Transforming Legal Aid: Next Steps

This consultation begins on 5 September 2013
This consultation ends on 18 October 2013
Transforming Legal Aid:

Next steps

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at https://consult.justice.gov.uk/digital-communications/transforming-legal-aid
About this consultation

To: This consultation is aimed at providers of publicly funded legal services and others with an interest in the justice system.

Duration: From 05 September 2013 to 18 October 2013

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Response paper:
A paper summarising the responses to this consultation will be published following their consideration. The response paper will be available on-line at:
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Ministerial Foreword

Legal aid is a vital part of our justice system – it ensures that those who are accused of a crime are always entitled to a defence. This goes to the heart of a civilised society, and underpins access to justice. This Government’s commitment to legal aid means we must ensure that it commands public confidence, and is put on a sustainable footing, for those who need it, those who provide it, and those who ultimately pay for it – the taxpayer.

This Government has embarked upon a process of repairing the public finances after years of reckless borrowing and financial crisis under the previous administration. The Ministry of Justice will see its budget reduce by nearly a third between 2010 and 2016. No area of our spending has been immune from scrutiny in these circumstances. Our legal aid system is a major part of my Department’s budget, and it is therefore appropriate that we look to make savings here too.

In April, my Department published a set of proposals to deliver these savings, to ensure a sustainable criminal legal aid market and a credible and efficient legal aid system. Since then we have been engaged in extensive consultation, which has helped us refine these proposals in line with our objectives. I would like to thank those who have engaged constructively in this process.

In particular, we have been involved in detailed negotiations with the Law Society. As a consequence of these discussions, I have agreed with them a sensible set of proposals for a sustainable legal aid market in criminal litigation. These proposals mean that all those accused of a crime would receive quality legal representation; that defendants are free to choose their lawyer, whether they want a big firm, their local high street solicitor or a particular specialist; that all those who currently provide criminal legal aid services can continue to do so, provided they meet minimum quality standards; and that access to justice is guaranteed nationwide through a new method of contracting duty providers from organisations with the capacity and capability to provide this service on an ongoing basis. These proposals also meet the financial constraints faced by my Department, and therefore represent a long term and sustainable way forward both for the Government and for the profession. We are today inviting views on these proposals.

In relation to advocacy fees, we are publishing two options for reform. One of these builds on the proposals we put forward in April, and the other is based on a scheme put forward by the Bar Council, drawing on that used by the Crown Prosecution Service. Both represent a sensible way to reduce fees, as well as speeding up and simplifying the administration of the legal aid system. We will be guided by the views of the profession and other stakeholders in reaching a final decision on which scheme to implement.

I think it is important to recognise that it is not simply fee arrangements which determine the success and viability of the legal profession, and I am taking a series of steps which demonstrate that this Government is serious about maintaining the legal profession in this country as a world leader. First, I understand the financial challenges that businesses around the UK are facing, and therefore we will introduce an enhanced system of interim payments for long running cases, to help with the cashflow of legal firms and self-employed advocates.
Second, I want to ensure that the criminal justice system is more efficient so that cases do not demand more resources than necessary, both in terms of public money and in terms of lawyers’ time. We are therefore putting together a panel of criminal lawyers to look at the legal process, identifying scope for improvements and drawing up proposals for reform. Finally, it is clear to me that advocacy is facing many challenges, from the rise of different routes into the profession, increasing supply but decreasing demand, regulatory changes, as well as financial challenges. I have therefore, in conjunction with the Law Society and the Bar Council, asked Sir William Jeffrey to conduct an independent review of the future of independent criminal advocacy in England and Wales, to report in six months time. I believe these three actions will help to secure the long term sustainability of the professions in the more difficult financial environment that we face.

I have decided to proceed with most of the measures we proposed in April, to bear down on the cost of legal aid and ensure public confidence in the legal aid system. To qualify for civil legal aid, people must in future have a strong connection with the UK; no longer will civil legal aid be available for cases that only have a borderline chance of success – if a private individual would not likely fund the case, the taxpayer should not either; wealthiest Crown court defendants will no longer automatically receive criminal legal aid and neither will offenders have access to criminal legal aid simply to seek an easier life in another prison. We are also proceeding with the change in civil and experts fees with some minor modifications.

This is a comprehensive package of reform, based on extensive consultation. I believe it offers value for the taxpayer, stability for the professions, and access to justice for all.

Chris Grayling
Lord Chancellor and Secretary of State for Justice
Chapter 1. Introduction & The Case for Reform

1.1 The justice system in England and Wales has a world class reputation for impartiality and fairness and is a model for many other systems the world over. The provision of legal aid where necessary is an integral part of that system.

1.2 However, any legal aid scheme needs to be properly targeted at the cases and people most in need of assistance. And publicly funded legal services must be provided in as efficient a way as possible to ensure value for the taxpayer on the one hand and the availability of sustainable high quality services for clients on the other. These objectives go with the grain of the Government’s wider approach to enable Britain to succeed in the 21st Century. Public services must be fair to the taxpayer and the recipient, standards must be high and we must reduce costs so the country can live within its means as we build a strong, sustainable economy.

1.3 In spite of various attempts by previous Governments to restrain the cost of legal aid spending, the fact remains that at an annual cost of around £2 billion, we still have one of the highest levels of legal aid spending in the world, with around £1 billion of this spent on criminal legal aid. It costs more per head than any other country, including those with similar legal and judicial traditions.

1.4 The Government is committed to reducing spending and the legal aid scheme cannot be immune. Overall, by 2015/16 the Ministry of Justice budget will have reduced by a third since 2010, and our reforms to the legal aid scheme, once implemented, would see that particular budget fall by a similar proportion.

1.5 If we are to maintain the credibility of legal aid as an integral part of our justice system we have to be able to demonstrate to the public and hard-working families on whose taxes this system depends that we have scrutinised every aspect of legal aid spending to ensure that it can be justified and that services are being delivered as efficiently as possible. Unless the legal aid scheme is targeted at the people and cases where funding is most needed, it will not command public confidence or be credible.

1.6 That is why when the Government took office in 2010 it confirmed that it would ‘carry out a fundamental review of the legal aid scheme to make it work more efficiently.’1 To that end,

a. In November 2010 the Government published its Proposals for Reform of Legal Aid in England and Wales2 which led to the legal aid measures contained in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 20123. Those measures focused on changing the scope of civil legal aid, and brought about wide-ranging reform when it came into force in April 2013, targeting legal aid at the most serious cases which have sufficient priority to justify the use of public

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3 LASPO: http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted
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funds and delivering substantial savings to the scheme and better value for the taxpayer.

b. In April 2013 the Government embarked on the next step of reform, this time mainly focused on criminal legal aid, with the consultation Transforming Legal Aid: delivering a more credible and efficient system. This consultation focused both on the need to ensure that spending is credible in the light of the Government’s wider approach to public spending and economic reform and on the need to ensure in particular that criminal defence services are provided in a cost effective way through more efficient business and fee structures.

1.7 This document sets out the detail of the responses we have received to that second consultation and describes how the Government intends to proceed.

The consultation process

1.8 We recognise that the decisions to be made are difficult. We have therefore canvassed and received a broad range of views. We published a consultation – with 36 detailed questions – because we genuinely wanted to hear from those interested in the proposals and those delivering current services. Ministry of Justice officials held fourteen stakeholder events around the country which were attended by an estimated 2,500 people. The ministerial team met many representatives from the professions. We responded to and learned from Parliamentary debates and select committee hearings, questions, and requests for information. Our consultation received nearly 16,000 responses. We had lengthy and detailed responses from the relevant professional bodies and groups; legal aid practitioners; members of the judiciary; charities; and individuals. We have considered them all with care.

1.9 It is inevitable that changes of this kind will generate enormous interest as was evident in the responses we received. The Government recognises the strength of feeling raised by our proposals and especially among those most directly affected, the providers of services and their representatives.

The outcome

1.10 The Government believes that our consultation and the responses it has generated have shown clearly that legally aided criminal defence services can be delivered more efficiently. It has confirmed our view that the market for criminal defence litigation services needs significant consolidation and re-structuring if it is to function effectively at a lower cost. And whilst we intend to make some modification to our original proposals in the light of responses received, it has confirmed our view that further changes are needed to ensure that legal aid spending is properly targeted at priority matters. The Government also believes that it is right to press ahead with the reductions in fees paid in some civil cases and those paid to experts.

1.11 Our overall conclusion is therefore that there is a compelling case for transforming legal aid with these aims in mind. In the light of the feedback we have received we have decided to press ahead with some of the reforms in a modified form while for some others we have developed our approaches and are now seeking further views. For some reforms we have decided to proceed with the full original proposal.
Further Consultation

1.12 In relation to the procurement of criminal defence services, the Government is clear that further significant efficiencies can be made. However, the responses suggest that changes are required to the proposed model of procurement to encourage consolidation and the development of new business models and approaches and to secure a consistent and quality service. We have therefore decided to consult further on a modified model of procurement for criminal legal aid. We have been greatly helped by the positive contribution of The Law Society and others in responding to the consultation and believe that our proposed modified model is better able to achieve our objectives as a result.

1.13 We have listened to the views of respondents, including the concern that the market is not well placed to take part in a competition where they are asked to bid based on price, and we are persuaded that we can achieve our objectives through a competitive tendering process where price is not used as an award criterion. We also recognise the importance of client choice in any future model of criminal legal aid services. Therefore, under the modified model, we propose to retain the same level of choice for clients seeking criminal legal aid as now and the proposed procurement process would not use price as an award criterion. Instead, providers will be expected to demonstrate that they have the right capacity to deliver services at the right quality.

1.14 We are committed to ensuring there is sufficient coverage of service supply across all police stations and magistrates' courts for those individuals who do not have their own provider. Therefore, we propose to maintain a duty provider scheme. However, in order for that scheme to be sustainable at the rates of pay on offer we propose to reduce the current number of contracts to deliver Duty Provider Work by running a competitive tendering process for the services to be provided in each geographical area (see Chapter 3). We believe this process will support the consolidation needed in the market.

1.15 However, we recognise that not every provider wishes to join with others or grow their businesses to the extent required to deliver the volume of work on offer under the duty provider scheme. Therefore, we propose that any provider meeting the Requirements of the Tender Process (including the required quality standards) would be eligible to be awarded a contract by the Legal Aid Agency to deliver criminal legal aid services to those clients who select their own provider at the point of request (Own Client Work) anywhere in England and Wales.

1.16 We believe this modified model would ensure any provider (small or large) which satisfies the Requirements of the Tender Process (including the required quality standards) can continue to deliver criminal legal aid services whilst giving those providers wishing to expand their businesses through access to Duty Provider Work the opportunity to compete to do so.

1.17 For Duty Provider Work, we propose to run a competition for a limited number of contracts in each procurement area where tenders are evaluated against the Requirements of the Tender Process (including the required quality standards).

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4 The reference to 'Requirements of the Tender Process' throughout this document means the requirements of the tender process set out in the 'Pre-Qualification Questionnaire', the 'Information for Applicants' documentation (which will include the terms and conditions of tender) and the ‘Invitation to Tender’ – see Chapter 3 for further information.
1.18 Whilst for most of country, as previously proposed, Criminal Justice areas will be the most practical procurement area for competing Duty Provider Work, in some areas we will adapt this to take account of specific local geography.

