

Annex B: Response to consultation

Introduction

1. This Annex sets out the Government's response to the consultation paper, *Transforming legal aid: delivering a more credible and efficient system*.
2. We estimate that the proposals set out in this consultation, once fully implemented, will deliver savings of £220m per year by 2018/19.

Restricting the scope of legal aid for prison law

3. The consultation paper proposed amending the scope of advice and assistance, including advocacy assistance, in criminal legal aid for prison law to cases that:
 - involve the determination of a criminal charge for the purposes of Article 6.1 ECHR (right to a fair trial);
 - engage Article 5.4 ECHR (right to have lawfulness of ongoing detention reviewed); and
 - require legal representation as a result of successful application of the "Tarrant" criteria³¹.

4. The consultation asked:

Question 1: Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

Key issues raised

5. The majority of respondents were opposed to the proposal and raised the concerns set out below, although not all respondents were unsupportive. A number of respondents raised concerns about the impact the proposals would have on under 18s in custody, particularly around resettlement (for example ensuring that local authorities are fulfilling their statutory duties in terms of provision of suitable accommodation on release). It was said that young people in custody may find it more difficult to engage with the complaints system and it was also suggested that they would have a greater need of

³¹ When a prisoner attends a disciplinary hearing before a governor the prisoner is asked whether they want to obtain legal advice or representation. If the prisoner does not want any legal assistance the hearing proceeds. However, if the prisoner requests legal advice, the adjudicating governor will consider each of the following criteria (resulting from the case of *R v Home Secretary ex parte Tarrant*) and record their reasons for either refusing or allowing representation or a friend:

- the seriousness of the charge/potential penalty;
- a substantive point of law being in question;
- the prisoner being unable to present their own case;
- potential procedural difficulties;
- urgency being required; or
- reasons of fairness to prisoners and staff.

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

legal advice and assistance than adult prisoners. It was also questioned whether restricting criminal legal aid for under 18s may be in breach of the UK's obligations under the UN Convention on the Rights of the Child.

6. Respondents suggested that the removal of categorisation and licence conditions matters from the scope of criminal legal aid for prison law would not be in line with the policy intention of providing legal aid where an individual's liberty is at stake, and that in relation to licence conditions prisoners' rehabilitation may be affected. A number specifically argued that re-categorisation from Category A is essential if prisoners on Indeterminate sentences for Public Protection (IPPs) are to be released. In addition, the possibility of prisoners being housed in more secure conditions than necessary as a result of not being re-categorised, and the resulting cost implications, was also raised. Specifically, respondents suggested that the difference in cost of holding a prisoner in Category A as opposed to Category B, C or D conditions is significant and removing prisoners' access to criminal legal aid for categorisation cases may result in more prisoners being held in more secure, and therefore more expensive, conditions for longer than necessary.
7. Particular concerns were raised in relation to the ability of prisoners with mental health issues and/or learning disabilities to participate in and make use of the complaints and discipline systems effectively without the benefit of legal advice and assistance. Respondents argued that these prisoners are less confident in the complaints process than other prisoners and that screening was incomplete and as a result, reasonable adjustments were not generally made for all prisoners who may require them.
8. A number of respondents stated that an effective means of redress for prisoners' complaints was a key element in maintaining order in prisons. Some raised concerns about the robustness of the complaints system, particularly that it was not suitable to resolve serious issues. A number of respondents argued that it lacked transparency, accountability or independence and suggested that adherence to the relevant Prison Service Instruction (PSI 02/2012) varied across establishments. Concerns were also raised about the timeliness with which complaints were dealt with and survey data was provided that suggested that prisoners held the complaints system in poor regard.
9. Some respondents were also concerned that the Prisons and Probation Ombudsman (PPO) would be unable to handle an increase in the number of complaints referred for investigation in light of a decreased budget in recent years. Concerns were also raised over the timeliness with which the PPO concludes investigations, and the potential cost implications of more cases being resolved via the PPO than by way of a prison law practitioner. Respondents also noted that the PPO's decisions are not binding.
10. Various respondents raised concerns regarding potential indirect cost implications of the proposals. Particular points of concern for respondents were that it was said that a PPO investigation costs around £1,000 (figure for 2012/13 supplied by PPO is around £830), whereas the standard fixed fee for advice and assistance is £220. The contention was that an expected increase in referrals to the PPO would mean cases were more expensive to resolve than if they were addressed through legally aided prison law advice and assistance. The cost of judicial review proceedings was also set against the cost of a PPO investigation and the standard fixed fee.

Government response

11. As set out in the consultation document, 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 scope. The proposals aim to target limited public resources at the cases that really justify it, in order to ensure that the public can have confidence in the scheme.

Young people

12. The Government has considered what respondents to the consultation said about the particular vulnerability of young people and their particular need for legal advice to ensure statutory agencies support and rehabilitate young people appropriately. Improving outcomes for young people leaving custody and tackling reoffending is a key priority for this Government, as set out in the *Transforming Youth Custody: Putting education at the heart of detention* consultation³². However, for the reasons set out below, the Government does not intend to make an exception for those under the age of 18.
13. Under-18s are detained in three different types of establishment - Secure Children's Homes (SCHs), Secure Training Centres (STCs; these are contracted-out services) and Young Offender Institutions (YOIs). Each sector is subject to independent inspection according to individual frameworks that take account of the particular requirements of young people in custody. SCHs and STCs are subject to inspection led by Ofsted³³. YOIs are inspected by Her Majesty's Inspectorate of Prisons (HMIP)³⁴ (in partnership with Ofsted). Detailed requirements for each sector can be found within the standards, rules and Prison Service Instructions indicated below.
 - SCHs – The Children's Homes Regulations 2001³⁵ and National Minimum Standards³⁶ ;
 - STCs –The Secure Training Centre Rules 1998³⁷; and
 - YOIs – The Young Offender Institution Rules 2000³⁸ and Prison Service Instruction (PSI) 08/2012 (Care and Management of young people)³⁹.
14. All youth secure establishments (SCHs, STCs, YOIs) are required to have comprehensive internal complaints systems that enable young people to address issues relating to their detention, including issues that would currently be resolved with legal advice and assistance. Moreover, civil legal aid for judicial review remains available, subject to means and merits.

³² <https://consult.justice.gov.uk/digital-communications/transforming-youth-custody>

³³ <http://www.ofsted.gov.uk/inspection-reports/how-ofsted-inspects>

³⁴ <http://www.justice.gov.uk/about/hmi-prisons/inspections-guidance>

³⁵ <http://www.legislation.gov.uk/ukxi/2001/3967/contents/made>

³⁶ www.minimumstandards.org/nms_childrens_home.pdf

³⁷ <http://www.legislation.gov.uk/ukxi/1998/472/contents/made>

³⁸ <http://www.legislation.gov.uk/ukxi/2000/3371/contents/made>

³⁹ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2012/psi-08-2012-care-management-young-people.doc>

15. SCHs have individualised complaints processes. Appeals resulting from these will utilise their Local Authority's complaints process and as such will be monitored by them (see individual Local Authority websites for more information). The requirements for complaints systems within STCs are outlined in the contract with each provider and include specific requirements and timescales for dealing with complaints. The general requirements of the grievance procedures in STCs are set out in the Secure Training Centre Rules 1998 (regulation 8 – see paragraph 9.2.10 of Annex F). In addition the statutory Monitor, appointed under section 8 of the Criminal Justice and Public Order Act 1994, has a role in relation to complaints from under-18s in STCs. The majority of under-18s in custody are detained in YOIs run by the Prison Service. The YOI Rules set out the requirements for a complaints process. Governors in these establishments have additional duties when addressing complaints from young people. These are outlined in PSI 08/2012 (Care and Management of Young People) and include verbal explanations of the result of a complaint, forms specifically designed to be used by young people and quality assurance processes by the safeguarding children manager.
16. We recognise that young people may find it more challenging to navigate the complaints process, grievance or disciplinary procedures (depending on the type of establishment), which is why young people are supported by advocacy services within the secure estate. Advocates will help to ensure that appropriate support is provided by statutory agencies such as Local Authorities, and as such will help to resolve issues that might currently be dealt with by way of criminal legal aid legal advice and assistance. All advocacy providers must adhere to the National Standards for the Provision of Children's Advocacy Services in England and Wales. Personal officers or caseworkers are also available to assist. This will ensure that matters removed from the scope of criminal legal aid for prison law can be resolved satisfactorily without the need for legal advice and assistance.
17. A new contract for advocacy services provided by Barnardos commenced on 1 July 2013 across all STCs and YOIs in the youth secure estate. This service is designed for use by young people. Under the contract independent advocacy support is provided to young people in order to assist them with any issues that they may experience whilst in custody, either within or outside the youth secure estate. The role of the advocate is to provide a broad range of non-legal support services to young people to resolve issues at the right level (see section 9.2 of Annex F). The advocacy service provider will accompany a young person to meetings on request either to support the individual or represent their wishes, such as meetings with external agencies (see section 9.2 of Annex F). Advocacy services are provided under different arrangements in SCHs and these must be in accordance with the relevant National Standards.
18. There are various external bodies to which a young person can appeal if they are not satisfied with the outcome of their complaint or grievance. Young people in STCs can appeal to the Monitor – a statutory appointee not employed by the organisation running the STC - to investigate their case further. In addition, we have agreed that young people in STCs will be able to take their complaint to the PPO by the end of September. Young people in SCHs can refer a complaint to their Local Authority, while those in YOIs can refer their complaint to both the PPO and the Independent Monitoring Board (IMB). Access to these organisations must be made readily available and promoted within the relevant establishments. The Monitor, PPO and IMB can all make recommendations on behalf of the young person and will work with the establishment to put these measures in place.

19. In these circumstances we consider that adequate support is available to ensure that under 18s in custody are supported and provided for and that criminal legal aid for prison law is not required apart from in the circumstances set out in the scope criteria. In addition, civil legal aid may be available, subject to means and merits. We consider that this is not in breach of the UK's obligations under the UN Convention on the Rights of the Child.

