budget of the costs of representation altogether), compulsory insurance for Company Directors and the "GFS plus" scheme developed by the CBA.

(ii) We consider that the reductions in fees are unreasonable because:

(a) The Paper acknowledges that solicitors' firms would not be able to operate at the reduced fee levels without dramatically scaling up in size and scope (Paragraph 3.4 of the Paper). This would effectively mean the end for small firms grounded in local communities, which would have a dramatic impact on those communities, with a disproportionate negative impact on BAME communities.

(b) The economies of scale referred to in the Paper would push firms into a "litigation factory" model. This would have a detrimental effect on quality with the consequent effect of driving up costs:

- In order to generate the economies of scale necessary to make the savings envisaged, firms would have to employ fewer qualified lawyers and more unqualified case-workers to conduct the caseload. There would be a need to focus on quantity rather than quality and neither case-workers nor lawyers would have time to engage in the preparation necessary to allow the judicial system to function efficiently.
- The reality would be that the fall in standards, which would be the inevitable consequence of the reduction of funding, would result in increased delays and, therefore, increased costs.
- Whilst the factory model may mean that those costs would not be borne solely by the budget covering defence legal aid, the taxpayer would still have to cover the increased costs to other MoJ and Governmental budgets (the Courts, the prison service, the probation service etc), quite apart from defendants and victims of crime who would see justice delayed.

(c) We agree with the Paper that any sensible reforms should seek to embed the principle of "right first time" (paragraph 2.41). We do not see how the factory litigation model, which is the necessary consequence of the proposed fee reductions, could be said to further that principle. Rather, the fees reductions would necessarily lead to a reduction in quality thus leading to cases taking longer to resolve and an increased need for costly appeals to remedy failures caused by inadequate preparation due to lack of adequate resources.

Q2. Do you agree with the proposed procurement areas under the modified model (described at paragraphs 3.20 to 3.24)? Please give reasons.

We have no view on this and defer to the representative bodies for criminal solicitors who are in a better position to assess the impact on their members.

Q3. Do you agree with the proposed methodology (including the factors outlined) for determining the number of contracts for Duty Provider Work (described at paragraphs 3.27 to 3.35)? Please give reasons.

No. The proposal to reduce the number of contracts is driven by the wish to see firms forced to close or grow in order to acquire the economies of scale needed to make the cuts viable.

We consider that this would be highly damaging to public confidence in the criminal justice system; and would ultimately result in unintended cost increases which would outweigh the projected savings:

(i) As outlined above, in our answer to question one, the proposals would drive small firms and independent practitioners out of business, which would affect BAME practitioners and communities disproportionately:

(a) In areas with a particularly high proportion of residents from particular ethnic, religious or cultural backgrounds small specialist firms service those communities. Such firms are able to use their knowledge and experience of the communities' particular needs in the provision of legal services. As such, the firms attract substantial confidence and trust from within the communities. Such firms are usually small and are already operating to extremely tight margins. They could not hope to survive under the proposals within the Paper;

(b) The suggestion that such firms could survive through mergers or being taken over by larger firms is commercially unrealistic. The fact that small firms service a particular community means that a merger would lose the essence of the benefit that the small firm routed in a community provides. Furthermore, it would make no business or commercial sense for a larger firm to take on the liabilities of a smaller firm. Commercial pressure would ensure that the larger firm's business interest would be best served by waiting for the smaller firm to collapse (as it inevitably would) and then to recruit the firm's staff at lower rates thus bypassing the costs of taking over the smaller firm (TUPE obligations, redundancy costs, premises leasing costs etc);

(c) In any event, the consequence would be that BAME communities would be deprived of their representatives of choice, thereby eroding their confidence in the criminal justice system;

(d) The fact that the Government's changes would be perceived as disproportionately affecting BAME communities would cause further resentment, a greater sense of discrimination and harm to the public interest.

(ii) The Paper's wish to see larger firms utilising economies of scale to achieve savings is itself financially misguided, as the changes are likely to result in unintended costs increases elsewhere within the system. Such economies of scale are realistically achievable only with the "litigation factory" model outlined above.

The factory model would necessarily reduce the firms' ability to prepare cases properly. Under-prepared cases would have a number of inevitable consequences, including the number of trials collapsing, being adjourned or requiring further litigation either during the trial process or on appeal.

Not only would the delays result in additional cost burdens in relation to the conduct of the defence, but also on the budgets of the other parties and agencies within the criminal justice system which would be affected by the impact of delays caused by under-preparation by the defence. This would include the CPS, the Courts Service and the prison service (with defendants potentially held, expensively, on remand for longer).