1.19 We are proposing to give firms longer to prepare for this modified procurement process and our proposal is that all services – both Own Client and Duty Provider - under the new contracts will commence in spring 2015. Alongside this, we propose a phased approach to the overall reduction in remuneration. This would mean an interim fee cut of 8.75% in early 2014 followed by a further 8.75% reduction in fees in spring 2015. This second reduction would be set administratively (against the proposed new remuneration arrangements discussed below) and applied to both Duty Provider Work and Own Client Work under the new criminal legal aid contract (relative to current fee levels).

1.20 On criminal advocacy fees, we have listened to the feedback from respondents and reviewed a revised fee scheme put forward by the bar Council and are now consulting on two alternative graduated fees proposals: a revised harmonisation and taper model and a system based on the Bar Council’s proposed variation of the Crown Prosecution Service model. The first proposal is a revised model in which version of the earlier consultation model which simplifies the scheme in order to support the aim of efficient justice and encourage the defence team to give early consideration of plea by harmonising the Basic Fees for guilty pleas and cracked trials at a level in between the current rates, and introducing a tapered reduction to trial daily attendance which would be subject to a price floor below which rates would not fall. The second proposal is based on the Bar Council’s proposed variation of the Crown Prosecution Service model in which the structure of the fee scheme is simplified and Standard and Enhanced Fixed Fees replace the current Basic Fees and Pages of Prosecution Evidence (PPE) uplift. Cases would move from a Standard to an Enhanced Fee if they exceeded a PPE threshold. Daily attendance payments would be made for trials and not subject to tapering.

The way ahead

1.21 In most other areas, our analysis of responses to the consultation has convinced us that we should press ahead with our original proposals subject to no or only limited modification.

1.22 In relation to the package of measures on eligibility, scope and merits, the Government therefore intends to implement without modification, the reforms relating to imposing a financial eligibility threshold in the Crown Court and removing legal aid for borderline cases as part of the civil merits test.

1.23 We have made modifications to certain other proposals to ensure that their implementation is fully consistent with our wider objectives. So, on prison law, we have amended our proposals to ensure criminal legal aid remains available for all proceedings before the Parole Board in which it has the power to direct release, as opposed to all cases that engage Article 5.4 of the European Convention on Human Rights (ECHR). We also intend retaining sentence calculation cases where the date of release is disputed. We also agree with those respondents who have stressed the importance of ensuring that there is a robust prisoner complaints system in place, and in the detail that follows we describe the ways in which we are reinforcing compliance with current arrangements.
1.24 We have revised the proposed residence test so that children under 12 months of age will not need to meet the requirement for at least 12 months of previous lawful residence, and to include exceptions for certain types of cases, where we accept that there should be no requirement for an individual to demonstrate a strong connection to the UK.

1.25 For payment for permission work in judicial review cases, in the light of the responses to this proposal, we intend to consult further on an alternative option which will achieve our desired aim of preventing legal aid being used to fund weak cases which have little effect other than to cause delay and incur unnecessary cost. We intend to set out further details of this proposal shortly in a separate paper.

1.26 On our various other proposals for reforming fees in criminal and civil legal aid, we propose to proceed with reducing litigator and advocate fees in Very High Cost Cases (Crime) by 30%, reducing the use of multiple advocates, reducing the fixed representation fee paid to solicitors in family cases covered by the Care Proceedings Graduated Fee Scheme, harmonising fees paid to self-employed barristers with those paid to other advocates appearing in civil (non-family) proceedings and removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases.

1.27 On expert fees we have decided to proceed with our reform to fees, subject to retaining the rates payable to experts in those areas where recent increases have been made to address market supply issues. We have also decided to retain the current fees payable to interpreters in London and will limit the reduction in rates payable to interpreters outside London to ensure these do not fall below rates paid by CPS.

Future Work

1.28 As signalled in our consultation document, we will be bringing forward proposals for consultation in the autumn on how to adjust the eligibility criteria for legal aid in light of the roll-out of Universal Credit. This will replace the benefits which are currently used to “passport” recipients through all or part of the legal aid means test. We will propose a new system which is fair to everyone, whether they are in work or not, and which does not cut across any incentives to be in work. We also intend, later in the autumn, to bring forward a proposal as to how to adapt the current family fees scheme to reflect the creation of the single family court in April 2014.

1.29 In June 2013 the Government published Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System. It sets out a comprehensive programme of work that will drive system-wide improvement in the delivery of criminal justice. We are continuing to work with representative bodies from the legal professions both to deliver the action plan commitments and explore broader ideas that were raised through this consultation on how to remove inefficient process and procedure. We are establishing a panel of experienced defence lawyers to advise on system reform to support better value for money for the taxpayer. Achieving improvement of this nature would support hard-working defence practitioners and bring benefits to all those working and participating in the criminal justice system.

5 From 2013, during the period of phased roll-out, Universal Credit is being treated in the same way as other ‘passporting’ benefits.
Overall Impact on Spending

1.30 Our first reform programme launched in 2010, which focussed primarily on civil legal aid, is estimated to save approximately £320 million in 2014/15 and, as these savings begin to take effect, we have witnessed a small reduction in the overall legal aid budget between 2011/12 and 2012/13. Our further reforms ensure that we can continue to bear down on the costs of legal aid spending. The chapters that follow outline how we intend to achieve additional savings. We estimate that these reforms would save a further £220 million per annum in 2018/19 over and above the savings that we expect to deliver as a result of our previous reforms and changes in underlying caseload and expenditure. Full details are set out in the Impact Assessment, published alongside this Government response.6

1.31 As we have made clear, we recognise the continued importance of providing access to justice, supported by public funding in those cases which we judge to be a priority. We note that, even after implementation of all of our proposals, England and Wales will still have one of the most generous legal aid schemes in the world, with a budget of around £1.5 billion per annum.

Part One: The Programme of Reform
Chapter 2. Response to consultation

2.1 This document sets out the Government’s response to the consultation paper, Transforming legal aid: delivering a more credible and efficient system.

2.2 We estimate that the proposals set out in this consultation, once fully implemented, would deliver savings of £220m per year by 2018/19.

2.3 A detailed summary of the key issues raised in the consultation responses are our detailed response to those issues are set out in Annex B.

Eligibility Scope and Merits

2.4 Chapter 3 of the Legal Aid Transformation (LAT) consultation document sought views on a number of proposals that aimed at targeting limited resources at cases that really justify it, ensuring that the public can have confidence in the legal aid scheme. The detailed issues raised in consultation and the Government’s considered response are set out at Annex B.

Restricting the scope of legal aid for prison law

2.5 The proposals on amending the scope of criminal legal aid for prison law are intended to focus public resources on cases that are of sufficient priority to justify the use of public money. Alternative means of redress such as the prisoner complaints system should be the first port of call for issues removed from the scope of legal aid. In line with these principles we intend to proceed with the original proposals, subject to a number of adjustments. We intend to retain funding for proceedings before the Parole Board where the Parole Board has the power to direct release, as opposed to all cases that engage Article 5.4 ECHR. We also intend retaining sentence calculation matters within scope where disputed, as both these matters have a direct and immediate impact on the date of release.

2.6 We consider that adequate provision is in place to enable prisoners with mental health issues and/or learning disabilities and young offenders to use complaints systems; advocacy services are available to support young offenders. Prisoners/young offenders are able to refer complaints to the Prison and Probation Ombudsman (PPO) (or statutory Monitor or Local Authorities in the case of young offenders in Secure Training Centres and Secure Children’s Homes respectively) if they are not satisfactorily resolved using complaints processes. Categorisation matters and licence condition cases should be resolved using the prisoner complaints system or representations by prisoners for Category A prisoners. Civil legal aid for judicial review may be available subject to means and merits. We are confident that the complaints system and the PPO are properly resourced to deal with these issues.

2.7 It is intended that these changes will be introduced by way of amendments to secondary legislation, subject to Parliamentary approval, and contract amendments later this year.
Imposing a financial eligibility threshold in the Crown Court

2.8 The proposal to introduce a financial eligibility threshold of disposable household income of £37,500 or more in the Crown Court is intended to ensure that the wealthiest Crown Court defendants, who are able to pay privately, are not automatically provided with legal aid at the taxpayer’s expense. The Government intends to implement this proposal. We have conducted further analysis of private rates and consider that private defence costs should be affordable for the majority of defendants who would be subject to the threshold. Where a defendant can demonstrate on a hardship review that they cannot in fact afford to pay privately, they will remain eligible for legal aid, subject to a contribution under the existing Crown Court means-testing scheme.

2.9 We consider that the Legal Aid Agency’s (LAA) administrative processes are sufficient to mitigate the potential for additional delay, and that the hardship review will mean that defendants will not be forced to represent themselves, as some respondents claimed. Reimbursing acquitted defendants at legal aid rates rather than private rates is in accordance with the position in the magistrates’ courts following changes to central funds, which were approved by Parliament and came into force in October 2012.

2.10 It is intended that this reform will be introduced, subject to parliamentary approval, by way of secondary legislation early next year.

Introducing a residence test

2.11 The purpose of this proposal is to ensure that only individuals with a strong connection to the UK can claim civil legal aid at UK taxpayers’ expense. We proposed to do this by introducing a lawful residence test for applicants for civil legal aid. Following our analysis of consultation responses, we have identified the need for a number of modifications.

2.12 The Government continues to believe that individuals should, in principle, have strong connection to the UK in order to benefit from the civil legal aid scheme. We believe that a requirement to be lawfully resident at the time of applying for civil legal aid and to have been lawfully resident for 12 months in the past is a fair and appropriate way to demonstrate such a strong connection. We will therefore proceed to introduce a residence test in civil legal aid so that only those who:

- are lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time the application for civil legal aid was made; and
- have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for a continuous period of at least 12 months at any point in the past

would be eligible for civil legal aid, subject to the modifications and exceptions set out at paragraphs 2.13-2.16 below. It is intended that this reform will be introduced, subject to Parliamentary approval, via secondary legislation, to take effect in early 2014.

2.13 In addition to exceptions previously proposed for serving members of Her Majesty’s Armed Forces and their immediate families and for asylum seekers, we will implement the proposals so that children under 12 months old will not be required to have at least 12 months of previous lawful residence.
2.14 We have also concluded that there are further limited circumstances where applicants for civil legal aid on certain matters of law would not be required to meet the residence test. The test will therefore not apply to categories of case which broadly relate to an individual’s liberty, where the individual is particularly vulnerable or where the case relates to the protection of children.

2.15 We also agree that, in the case of successful asylum seekers, the continuous period of lawful residence required under the test will begin from the date they submit their asylum claim, rather than the date when that claim is accepted.

2.16 We consider it would be appropriate and proportionate to allow for short breaks in residence. We therefore intend that a break of up to 30 days in lawful residence (whether taken as a single break or several shorter breaks) would not breach the requirement for 12 months of previous residence to be continuous.

2.17 It is intended that these changes will be introduced by way of amendments to secondary legislation, subject to Parliamentary approval, in early 2014.

Paying for permission work in judicial review cases

2.18 The purpose of this proposal is to prevent legal aid being used to fund weak cases which have little effect other than to incur unnecessary costs for public authorities and the legal aid scheme. We proposed that providers should only be paid for work carried out on an issued application for permission 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. Reasonable disbursements, such as expert fees and court fees (but not counsel's fees) which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the court. Legal aid would continue to be paid for the pre-action stage of the case.

2.19 Respondents were concerned that the proposal would, as well as affecting weak cases, also affect a large number of meritorious cases which conclude prior to permission; that costs would not be recoverable in all such cases; that a merits test already exists to weed out weak cases; and that providers would no longer take on this work if made to act at risk in cases the outcome of which is difficult to predict.