Categorisation and licence conditions

20. In relation to retaining categorisation and licence conditions matters within the revised scope of criminal legal aid advice and assistance due to their impact on liberty, we have decided that these matters should not be retained within the revised scope on the basis that:
21. Categorisation matters should be resolved where possible using the prisoner complaints system or representations by prisoners for those in Category A. As noted above, civil legal aid for judicial review may also be available, subject to means and merits. Any disagreement with the licence conditions set should be discussed between the offender and their offender manager, with the relevant probation complaints system being used if no resolution can be reached. We consider these processes are sufficient to ensure that offenders' grievances will be properly considered and their rehabilitation will not be compromised.
22. Criminal legal aid advice and assistance will continue to be available for Parole Board proceedings where the Parole Board has power to direct release (but not for proceedings where the Parole Board has no power to direct release, for example cases which are referred to the Parole Board solely for the purpose of making a recommendation to the Secretary of State on categorisation).
23. Three groups of prisoners are to be considered in terms of release:
 - First, determinate sentence prisoners have an automatic release date built into their sentence and as such will definitely be released at a set date. For determinate sentence prisoners who are not eligible for consideration by the Parole Board for release prior to their automatic release date, provision of legally aided advice and assistance in relation to categorisation will therefore not affect the date on which the prisoner will be released.
 - Secondly, there are determinate sentence prisoners who are eligible for consideration by the Parole Board for release prior to their automatic release date.
 - Thirdly, there are indeterminate sentence prisoners (for example those sentenced to life imprisonment or serving IPP sentences). They do not have a set release date. Their release is considered on the basis of a comprehensive risk assessment by the Parole Board based on reports of the prisoner's general risk factors, reduction in risk and performance and behaviour in prison, including suitability for release on licence and compliance with any sentence plan.
24. It is recognised that categorisation may be an important element of that risk assessment for all prisoners but we do not consider it is necessarily or directly determinative of release in the second and third categories. It is therefore a relevant factor in Parole Board decisions about release of prisoners in the second and third categories, but not the sole consideration. It should be noted that a small number of Category A prisoners have been released by the Parole Board without being re-categorised to Category B or below. The categorisation process for prisoners is set out

in PSI 39/2011⁴⁰ (Women Prisoners), PSI 08/2013⁴¹ (Review of security category: Category A/restricted status prisoners), PSI 40/2011⁴² (Adult Male Prisoners), and PSI 41/2011⁴³ (Young Adult Male Prisoners). However, as noted above, the complaints systems are available to those in these categories other than to Category A prisoners, and, in relation to Category A, representations by prisoners may be submitted. Civil legal aid for judicial review may be available, subject to merits and means.

25. In any event, criminal legal aid advice and assistance for proceedings before the Parole Board where the Parole Board has power to direct release will continue to be funded under the proposed new scope criteria.
26. Similar points apply in relation to licence conditions and suitability for release on licence.
 - They are discussed at Parole Board hearings for those determinate sentence prisoners whose release (or early release) is at the discretion of the Parole Board (the second category) and for indeterminate prisoners (the third category). As noted above, the proposal is that criminal legal aid advice and assistance will remain available for proceedings before the Parole Board where the Parole Board has power to direct release.
 - All other prisoners serving determinate sentences have an automatic release date and so do not have a Parole Board hearing at which licence conditions are discussed prior to release – licence conditions in those cases do not affect the date of release.
 - Offenders who have been released on licence but recalled due to breach of their conditions have any future release considered by the Parole Board, including individuals on determinate sentences. These proceedings will continue to be funded.
27. As noted above, respondents to the consultation argued that the proposed scope changes would lead to prisoners being housed in more secure conditions than necessary so increasing costs. We do not consider that the changes would lead to this result. Of the areas removed from the scope of criminal legal aid for prison law there are around 6,000 legally-aided categorisation cases per year based on 2012/13 Legal Aid Agency (LAA) data. If prisoners were to be held in a higher security category than necessary as a result of this change there would be an additional cost burden. However, we consider that the alternative means of redress such as the prisoner complaints system are sufficient to deal with these matters satisfactorily.

The complaints system

28. The Government has considered the points raised by respondents in relation to the complaints system, such as those related to prisoners' confidence in the system and its general effectiveness. We consider the complaints system to be sufficiently robust to enable the issues removed from the scope of criminal legal aid for prison law to be resolved satisfactorily including for prisoners with mental health issues and/or learning disabilities, for the reasons set out below. Category A prisoners may also make

⁴⁰ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-39-2011-womens-cat-recat.doc>

⁴¹ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2013/psi-08-2013-review-security-cat-a.doc>

⁴² <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-40-2011-categorisation-adult-males.doc>

⁴³ <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-41-2011-categorisation-young-adult-males>

representations to the prison in relation to categorisation matters. Civil legal aid for judicial review may also be available, subject to means and merits.

29. PSI 02/2012 sets out a robust set of procedures to ensure that prisoner complaints are dealt with effectively, including those made by prisoners with mental health issues and/or learning disabilities (or other protected characteristics).
30. There are two stages to the internal prisoner complaints process: (i) the initial complaint stage; and (ii) the appeal stage. The response timings for initial complaints reflect the urgency of the complaint, prioritising the most critical, but subject to an overarching maximum time period of 5 days. If a prisoner is dissatisfied with the response to their complaint they may submit an appeal which should normally be made within 7 calendar days of having received the initial response, unless there are exceptional reasons why this would have been difficult or impossible. Appeals are answered by someone at a higher level in the management structure than the person who provided the response to the original complaint. Under the complaints procedure, a prisoner who has a complaint about a particularly serious or sensitive matter, for example where it would be reasonable for the prisoner to feel reticent about discussing it with wing staff, such as a victimisation case, has the right to make a complaint under confidential access (in a sealed envelope) to the governing governor, the Deputy Director of Custody or the local Independent Monitoring Board (IMB). At any point during the complaint process a prisoner can make an application to speak to a member of the local IMB. Prisoners are provided with a written response to their complaint.
31. Prisons are required to make sure that information is available in formats that all prisoners can understand. This in particular means that prisoners who cannot read English either because of a learning disability, has difficulty reading or writing for any reason or because their first language is not English, will have information given to them in another format. In many prisons this will mean that induction information (for example) is provided on a video as well as in writing. We therefore consider that reasonable adjustments are made in accordance with relevant PSIs for prisoners with mental health issues and/or learning disabilities (see paragraphs 40-43 and section 9.2 of Annex F).
32. The complaints system was recently audited by the National Offender Management Service (NOMS) with the aim of assessing the adequacy, effectiveness and reliability of controls operating over prisoner complaints, although not whether the system catered adequately for different prisoners. The report was finalised after the publication of the consultation paper in May. The audit found that that the system is generally operating as set out in PSI 02/2012 (Prisoner complaints). A number of recommendations were made, including around provision of information in other languages and that appeals should be heard by an individual independent of the original respondent, which were accepted in full by NOMS. The report found that prisoner induction was the primary method for informing prisoners about the complaints process, and that where induction was not used, alternative processes were in place to ensure prisoners were properly informed. We are therefore confident that the complaints system is being followed in establishments.
33. NOMS data on the types of matter dealt with through the prisoner complaints system also show that the system is not used solely for what might be considered lower level issues, such as visits or food, but also for more serious matters such as transfers and home detention curfew refusal appeals.

34. NOMS will develop a communications strategy to reinforce compliance with relevant PSIs in all establishments, and highlight changes to the criminal legal aid scheme, to ensure that staff and prisoners are fully aware of the changes being made and proposed alternative means of redress. This will include a letter from the Chief Executive of NOMS, to all Governors. In addition, the Youth Justice Board will write to all STCs to reinforce the same message, and Ministry of Justice will liaise with the Department for Education to ensure SCHs receive the same message. The messages will also reinforce the need to make reasonable adjustments for prisoners with protected characteristics including those with mental health issues and/or learning disabilities. NOMS will also ensure that changes to criminal legal aid for prison law are communicated to the prison population and that the requirements outlined in PSIs in relation to the complaints system are highlighted in detail.
35. NOMS will formally approach HMIP to include a 'complaints' thematic inspection towards the end of 2014/15 or early in their 2015/16 programme of work to allow time for the changes to criminal legal aid for prison law and any impact on the complaints system to take effect. This will test the complaints system after the changes to criminal legal aid have taken effect and give an independent view on their impact. NOMS will continue to monitor the number of complaints submitted centrally to assess the impact on services. The effectiveness of the complaints process will continue to be assessed on an ongoing basis in the future.
36. Prisoners also have the opportunity to refer a complaint to the PPO if they are not content with the outcome of the complaints process. We consider that the complaints system, as well as the prison discipline procedures and probation complaints systems, are sufficient to ensure that prisoners grievances are properly considered. In addition, civil legal aid for judicial review may be available, subject to merits and means.
37. We recognise concerns raised by respondents in relation to a potential increase in caseload for the PPO and possible increased costs as a consequence. However:
 - We consider the actions that will be taken by NOMS to reinforce compliance with PSI 02/2012 (Prisoner complaints) in all establishments should minimise the risk of a significant increase in caseload.
 - The PPO also continues to work with NOMS to reduce its complaints workload, for example by providing information to reduce the number of ineligible complaints (see the PPO's latest annual report⁴⁴). We consider that these actions and ongoing work will contribute to improved timeliness of PPO investigations. It should be noted that the majority of recommendations made by the PPO are implemented by establishments, despite these recommendations not being binding.
38. We consider the actions to be taken by NOMS in reinforcing compliance with relevant PSIs, including in relation to the complaints process and those regarding prisoners with protected characteristics (see paragraph 34), will reduce the likelihood of complaints not being satisfactorily resolved within establishments and so necessitate referral to the PPO. NOMS have also committed to approaching HMIP in relation to a 'complaints' thematic inspection that would highlight any unforeseen impacts.

⁴⁴ <http://www.ppo.gov.uk/annual-reports.html>

39. In relation to possible cost implications, informal feedback from NOMS suggests that it costs significantly less than the standard fixed fee for prison law legal aid advice and assistance to resolve a complaint using the prison complaints system.