(iii) The real potential for under-preparation by defence firms would have a profound negative impact on the public interest. It is clearly contrary to the public interest for defendants not to receive a fair trial, which may well be the consequence of under-preparation by their representatives. Equally, victims would suffer by seeing justice delayed and may be more likely to be required to give evidence as the defence would not have had time or payment to consider agreeing evidence in advance of trials.

Q4. Do you agree with the proposed remuneration mechanisms under the modified model (as described at paragraphs 3.52 to 3.73)? Please give reasons.

No. For the reasons set out above, the cuts (and the consequent forcing of firms into a "factory" model) is contrary to the public interest, discriminatory, contrary to the interests of justice and is also likely to result in unintended cost increases.

Q5. Do you agree with the proposed interim fee reduction (as described at paragraphs 3.52 to 3.55) for all classes of work in scope of the 2010 Standard Crime Contract (except Associated Civil Work)? Please give reasons.

We believe that <u>any</u> fee reductions are likely to cause real damage to the criminal justice system whilst also resulting in unintended cost increases.

Q6. Do you prefer the approach in:

- ***Option 1 (revised harmonisation and tapering proposal); or,***
- ***Option 2 (the modified CPS advocacy fee scheme model)***

Please give reasons.

The choice on offer is akin to asking the condemned man if he wishes to die by firing squad or hanging. The independent criminal Bar has suffered from repeated fees cuts over the last 20 years, and has now reached breaking point. Either option would destroy the independent Bar and end up costing the tax-payer more.

We make the following specific observations which ought properly to inform consideration of these proposals:

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

(i) Defence legal aid fees have fallen in real terms by around 40% since 1997;

(ii) 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 [and VAT] are deducted;

(iii) An illustration of fees have been cut since the Carter review is set out in the table below:

2007 Crown Court Fees	**2013 Crown Court Fees**
Category C brief fee for trial **£1038** *(covering cases such as GBH, drug dealing and robbery)*	**£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)**
Sentencing Hearing £125	**No separate fee (now included in the reduced brief fee)**
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**

(iv) 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. When one calculates the hourly rate after expenses for the work required properly to prepare a case for hearing, the Criminal Bar is often working at below the statutory minimum wage. 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.

(v) We regret that the comments from the Secretary of State and the department which describe the cuts as reducing the fees of "fat cat" legal aid lawyers are both inaccurate and misleading. The figures cited inevitably relate to the very top earners in the profession and are gross figures (including VAT and professional expenses) representing payments at the end of cases which may cover several years of work. Hence, comparisons between such payments and, for example, the Prime Minister's annual salary, are neither fair nor helpful. More importantly, the figures for the very top earners bear little comparison to the earnings of the vast majority of criminal legal aid practitioners who would be hit by the proposals.

The Government's own figures show that over 60% of barristers doing legal aid work receive an annual gross income of under £50,000. When one allows for business expenses (Chambers rent, clerks fees, travel etc), that means that the vast majority of legal aid barristers have an annual income of less than £32,000. We note that this is total income rather than the disposable income which would be used to calculate eligibility for legal aid. Ironically, this means that most legal

aid barristers would earn sufficiently little to qualify for legal aid given that they will have a disposable income of under £37,500. Given that, as self-employed persons, barristers must pay for their own pensions and receive no sick leave, paid holidays, maternity leave etc (and moreover have had to bear the costs of their own professional training and regulation), the truth is that most legal aid barristers earn materially less than relatively junior teachers, nurses, police officers etc despite working considerably longer and more anti-social hours.

2. The criminal justice system is heavily reliant upon the goodwill of the Bar in keeping the system working. The proposed cuts would destroy that goodwill, and the Bar would be unable (and unwilling) to afford to put in the amount of work currently undertaken without remuneration to keep the system working:

   (i) The goodwill of the Bar is necessary to enable the criminal justice system to work:

      (a) Without the willingness of the Bar to work through the night to prepare cases at short notice, the warned list system would collapse. Without the warned list system: the Courts would be in disarray; delays in getting cases before the Courts for trial would increase; custody time limits would be routinely breached and the Courts would be obliged to release defendants facing trial on the most serious sexual and violent offences on bail pending their trials; and, the impact of the delays would send costs soaring;

      (b) It is not unusual for evidence to be served either very close to or during the trial. Without the willingness of the Bar to work through the night to assimilate the evidence, it would have to be done during the sitting day or else the trial would have to be adjourned. Either way, the consequence would be delays and increased cost;

      (c) Late disclosure by the Crown is sadly all too common. Without the willingness of the Bar to respond immediately to material served at the last minute many more trials would collapse. The

consequences of this would be akin to those of the collapse of the warned list system.