2.20 The Government’s aim remains to ensure that legal aid is focused on judicial review cases where it is really required. However, we have considered this proposal again in the light of the responses. We therefore intend to consult very shortly on a further proposal in which providers would not be paid unless granted permission, subject to discretionary payment in certain cases which conclude prior to a permission decision without a costs order or agreement. We intend to set out further details of this proposal shortly in a separate paper.

Civil merits test – removing legal aid for borderline cases

2.21 The purpose of this proposal is to direct the limited legal aid budget at the cases which really justify public funding by requiring a case to have at least 50% prospects of success in order to warrant public funding. We proposed to do this by no longer funding cases with ‘borderline’ prospects of success.

2.22 The merits test for civil legal aid broadly aims to replicate the decisions that somebody who pays privately would make when deciding whether to bring, defend or
continue to pursue proceedings. We do not think that a reasonable person of average means would choose to litigate in cases which only have a borderline prospect of success and we do not think it is fair to expect taxpayers to fund such cases either.

2.23 The Government has decided to proceed to remove legal aid for all cases assessed as having ‘borderline’ prospects of success. It is intended that this reform will be introduced, subject to Parliamentary approval, via secondary legislation in late 2013.

Introducing Competition in the Criminal Legal Aid Market

2.24 In Chapter 4 of the original consultation we sought views on a proposed model of competitive tendering for criminal legal aid contracts in England and Wales. That model was designed to achieve best value for money by offering providers increased opportunities to scale up to achieve economies of scale and provide a more efficient service, giving them the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain returns.

2.25 Having carefully considered the responses, the Government is clear that further significant efficiencies can be made in a way which secures consistent service provision by applying a new model of procurement to encourage consolidation and the development of new business models and approaches. We have been greatly helped by the positive contribution of the Law Society and others in responding to the consultation and believe that our proposed modified model – which is described below – is better able to achieve our objectives as a result.

2.26 A summary of the key issues raised during consultation and the Government response on each question are set out in Annex B. The proposed modified model is discussed in the following chapter.

Client choice

2.27 The Government recognises that many respondents regard client choice as fundamental to the effective delivery of criminal legal aid. The modified model would in practice retain the same level of choice for clients seeking criminal legal aid as now.

Price as an award criterion

2.28 Having listened to the views of respondents, the Government is persuaded that a model of competition where price is set administratively would still enable us to achieve the overall policy objectives of a sustainable, more efficient service at a cost the taxpayer can afford. Therefore, we have designed a model that does not include the evaluation of tenders on price.

Number of contracts

2.29 The Government is convinced that steps are needed to support re-structuring and consolidation of the market. This is a view shared by a number of respondents including the Law Society. The Government continues to believe that without any Government intervention the market will not take any action to consolidate and that the best possible way to achieve such a sustainable market is through a procurement process that involves an element of competition.
Therefore, the modified model on which the Government is now consulting means that any organisation meeting the Requirements of the Tender Process (including the required quality standards), would be able to deliver Own Client Work\(^7\) anywhere in England and Wales. There would be no restriction on the number of contracts to deliver this work.

However, in order to ensure a sustainable duty provider service (the provision of criminal legal aid services at the police station and magistrates’ court for those clients who do not have their own lawyer) at the rates of pay on offer, we intend to press ahead with plans to compete Duty Provider Work\(^8\). In determining the number of contracts we propose to have regard to the same four factors identified in the previous consultation paper in addition to one further factor. We aim to make, as far as possible, the contracts to deliver Duty Provider Work large enough in volume and value to be sustainable in their own right. In order to help inform our final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research exploring the size of contract necessary for it to be sustainable.

**Geographical areas for the procurement and delivery of Duty Provider Work**

The Government continues to believe that for most of the country the use of the Criminal Justice System (CJS) procurement areas for letting Duty Provider Work contracts is appropriate. However, in some areas, for specific local geographical reasons, we intend to base our procurement areas on combinations of existing police station duty scheme areas. Providers delivering Own Client Work would be able to deliver services anywhere in England and Wales.

**Procurement process**

Aside from the necessary changes to the procurement process to facilitate an approach whereby a provider could apply to deliver Own Client Work, and could apply to deliver Duty Provider Work, it is important to highlight that we have designed a modified model where price is set administratively. This would mean that the rates of pay for would be set administratively, both for the competed Duty Provider Work and for Own Client Work. Therefore, for Duty Provider Work, we propose to run a competition for a limited number of contracts in each procurement area where tenders are evaluated against the Requirements of the Tender Process (including the required quality standards). We are seeking views on this modified model.

**Contract award / implementation**

The Government agrees that it is important that the timetable for the implementation of any competitive tendering process gives providers sufficient time to secure all necessary resources to deliver services effectively at the point the service commences. Therefore, we are proposing a new implementation timetable. This would mean we would start the procurement process in early 2014, award contracts in late 2014/early 2015 and the service would commence in spring 2015.

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\(^7\) Own Client Work is all criminal legal aid advice, litigation (except VHCCs) and magistrates’ court advocacy services delivered to clients who choose their own provider at the first point of request.

\(^8\) Duty Provider Work is all criminal legal aid advice, litigation (except VHCCs) and magistrates’ court advocacy services delivered to clients who choose the Duty Provider at the first point of request.
Scope of the contract

2.35 A number of respondents suggested that we consider letting providers who only wish to deliver prison law and/or appeals and reviews services to be able do so. We agree and the modified model we are consulting on would enable this.

Contract length

2.36 The Government recognises the need to strike a balance between providing as much certainty as possible for providers in order to give them the greatest opportunity to invest in their businesses; and not binding providers and the Government into a contract for too long a period. Therefore, in the modified model we propose to extend the contract term for both Own Client Work and Duty Provider Work to four years with the option for the Government of extending the contract term by up to one further year (subject to rights of early termination).

Remuneration

2.37 Our original model proposed a price cap 17.5% below the rates paid in 2012/13. Our modified model, on which we are seeking views, achieves the same overall reduction in fees but we propose a phased approach to the reduction, beginning with an 8.75% interim fee cut in early 2014 followed by a further 8.75% reduction (relative to current fee levels and against the proposed remuneration arrangements discussed below) upon commencement of the new contracts in spring 2015.

2.38 We maintain the view that the current remuneration mechanism is unnecessarily complex and that the introduction of fixed fees to simplify administrative processes would help cut costs for both providers and the Legal Aid Agency. Under the modified model, we propose to maintain the escape mechanism for non-standard cases in the magistrates’ court; and introduce a series of fixed fees for Crown Court litigation (cases with less than 500 PPE) based on offence type and bands of PPE rather than one fixed fee for all types of Crown Court case with less than 500 PPE. Our modified approach will also provide for magistrates’ court duty work to be remunerated by way of hourly rates and will keep the payment of travel and subsistence disbursements separate from the fixed fees.

Conclusion

2.39 Having considered, and given due weight to the responses to the consultation, the Government has decided to consult on a modified model of criminal legal aid which seeks to address many of the concerns expressed in response to the original proposal. The details of the new model are set out in the next chapter and we seek views on the proposal.

Interim Payments

2.40 The Government has decided to proceed with a suggestion put forward by respondents, including the Law Society and Bar Council, to improve cash-flow for litigators and advocates. The LAA will work with the profession’s representative bodies to consider further how best to provide a facility or improve an existing mechanism by which cash-flow issues for litigators and advocates would be addressed.
Reforming Fees in Criminal Legal Aid

2.41 Chapter 5 of the consultation document looked at reforming fees in criminal legal aid in order to deliver further savings. Crown Court advocacy\(^9\) represents approximately £245m per annum of criminal legal aid but the current fee structure could be improved to better support efficient resolution of cases. Very High Cost Cases (Crime) (VHCCs) are long running cases which cost the scheme a disproportionately large amount. The reforms proposed complement work in the wider criminal justice system to embed the principle of “right first time”, ensuring that cases are resolved more quickly and cost effectively. The proposals include restructuring the Advocates’ Graduated Fee Scheme (AGFS), reducing litigator and advocate fees in VHCC (Crime) matters by 30% and reducing the use of multiple advocates.

Restructuring the Advocates’ Graduated Fee Scheme

2.42 The purpose of this proposal was to restructure the current AGFS to encourage earlier resolution of cases and more efficient working through a harmonisation of guilty plea, cracked trial and basic trial fee rates to the cracked trial rate, and a reduction in and tapering of daily trial attendance rates from day three onwards.

2.43 We have been persuaded by consultees that the gap between the preparation done and fees payable within the AGFS as a result of harmonising the Basic Fee for trials with those for guilty pleas and cracked trials might be too great to be managed by advocates given the current distribution of work.

2.44 However, the Government believes that further simplification of fee structures is needed which nonetheless takes account of the amount of preparation generally needed in different types of case. We therefore propose to consult on two different approaches to restructuring the AGFS as outlined in Chapter 4.

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

2.45 Following careful consideration of responses to our proposal for VHCCs, our conclusion is that these cases do need a separate regime to manage their remuneration. LAA analysis of fraud VHCCs shows that the average value of a contract is £1m and contracts run for three to four years on average. VHCCs will remain high value, long duration cases that, because of the way these cases are managed by the LAA, with regular phased payments, bring certainty of income for providers for the extended period in which they are instructed in these matters. This is particularly important to self-employed advocates.

2.46 In relation to fees for VHCCs we do not accept that a distinction in legal aid and CPS rates for VHCCs undermines the principle of “equality of arms”. We are confident that defendants will continue to receive effective representation under the revised rates. Having considered, and given due regard to the responses to the consultation, the Government has decided to proceed with the proposed 30% reduction in fees payable to all new criminal VHCCs and to future work in existing cases, with the exception of pre-panel cases.

\(^9\) Excluding expenditure on Very High Cost Cases.
2.47 It is intended that these changes will be introduced by way of amendments to secondary legislation, subject to Parliamentary approval, and contract amendments later this year.

**Reducing the use of multiple advocates**

2.48 We proposed tightening the criteria governing the decision to appoint multiple counsel in a case, changing litigator contracts to require greater support to counsel from the litigation team, and introducing a more robust and consistent system of decision-making.

2.49 Following our analysis of consultation responses, we remain concerned that there are cases where multiple advocates are being appointed unnecessarily, particularly in cases with multiple defendants.

2.50 We accept that Presiding Judges will not be as close to the detail of a case as an individual resident judge or the trial judge. However, Presiding Judges’ oversight on a circuit-wide basis would allow them to ensure there was a consistency of approach between court centres. We intend to give Presiding Judges the power to delegate their function where they consider it appropriate to provide flexibility to ensure that bureaucracy and delay might be minimised.

2.51 Having considered, and given due regard to the responses to the consultation, the Government has decided to amend the criteria for the appointment of multiple advocates. We will also require decisions to allow Queen’s Counsel (QC) or multiple advocates to be confirmed by a Presiding Judge (or nominee).

2.52 It is currently anticipated that the changes to the criteria together with the changes to the decision-making process will be implemented through changes to secondary legislation to be laid later this year.

2.53 On the question of greater litigation support for advocates, we consider it appropriate to defer taking a decision until deciding the terms of the new criminal litigation contracts generally.

**Reforming Fees in Civil Legal Aid**

2.54 Chapter 6 of the consultation paper sought views on a series of proposals designed to deliver further savings ahead of the introduction of competitive tendering for services in civil and family cases.