Prisoners with mental health issues and/or learning disabilities

40. The Government considers that current processes are sufficient to allow those with mental health issues and/or learning disabilities to use the prisoner complaints mechanism, the disciplinary process or the probation complaints process or, if necessary, the PPO. PSIs 02/2012 (Prisoner complaints), PSI 75/2011 (Residential services), PSI 32/2011 (Ensuring equality) and 08/2012 (Care and management of young people) provide more information on the processes for ensuring these prisoners are able to participate effectively in terms of the complaints system and discipline procedures. Probation complaints systems vary between probation trusts (see individual trusts' websites for more information). Those prisoners with literacy difficulties should ask a friend (or prison 'listener') or relative to help when making a complaint to the PPO⁴⁵.
41. If an individual is identified (whether by a member of staff or by self-identification) as having mental health issues or learning disabilities, NOMS will apply those policies outlined in relevant PSIs and consider whether there are any other reasonable adjustments that should be made.
42. HMIP's annual report contains a comparison of survey scores of prisoners who consider themselves to have a disability and those who do not; these data include prisoners with a physical disability as well as those with mental health issues and/or learning disabilities. HMIP's 2011-12 Annual Report (latest available) indicates the following:
- Q. Is it easy to get a complaints form?**
- Disabled – 82% Yes
Non-disabled – 83% Yes
- Q. Have you made a complaint?**
- Disabled – 55% Yes
Non-disabled – 46% Yes
- Q. Is there a member of staff in this prison that you can turn to for help if you have a problem?**
- Disabled – 76% Yes
Non-disabled – 75% Yes
43. We acknowledge that HMIP's response to the consultation contained data indicating that prisoners with mental health issues and/or learning disabilities (as well as prisoners generally) did not have confidence in the complaints system and that outcomes were poor. However, the information from the 2011-12 Annual Report referred to above suggests a different picture in terms of accessibility, willingness to use the system and the potential for reasonable adjustments to be made when comparing disabled and non-disabled prisoners. Although respondents had concerns

⁴⁵ <http://www.ppo.gov.uk/complaints-faqs.html#4>

around potential impacts on these prisoners we consider the processes set out in PSI 02/2012 (Prisoner complaints), PSI 32/2011 (Ensuring equality) and 75/2011 (Residential services) are sufficient to ensure they are able to make effective use of the complaints system and access the other alternative means of redress (see section 9.2 of Annex F).

Article 5.4 ECHR

44. Some Parole Board hearings do not engage Article 5.4 of the ECHR, in particular those for certain determinate sentence prisoners. However, the Government considers that criminal legal aid should remain available for advice and assistance in relation to all proceedings before the Parole Board where the Parole Board has the power to direct release (see also paragraphs 24 and 25).
45. There are hearings before the Parole Board where the Parole Board has the power to direct release and, if it decides not to direct release, it may make a recommendation to the Secretary of State regarding categorisation. As the Parole Board does have the power to direct release at these hearings we will continue to fund these cases. However, hearings before the Parole Board that consider solely categorisation or licence conditions would not be funded as there is no consideration of whether to direct release.

Sentence calculation

46. The Government has also considered again the issue of sentence calculation matters – that is, how prison staff apply the relevant release provisions in the legislation to a prisoner's sentence or sentences in order to calculate their correct release date. The amendment to the scope criteria outlined above would have the effect of removing both sentence planning and sentence calculation from scope as they are not matters for the Parole Board. The consultation paper stated that sentence planning matters would continue to be funded but the modified scope criteria will mean they are not in future.
47. However, the Government accepts that sentence calculation, where it is disputed, has a direct and immediate impact on the date of release from prison and should for that reason remain in scope. Legal aid should only be available, though, once alternative means of redress (such as the prisoner complaints system and the sentence calculation helpline) have been exhausted. As a result, criminal legal aid will remain available for advice and assistance in relation to sentence calculation in these circumstances.

Conclusion

48. Having considered and given due weight to the responses to the consultation the Government has decided to proceed with the proposal to limit the scope of criminal legal aid for prison law cases as proposed in the consultation document with the exception that criminal legal aid will remain available for:
 - all proceedings before the Parole Board, where the Parole Board is considering whether to direct release; and,
 - advice and assistance in relation to sentence calculation where the date of release is disputed.
49. It is intended that these changes will be introduced by way of amendments to secondary legislation and contract amendments in late 2013.

Imposing a financial eligibility threshold in the Crown Court

50. The consultation paper proposed the introduction of a financial eligibility threshold, whereby any defendant with a disposable household income of £37,500 or more would be ineligible for legal aid in the Crown Court. This would be subject to review on hardship grounds for those who exceed that threshold but demonstrate that they cannot in fact afford to pay for their own defence. The consultation document asked:

Question 2: Do you agree with the proposal to introduce a financial eligibility threshold on applications for legal aid to the Crown Court? Please give reasons.

Question 3: Do you agree that the proposed threshold is set at an appropriate level? Please give reasons

Key issues raised

51. There was some support for this proposal in principle (for example the Law Society stated that it agreed with the principle that the taxpayer should not ultimately pay for wealthy defendants), although a number of concerns were also raised. It was suggested by respondents that the proposed threshold is at too low a level to enable private defence costs to be affordable in the majority of Crown Court cases, and so should be set at a higher level. It was also argued that the proposal to use annual disposable household (i.e. defendant's plus partner's) income would deny criminal legal aid to households of relatively modest means, as well as unfairly penalise partners, and therefore again that the threshold should be set at a higher level. Respondents also commented that the proposed level of household expenditure to be used in the calculation of disposable income was too low.
52. Some respondents argued that the introduction of the threshold would increase the number of defendants representing themselves including vulnerable defendants, whether through necessity or choice, with the consequent delays and inefficiency this would cause in the criminal justice system. It was argued that defendants would be denied representation and, if they could not afford to pay privately and therefore could not access representation, this would breach their right to a fair trial under Article 6 of the ECHR.
53. The issue of defendants being able to cross-examine vulnerable witnesses in person was raised by a number of respondents. It was also argued that defendants in person would 'play' the system leading to more collapsed trials. The issue of vulnerable defendants having to act in person was also raised. The comments of Ward LJ in *Wright v. Wright* ([2013] EWCA Civ 234) regarding litigants in person in civil cases were referred to by a number of respondents.
54. Concerns were raised by a number of respondents about the timeliness with which the LAA makes decisions on financial eligibility. It was argued by many that this proposal would build delay and inefficiency into the criminal justice system. Concern was raised in particular about the need for sufficient time to be available following that decision for providers to be instructed and begin work on the case before proceedings commence. It was also suggested that if delays do occur this would have significant knock-on effects for the trial process (and so transfer costs to Her Majesty's Courts and Tribunals Service (HMCTS)) and that as a result the defendant's Article 6 ECHR rights may be breached.

55. Many respondents questioned whether private rates are the same as, or similar to, legal aid rates. It was suggested that the proposal to reimburse privately paying defendants at legal aid rates following acquittal represents an unfair financial penalty considering, in respondents' view, the practical impossibility of securing private representation at legal aid rates. The primary objection was that it is unfair to exclude a person from legal aid, and then for them to incur significant private costs which they cannot recoup in full (or at least up to a reasonable amount) in the event that either they are acquitted or the Crown Prosecution Service (CPS) discontinues a case. It was suggested that reimbursement should be at reasonable, if not full, private rates.
56. Amendments to the Crown Court Means Testing (CCMT) scheme were implemented on 1 April and on 30 July (see paragraph 86) and respondents argued that it was not appropriate for further changes to be made to financial eligibility arrangements in the Crown Court without a better understanding of how these changes have bedded in.
57. The Government has also committed to undertaking a consultation in the autumn on additional changes to legal aid eligibility criteria in the light of the wider roll-out of Universal Credit. Respondents were concerned that the proposed changes on Crown Court eligibility would be implemented shortly before any decisions in relation to the proposals in that consultation. The Government response to the Universal Credit consultation, which will consider financial eligibility arrangements and the basis on which financial eligibility is calculated, is expected to be published in early 2014.
58. It was suggested that assets restrained under the Proceeds of Crime Act 2002 should be released to pay for wealthy defendants' reasonable private defence costs.

Government response

59. The proposal to introduce a financial eligibility threshold of £37,500 disposable household income 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.
60. As noted above, a key concern expressed by respondents was that the threshold is set at too low a level and that private costs would not be affordable for defendants ineligible as a result of the threshold, with a consequent significant impact on middle income earners. We have undertaken analysis of all Defence Costs Orders (DCOs) processed in Manchester (one of the 2 processing centres in England and Wales) over a 6 month period up to 23 March 2013. These are the most recent available data, as from October 2012 legal costs in the Crown Court could no longer be recovered under a DCO from Central Funds (although costs could still be recovered under DCOs granted prior to the changes which were still being processed after October 2012). The analysis provides further information on likely costs that defendants affected by this proposal may incur: DCOs were reimbursed from central funds at reasonable private rates – this is therefore the best available information we have as to private rates recently available to defendants. The data below give average DCO values for each offence group A-K⁴⁶ (see Table B1 for definitions).

⁴⁶ Please note that average private costs derived from DCOs are based on small numbers with a high degree of variation and as such must be treated with caution.

Table B1: average DCO values and number of DCOs in the sample, plus average legal aid rates, for each offence group A to K.

Offence group	Average DCO £ value (rounded to nearest £000)	Number of DCOs in sample
A – Homicide and related grave offences	176	3
B – Offences involving serious violence or damage, or serious drug offences	13	26
C – Lesser offences involving violence or damage and less serious drugs offences	9	44
D – Sexual offences and offences against children	10	19
E – Burglary	12	3
F – Dishonesty under £30k	16	23
G – Dishonesty £30-100k	0	0
H – Miscellaneous other offences ⁴⁷	15	38
I – Offences against public justice and similar offences	14	7
J – Serious sexual offences	27	11
K – Dishonesty above £100k (including 2 Very High Cost Cases)	603	4

61. The data show that in the majority of cases, across the majority of offence categories, average private defence costs should be affordable to a defendant excluded from legal aid by the proposed threshold. The average value of a DCO in relation to offence categories B – I (160 cases out of a total sample of 178), which includes some of the most common offences in the Crown Court (such as those relating to drugs, violence and less serious dishonesty) is between £9,000 and £16,000. The average value of a DCO in the 11 cases in category J (serious sexual offences) is higher (£27,000), but is still below the disposable income threshold we proposed and therefore affordable. There were no cases in offence group G in the sample so we are not able to draw any conclusions in relation to that category. A hardship review, with the potential for legal aid to be granted, would remain available for any cases that are not in fact affordable.
62. The data show that offences in offence groups A (homicide and related grave offences) and K (dishonesty above £100,000) are, on average, considerably more expensive. This is not unexpected and this kind of variance of cost in complex cases was expressly acknowledged in the consultation paper. However, also as expected, there were fewer cases in these categories (7 out of a total sample of 178) and these are precisely the kinds of cases in which it is envisaged that a defendant with a disposable income above the threshold could make an application for a hardship review on the basis that the estimated defence costs in their case are beyond their means.
63. The data have indicated that there is a difference between legal aid rates and private rates in all offence groups and that the rates reimbursed under a DCO were higher

⁴⁷ A comprehensive list can be found in Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013. Please see: <http://www.legislation.gov.uk/uksi/2013/435/contents/made>

than legal aid rates. However, we consider the data also demonstrate that private costs will be affordable for the majority of offence groups and where private costs are unaffordable the hardship review will ensure representation is provided.