(ii) The self-employed Bar has always been willing to put in whatever work is needed to ensure that trials are prepared and ready, even when the time required and fixed low fees mean that they are working, pro-rata, below the minimum wage. This is 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?

(iii) Criminal barristers currently work long hours and take few holidays, providing a high level of value for money [see 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, 2011 p40].

(iv) 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.

3. 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.

4. It should be noted that without a decent income to which to aspire, the criminal Bar would die from the bottom up. It would fail to attract the brightest and best and would consequently fall in quality too. That would 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.

5. 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.

6. 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. 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. To hinder this practice would be contrary to the public interest and impact on the diversity of recruitment.

7. It is to be noted that most of the in-house Government advocates were trained by the criminal Bar and at the expense of the criminal Bar. That resource would no longer be available following the fees cuts which would make the Chambers system financially unviable. 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.)

8. 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].

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

Q7. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons
Q8. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.
Q9. Are there forms of mitigation in relation to impacts that we have not considered?

We address these three questions together.

We do not agree with the impact assessments in the Paper, or the assumptions upon which they are based. The cuts would diminish the quality of service which would disproportionately hit defendants and victims (who tend to be disproportionately from BAME backgrounds). Furthermore, no adequate consideration appears to have been given to the inevitable loss of small firms within specific communities.

In terms of impact on firms, it appears to be conceded that there will be a disproportionate impact on BAME firms (para 7.3.10) but that is justified by reference to the need to make cuts (see para 6.3). This justification simply does not stand up to scrutiny. The purported justification for the need to make the cuts is not made out and, in any event, cuts could be achieved through other

means which would not have such a disproportionate negative impact on BAME practitioners.

In terms of the impact on the Bar, the impact assessment (annex F) indicates that BAME and female practitioners tend to be more junior and would therefore be less badly affected since the cuts would predominantly affect those doing longer cases (who tend to be more senior and therefore more likely to be white and male). This analysis does not bear any rational scrutiny:

(i) The impact assessment is predicated upon a "ceteris paribus" assumption (i.e. the more junior practitioners will continue to do the same work which will be less badly affected by the cuts). This assumption is wholly misplaced;

(ii) Junior practitioners are already operating at a level which is close to unsustainable, with many carrying debts and obligations which are not covered by the existing fees levels. The cuts to fees, even on the smaller cases, would impact upon them disproportionately;

(iii) The commercial pressures that the fees cuts would impose on firms would be likely to mean that guilty pleas would be kept "in house" and so the junior practitioners would only be instructed in matters going to trial (where cuts are proposed). Accordingly, female and BAME practitioners would be disproportionately hit;

(iv) Historically, junior practitioners have been able to survive financially, not because of the small trials that make up the bulk of their practice, but because of the occasional better-paid junior briefs in bigger cases. Such junior briefs are likely to become increasingly rare for the Bar for a number of reasons. Firstly, the response to the previous consultation makes clear that the number of two counsel cases is set to be reduced (irrespective of whether the interests of justice dictate that two counsel are needed for a case). Secondly, it is likely that firms will increasingly be forced into instructing "in house" juniors in order to make up for fees cuts elsewhere. Finally, the reduction of 30% in VHCC fees and the proposed substantial cuts to GFS fees in longer cases mean that the bigger cases fail to provide the much needed boost to incomes. The loss of such income

means that the junior Bar is already suffering a real diminution of its overall income;

(v) Furthermore, as the availability and remuneration of bigger cases, currently undertaken by more senior practitioners diminishes (e.g. the reduction of certificates for two advocates and the cuts to VHCC rates), and such work becomes less financially viable, senior practitioners will take more of the work previously done by junior practitioners. Hence the impact of the cuts will disproportionately impact upon the junior Bar;

(vi) The income from the higher earners, who will be disproportionately hit particularly by the VHCC cuts, is used within a Chambers system to subsidise the more junior members. Without that subsidy to rents and Chambers fess, junior practice would be financially unsustainable. Accordingly, the impact of the cuts to higher earners will 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;

(vii) The reduction in fees will fundamentally undermine the ability of the Bar to promote diversity. Even if the independent criminal Bar does survive (which is unlikely if the fees cuts take effect), the availability of pupillage will collapse. A dramatic reduction in the availability of pupillage means that the few places available are likely to go to the candidates with a private income who are willing to undertake legal aid work. This is likely to have a disproportionately adverse effect on BAME applicants.

Simon Thorley QC *(Master Treasurer of the Inner Temple)*
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8th October 2013

** The Bar Liaison Committee is the representative body for practitioner members of the Inn representing 3,949 barrister practitioners*