**Reducing the fixed representation fees to solicitors in family cases covered by the Care Proceedings Graduated Fee scheme**

2.55 The purpose of this proposal is to ensure that the representation fee in public law family cases more accurately reflects the work involved in such cases, in particular, the benefits arising out of the streamlining and speeding up of the family justice system as a result of the implementation of the Family Justice Review reforms. The current fixed fee regime is based on the codification of the average of the bills paid at hourly rates in care proceedings in 2007. As the family justice system reforms take effect, the Government remains of the view that these fees increasingly do not represent value for money. Having considered, and given due regard to the
Transforming Legal Aid: Next steps

responses to the consultation, the Government has therefore decided to proceed with the proposal as set out in the consultation paper, to reduce by 10%:

- the fixed representation fee; and
- the hourly rates that apply when a case reaches the escape threshold.

2.56 The revised hourly rates will be used for the purpose of calculating the escape threshold from the fixed fee scheme.

2.57 It intended that the revised rates will be implemented, subject to Parliamentary approval, by way of secondary legislation in April 2014. The timing is intended to coincide with changes to the Family Advocacy Scheme required to facilitate the introduction of the new Single Family Court on which the Government will consult later this year.

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

2.58 This proposal seeks to deliver value for money for the taxpayer by ensuring that self-employed barristers appearing in civil legal aid cases would be remunerated on the same basis as other advocates where they were undertaking similar work.

2.59 The Government continues to believe that it is an important principle that the same rates of pay should be used for the same basic work irrespective of the branch of the legal profession to which the practitioner belongs. Therefore, having considered and given due regard to the responses to the consultation, the Government has decided to proceed with the proposal as set out in the consultation paper to harmonise the fees payable to barristers in civil non-family proceedings with those of other advocates.

2.60 It is intended that the revised rates will be implemented, subject to Parliamentary approval, by way of secondary legislation, later this year.

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

2.61 The purpose of this proposal is to ensure that remuneration for Immigration and Asylum Upper Tribunal cases reflects wider scheme changes by removing the 35% uplift in the rate for Immigration and Asylum Upper Tribunal appeal cases.

2.62 Having considered and given due regard to the responses to the consultation, the Government’s view remains that there is no justification for the continuing payment of the uplift. It is intended that this reform will be introduced, subject to Parliamentary approval, by way of secondary legislation, later this year.

Expert Fees in Civil, Family and Criminal Proceedings

2.63 Chapter 7 of the consultation paper sought views on a proposed 20% reduction in fees payable to experts in civil, family and criminal proceedings in order to ensure that the fees paid to experts under legal aid deliver value for money to the taxpayer and more accurately reflect the fees paid to experts elsewhere. The Government believes that the basic principle should be that it pays only those fees that are absolutely necessary to secure the level of services that are required. Therefore, having considered and given due regard to the responses to the consultation, the
Government has decided to proceed with the proposal to reduce the fees payable to most experts in civil, family and criminal proceedings by 20% as proposed in the consultation paper. However, in the light of recent changes to ensure market supply, we have decided to modify the proposal in respect of:

- Neurologists, Neuroradiologists and Neonatologists in clinical negligence (cerebral palsy) cases where the higher rates recently set out in guidance to the LAA will be codified;
- Surveyors in housing disrepair cases where the current rates codified in the Civil Legal Aid (Remuneration) Regulations 2013 will be retained; and
- Interpreters, where the:
  - current rates payable to interpreters inside London will be retained; and
  - rates payable to interpreters outside London will be reduced by 12.5%.

2.64 It is intended that the revised rates will be introduced, subject to Parliamentary approval, by way of secondary legislation later this year.
Part Two: Further Consultation

Nearly 16,000 responses were received following the Transforming Legal Aid consultation published in April. In addition to these, the Ministry of Justice held 14 stakeholder events throughout the consultation period. The responses are summarised at Annex B.

All views expressed have been carefully considered and it is on the basis of these that the proposals set out in Part 1 have been determined. In the case of two of the original Transforming Legal Aid proposals – those to introduce competitive tendering and our proposed reforms to criminal advocacy fees – it was decided to undertake a second phase of consultation on refined proposals. These are set out here, in Part 2 of the document.
Schedule of Consultation Questions

Chapter 3: Introducing Competition in the Criminal Legal Aid market

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

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

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.

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.

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.

Chapter 4: Advocacy fee reforms

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.

Chapter 5: Impact Assessments

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?
Chapter 3. Procurement of Criminal Legal Aid Services

Introduction

3.1 The Government’s proposals for reform of the procurement of criminal legal aid services are intended to support the market to move towards more cost effective and modern business models, reducing back office costs in order to provide quality services for users at a lower cost to the taxpayer.

3.2 Our analysis of responses to the consultation (see Annex B) and the detailed discussions we have had with providers and their representative bodies convinces us both that criminal defence services can be delivered more efficiently and that significant consolidation of the market is required in order to enable firms to function effectively at those lower costs. We continue to believe that the way in which the Government organises the procurement of these services will be an important part of that consolidation process. However, as a result of responses to the consultation and the further helpful engagement that this has stimulated, we are making a number of changes to that proposed procurement method which we believe will provide a more secure means of achieving our objectives. We believe that this will be better for providers and their clients as well as for the taxpayer. We are therefore seeking further views in this document on a revised procurement model.

3.3 The modified model set out below would give providers the opportunity to apply for one of an unlimited number of contracts to deliver criminal legal aid services to their own clients anywhere in England and Wales. For those seeking to also provide services to clients that do not have their own lawyer, we propose to run a competitive tendering process for a limited number of contracts for access to this work. We believe this maintains an appropriate balance between providing opportunities for consolidation - thereby ensuring sustainable provision of the duty provider service which is fundamental to the effective of criminal legal aid - without restricting access to the market unnecessarily.

New proposals

Modified Model

3.4 The model for the procurement of criminal defence services which is described below has been designed to achieve the same policy objectives as the proposed model set out in the consultation paper, namely:

- Economies of scale – providers would have increased opportunities to scale up to achieve economies of scale and provide a more efficient service.
- Economies of scope – providers would be obliged to deliver the full range of litigation services, as well as advocacy in the magistrates’ court. This would enable providers to resource their contract in the most efficient way.
- Simplification and greater flexibility – systems and processes for operating the scheme would be simplified to introduce fixed fees where possible; and providers...
• Savings objective – proposals would reduce criminal legal aid expenditure through a more efficient service and structure.

3.5 In response to feedback to the consultation, we have considered how to develop a model of competitive tendering which includes client choice. For example, we have re-examined how best to structure the proposed fixed fee scheme; the scope of the work competed; the appropriate size of procurement areas; and the number of contracts in order to accommodate client choice.

3.6 We have also listened to the views of respondents and discussed at length with the Law Society the concerns raised about a competitive tendering process which uses price as a key criterion. Having considered these views, we are persuaded that we can achieve our objectives through a competitive tendering process where price is not used as an award criterion.

3.7 The modified model therefore provides firms with an opportunity to apply to deliver just Own Client Work\textsuperscript{10} and for firms which fulfil the requirements to provide Own Client Work also to have the opportunity to apply to deliver Duty Provider Work\textsuperscript{11}. This would retain the same level of choice for clients seeking criminal legal aid as now.

3.8 There would be no restriction on the number of contracts for Own Client Work and any provider meeting the Requirements of the Tender Process\textsuperscript{12} (including the required quality standards) would be able to deliver those services anywhere in England and Wales and individuals would be free to select any provider with an Own Client contract to represent them.

3.9 Under the modified model, we would let a limited number of contracts for Duty Provider Work. The successful providers would be given an equal share of the police duty slots within the relevant contractual area. Applicants for Duty Provider Work would need to demonstrate how they met the Requirements of the Tender Process (including the required quality standards) but would also have to demonstrate how they had capacity to deliver the type and volume of work on offer. Our assessment of the ability of firms to meet these requirements would form the basis of a process through which the limited number of contracts for this work would be let.

3.10 Whilst for most of the country the procurement area for these Duty Provider contracts will be existing CJS areas, we propose to modify this in a number of areas where geographical constraints make it impractical.

\textsuperscript{10} Own Client Work is all criminal legal aid advice, litigation (except VHCCs) and magistrates’ court advocacy services delivered to clients who choose their own provider at the first point of request.

\textsuperscript{11} Duty Provider Work is all criminal legal aid advice, litigation (except VHCCs) and magistrates’ court advocacy services delivered to clients who choose the Duty Provider at the first point of request.

\textsuperscript{12} The reference to ‘Requirements of the Tender Process’ throughout this document means the requirements of the tender process set out in the ‘Pre-Qualification Questionnaire’, the ‘Information for Applicants’ documentation (which will include the terms and conditions of tender) and the ‘Invitation to Tender’. 
Summary of proposed modified model

3.11  Looking at the same key elements as were discussed in the consultation paper, we set out in Table 1 below the key elements of the proposed modified model. Each element is discussed in detail in the paragraphs that follow.

Table 1: Key elements of proposed modified model

<table>
<thead>
<tr>
<th>(i) Scope of the new contract(s)</th>
<th>The structure of the new contract(s) would enable providers to:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1. Apply to deliver the following services to only clients who choose their own provider (Own Client Work) at the first point of request:</td>
</tr>
<tr>
<td></td>
<td>Investigations, Proceedings, Associated Civil Work, Crown Court (non VHCC) litigation and higher court representation(^{13});</td>
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<tr>
<td></td>
<td>and</td>
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<tr>
<td></td>
<td>2. Apply to take part in a competition to deliver those same services to clients who choose the Duty Provider at the first point of request (Duty Provider Work):</td>
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<tr>
<td></td>
<td>Providers wishing to apply to conduct prison law and/or appeals and reviews classes of criminal legal aid services would be able to do so, whether they deliver other criminal legal aid services or not.</td>
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<tr>
<td></td>
<td>(A full breakdown of the types of classes of work delivered under each of these headings is included in Table G1 at Annex G)</td>
</tr>
<tr>
<td>(ii) Contract length</td>
<td>Four year contract term both for Own Client Work and for Duty Provider Work with the option for the Government of extending the contract term by up to one further year (subject to rights of early termination).</td>
</tr>
<tr>
<td>(iii) Geographical areas for the procurement and delivery of services</td>
<td>For Own Client Work, the procurement area would be England and Wales.</td>
</tr>
<tr>
<td></td>
<td>For Duty Provider Work, the proposed procurement areas are a mixture of Criminal Justice System (CJS) areas and combined police station duty scheme areas</td>
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<tr>
<td></td>
<td>3.20-3.26</td>
</tr>
</tbody>
</table>

\(^{13}\) Representation before the Court of Appeal or Supreme Court.
(iv) **Number of contracts**

For Own Client Work, there would be no restriction on the number of contracts across England and Wales.

For Duty Provider Work, applicants would be able to compete to deliver services in more than one procurement area. The number of contracts would vary by procurement area and would be determined based on a number of factors.

(v) **Types of provider**

Providers could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an Alternative Business Structure (ABS) but must be a single legal entity.

(vi) **Contract value**

There would be no limitation on the amount of Own Client Work a successful applicant could deliver.

For Duty Provider Work, providers would be contracted to deliver an equal share of police station and magistrates’ court duty slots in their procurement area, thereby granting them access to further work in either the station or the court.

(vii) **Client Choice**

Clients would be able to choose between a provider they know and/or already have a relationship with provided that provider holds a criminal legal aid contract for Own Client Work; or the provider on duty at the time they are seeking advice. This maintains the current level of choice for clients.

(viii) **Case allocation**

As now, there would be no system of case allocation for those clients seeking to instruct their own provider. Duty Provider Work would be allocated on a duty slot rota basis or, where applicable on a panel basis.