64. In arguing that the threshold would mean that private representation is unaffordable, a number of respondents did not address the inter-relationship between the proposed threshold and the hardship review. Any defendant (in whatever category their offence falls) would be able to make such an application and, if successful, would be granted legal aid. The potential grant of legal aid following a hardship review also secures the compatibility of the proposal with Article 6 ECHR.
65. Paragraph 3.34 of the previous consultation set out how the hardship review would work. The defendant would be required to supply detailed financial information which showed that they could not afford to pay the estimated full costs of their defence privately. This review would have two stages. At the first, the estimated costs of the defendant's particular case and any additional allowable expenditure (for example secured or unsecured loans, medical costs, rent arrears, student loans, certain pension payments and credit card payments) would be subtracted from the defendant's disposable household income. If the defendant's remaining disposable household income is then below £37,500 they would be eligible for legal aid, but subject to a contribution in accordance with the CCMT scheme. At the second stage, the estimated private costs would be disregarded (as they are no longer relevant) and the defendant's liability to a contribution is based, in accordance with the CCMT Scheme, on an assessment of their disposable household income and any additional allowable expenditure.
66. Eligibility would be calculated on the basis of disposable income from which some living costs and specified allowable outgoings (tax and National Insurance, council tax, housing and childcare costs, and any maintenance costs) have already been deducted – it would not be based on *gross* household income as some respondents seemed to suggest. This is in line with current financial eligibility rules elsewhere in the legal aid scheme. It should also be noted that the living allowance is weighted according to family circumstances⁴⁸.
67. Some respondents argued that it was inappropriate to aggregate the income of a defendant and their partner in assessing eligibility as was proposed and is currently the case. Aggregating the means of the applicant and their partner is the norm, both in the legal aid context and in relation to means-tested benefits in England and Wales. Aggregation is a way of ensuring that all of the resources available to a person are assessed; household expenses and bank accounts are often shared and it is reasonable to operate on the basis that a defendant will have access to the *household* income to pay for their defence. We must also guard against a situation arising whereby a defendant with a partner with considerable means is provided with criminal legal aid.
68. The Government has considered respondents' concerns regarding the potential delay that may be caused by the introduction of the threshold, in terms of LAA administration and changes in defendants' circumstances or actual private costs. However, we consider that current processes are sufficient to ensure that delay does not occur.

⁴⁸ For more information see the Criminal Legal Aid Manual pp.92-97: <http://www.justice.gov.uk/downloads/legal-aid/eligibility/criminal-legal-aid-manual.pdf>

69. Current administrative processes are adequate to ensure that sufficient time is available following a decision regarding eligibility for private representation to be sourced before proceedings commence, although this is dependent on applicants submitting applications in a timely way in accordance with the relevant regulations and LAA rules.
70. Current performance data (2012/13) indicate that 93% of first time applications in magistrates' courts and Crown Court cases (both interests of justice and means tests) are dealt with by HMCTS within 2 days of receipt of a fully completed application, and 99% within 6 days of receipt. 100% of fully completed and evidenced complex and hardship applications are dealt with by the LAA National Courts Team within 2 days of receipt (both magistrates' court and Crown Court). We believe this demonstrates the efficiency and adequacy of current administrative processes. These turnaround times are dependent on fully completed forms; delays often occur because forms are not completed properly rather than as a result of LAA administrative processes.
71. Although neither the administrative process in the current magistrates court means testing or CCMT schemes are exactly analogous to those that will be required for the Crown Court eligibility threshold, we consider that current performance in these areas is indicative of the processes that we will put in place and their likely efficiency.
72. There may be situations where an individual has applied for legal aid, that application (including any hardship review applied for) has been refused because it is deemed that the individual can afford the costs of their own defence, and then during the course of the proceedings the individual's circumstances change. If, for example, the individual's financial circumstances change or the proceedings run longer than anticipated, resulting in private costs being unaffordable, mechanisms will be in place to enable the individual to obtain legal aid. Similarly where the circumstances of an individual who did not initially apply for legal aid subsequently change such that they can no longer afford to fund their own defence, they will be able to make a legal aid application in the light of the change.
73. Should the application be successful any private provider acting for the individual who also holds a legal aid contract would be able to continue acting for the individual, albeit at legal aid rates, thus providing continuity for the client and minimising disruption for the court. If the provider does not hold a contract there is an individual case contracting mechanism currently in place for exceptional circumstances where a defendant is represented by a provider who does not hold a Crime Contract, but it is in the interests of justice and public funds to enable the provider to obtain legal aid to represent that defendant. This would cater for these situations where a defendant funds him or herself privately at the start of proceedings, but cannot afford to do so throughout the case (i.e. is initially ineligible then becomes eligible). The risks of lack of continuity for the defendant and delays in court are therefore minimised.
74. The Government has also considered respondents' concerns in relation to a possible increase in the number of defendants representing themselves and the potential for delay and inefficiency this may introduce. However, we do not consider it likely that the introduction of the threshold will result in an increase in defendants acting in person for the reasons set out below.
75. There are two potential drivers for an increase in defendants acting in person – lack of affordability (necessity) and a perception by defendants that representing themselves would benefit their case (choice). As set out above, average private defence costs

should be affordable for those whose disposable income is above the proposed threshold in most cases. Where this is not the case, there will exist a hardship review to ensure that representation is available. We therefore consider that affordability should not be a driver of an increase in defendants representing themselves. Any increase in defendants representing themselves as a result of a perception by defendants that doing so would benefit their case would be driven by behavioural response as is currently the case, but we are not able to quantify this risk. We do not consider the introduction of the threshold would necessarily result in an increase in defendants acting in person. These two points regarding necessity and choice would apply equally to vulnerable defendants.

76. For these reasons, we do not consider that this proposal will lead to an increase in defendants cross-examining vulnerable witnesses in person. In any event, special measures are available to support witnesses to give evidence in court, which may include the use of screens around the witness box or giving evidence via livelink. The Ministry of Justice is currently reviewing how to reduce distress to victims during cross-examination and will report on this by the end of the year. In addition, the court is able to appoint an advocate to cross-examine vulnerable witnesses in certain cases where the defendant is representing themselves. These measures would continue to apply.
77. We will consider any impacts the introduction of a financial eligibility threshold may have in terms of delay in court, including via any informal feedback supplied by the judiciary. Should any impacts be identified we would examine ways in which the issues raised could be mitigated. This consideration of impacts will ensure that any delays resulting from an increase in defendants acting in person can be assessed.
78. The Government has already acted in response to concerns raised about those with substantial restrained assets receiving free legal aid. The Government brought forward proposals which were enacted by Parliament in the Crime and Courts Act 2013. That Act contains powers to amend the Proceeds of Crime Act 2002 to recoup legal aid contributions from restrained assets in certain circumstances. The detail of how this will be implemented remains under consideration.
79. A number of respondents were concerned that the proposal to reimburse acquitted defendants at legal aid rates rather than full or reasonable private rates would represent an unfair financial penalty. However, for the reasons set out below we consider it is right to reimburse acquitted defendants at legal aid rates.
80. Since 1 October 2012, defendants in the Crown Court have not been able to claim their private legal costs from Central Funds on acquittal. The reason for this is that at present, every defendant has access to legal aid and so the state will not reimburse a choice to pay privately. In the magistrates' courts, those who are not entitled to legal aid because their income is too high are entitled to reimbursement on acquittal at legal aid rather than private rates. There were a number of reasons for changing the rate of reimbursement from private rates to legal aid rates, including that:
 - it is not considered right for the taxpayer to bear significantly greater costs for a privately-paying defendant or appellant than for one who is legally aided;
 - if an individual chooses a very expensive private lawyer, we do not believe that the taxpayer should indemnify them simply because the individual was willing to pay more;

- money spent compensating successful defendants at private rates is money that would not be available to provide publicly funded legal services to those most in need of them; and
 - capping recoverable legal costs from central funds at legal aid rates helps to ensure greater parity between legal aid payments and payments to acquitted defendants from Central Funds. We think that this is fair to the individual and fair to the taxpayer.
81. Our proposal in the consultation was to reintroduce reimbursement (at legal aid rates) to acquitted defendants who apply for, but are no longer entitled, to legal aid in the Crown Court as a result of the threshold. We consider that even though this will cost the public purse it is a fair change to make, given that defendants excluded from legal aid by the threshold will need to pay privately. Ineligible Crown Court defendants will therefore be treated on the same basis as those in the magistrates' courts.
82. However, we do not consider that it is right or necessary to go further and reimburse at full or reasonable private rates for the reasons set out above. The changes to Central Funds have been approved by Parliament in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
83. Given the continuing challenging fiscal environment, a key objective of the Transforming Legal Aid programme is to deliver savings and we must also be mindful of the risk of reducing the savings expected from the reforms to Central Funds implemented in October 2012.
84. The CCMT scheme was further improved in 2013 by strengthening possible sanctions, re-assessment and the collection regime (see below). The introduction of a financial eligibility threshold in the Crown Court would not affect the current contributions regime, which would remain in place for those defendants eligible for legal aid but subject to a contribution. In light of this, we do not consider it necessary to wait for an assessment of how the CCMT changes are operating before implementing the £37,500 threshold.
85. The Government has considered alternative proposals submitted by respondents, in particular the Bar Council and the Criminal Bar Association. However, for the reasons set out below we do not consider these to be satisfactory alternatives.
86. The Bar Council suggested that another way of making savings would be to subject the CCMT scheme to more rigorous monitoring and enforcement with a possible sanction of revocation of legal aid mid-proceedings. However, enforcement is already rigorous and revocation of legal aid mid-proceedings could result in inefficiencies through changes in representation. In addition, changes to the CCMT scheme were implemented in April 2013, and the scheme has since been further strengthened by the implementation of the Motor Vehicle Order provisions on 30 July. This package of changes covers:
- The provision of evidence and sanctions for the defendant's failure to comply with requests for evidence;
 - Once a liability to an Income Contribution Order is established, considering the range of triggers which may lead to a re-assessment of that liability; and
 - Provisions concerning the collection and enforcement of payments under a contribution order, including implementation of motor vehicle order regulations.

87. The Criminal Bar Association (CBA) made two suggestions. Firstly that there would be a presumption that legal aid would be provided if private costs are likely to be more than £5,000, subject to a means assessment and potential contribution. Secondly it was suggested that legal aid should be provided up to the Plea and Case Management Hearing.
88. The first proposal from the CBA would not have significant administrative costs but would have a limited impact in terms of reducing the number of wealthy defendants, who are in a position to pay privately for their defence, who would receive legal aid in the Crown Court. The policy objective of restricting the provision of legal aid to such individuals would therefore not be fully achieved. The second would introduce potential delay as ineligible defendants would have a limited amount of time to instruct privately, and there would be a shortened period in which applicants could provide supporting evidence (if required) for applications resulting in potential delay in processing. Both of these proposals would also incur extra cost to the legal aid fund at a time when the Government is aiming to reduce its spend on legal aid.

Conclusion

89. Having considered and given due weight to the responses to the consultation, the Government has decided to proceed with the proposal as set out in the consultation document and introduce a financial eligibility threshold whereby any defendant with a disposable household income of £37,500 or more would be ineligible for legal aid in the Crown Court, subject to review on hardship grounds for those who exceed that threshold but demonstrate that they cannot in fact afford to pay for their own defence.
90. It is intended that this will be implemented through amendments to secondary legislation in early 2014.

Introducing a residence test

91. The consultation paper proposed requiring applicants for civil legal aid to satisfy a residence test for civil legal aid to be available under the England and Wales scheme. The test as proposed would comprise two limbs:
- The individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time the application for civil legal aid was made; and
 - The individual would need to 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.
92. We proposed that the residence test would not apply to two types of individual: serving members of Her Majesty's armed forces and their immediate families, and asylum seekers. The consultation paper asked:

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

Key issues raised during consultation

93. The majority of those who commented (and in particular, the majority of civil legal aid practitioners) opposed the Government's proposal. Respondents were particularly

concerned that the proposal would unfairly impinge upon access to courts and would have a significant impact on vulnerable groups. However, a number of respondents welcomed the proposal and agreed that it was reasonable to require an individual to have a strong connection to the UK in order to receive taxpayer-funded legal aid. Some responses suggested that a longer period of lawful residence should be considered.

94. Respondents who opposed the test argued that the scope of the civil legal aid scheme was only recently significantly restricted through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), and that the residence test would effectively remove certain categories of law from the scope of that civil legal aid scheme. Particular concerns were raised about the impact on vulnerable groups of people and certain types of case, including (but not limited to) victims of trafficking, victims of domestic violence, victims of forced marriage, protection of children cases, children leaving care, homeless people, those with mental health and mental capacity issues, and cases which do not currently attract a means or merits test under the civil legal aid scheme. Many responses argued that further exceptions to the test should be made for these groups and cases. Some respondents queried the compatibility between this proposal and broader Government policies and strategies to support these groups. Some responses queried the compatibility of the test with Government policy to promote the UK as a centre of expertise for litigation.
95. A particular concern was raised by respondents regarding children under 12 months old who would be unable to meet the second limb of the proposed test. Other responses argued that the test would prevent individuals who are not lawfully resident from challenging and seeking redress for suffering caused through actions of the British state. Some responses argued that the proposed test would conflict with proposed tighter time limits for bringing judicial review cases. Some responses argued that the test would prevent people who reside overseas from accessing legal advice and representation at inquests into the death of relatives in the UK.
96. A number of responses queried the statement at paragraph 3.54 of the consultation paper that the existing power in section 10 of LASPO for funding to be provided in exceptional circumstances, where a case is excluded from the scope of the civil legal aid scheme, would enable funding to be provided to persons excluded by the test. Respondents also noted the differing application process and requirements for exceptional funding and therefore argued that the scheme would not be adequate in urgent cases.
97. Many respondents welcomed the proposed exception for asylum seekers. However, some responses raised concerns over the position of failed asylum seekers, whereby under the proposal, these individuals would not benefit from the proposed exception unless they made a fresh claim for asylum. Respondents argued that the proposed residence test would result in some people being unable to obtain legal aid to assist with preparing a fresh claim, and unable to access legal aid to judicially review the decision of the Home Office to reject their further submissions as amounting to a fresh claim. Respondents also raised concerns about the proposal that successful asylum seekers would have to wait a further 12 months from the date their claim was successful before they could satisfy the second limb of the proposed residence test, arguing that this requirement was unfair.
98. Many responses welcomed the proposed exception for serving members of Her Majesty's armed forces and their immediate families. Some responses suggested that

further exceptions should be made for military veterans and other persons who are normally lawfully resident but are working abroad.

99. Respondents queried the evidence for the Government's view that the proposal would result in an increase in public confidence in the legal aid scheme, arguing that without evidence to support this statement, the disadvantages that would arise as a result of the test could not be justified as a proportionate means of addressing a problem. Respondents have argued that the inability to estimate the volume of cases which would be affected by the proposed test (due to the fact that the LAA does not currently record the residency status of a client) does not allow for a sufficiently robust analysis of the impact of the proposal.
100. Respondents queried whether the test would result in savings to the legal aid scheme. They suggested that other costs would result if the test were implemented as proposed through increased numbers of litigants in person (many of whom may not speak English). They suggested that the LAA would face increased administration costs in establishing that the test is met and dealing with increased numbers of exceptional funding applications (and potential litigation of exceptional funding refusals). They also suggested that the state would face increased costs as a result of immigrants remaining in detention for longer than they would otherwise do if they were able to access civil legal aid to challenge their detention.
101. As part of the concerns about the potential increase in the numbers of litigants in person, some respondents raised concerns regarding the position of individuals who would not meet the test and who lack capacity (under the rules of court) to represent themselves. Some responses suggested that a separate fund should be set up to support litigants in person.
102. Many respondents argued that the Government had not properly considered the impact on vulnerable groups of people, in particular women, children and black and minority ethnic groups. They argued that insufficient consideration had been given to the nature and severity of the impacts for those with protected characteristics of gender, ethnicity and age. They also argued that no consideration was given to the Government's positive duties to promote equality of opportunity in respect of this proposal.
103. Many respondents queried the compatibility of the proposal with the Government's domestic, EU and international legal obligations. In particular, respondents argued that the proposal would amount to unlawful discrimination on the basis of nationality and would be contrary to EU law, ECHR law and common law. Respondents also argued that the Government's intention to implement the test through secondary legislation would be unlawful, as LASPO would not provide the powers to implement the test in that way.
104. Many responses queried paragraph 3.53 of the consultation paper which stated that the Government would continue to provide legal aid where necessary to comply with obligations under EU and international law. Respondents argued that insufficient detail was provided on how this would be achieved and raised particular concerns about vulnerable cases (such as persons seeking to recover abducted children through the Hague Convention 1980) and the extra delay that would be created if such cases were required to apply for exceptional funding.
105. Other responses queried the lawfulness of the proposals with respect to specific international obligations, such as the United Nations Convention on the Rights of the

Child (UNCRC), the EU Directive on combating human trafficking (2011/36/EU) and the Council of Europe Convention on Action against Trafficking in Human Beings and the Refugee Convention.

106. Respondents argued that the proposal would be incompatible with the Equality Act 2010 as it would indirectly discriminate on the grounds of race/nationality and gender.
107. Finally, a large number of responses raised concerns around the practical issues which might arise in applying the test.
108. A key practical concern raised by many respondents was the lack of a clear definition of 'lawful residence' and the lack of detail provided in the consultation paper on the forms of evidence that claimants would need to provide to satisfy the test. Responses argued that lawful residence is not a simple matter and that many providers would lack the expertise in immigration matters to carry out the proposed test. Some argued that, in order to mitigate impacts and/or create a simpler test, the requirement for previous residence should be shortened to six or three months, that the test should be based on lawful presence, not lawful residence, or that possession of a national insurance number should be sufficient to meet the test.
109. Some responses queried the requirement for 12 months of previous residence to be continuous and the effect that short absences would have on eligibility for civil legal aid under the test.
110. Responses also raised concerns about the proposal that providers should carry out the test and the financial burden that this would place on them. Some argued that responsibility for carrying out the test should sit with the LAA, not providers, or that a residence test should apply only where the case suggests it is appropriate.
111. A number of responses argued that the test would have the effect of excluding those who are genuinely lawfully resident but are unable to provide the necessary evidence. Particular concerns were raised regarding the difficulty that certain vulnerable groups might face in providing evidence, such as homeless people, victims of domestic violence and those with mental health problems. Some argued that signed declarations certifying that an individual was nevertheless lawfully resident should be permitted in circumstances where evidence was not available.
112. Respondents queried the extra delay and complexity that might arise from carrying out the test and the difficulties this could raise for providers dealing with urgent cases. Some respondents queried what would happen in the event that they carried out the test but subsequently the claimant was shown to be not lawfully resident.

Government response

113. The Government has carefully considered the responses to the consultation. We continue to believe that individuals should in principle have a strong connection to the UK in order to benefit from the civil legal aid scheme. As with any other public service, legal aid must be fair to the people who use it but also fair for the taxpayer who pays for it. The Government believes that those who do not have a strong connection should not be prioritised for public funding in the same way as those who do have a strong connection. We must ensure that limited resource is targeted appropriately. This is always an important responsibility of Government but even more so at a time of financial constraint.