(ix) **Remuneration**

Fixed fee schemes for police station attendance, magistrates’ court representation and Crown Court litigation (cases with less than 500 pages of prosecution evidence (PPE)).

For Crown Court litigation, cases with more than 500 PPE would be remunerated under the Litigators Graduated Fee Scheme (reduced by 17.5%).

All other remuneration mechanisms would remain unchanged, albeit rates of pay would be reduced.
(x) Procurement process

Applicants could:

- Apply for one of an unrestricted number of contracts to deliver Own Client Work anywhere in England and Wales;

and

- Apply to take part in a competition to be awarded one of a limited number of contracts to deliver Duty Provider Work in a procurement area(s).

Organisations that wish to undertake Prison Law would be able to apply under a separate process that would have specific criteria reflecting the quality requirements of the service.

The application process for Own Client Work would be a single stage process to evaluate the Requirements of the Tender Process consisting of:

- Pre-Qualification Questionnaire (PQQ);

and

- An assessment that the applicant can meet certain core obligations under the contract.

The application process for Duty Provider Work would be a two stage process to evaluate the Requirements of the Tender Process:

- Stage 1 - PQQ; and

- Stage 2 - Invitation to Tender consisting of the assessment of bidders' Delivery Plans.

(xii) Contract Award / Implementation

Tendering process to start in all procurement areas in early 2014 for both Own Client Work and Duty Provider Work.

Our current intention is for the service to commence in spring 2015 for Own Client Work and Duty Provider Work.
(i) **Scope of the new contract**

3.12 The previous consultation model proposed that the scope of the new contract would include all services currently in scope of the 2010 Standard Crime Contract. Successful applicants would have been required to deliver all services within scope of the new contract, thereby preventing those organisations currently delivering just prison law and/or appeals and reviews matters from doing so in future. We have made a number of modifications to this approach.

3.13 As with the previous consultation model, under the modified model the new contracts would only apply to new cases starting on or after the service commencement date. Further to the reasoning set out at paragraphs 212 to 220 of Annex B, we propose that whatever the structure of the new contract(s), providers could:

- Apply to deliver Own Client Work only – all classes of criminal legal aid listed in Table G 1 of Annex G to those clients where they choose their own provider, including:
  - Investigations – includes all work undertaken for a client during the criminal investigation of a matter up to the point at which a client is charged, discharged or summonsed for the matter under investigation;
  - Proceedings – includes all work undertaken for a client during the magistrates’ court criminal proceedings in a matter or case from the date of charge or summons;
  - Associated Civil Work - legal advice and representation for matters concerning public law challenges arising from any criminal case; and
  - Crown Court (non-VHCC) litigation; and
  - Representation for appeals heard by the Court of Appeal or Supreme Court.

And

- Apply to deliver Duty Provider Work covering the same classes of criminal legal aid.

3.14 Providers who only wish to deliver prison law and/or appeals and reviews services should be able do so.

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

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14 The new Crime Contract(s) would also be tailored to the services required under the final model and procurement process. They would also be updated to reflect changes to our business processes (e.g. electronic working) and impacts as a result of changes to legislation and/or the justice system.

15 Prison law (as revised – see Chapter 2).

16 Appeals and reviews – advice and assistance on appeals against conviction or sentence (where a newly instructed representative is not covered by an existing Representation Order) or applications to the Criminal Cases Review Commission (CCRC).
3.16 We propose to maintain such a service under the modified model, but only those awarded contracts to deliver Duty Provider Work would be eligible to provide court duty provider coverage in their procurement area (paragraph 3.64 sets out proposals on how this work would be remunerated having taken into consideration the responses to the consultation).

3.17 For the reasons outlined at paragraphs 212 to 220 of Annex B, we intend to proceed with our plans to exclude the following three areas of criminal legal aid from the scope of the new contract entirely:

- Crown Court Advocacy;
- Very High Cost Cases (Crime);
- Defence Solicitor Call Centre and Criminal Defence Direct services.

(ii) Contract length

3.18 Following feedback from consultees, we see the case for a slight adjustment to the proposed period for contract length. We propose that new contracts would be for a four year term, with the option for the Government of extending the contract term by up to one further year (and subject to rights of early termination).

3.19 We still propose that any new criminal legal aid contract for Duty Provider Work would include a modified no fault termination clause to include provision for compensation in certain circumstances for early termination of the contract by the Lord Chancellor.

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

3.20 We believe that the case for using the existing 42 CJS areas as the basis for setting procurement areas stands. However, for the reasons set out at paragraphs 244 to 246 of Annex B, we propose to make a number of modifications.

3.21 Providers delivering Own Client Work would, of course, be able to deliver services anywhere in England and Wales.

3.22 In relation to Duty Provider Work, in a small number of areas, for reasons of specific local geography, we propose to create smaller procurement areas based on combinations of existing police station duty scheme areas. In taking this approach we have looked at two key factors:

a. Travelling time between the most extreme two points of delivery in the procurement area – we have assessed the two points of delivery (e.g. police station, magistrates’ court, Crown Court location) which are the most extreme geographically in each procurement area. No proposed procurement area would require a provider to travel more than 1.5 hours by car between two points of delivery.
b. Input from the LAA on an appropriate geographic division of the area. We asked the LAA to use their local knowledge of the proposed geographic split and advise on appropriate amendments where necessary.

3.23 Our proposal for London is that it should be subdivided and procurement areas set by London Local Justice Areas. There are currently nine Local Justice Areas in London, whereby London Boroughs are grouped according to the relevant magistrates’ courts.

3.24 Based on the analysis above, the proposed procurement areas under the modified model are as follows:

Table 2: Proposed procurement areas under the modified model

<table>
<thead>
<tr>
<th>Procurement area</th>
<th>Police Station Duty Schemes</th>
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<tbody>
<tr>
<td>Avon and Somerset 1</td>
<td>Mendip, Weston Super Mare, Sedgemoor</td>
</tr>
<tr>
<td>Avon and Somerset 2</td>
<td>Avon North, Bath, Bristol</td>
</tr>
<tr>
<td>Bedfordshire</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Cambridgeshire</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Central London</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Cheshire</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Cleveland</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Cumbria 1</td>
<td>Barrow in Furness, Whitehaven</td>
</tr>
<tr>
<td>Cumbria 2</td>
<td>Kendal, Penrith</td>
</tr>
<tr>
<td>Devon and Cornwall 1</td>
<td>Barnstable, Exeter, Plymouth, Teignbridge</td>
</tr>
<tr>
<td>Devon and Cornwall 2</td>
<td>East Cornwall, Carrick</td>
</tr>
<tr>
<td>Dorset</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Durham</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Dyfed-Powys 1</td>
<td>Amman Valley, Llanelli, Pembrokeshire</td>
</tr>
<tr>
<td>Dyfed-Powys 2</td>
<td>Carmarthen, Brecon, Mid Wales, North Ceredigion</td>
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<tr>
<td>East London</td>
<td>All police station duty schemes currently within CJS area</td>
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<td>Essex</td>
<td>All police station duty schemes currently within CJS area</td>
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<tr>
<td>Gloucestershire</td>
<td>All police station duty schemes currently within CJS area</td>
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<tr>
<td>Greater Manchester</td>
<td>All police station duty schemes currently within CJS area</td>
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<tr>
<td>Gwent</td>
<td>All police station duty schemes currently within CJS area</td>
</tr>
<tr>
<td>Hampshire 1</td>
<td>Aldershot, Andover, Portsmouth, Gosport, Southampton</td>
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<tr>
<td>Hampshire 2</td>
<td>Isle of Wight</td>
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<tr>
<td>Hertfordshire</td>
<td>All police station duty schemes currently within CJS area</td>
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<tr>
<td>Humberside</td>
<td>All police station duty schemes currently within CJS area</td>
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<td>Kent</td>
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<td>Merseyside</td>
<td>All police station duty schemes currently within CJS area</td>
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<tr>
<td>Norfolk 1</td>
<td>Cromer, Great Yarmouth, Norwich, Thetford, Dereham</td>
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<td>Norfolk 2</td>
<td>Kings Lynn</td>
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Transforming legal aid: Next steps

### Procurement area

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<th>Procurement area</th>
<th>Police Station Duty Schemes</th>
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<td>North Wales 1</td>
<td>Colwyn Bay, Denbighshire, Mold, Wrexham</td>
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<td>North Wales 2</td>
<td>Bangor, Dolgellau, North Anglesey, Pwllheli</td>
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<td>North Yorkshire 1</td>
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<td>North Yorkshire 2</td>
<td>Scarborough, Malton, York</td>
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<td>S. E. Northumbria, Newcastle Upon Tyne, Gateshead, N. Tyneside, S. Tyneside, Sunderland, Tyndale</td>
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<td>Northumbria 2</td>
<td>Berwick and Alnwick</td>
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<td>Nottinghamshire</td>
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<td>Felixstowe / Ipswich &amp; District / Woodbridge, Lowestoft</td>
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<td>Sudbury</td>
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<td>Surrey</td>
<td>All police station duty schemes currently within CJS area</td>
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<td>Sussex 2</td>
<td>Chichester, Crawley</td>
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<td>West London</td>
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<td>West Mercia 1</td>
<td>Hereford, Kidderminster, Worcester</td>
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<td>West Mercia 2</td>
<td>Shrewsbury, Telford</td>
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<td>Wiltshire</td>
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### Exclusivity

3.25 A contract to deliver Duty Provider Work in one procurement area would not permit that provider to deliver Duty Provider Work in another procurement area except where a case crossed procurement area boundaries. Where a case crossed the procurement area boundary (for example, where a case is transferred to a court in a different procurement area) the Duty Provider would be contractually obliged to follow that client to the other procurement area.

3.26 Applicants would be able to tender to deliver Duty Provider Work in more than one procurement area. However, applicants would not be able to tender for more than one share of Duty Provider Work in a single procurement area.
(iv) **Number of contracts**

3.27 Under the previous consultation model, we set out four factors which we proposed to use to determine the optimum number of contracts in each procurement area, and asked for feedback on these factors and whether there were any others we should consider. We explained that based on our assessment of these factors, the LAA claim data for the period October 2010 to September 2011 would suggest approximately 400 contracts with providers across England and Wales. These contracts would have covered both Own Client and Duty Provider Work and therefore were, in general, for much larger volumes of work than most providers currently undertake.

3.28 Under the modified model which includes client choice, we are proposing only to compete Duty Provider Work, which accounts for around 40% (based on a national average) of cases receiving criminal legal aid. We believe it is necessary to limit the number of contracts to deliver Duty Provider Work – relative to the number of duty providers today – in order to ensure the duty provider service, which is fundamental to the effective delivery of criminal legal aid, is sustainable at the rates of pay on offer.

3.29 However, we have heard from respondents that for some providers, the level of growth necessary to obtain one of the new duty contracts may not be desirable or achievable. Therefore, under the modified model, providers would be able to deliver services to their own clients and ensure their business remains sustainable within the reduced fees by growing the amount of Own Client Work they deliver and where necessary explore opportunities for consolidation during the contract term. We believe that the proposed modified model would support those providers to make those changes by offering greater flexibility in terms of business structures; giving them the opportunity to grow their business and innovate; and adopting a staged reduction in fees.

3.30 Under the modified model, the number of contracts for Own Client Work would be unlimited. Any provider that was capable of meeting the requirements of the tender process (including the required quality standards) would be awarded a contract to provide criminal legal aid services to a client who chooses them from anywhere in England and Wales at the first point of request.

3.31 For the purposes of determining the number of contracts for Duty Provider Work, we maintain our view that the same four key factors as set out in the previous consultation paper should still be taken into account. These are:

- **Sufficient supply to deal with potential conflicts of interest** – Having expanded our data set to include LAA claim data from 2009 to 2013, the data confirms that the vast majority of cases have four defendants or less. The data therefore indicates that there should be a minimum of four contracts in each procurement area.

- **Sufficient case volume to allow fixed fee schemes to work** – To manage the level of risk of financial loss faced by providers with a fixed fee scheme, we would need to offer sufficient volume of work in order for them to cope with variations in case mix. We intend to assess this using a similar approach to that set out in the previous consultation - adjusted for the latest data and to reflect Duty Provider Work only - and changes to the fixed fee scheme and procurement areas.
Our view remains it would be reasonable to expect providers to absorb up to a 3% change in revenue, in any one year, relative to what they would have received on the same mix of cases. For example, taking an area with a current average claim value of £400, we would aim to be statistically confident that under the proposed fixed fee schemes, the average claim value a provider will receive is no less than £388 (-3%) and no more than £412 (+3%).

- **Market agility** – The same considerations apply with this model compared with the previous consultation model, in terms of the extent to which existing providers in each procurement area would need to expand their businesses to take on increased volumes of Duty Provider Work. However, we would also take into consideration the views presented in response to consultation by those firms who may, on their assessment, have had to scale their businesses down. In determining the number of Duty Provider Work contracts, we would therefore need to consider the extent to which this could be mitigated by enabling those providers to maintain access to Own Client Work.

- **Sustainable procurement** – We also maintain the view that we need to ensure the market is competitive in future tendering rounds. As set out in the previous consultation paper, we expect that a number of successful applicants would be joint ventures or a legal entity using agents. In addition, providers of Own Client Work would have the opportunity to grow their businesses should they wish through obtaining more work as a result of competition through natural market forces. This in turn might enable those providers to build enough scale in order to compete in a future round of procurement.

3.32 In addition to these factors, our intention is to ensure that the contracts to deliver Duty Provider Work are large enough in volume and value to be sustainable in their own right after the cumulative reduction in fees by 17.5%, so far as is possible. We clearly must ensure that a minimum number of providers continue to operate in each area and that a service is provided to all who need it. We think the best way to do that would be to ensure that Duty Provider Work is sustainable on its own.

3.33 In order to help inform our analysis of sustainability and the final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research to get more detailed information for this purpose. It would also be necessary for such work to take into account the proposed size of procurement area.

3.34 Therefore, we propose to determine the appropriate number of contracts for Duty Provider work on the basis of the four factors set out above and the outcomes of the further research. We would welcome consultees’ views on these factors and whether there are any others that we should consider.

3.35 We note that an indicative analysis set out in a report by Otterburn and Ling, supplied by the Law Society in response to previous consultation¹⁷, suggested that three hypothetical organisations operating across the proposed CJS procurement areas would have a better chance of sustaining their business after a 17.5% reduction in fees, if they have an annual turnover in excess of around £1m (including VAT).

Taking the estimated spend on criminal legal aid services in scope of the proposed new contract after the proposed 17.5% reduction in fees (which would equate to around £570 million in steady state), this would suggest that we should offer, no more than, 570 contracts for Duty Provider Work. Whilst this is a useful starting point, this number does not take account of the other factors set out above, and also presupposes that the providers with a Duty Provider Work contract would need to absorb all Own Client Work available in the market during the contract term in order for the contracts to be sustainable. As indicated above, our aim is that Duty Provider Work contracts should be large enough to be sustainable in their own right after the cumulative reduction in fees by 17.5%. We would have regard to all the factors set out above, including the further research described at paragraph 3.33 above, in determining the final contract numbers for this work.

Public Defender Service (PDS)

3.36 We continue to believe that it is important to maintain a role for the PDS because of the part that the service plays in benchmarking; in the development of quality standards in criminal defence work; and as a safeguard against market failure. Our current intention is that following an assessment of the capacity of the PDS, it would be assigned an equal share of duty slots in the areas in which it is already established. The PDS would also be eligible to conduct Own Client Work anywhere in England and Wales.

(v) Types of provider

3.37 As with the previous consultation model, we do not propose to limit the types of organisation that may bid for a contract provided that they meet the applicable Requirements of the Tender Process (including the required quality standards) in this regard. Our current thinking is that any applicant applying for a contract and not already regulated, must ensure that it has applied for appropriate regulation in order to be regulated by the contract start date. Subject to the outcome of this consultation this may be a condition of submitting a tender (i.e. applicants would need to be a legal entity and have applied for appropriate regulation by the close of the Invitation to Tender for Duty Provider Work). Applicants would need to check with their regulatory body with regard to what is required in order to apply for regulation and how long this process would take (which may be a number of months).

3.38 Consistent with the previous consultation model, under the modified model applicants could be individual organisations (such as a partnership or a Legal Disciplinary Practice), a joint venture or an ABS but will need to form a single legal entity. Applicants could choose to deliver the service themselves and/or through the use of agents. The model would not preclude any new entrant to the market, provided they were appropriately regulated.

3.39 Under the model, providers would be permitted to use agents, but they might need to provide, as part of their tender, details of the agents with whom they had a relationship or intended to have a relationship by the start date of the contract. Providers would need to take responsibility for the quality of the work carried out by their agents in accordance with the terms of the contract.
Applicants that were awarded contracts for Duty Provider Work would be expected to have the capacity and capability to undertake all of the categories of work within the scope of the Duty Provider Work contract or use appropriately qualified agents.

**Contract value**

It follows from the modifications we have outlined that contract value in relation to Own Client Work would depend on the volume of business generated by individual firms and the proposed changes to the fees available.

We also propose that providers undertaking just Own Client Work would have access to the subsequent criminal proceedings in the magistrates’ court, and where applicable, the Crown Court and higher courts.

In relation to Duty Provider Work, the overall value of the contract to successful firms would depend on the number of contracts in each area. We intend that providers would be given an equal share of police station and magistrates’ court Duty Provider slots in the given procurement area over the life of the contract. Providers would have access to the subsequent criminal proceedings in the magistrates’ court, and where applicable, the Crown Court and higher courts.

A provider wishing to conduct prison law and/or appeals and reviews classes of work would be able to do so whether they wish to conduct only those services or in addition to other criminal legal aid services.

For clarity, as with the previous consultation model, we could not guarantee a specific number of cases for each provider awarded Own Client Work or Duty Provider Work; simply that depending on type of contract(s) awarded, providers would have access to such work available that flowed through their procurement area either by the client choosing the provider or by means of an allocation of an equal share of Duty Provider slots.

**Client choice**

In line with the modifications we have outlined, our proposal is that clients would retain the opportunity to choose between:

- a provider they know and/or with whom they have a pre-existing relationship, so long as that provider holds a contract with the Lord Chancellor to conduct criminal legal aid services; or
- a provider who is on duty at the time that client needs such advice.

This maintains the same level of choice as is available under the current scheme.

Once a provider has been chosen (Own Client Work) or allocated (Duty Provider Work), we propose that the provider would, in general, be obliged to deliver the full

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18 Prison law (as revised – see Chapter 2).
19 Appeals and reviews – advice and assistance on appeals against conviction or sentence (where a newly instructed representative is not covered by an existing Representation Order) or applications to the Criminal Cases Review Commission (CCRC).
range of advice, litigation and magistrates’ court representation services. We still however propose that a client wishing to change their legal representative would be able to do so. As is currently the case, any change in provider after the grant of a representation order would be determined by a court, subject to the same criteria set out currently in regulations\textsuperscript{20}.

3.48 We also propose that where a provider considers it appropriate, in line with their professional Code of Conduct, to withdraw their services, they should be able to do so. We propose therefore that the same criteria as apply now for withdrawals/transfers following the grant of a representation order should continue to apply under the modified model\textsuperscript{21}. We would expect that any withdrawals or transfers prior to the grant of a representation order would only take place having considered the same criteria. The LAA would explore whether to include any obligations in the new criminal legal aid contract against which providers would be monitored.

(viii) Case allocation

3.49 Under the modified model, it follows that only cases where the client chooses the Duty Provider, would be allocated to whichever provider is on duty at the relevant time. This maintains the current case allocation method including the current rules on managing conflicts of interest.

3.50 As now, clients choosing their own solicitor would be directed by the Defence Solicitor Call Centre to the provider they choose provided that the provider holds a criminal legal aid contract. In the event the client chooses a provider that does not hold a criminal legal aid contract, the provider can of course deliver the service on a privately funded basis. In any event, the client should be advised that they can seek free legal advice and assistance from a contracted provider should they so wish, pursuant to their professional obligations.

Case allocation outside police station attendance

3.51 Under the modified model, clients seeking advice from a provider for matters outside the police station would seek such advice from any provider holding a criminal legal aid contract. As now, there would be no allocation process for this work, the client would simply contact a provider directly.

(ix) Remuneration

Phased fee reduction

3.52 The modified model proposes a total reduction in fees of 17.5% by spring 2015, the proposed Service Commencement date of the new criminal legal aid contract. It therefore delivers the same level of savings as the previous proposal.

\textsuperscript{20} See Regulation 14 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013.

\textsuperscript{21} As above, see Regulation 14 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013.
3.53 Rather than making a one step reduction of 17.5% in spring 2015, we propose to make two successive reductions: a 8.75% fee reduction in early 2014 across all criminal litigation services22 (with the exception of VHCCs which are discussed in Chapter 2) and magistrates’ court advocacy fees followed by a second reduction of 8.75% across the same range of fees in spring 2015 to be applied to both Duty Provider Work and Own Client Work under the new criminal legal aid contracts (relative to current fee levels and against the proposed remuneration arrangements discussed below).

3.54 Such an approach would enable us to begin realising necessary savings and help providers to adapt through a more gradual reduction in fees over the course of the extended period preceding the start date of the new contracts. It would have the added benefit of encouraging providers to explore the opportunities for the level of market consolidation necessary to ensure sustainable services in the longer term. We think a more phased implementation of the proposed price cap and/or ultimate fee reduction, beginning with an 8.75% interim cut, strikes the appropriate balance of delivering initial savings and mitigating the risk of a single, substantial drop in prices while incentivising change.

3.55 The current and proposed reduced rates for the litigation services affected by the proposed interim fee cut are set out in Table G2 of Annex G.

**Fixed fees**

3.56 As set out in the previous consultation document, the Government believes that the current remuneration mechanism for criminal legal aid services is overly complex and administratively burdensome. Therefore, in looking at alternative models we propose to introduce fixed fees as far as is reasonably practicable.

3.57 We also believe that no matter whether the client chooses their own provider or the Duty Provider, the payment mechanism (i.e. a fixed fee scheme) would be the same.

3.58 Therefore, in adapting the original proposed fixed fee scheme as set out in the previous consultation paper, we now propose the following for each stage in the CJS process.

a) **Police station attendance fixed fee**

3.59 We propose to introduce a fixed fee approach to remuneration for police station attendance.

3.60 For both Own Client Work and Duty Provider Work, no matter where services are delivered, the same national fixed fee for police station attendance would apply. In order to determine the national police station attendance fixed fee, we would apply the following process:

   a. From 2012/13 claim volume and value data, calculate the average police station attendance claim nationally by taking the total expenditure on police station attendance nationally and dividing that total by the volume of claims nationally;

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22 References to ‘litigation services’ throughout this chapter means all services currently in scope of the 2010 Standard Crime Contract.
b. Reduce the average police station attendance claim value by 17.5% (subject to
the proposed phased fee reduction approach discussed in paragraphs 3.52 to
3.55 above) below current rates\(^23\).