114. We also believe that the 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 do not consider that any of the alternative suggestions put forward in responses (such as a requirement for a shorter period of lawful residence or a test based on lawful presence) would demonstrate a sufficiently strong connection to the UK. A period of 12 months of previous lawful residence demonstrates a meaningful connection with the UK. A test such as this inevitably involves making a choice on how a strong connection is best demonstrated. We consider that the test proposed strikes the correct, justified and proportionate balance by focusing on past and current connection to the UK.
115. It is important to note that the residence test would be introduced through an amendment to the scope of the civil legal aid scheme as set out in Schedule 1 to LASPO. Therefore, anybody excluded from civil legal aid as a result of the residence test would be entitled to apply for exceptional funding under the power set out in section 10 of LASPO (including applications for services described in Part 1 of Schedule 1 to LASPO from which the individual would be excluded as a result of the residence test). This will ensure that civil legal aid will continue to be provided (subject to merits and means testing) where failure to do so would breach the applicant's rights to legal aid under the ECHR or EU law (or, in the light of the risk of such a breach, it is appropriate to provide legal aid).
116. We do not accept arguments that the proposal would amount to unlawful discrimination. We believe that the policy decision to apply the residence test is justified and proportionate. In addition, anyone excluded by the residence test would be entitled to apply for exceptional funding. Neither do we accept arguments that the test would result in the Government failing to meet its legal obligations; as set out in the consultation paper, we would ensure that legal aid would continue to be available where necessary to comply with our obligations under EU or international law set out in Schedule 1 to LASPO and the secondary legislation that will implement the residence test will ensure that this is the case. We therefore do not consider that the proposal would breach ECHR, EU or any international law obligation on the UK.
117. The Government does not accept arguments that the test could not be implemented through secondary legislation. We consider that the necessary powers are contained within LASPO.
118. We recognised in the consultation paper that in certain circumstances it would be appropriate to provide for specific exceptions to the residence test. For example, we proposed an exception for asylum seekers, because of the particular vulnerability of this group. As set out in the consultation paper, by asylum seeker we mean any person claiming rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO. Such a person would continue to be able to get legal aid to help with making their claim for asylum, including preparing and submitting a fresh claim. Where the Home Office decides that their further submissions do not amount to a fresh claim, legal aid would continue to be available in respect of a judicial review of that decision (subject to means and merits).
119. We have considered concerns raised by respondents about requiring an individual who is successful in their asylum claim to have to wait a further 12 months to comply with the residence test for any new application for civil legal aid. In the light of these concerns, we therefore intend that the continuous 12 month period of lawful residence required under the second limb of the test should, in the case of an asylum seeker who

is successful in their asylum claim, begin from the date they submitted their asylum claim, rather than the date when that claim for asylum is accepted. However, as previously proposed, where an asylum seeker has been unsuccessful in their asylum claim and their appeal rights had been rejected, they would no longer benefit from the asylum seeker exception to the residence test.

120. We also proposed an exception for armed forces personnel because these individuals are acting in accordance with their duties and in defence of the UK and therefore clearly maintain a strong connection to the UK, even when they are not resident in the UK.
121. We do not agree that the proposed exception for serving members of Her Majesty's armed forces should be extended to military veterans or anybody else who is working and living outside the UK. We recognise that military veterans may have a strong connection with the country, but they are no longer acting in accordance with their duties and will therefore have a choice over where they reside. Similarly, those working and living outside the UK have a choice over where they reside and therefore we do not think an exception for either group is justified. However, we note in respect of both groups that, as above, if they were excluded from civil legal aid as a result of the residence test, they would be entitled to apply for exceptional funding under section 10 of LASPO.
122. We do not agree that the proposal would prevent people (whether they reside overseas or in the UK) from receiving legal aid for representation at inquests into the death of relatives. Funding for representation at inquests, where required, is provided through the exceptional funding scheme under section 10 of LASPO and would therefore not be subject to the residence test. Initial legal help for an individual in relation to an inquest is provided under the general civil legal aid scheme and therefore would be subject to the residence test. However, as set out at paragraph 115 above, anybody excluded from legal advice in relation to an inquest as a result of the residence test would be entitled to apply for exceptional funding under section 10 of LASPO.
123. Some respondents had concerns that the residence test would lead to an increase in the numbers of litigants in person, and that this would create costs in other parts of the justice system. However, we do not accept that there is likely to be a significant increase in the number of litigants in person. In the event of any increase, we do not accept that it would lead to such additional costs in other parts of the system as to outweigh the justification for introducing the residence test. We have been monitoring the impact of litigants in person following the reforms introduced by LASPO and will continue to do so. We have established a Litigants in Person Programme Board which has this responsibility. The Board includes members from Her Majesty's Courts and Tribunals Service (HMCTS) and the Judicial Office. We have also improved signposting to alternative sources of advice for those excluded from receiving civil legal aid. As above, any individual excluded from civil legal aid as a result of the residence test (including those who lack capacity under the rules of court to represent themselves) would be entitled to apply for exceptional funding under section 10 of LASPO.
124. We therefore consider that the proposed residence test is lawful, justified and appropriate and in general should apply to the matters set out in Part 1 of Schedule 1 to LASPO. However, in the light of the responses we have decided that it would be appropriate to modify our approach in some areas.

125. Having carefully considered consultation responses, we have concluded that there are further limited circumstances where applicants for civil legal aid on certain matters of law (as set out in Schedule 1 to LASPO) would not be required to meet the residence test. The test will not apply to the following categories of case (which broadly relate to an individual's liberty, or where the individual is particularly vulnerable or where the case relates to the protection of children):
- Detention cases (paragraphs 5, 20, 25, 26 and 27 (and challenges to the lawfulness of detention by way of judicial review under paragraph 19) of Part 1 of Schedule 1 to LASPO)
 - Victims of trafficking (paragraph 32 of Part 1 of Schedule 1 to LASPO), victims of domestic violence and forced marriage (paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO);
 - Protection of children cases (paragraphs 1, 3⁴⁹, 9⁵⁰, 10, 15 and 23 of Part 1 of Schedule 1 to LASPO); and
 - Special Immigration Appeals Commission (paragraph 24 of Part 1 of Schedule 1 to LASPO).
126. We will also make limited exceptions for certain judicial review cases for individuals to continue to access legal aid to judicially review certifications by the Home Office under sections 94 and 96 of the Nationality, Immigration and Asylum Act 2002.
127. We also recognise concerns raised regarding the effect of the test on children under the age of 12 months. Our intention is that they would not need to 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. However, they would still need to meet the first limb of the proposed test; that is they would need to be lawfully resident at the time of application for civil legal aid.
128. In applying the residence test, our intention is that “lawfully resident” should bear its natural meaning. That is that the individual has a right to reside lawfully in the UK and is exercising that right, whether that be for work, study, settlement or any other reason. Further details on how this will be demonstrated for the purposes of the test will be described in secondary legislation and guidance as appropriate so that the requirements are clear and providers will be clear on what is required of them. We continue to believe it is reasonable to expect providers to carry out the test. It is our intention that the test will be objective and not overly onerous to administer. Where it is established that an individual who has passed the test was not, in fact, lawfully resident at the time of making their application for civil legal aid, then legal aid funding would cease. Providers would not face a further penalty or loss of funding in these situations, presuming they acted in accordance with their legal and contractual obligations. Providers would of course be required to adhere to their existing contractual, legal and professional duties when applying the test.
129. In applying the test, we also intend that “continuous” should bear its natural meaning, so that significant breaks in residence would not satisfy the “continuous” requirement.

⁴⁹ Exceptions to the residence test for cases under paragraph 3 of Part 1 of Schedule 1 to LASPO would only apply for cases where the abuse took place at a time when the individual was a child.

⁵⁰ Exceptions to the residence test for cases under paragraph 9 of Part 1 of Schedule 1 to LASPO would only apply to cases under the inherent jurisdiction of the High Court in relation to children.

However, 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.

130. We have considered whether, in exceptional circumstances, signed statements should be accepted where evidence cannot be provided, potentially due to the particular circumstances of the claimant. We acknowledge that many respondents have raised concerns about difficulties that certain groups might face in providing evidence. However, we are concerned that allowing for signed statements to be made would dilute the effectiveness of the test as a genuine means of preventing non-residents from obtaining civil legal aid. A system of signed statements (even in only exceptional circumstances) would result in increased administrative costs to the LAA. On balance, we therefore consider that signed statements should not be allowed. As set out above, the legislation and guidance which introduces the test will provide further details on the forms of acceptable evidence.
131. We have published a revised impact assessment and equalities analysis which further considers the arguments raised regarding the impact of this proposal. We consider that the further modifications to the residence test outlined above substantially mitigate concerns raised about the impact of the residence test on groups with protected characteristics.

Conclusion

132. Having considered and given due weight to the responses to the consultation, the Government has decided to proceed with the introduction of 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. Asylum seekers and serving Members of Her Majesty's Armed Forces and their immediate families would not be required to satisfy the test.
133. The following modifications will apply:
- children under 12 months will not be required to satisfy the requirement to have a continuous period of at least 12 months previous lawful residence;
 - applicants for civil legal aid on certain matters of law (as set out at paragraph 125 and 126 above) will not be required to satisfy the test;
 - in the case of successful asylum seekers, the continuous 12 month period of lawful residence required under the second limb of the test will begin from the date they submit their asylum claim, rather than the date when that claim is accepted; and
 - 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.
134. It is intended that this reform will be introduced, subject to Parliamentary approval, via secondary legislation, to take effect in early 2014.

Paying for permission work in judicial review cases

135. The consultation paper proposed that providers should only be paid for work carried out on an 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.
136. We proposed that reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the court. The consultation paper asked:

Question 5: Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursements should be payable in any event)? Please give reasons.

Key issues raised

137. The majority of those who commented (in particular civil legal aid practitioners) opposed the Government's proposal. Respondents were particularly concerned that the proposal would reduce access to judicial review as an effective mechanism for challenging decisions by public bodies. However, a number of respondents welcomed the proposal and agreed that it was reasonable to expect providers to more carefully consider the merits of a judicial review case before issuing proceedings, and to withhold payment from cases which were not considered by the courts to be arguable.
138. Respondents who opposed the proposal argued that legal aid for judicial review was retained within the scope of the civil legal aid scheme as set out in the LASPO, in view of the importance of enabling public access to a form of redress against decisions by public bodies which affect them. They argued that the proposal would effectively reduce the availability of judicial review and therefore undermine the rule of law and access to justice. They also argued that it would affect the sustainability of the market as providers would be unwilling to do this work, and that this would have an impact on the junior Bar (who are often instructed to draft grounds of claim). Some respondents raised legal issues in respect of the proposal including in relation to Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights, and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.
139. Some responses queried whether the proposal was necessary, arguing that the LAA already applies a merits test to determine whether or not public funding should be provided, and that this should be sufficient to prevent weaker cases from receiving legal aid. Respondents argued that the effect of the recent changes made under LASPO and the removal of the ability of providers to self-grant funding for emergency legal representation had not yet been felt and further changes should therefore not be made at this point.
140. Those opposed to the proposal argued that it would not be fair to expect providers to accurately assess the likelihood of permission being granted before an application was issued, as the outcome of public law claims is fact-specific and difficult to predict, and important evidence may often only be provided by defendants following issue.