3.61 Applying a 17.5% reduction to the 2012/13 Police Station billing data gives a
proposed national fixed fee of £200.64.

b) **Representation in the magistrates’ court fixed fee**

3.62 As with the proposal set out in the original consultation, we propose replacing the
Standard Fee scheme in the magistrates’ court with a fixed fee. This would remove
the distinction between a Lower Standard Fee and a Higher Standard Fee and
instead every claim for magistrates’ court representation would be based on one fixed
fee. However, having listened to the views submitted in response to consultation, we
propose to maintain a mechanism, similar to the current non-standard fee mechanism
for magistrates’ court representation work, whereby providers would be able to claim
a higher fee. The current non-standard fee mechanism enables providers to claim a
higher fee provided they can demonstrate that their hours worked exceed a specified
threshold. For the purposes of this chapter we will continue to refer to this as a Non-
Standard Fee. The hourly rates for such work would be reduced by 17.5% below
current rates\(^24\).

3.63 For both Own Client Work and Duty Provider Work, no matter where services are
delivered, the same national fixed fee for magistrates’ court representation would
apply for cases which do not exceed the Non-Standard Fee threshold. In order to
determine the national magistrates’ court representation fixed fee we would apply the
same calculation as described at 3.60 above but based on magistrates’ court
representation data (for Lower and Higher Standards Fees only). For both Own Client
Work and Duty Provider Work, providers that can demonstrate they have worked in
excess of the Non-Standard Fee threshold would be able to claim on an hourly rate
basis. The current hourly rates\(^25\) applicable for the magistrates’ court representation
Non-Standard Fee would apply subject to a proposed reduction of 17.5%.

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\(^23\) By current rates we mean those rates of pay for litigation (except VHCCs) and magistrates’ court advocacy
services as apply at the time of publication. 17.5% would be the total reduction in fees which would include the
proposed 8.75% reduction across the same rates in early 2014 (see paragraphs 3.52 to 3.55 on a proposed
interim fee reduction).

\(^24\) ibid.

\(^25\) By current hourly rates we mean those rates of pay for Non Standard Fees for magistrates’ court
representation as apply at the time of publication. 17.5% would be the total reduction in fees which would
include the proposed 8.75% reduction across the same rates in early 2014 (see paragraphs 3.52 to 3.55 on a
proposed interim fee reduction)
3.64 As described at paragraph 3.16 we propose to maintain the magistrates’ court duty provider scheme under this model. Currently, magistrates’ court duty work is remunerated by way of hourly rates and providers are paid based on the number of hours in attendance at the magistrates’ court. Our proposal is to maintain the separate remuneration for this work and retain the hourly rate mechanism. However, those providers awarded Duty Provider Work would be remunerated for this work at the current rates reduced by 17.5%.

3.65 A 17.5% reduction to all magistrates’ court bills (except for claims made for Non-Standard Fees) in 2012/13 would give a proposed national fixed fee of £321.05.

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

3.66 We maintain the view that any future criminal legal aid scheme must look to simplify the current Litigators Graduated Fee Scheme (LGFS). Whereas the previous consultation model proposed replacing such a scheme with a single fixed fee scheme, having considered the responses to the consultation with regard to the financial uncertainty of such a model, we have explored a number of modifications to the proposed fixed fee scheme. For both Own Client Work and Duty Provider Work we therefore propose a fixed fee scheme based on two variables (offence type and pages of prosecution evidence (PPE)) to mitigate the financial risk for providers. Rather than the one fixed fee proposed in the previous consultation model, we are proposing five fixed fees for each of the eleven offence types. This we believe would help to reduce the risk of a provider substantially gaining or losing financially from any one case.

3.67 As under the original proposal, we propose to maintain one exception to this fixed fee scheme, namely the alignment of the fees in the magistrates’ court and Crown Court schemes in cases which magistrates had determined were suitable for summary trial but where the defendant had elected trial by jury and subsequently pleaded guilty. In such a scenario, the fee paid would be equivalent to that received if the case had remained in the magistrates’ court.

3.68 We maintain the view that some cases are of such length and complexity that their inclusion in a fixed fee scheme would be hard to accommodate without requiring providers to bear an unreasonable level of risk, and therefore we maintain our original proposal that those cases with over 500 PPE should be remunerated by the graduated fee scheme.

3.69 For both Own Client Work and Duty Provider Work, no matter where services are delivered, the same national fixed fee scheme for Crown Court litigation would apply for cases with 500 PPE or less. In order to determine the fixed fees, we would apply the same calculation as described at 3.60 above but based on Crown Court litigation claim data (for cases with 500 PPE or less).

3.70 The new indicative proposed fixed fee scheme for Crown Court cases with less than 500 PPE is set out in Table G3 of Annex G.

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26 By current hourly rates we mean those rates of pay for magistrates’ court duty solicitor hourly rates as apply at the time of publication. 17.5% would be the total reduction in fees which would include the proposed 8.75% reduction across the same rates in early 2014 (see paragraphs 3.52 to 3.55 on a proposed interim fee reduction).
d) **Crown Court litigation graduated fee (cases with 500 PPE or greater)**

3.71 As outlined above, we propose to maintain the current LGFS for cases where the PPE is 500 or greater. For both Own Client Work and Duty Provider Work, the rates underpinning the LGFS would be set administratively at 17.5% below current rates\(^{27}\).

### Rates of pay for other classes of criminal legal aid

3.72 The rates of pay for all other classes of work would be set administratively and reduced by 17.5% below current rates\(^{28}\). The current rates of pay for each of the classes of work with administratively set rates are set out in regulations.\(^{29}\)

### Disbursements

3.73 We recognise the importance of separate disbursement payments and therefore we propose that the cost of any travel and subsistence disbursements under each category above would be remunerated separately. Disbursement costs for experts, would continue to be paid separately.

(x) **Procurement Process**

3.74 Subject to the outcome of this consultation, the purpose of this section is to explain how we currently intend to run the procurement process to procure new crime contracts under the modified model.

3.75 However, the model will need to be reviewed subsequent to the further work we intend to jointly commission with the Law Society to help inform contract sizes for Duty Provider Work. We make no express commitment in this section with regard to the final version of the procurement process (including the terms and conditions that would govern the process, the final criteria, any method for evaluating tenders and/or any scoring mechanism applied).

3.76 The procurement process would allow applicants to:

- Apply for a contract to deliver Own Client Work anywhere in England and Wales; and
- Apply to take part in a competition to be awarded a contract to deliver Duty Provider Work in the proposed procurement area.

3.77 Organisations that wish to undertake Prison Law and/or Appeals and Reviews work would be able to apply under a separate process that would have specific criteria reflecting the quality requirements of the service. These criteria would include the requirement to employ a Prison Law Supervisor. There would be a revised Prison Law Supervisor standard taking into account the revised scope of the work and removing exceptional circumstances as a route for qualifying for the standard. This would be made available in advance of the tender process opening.

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\(^{27}\) By current rates we mean those rates of pay for litigation (except VHCCs) and magistrates’ court advocacy services as apply at the time of publication. 17.5% would be the total reduction in fees which would include the proposed 8.75% reduction across the same rates in early 2014 (see paragraphs 3.52 to 3.55 on a proposed interim fee reduction).

\(^{28}\) Ibid.

\(^{29}\) Criminal Legal Aid (Remuneration) Regulations 2013.
Contract for Own Client Work

3.78 This application process would be a single stage process consisting of:

- Pre-Qualification Questionnaire (PQQ); and
- An assessment that the applicant can meet the conditions of tender and core obligations under the contract.

3.79 Applicants would have to meet the Requirements of the Tender Process (including the required quality standards) in order to be awarded a contract to undertake Own Client Work.

Pre-Qualification Questionnaire (PQQ) for Own Client Work

3.80 The PQQ for Own Client Work would consist of mandatory and discretionary criteria.

Mandatory and Discretionary Criteria

3.81 The mandatory and discretionary criteria would test an applicant’s suitability to contract with a public body.

3.82 As outlined in the original consultation model, we propose that the PQQ would, as far as possible, follow Cabinet Office guidance. The PQQ would include the standard PQQ core questions covering grounds for mandatory rejection (for example, convictions for bribery) and grounds for discretionary rejection (for example, fulfilment of tax obligations). Discretionary criteria would also include LAA specific considerations (for example, whether the applicant has had previous contract termination).

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

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

Core obligations under the Contract for Own Client Work

3.85 As part of the tender process, applicants would have to meet certain core obligations. The Law Society has made a number of valuable suggestions about the minimum service requirements applicants should meet, and we have reflected these as far as possible in the core obligations outlined below. Their suggestions around ensuring quality were particularly helpful and as a result we plan to require that all organisations employ at least one qualified full time equivalent members of staff and to introduce a supervisor to caseworker ratio of 1 to 4.

3.86 Core obligations that we are currently considering include (but are not limited to):

- Applicants must hold (or commit to acquire within a specified time period) a relevant quality standard (either the LAA’s Specialist Quality Mark or the Law Society’s Lexcel standard or an equivalent quality standard agreed by the LAA)
- Applicants must be subject to regulation by one of the legal sector regulators
- Applicants must receive a Peer Review Rating of 3 or above during any audit under the contract;
- Applicants must have or commit to have and use a CJS Secure Email Account to accept service of electronic evidence from prosecution agencies.
- Applicants must employ at least one full-time equivalent Supervisor and commit to maintain a Supervisor to caseworker/advisor ratio of 1:4 throughout the contract term;
- Applicants must employ at least one full-time equivalent CLAS accredited staff member; and
- Applicants must have an office in England and Wales that meets the presence requirements set out in the contract.

**Contract to deliver Duty Provider Work**

3.87 For Duty Provider Work, we propose to run a competition for a limited number of contracts in each procurement area where tenders are evaluated against the Requirements of the Tender Process (including the required quality standards). To tender to deliver Duty Provider Work, there would be a two stage process consisting of:
- PQQ (including testing an applicant’s experience and capability); and
- an Invitation to Tender consisting of a Delivery Plan.

**PQQ Experience and Capability Criteria for Duty Provider Work**

3.88 In addition to the Mandatory and Discretionary Criteria described above, we propose to use additional PQQ criteria to shortlist applicants bidding to deliver Duty Provider Work. As suggested by the Law Society it would also be a requirement that applicants have an office meeting the presence requirements in the specific procurement area in which they are tendering.

3.89 We were interested in the Law Society’s suggestion that we should be testing the experience of applicants, and as a result these PQQ criteria would evaluate an applicant’s experience as well as their capability of delivering services of similar type or volume. Applicants would be scored against a number of criteria. Those we are currently considering include:
- Experience of staff;
- Experience of the management team in managing a comparable service;
- Experience of having delivered comparable volumes of work; and
- Financial assessment (including scale of any expansion required to deliver the contract).

3.90 The number of shortlisted applicants at the PQQ stage would be determined relative to the number of Duty Provider Work contracts required in each procurement area.

**Invitation to Tender (ITT) for Duty Provider Work**

3.91 The ITT would involve the assessment of the applicant’s Delivery Plan against the published criteria and applicants would then be scored and ranked in order of highest score.
3.92 We would aim to award a specified number of equal sized contracts in each procurement area to the highest scoring applicants.

**Delivery Plan**

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

3.94 The LAA would evaluate Delivery Plans to ensure applicants had capacity to deliver the service. This might include, where applicants were tendering to deliver services in more than one procurement area, the LAA’s confidence in the applicant’s ability to deliver services simultaneously in all procurement areas.

**Allocation of duty slots**

3.95 Depending on the number of contracts required in each procurement area, the highest scoring applicants would then be allocated equal numbers of police station and magistrates’ court duty slots.

3.96 For example, if ten contracts were to be awarded in a Procurement Area, to the ten highest scoring bids then each of these providers would be awarded equal sized allocations of duty slots (i.e. each provider would get 10% of the available duty slots).

**Contract mobilisation**

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

**TUPE**

3.98 It would be each applicant’s responsibility to form their own view (taking legal advice as necessary) as to whether or not the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied.

**(xi) Implementation**

3.99 Having considered responses to the previous consultation and as a consequence of this further consultation period, subject to its outcome, we now propose to commence the procurement process for criminal legal aid services in early 2014 with a view to contracts being awarded in late 2014 or early 2015. This would extend the time applicants have to explore opportunities for possible mergers, joint ventures and/or agency arrangements and to prepare for service commencement. We propose the service commences in spring 2015.
Consultation Questions

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

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

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.

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.

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.
Chapter 4. Reforming Criminal Advocacy Fees

Introduction

4.1 This chapter sets out our revised proposals for restructuring the Advocates' Graduated Fee Scheme (AGFS) for criminal advocacy carried out in the Crown Court.

4.2 Following consultation, we have developed two alternative models and are seeking views on which would be the preferred option for reforming the AGFS. The two proposed options meet our objective of bearing down on costs in order to achieve best value for the taxpayer and both simplify the fee scheme while taking account of the amount of preparation generally required in different types of case.

4.3 We have been conscious throughout of the impact that the options would have on those with lower fee income and the accompanying Impact Assessment provides a detailed analysis of the impacts of the two options whilst also recognising that fee income is determined not only by the values of the fees paid but also the number of advocates and volume of cases in the criminal market, as well as the specific case mix undertaken by each advocate. Option one is based on our original proposal for advocacy fees but with some adjustments to structure, rates and the operation of the taper. Option two is adapted from the fee structure operated by the Crown Prosecution Service (CPS) as suggested by the Bar Council but with a reduction in the rates that they proposed. Both proposals represent a sensible and rational way forward for reforming fees and reducing expenditure.

Advocacy Option 1 - Harmonisation and tapering

4.4 As set out in the previous consultation document we believe there is a case for harmonising Basic Fees and for reducing and tapering trial daily attendance fees (DAFs). Option 1 supports the aim of efficient justice, promoting early consideration of the question of plea and the earliest possible resolution of contested matters. Decisions on the question of plea are ultimately for the defendant; we do not believe that changes in the fee structure will lead to lawyers abandoning their professional obligations to clients. However, we continue to consider that the current system of fees could better support the aim of speedy and efficient justice.

4.5 We are pursuing a number of initiatives to support the efficient resolution of trials and minimise the likelihood of delay (as explained in paragraph 1.29 above). This revised proposal continues to support that aim. However, we have adjusted our original proposal in this option to address respondents' concerns that the scale of work for trials should be properly reflected in the fees paid and that longer cases should not be disproportionately affected.

4.6 In light of consultation responses, we recognise that harmonising trial fees at the same rate as those for guilty pleas and cracked trials may create too large a discrepancy gap between the amount of preparation done and the fees payable in some cases. Thus, under this option we propose to harmonise Basic Fees for

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cracked trials and guilty pleas and to leave the Basic Fees for trials unchanged from current levels. The Basic Fee for cracked trials and guilty pleas would be a harmonised fee set at a level that would be lower than the current fee for cracked trials, but higher than the current fee for guilty pleas, supporting the objective of encouraging early consideration of the question of plea. This proposal would therefore result in a redistribution of remuneration across cracked trials and guilty pleas on a cost neutral basis. As now, the fees would vary by type of advocate and offence group.

4.7 Under this option there would still be a reduction in the DAFs and a taper in DAF rates from day three of the trial so that the fee payable for each additional day of trial would gradually decrease. Compared to the consultation paper, this revised option would reduce DAFs overall by less than was originally proposed (20% instead of 35%), through a combination of a higher starting DAF and a less steep taper being applied. The revised option also includes a floor (i.e. a level at which DAFs stop tapering) which rates would not fall below.

4.8 We propose to set the floor at the same rate as is currently paid for the 41st day of the trial, which is the same rate as the current lowest DAF (ie QC £387, Leading Jr £331, Lone Jr £225). This is the point where, in the current fee scheme, DAFs are reduced from the level paid for 3 to 40 day trials. If, as a result of the taper, that point floor is reached before the 41st day of trial then DAFs from that point forward will not be tapered further and will be paid at the same rate for the remainder of the trial. This is illustrated in Chart 1 below where applying the taper results in the floor being reached after Day 18. In all other cases (typically more complex offence groups) the current DAF rate is applied from day 41 onwards as illustrated in Chart 2.

4.9 This means that in cases where the trial is exceptionally long, the advocate would not see DAFs fall to an extremely low level. This should address the concern raised by respondents to consultation that a large initial reduction in DAFs and steeper taper might lead to senior advocates switching to shorter, more profitable cases thereby disproportionately impacting on junior advocates.

4.10 Under the current scheme, there is a small increase in the rate payable for DAFs for day 50 of the trial onwards. We propose to eliminate this so that once the DAF reaches our proposed floor it does not increase, as there is no justification for retaining an increase.
4.11 Below we set out some examples of Option 1 and compare these with the current and previously proposed rates:

Chart 1: The impact of Option 1 compared to the current scheme and the original consultation proposal on the Daily Attendance Fees for a Junior alone for Offence Group F: Dishonesty under £30,000
4.12 The proposed new rates payable under this option are set out in Annex H.

Advocacy Option 2 – Modified CPS Advocacy fee Scheme Model

4.13 Having considered the concerns raised by respondents and the alternatives put forward, we are also seeking views on an alternative model that would simplify the AGFS fee structure. Option 2 is based on the Bar Council’s proposed alternative reflecting the fee scheme currently used by the Crown Prosecution Service (CPS). Last year the CPS changed the calculation of fees for Crown Court advocacy to a simplified model put forward then by the Bar Council. The mechanism whereby the evidence uplift was calculated by a precise page count was removed. Basic Fees (known as core fees in the CPS scheme) covering preparation and the Pages of Prosecution Evidence (PPE) uplift are now calculated according to a page threshold as either a standard or enhanced fee. There is a page cut-off point which determines the applicable fee for each case type, each offence category and different types of advocate instructed.
4.14 The approach in Option 2 takes account of some key differences between prosecution and defence schemes and introduces a number of simplifications, as acknowledged by the Bar Council. The alternative approach suggested by the Bar Council was based on 2009/10 AGFS rates and would not deliver savings on the order of our original proposal. We therefore propose a reduction in rates. The rates we propose under this option would achieve the same level of savings as the original proposal and Option 1.

4.15 Under the scheme introduced by CPS there are two bands of Basic Fee for each offence group, a ‘standard fee’ and an ‘enhanced fee’. For each offence type, the level of fees is varied by the type of advocate instructed. The standard fee is payable for all cases where the page count falls below a particular threshold, and is the same regardless of the precise page count. The thresholds used vary with the offence type. The standard fee is designed to capture 95% of the cases in any particular offence type.

4.16 The enhanced fee is payable for all ‘evidence heavy’ cases where the page count falls above the threshold, and again will be the same for all such cases regardless of the precise page count. The enhanced fee is designed to capture the top 5% of cases in any particular offence type in terms of PPE. The page count is therefore only used to determine whether the threshold between the standard and enhanced fee has been exceeded. In most cases whether a case will receive a standard or an enhanced fee will be a clear cut matter, making the scheme simpler to administer for both the Legal Aid Agency (LAA) and advocates. This would address concerns raised by advocates about the time spent establishing precise page counts which is viewed as inefficient.

4.17 In the small minority of cases close to the boundary there may be an incentive to claim the enhanced rate, but we do not consider this to be a significant risk. The LAA would continue to require advocates to submit objective evidence of the volume of evidence served where it has an impact on the fee payable.

4.18 The CPS pay separately for all additional hearings and conferences (as these might be carried out by in-house lawyers rather than the independent Bar). Option 2 however retains the structure of the existing scheme for defence advocates in which the Plea and Case Management Hearing and first four standard appearances (as well as the first three conferences and views) are included within the Basic Fee, in order to promote the efficient resolution of proceedings. In addition, this option retains the Bar Council’s proposed simplification of rates in cases where a QC or multiple counsel are instructed. In these cases, the respective rates paid for QCs, leading juniors and led juniors are harmonised across all offence groups, which would further simplify payment in these complex cases. Harmonisation across all offence groups is consistent with recent amendments to the fee scheme which resulted in Basic Fees for Offence Group A (Murder and Manslaughter) being harmonised with those for Offence Groups J (serious sexual offences) and K (high value dishonesty offences).

4.19 An outline of the proposed payment rates is at Annex I. DAFs and other fixed fees would remain unchanged.

4.20 Our initial conclusions as to the impacts of these proposals are addressed in Annex F and the accompanying Impact Assessments. The impact on advocates’ earnings is estimated based on historic work undertaken and we have assumed the behaviour of advocates in taking decisions remains the same in future. It is important to note that
the impact on an individual advocate will depend on their individual workload. Different advocates have different workloads and mixes of case. Fee income is affected not only by the value of fees paid but also the number of advocates in the criminal market, the volume of cases and the specific case mix undertaken by each advocate. However, the average impact on fee income for each option is set out in the table below for trials, cracked trials and guilty pleas.

Table 3: Reduction in fees under each option, split by case type, based on 2012/13 LAA billing data

<table>
<thead>
<tr>
<th></th>
<th>Guilty</th>
<th>Crack</th>
<th>Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>+23%</td>
<td>-18%</td>
<td>-11%</td>
</tr>
<tr>
<td>Option 2</td>
<td>-11%</td>
<td>-2%</td>
<td>-8%</td>
</tr>
</tbody>
</table>

Consultation Question

Q6. Which approach do you favour in terms of reforming the Advocates’ Graduated Fee Scheme:
- Option 1 (revised harmonisation and tapering proposal); or
- Option 2 (the modified CPS advocacy fee scheme model);
Please give reasons.

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30 This has been derived taking all AGFS bills in 2012/13 and creating a baseline expenditure after applying the 2013/14 rates. The baseline expenditure was split into guilty / cracked / trials. We have then applied the rates from options 1 and 2 onto each of the bills to generate expenditure figures for each option, split into guilty / cracked / trials. We compared the aggregate expenditure of each option against the baseline, split by guilty / cracked / trials. This table summarises the percentage differences in aggregate expenditure.
Chapter 5. Impact Assessment

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

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

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

Consultation Questions

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?
# About you

Please use this section to tell us about yourself

| **Full name** | |
| **Job title** or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) | |
| **Date** | |
| **Company name/organisation** (if applicable): | |
| **Address** | |
| **Postcode** | |

If you would like us to acknowledge receipt of your response, please tick this box

(please tick box)

Address to which the acknowledgement should be sent, if different from above

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

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Consultation Co-ordinator Contact Details

Please send your response by 18 October 2013 to:
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Complaints or comments
If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

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

Alternative format versions of this publication can be requested using the contact details above.

Publication of response
A paper summarising the responses to this consultation will be published following their consideration. The response paper will be available on-line at:

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

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

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

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