141. Respondents argued that the grant of permission was the wrong indicator, and that the proposal was disproportionate particularly as, in addition to weaker cases, it would result in legal aid not being paid in:
- Cases which were refused permission but where a substantive benefit to the client was recorded by the provider in their return to the LAA; and
 - Cases which are not unmeritorious but proceedings are issued and only then settle (or are withdrawn) prior to a court decision for good reason (e.g. the defendant grants the claimant the relief sought in their claim only after the claim has been issued; or the claim becomes academic though an external event or the grant of interim relief).
142. Respondents also queried whether the proposal would result in legal aid not being paid in urgent cases which bypass the Pre-Action Protocol for Judicial Review (PAP) but where the defendant concedes at the last moment and therefore the case does not issue.
143. Respondents further argued that, particularly in complex cases, a significant amount of work could be required to prepare an application for permission.
144. Respondents argued that it would be unfair to withhold payment in cases which issue but do not reach the permission decision stage and that providers would be unable to bear this burden. They argued that defendants may often offer to settle on the basis that no order should be made as to costs. Respondents argued that the proposal would therefore result in a conflict of interest between providers and clients in these situations, as providers would be incentivised to continue to take the case to the point of a decision on permission. Respondents argued that; it would be difficult for providers to assess the likelihood of the court granting a costs order; costs orders will not generally be made by the courts upon settlement unless it could be clearly shown that the claimant would have succeeded had the case proceeded; and that costs orders are rarely granted in favour of the claimant if permission is refused. Some respondents argued that the proposal would create an incentive for providers not to take on the strongest cases which were most likely to settle. For urgent cases which do not issue, respondents argued that providers would be unable to recover costs by means of settlement or a costs order.
145. Some respondents raised concerns that the proposal would affect the wider dynamics of judicial review. Although the proposal did not suggest any change in payment of legal aid for the earlier stages of a case, some responses argued that the PAP is only effective if there is a credible threat of judicial review. Therefore they considered that the proposal would result in fewer cases being resolved through the PAP, on the grounds that defendants would have a disincentive to settle as they might consider that providers would be unwilling to take the case further.
146. Some responses noted that the court currently takes a flexible approach and may apply an enhanced test for permission, which is a higher standard than 'arguability'. Arguments were made both that this made the grant of permission an unfair determinant of payment, and that the courts could be reluctant to apply this enhanced test in future, resulting in more cases being granted permission which would ultimately fail.
147. A number of respondents raised concerns over the estimated savings figure for the proposal set out in the impact assessment. They argued that the proposal would result

in further costs for the courts and public bodies as a result of more cases being pursued to the point where the judge has to consider the permission application, an increase in oral renewal hearings, an increase in costs orders against public bodies, increased satellite litigation where costs are not agreed, and an increase in litigants in person. Respondents argued that rolled up permission hearings would in future be separated out into two separate hearings, resulting in additional costs to the courts. If rolled up hearings continued, responses argued that it would be unfair and disproportionate if preparation for the whole of the rolled up hearing were to be at risk.

148. Many responses argued that the data provided in the consultation paper was incomplete and did not enable a full response to be provided. Particular concerns were raised about the lack of information on cases which issue proceedings but settle or are withdrawn before the court makes a decision on permission. Respondents argued that it was unclear how many such cases there were and that, without clearer data, it was not possible to respond fully to the consultation proposal. Some responses argued that the data presented did not provide evidence of a problem and in particular when compared to data on judicial reviews as a whole, legally-aided judicial reviews have a higher 'success rate' than non legally-aided cases and that this suggests providers are already assessing carefully whether to issue proceedings and that therefore the proposal is unnecessary.
149. A number of responses raised concerns over which work providers would be expected to undertake on a contingent basis and under which forms of service as a result of the proposal. Some responses queried whether interim relief hearings would perform part of this work.
150. Some responses queried the accuracy of the comparison at paragraph 3.70 of the consultation paper with the existing system for immigration and asylum Upper Tribunal appeals. Respondents argued that in those cases the provider is more likely to have been involved at first instance and will have clearer evidence (and a judgment of the First-tier Tribunal) on which to make a decision on the merits of the case and whether to work on a contingent basis. They also noted that the amount of work carried out in preparing an application for permission to appeal to the Upper Tribunal will be less.
151. Some responses suggested that, as an alternative, the Government should consider only withholding payments from permission applications which are certified by the courts as 'Totally Without Merit' (TWM). In addition, it was suggested that, where an oral renewal hearing is applied for and is unsuccessful, providers should not be paid for the costs of that hearing.
152. Many responses argued that judicial review is often the only means available to vulnerable people to challenge the decisions or failures of public bodies and that this proposal would have a particular impact on disabled people and their ability to access justice. Respondents have argued that this proposal (when considered alongside the proposed residence test and proposed removal of funding from cases with borderline prospects of success) will make it extremely difficult for people with protected characteristics to qualify for legal aid to challenge decisions made by the State. Some responses raised concerns about the impact on the junior Bar who would be required to undertake at risk work and responses argued that the proposal would therefore impact disproportionately on BAME and women barristers.

Government response

153. The Government continues to believe that taxpayers should not be expected to pay the legal bills for a significant number of weak judicial review cases which are not permitted by the court to proceed as they fail the test for permission in judicial review. This is entirely consistent with our approach to focus legal aid on individuals and cases which need it most. In the case of judicial review, it is not just a matter of costs to the legal aid fund, it also means more costs for the courts in considering applications and for public authorities in defending proceedings. Legal aid must be fair to the people who use it but also fair for the taxpayer who pays for it and we need to ensure that resources are carefully targeted so as to command public confidence in the system.
154. We recognise and agree with respondents that it is important to make legal aid available for most judicial review cases, to ensure access to a mechanism which enables individuals to challenge decisions made by public authorities which affect them. But access to justice cannot and should not be equated with access to taxpayer funding regardless of the strength of the case. Limits on access to public funding on the basis of the merits of the case are common and consistent with the principles underpinning access to court. The limit we have proposed is not based on the ultimate success or failure of the claim but simply on whether the claim passes the permission threshold.
155. It is legitimate for the Government to focus limited resources on the cases that really require it and legitimate to use the permission threshold as a test for that purpose. As set out in the consultation paper, we do not consider that the existing merits criteria are sufficient by themselves to provide appropriate control. Instead, we consider that a better and legitimate system is one in which the provider assumes some financial risk in relation to the application, in order to provide a greater incentive to give careful consideration to the strength of the case before applying for permission for judicial review.

Conclusion

156. We have listened carefully to the views of respondents, as set out above. We recognise concerns raised that our proposal, as set out in the consultation paper, might additionally affect meritorious cases which issue but do not reach the point of a court decision on permission. We therefore propose to introduce a discretion to permit the LAA to pay providers in certain cases which conclude prior to a permission decision. We intend to consult on this further proposal and the criteria which would be used to determine whether or not a discretionary payment is made. We will set out details of this proposal shortly in a separate paper.

Civil merits test – removing legal aid for borderline cases

157. The consultation paper proposed that cases assessed as having 'borderline' prospects of success would cease to qualify for civil legal aid funding. We asked:

Question 6: Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success? Please give reasons.

Key issues raised

158. A number of respondents welcomed the proposal and agreed that it was reasonable to limit public funding to cases with moderate or better prospects of success. However, the majority of those who commented (in particular civil legal aid practitioners) opposed the Government's proposal. Respondents were particularly concerned that the current exception for borderline cases allows for important and uncertain cases to continue receiving funding and helps to develop case law. Respondents' concerns can be grouped into five main categories.

Data, Evidence and Proportionality

159. A number of respondents were of the view that the data and evidence in support of the proposal were insufficient (not least because the data was not broken down by case category). Some respondents also thought that the current system is working as intended so there is no need for change. Some respondents suggested that the ability of judges to make cost orders already acts as a disincentive for providers to bring weak cases. Respondents also questioned whether the proposals were proportionate. They argued that the amount we have estimated we will save is minimal (£1m) and that, when compared with the importance of the cases affected, the impact is disproportionate.

Ability to Realise Savings

160. Respondents argued that the proposal would not save money but could actually lead to additional costs. One of the reasons advanced for this contention included concern that providers will simply take a cautious approach and, if in doubt, reassess prospects to 'moderate'. Respondents also thought that there would be an increase in cases categorised as 'unclear' and an increase in appeals on merits decisions to Independent Funding Adjudicators. Some respondents suggested that the estimated savings were likely to be erroneous as they do not factor in the recovery of *inter partes* costs in successful cases. There were also broader concerns about cost impacts to HMCTS if the proposed change increases the number of litigants in person. Finally, some respondents considered that borderline cases have the potential to set useful precedents – thereby clarifying the law in difficult areas – and actually making legal aid funding less likely to be required in future cases.

Removal of Funding for Important Public Law Test Cases

161. Respondents argued that cases with borderline prospects have often ended in landmark decisions that have clarified or developed the law and that most decisions on appeal to the Court of Appeal or Supreme Court are almost bound to have borderline prospects. Some respondents have also suggested that novel, test or complex cases, particularly concerning judicial review, are less likely to be funded under the proposal – limiting access to justice and dispensing with an important check on the executive.
162. Some respondents considered that, by definition, it was actually more important to fund borderline cases than those with better prospects of success (which can often be settled). Some respondents considered that borderline cases often presented the most difficult issues. Certain respondents listed cases where prospects were borderline, but cases were won, and judgments made which are now important in their respective areas of law. One example provided was the Supreme Court's judgment in the case of *Manchester City Council v Pinnock*.

The Impact on Specific Categories of Case

163. Respondents had concerns about the effect of the proposal on asylum cases – particularly because of the potential consequences (i.e. deportation). Some responses stated that immigration practitioners do not use up the limited numbers of matter starts available to them under their contracts on cases they do not consider they can win – but the particulars of immigration law (e.g. cases affected by “country guidance” in the Upper Tribunal) mean that cases are taken on which they know will be difficult to win. That is why they considered the ongoing availability of funding for borderline cases to be particularly important in this context.
164. Respondents had particular concerns in relation to housing possession cases – also because of the significant consequences for applicants (i.e. potential loss of home). One response cited a case study concerning a victim of domestic violence, where the provision of legal aid allowed possession proceedings to be settled without the case coming to court – this was a borderline case. One response raised concerns that the Government continues to add new “products” to housing law (citing the example of “flexible tenancy”). They stated that this makes it difficult to predict how the courts will react to housing cases – and also cite borderline cases which were subsequently successful.
165. One response argued that judges currently use an element of discretion when ruling on cases where the applicant has, for example, mental health issues which are causing or exacerbating anti-social behaviour (such that they are likely to be evicted) and that in these circumstances eviction might be delayed. However, the response argued that these cases may fail to be brought if cases where prospects of success are borderline no longer qualify for funding.
166. There was more limited concern amongst respondents about domestic violence cases, family cases, education cases, public law cases, claims against public authorities and any cases involving children. Respondents argued that many of these will often involve significant human rights issues.

Other Issues

167. Some respondents considered the proposal was unlikely to be compliant with Article 6 ECHR⁵¹. Some respondents erroneously raised concern about the impact on cases where no prospects of success test is applied – for example mental health proceedings. In fact, there is no proposed change to the availability of funding in these cases.⁵²

⁵¹ Article 6(1) ECHR states that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”.

⁵² Under the Civil Legal Aid (Merits Criteria) Regulations 2013 (“Merits Regulations”) these are:

- Certain family cases under regulation 11(9);
- Mental health cases under regulation 51;
- Public Law children cases under regulation 65(2)(a);
- Certain family cases (where the individual has benefitted from legal aid in the country of origin (under regulation 65(2)(b));
- EU Maintenance Regulation cases under regulation 70; and
- Hague Convention 2007 cases (concerning international recovery of child support and other forms of family maintenance) under regulation 71.

168. Some respondents also appeared to conflate the “borderline” and “unclear” categories. ‘Unclear’ cases are those where it is not possible to categorise the case as very good, good, moderate, borderline or poor, but where there are identifiable investigations which could be carried out, after which it should be possible to make a reliable estimate of the prospects of success. Our proposal does not affect civil legal aid for unclear cases.
169. Respondents raised specific concerns regarding the impacts of the proposal on disabled people, children, BAME and female clients. Other respondents suggested that clients who lead chaotic lives could be particularly affected. One response raised a specific concern regarding cerebral palsy cases and the impacts for vulnerable disabled children.
170. Some respondents also suggested potential alternative proposals.
- One response suggested that an alternative which should be considered is the re-creation of local committees of lawyers to advise the LAA on whether it should fund cases where the prospects are borderline. It argued that these committees worked well in the past as they consisted of informed, independent advisers who took a realistic and responsible view of which cases should be funded.
 - Other respondents presented further alternatives. One suggested alternative was the limiting, or capping, of funding for work carried out at an initial stage, which would then be subject to a mandatory review before any further funding was granted.
 - Another alternative suggested was that, for cases with borderline prospects, where the reason for that assessment is disputed law, funding should be retained. Whereas, for cases with borderline prospects, where the reason for that assessment is disputed facts or expert evidence, funding should be removed.
 - Other respondents suggested that the Government should change or clarify what is meant by success – for example, it should be significant benefit, or a significantly beneficial alteration, rather than definitive success on the substantive issue decided.

Government Response

171. The Government continues to believe that it is a reasonable principle that, in order to warrant public funding through civil legal aid, a case should have at least a 50% prospects of success (i.e. moderate or greater). Our underlying view is that the merits test 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 prospects of success and we do not think it is fair to expect taxpayers to fund such cases either.

Data, Evidence and Proportionality

172. The Government does not accept that the data or evidence cited in support of the proposal is deficient or insufficient. In our impact assessment we estimated that approximately 100 fewer cases p.a. would be funded if this proposal was implemented and would save around £1m p.a. Those figures were based on LAA closed case administrative data concerning the number of borderline cases funded in 2011/12 – which were then adjusted to take into account the reduced scope of the civil legal aid scheme as LASPO came into force. These figures were then rounded. Further

supporting data, consisting of a breakdown by category of law, is now included in the updated impact assessment.

173. We do not consider that, by dint of the savings estimated or number of cases affected, the policy is disproportionate. We are simply tightening the merits criteria that already exist, in order to ensure that public funding is not expended on cases that do not have at least a 50% chance of success.

Ability to Realise Savings

174. In terms of the estimated savings, we have already considered the potential cost drivers identified by respondents. Our original impact assessment refers to the possibility of increased internal LAA reviews, the possibility of increased Independent Funding Adjudicator appeals, the potential for some individuals to try and resolve their disputes without representation, the potential for providers to alter their assessment of prospects of success as a result of the policy, and the potential for an increase in investigative representation grants. We do not consider any of the other issues raised by respondents are likely to have a significant impact on the estimates we have made.

Removal of Funding for Important Public Law Test Cases

175. We recognise that there is some concern from providers, and representative bodies, concerning the impact of these proposals on the development of case law and the potential for precedents to be set. In essence, this returns us to the fundamental purpose of this proposal. Although legally aided cases may have led to the development of case law in the past, we do not consider this sufficient justification, in itself, for legal aid to be granted in cases which do not have at least 50% prospects of success. Further, we consider that it is doubtful that the proposal would prevent or even hinder the development of case law. In order to warrant such a development, the arguments for it are likely to be strong.
176. It is legitimate for the Government to focus limited resources through applying a prospects of success test. The principle on which we have consulted is that, where cases are subject to the merits criteria, limited public funding should in future only be directed at those which have at least 50% prospects of success.

The Impact on Specific Categories of Case

177. We recognise that there is concern about the impact on particular categories of case. We recognise that asylum cases have important consequences for the individuals involved. We also recognise that concerns have been raised about the impact on housing cases given that these concern the roof over a person's head. Other categories of borderline case may also involve serious impacts on the individual involved. However, as we set out in the consultation paper, even for such important cases there is an assessment of merits and a decision must be made as to whether the prospects of success justify the provision of public funds. This is already a principle of the existing scheme – and it is right that public funding should be directed at cases that have at least a moderate prospect of success.

Other Issues

178. The Government has carefully considered the views of respondents on the equalities impacts of this proposal. In our equality statement we have acknowledged, having analysed 2011-12 closed case data, that disabled clients and those aged 25-64 are overrepresented as compared to the general population and so may be

disproportionately affected. We cannot be sure whether BAME individuals will be disproportionately impacted. We remain of the view that any such impact is justified given the essential rationale for the policy. We do not accept, however, based on the evidence, that the proposal is more likely to affect children and female clients and therefore have a more pronounced impact on the protected characteristics of age and sex.

179. The Government also considers that concerns about the lack of evidence being available at the time the assessment of prospects of success is made, are misplaced. It is worth reiterating that there is no change proposed to the availability of legal aid funding for cases categorised as unclear (i.e. where there are identifiable investigations which could be carried out, after which it should be possible for a reliable estimate of prospects to be made). We consider that the concern raised in relation to cerebral palsy cases, for example, is mitigated by the continuing availability of legal aid for unclear cases.
180. The Government has also carefully considered some of the alternative options suggested by respondents. We cannot agree to the suggestion that a committee is created to advise the LAA on whether to fund borderline cases or not. This would result in borderline cases continuing to attract funding, contrary to the policy intention.
181. We do not consider any of the other specific alternative ideas suggested by respondents to be necessary or workable. The suggestion of a limitation or cap on borderline cases for a set period of time, or amount of work, again does not accord with the basic policy intention because it would still result in borderline cases being funded. In addition it does not seem to account for the ongoing availability of investigative representation for 'unclear' cases.
182. The suggestion that distinctions are drawn between cases with disputed law and disputed facts/evidence would not achieve the policy intention. In addition it would not be compatible with all the other tests for legal aid provision, and it would be inconsistent to make these distinctions here, without reflecting them anywhere else in the civil scheme.
183. In response to the suggestion that the Government clarify or redefine what it means by success; the existing definition is set out in existing regulations⁵³. "Prospects of success" means the likelihood that an individual will obtain a successful outcome at trial or other final hearing in the proceedings to which the application relates. "Successful outcome" in this context means the outcome a reasonable individual would intend to achieve in the proceedings in all the circumstances of the case. We consider that the current position is clear.
184. For the reasons set out above we consider that the proposed removal of funding from cases with borderline prospects of success is lawful, justified and appropriate.

Conclusion

185. Having considered and given due weight to the responses to the consultation, the Government has decided to proceed to remove legal aid for all cases assessed as having 'borderline' prospects of success.

⁵³ See Regulation 4 of The Civil Legal Aid (Merits Criteria) Regulations 2013 – available at this location: <http://www.legislation.gov.uk/ukSI/2013/104/contents/made>

186. 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

187. The consultation paper sought views on a proposed model of competitive tendering for criminal legal aid contracts in England and Wales (referred to herein as “the April 2013 Model”).
188. The following is a summary of responses and the Government response on each element of the April 2013 Model. The modified model on which we are seeking views is set out in Chapter 3.

General comments on the April 2013 Model

Key issues raised during consultation

189. Many respondents, including the Law Society, are clear that they do not object to the principle of competition in criminal legal aid and in fact highlight that current providers already operate in a competitive market (i.e. through own client work). However, they oppose the introduction of price competitive tendering in this context. A number of respondents, including the Bar Council, argued that they felt the case for competitive tendering had not been made.
190. A significant number of respondents, including the Law Society, Bar Council, specialist associations, individual practitioners and other interested parties argued that the April 2013 Model would not achieve the required objectives. The Law Society argued that the model was impractical to achieve in the timescales proposed and whilst the model might lead to savings in legal aid in the short term, it would cost the wider system in the longer term due to creating greater inefficiency and increasing miscarriages of justice.
191. These views were shared by the Bar Council which questioned the evidence for the consultation proposals. They stated that the proposals would have the effect of manipulating solicitors into merger, rationalisation and restructuring and that in fact the need for such an approach is not based on any evidence. The Bar Council also argued that there is also no evidence to support the Government’s argument that further cuts are required to the extent described, particularly in light of falling crime figures and cuts already made.
192. The various specialist associations (e.g. London Criminal Court Solicitors Association (LCCSA), Criminal Law Solicitors Association (CLSA), Criminal Bar Association (CBA)) supported the views above made by the Law Society and Bar Council and added the following comments:
- It is not a true competition as it will just create cartels;
 - Price competition will not ensure sustainability and value for money;
 - Competition eliminates any intention of protecting the junior Bar from the extensive cuts imposed on advocacy fees as solicitors will use in-house advocates;
 - Lawyers will move away from defence work which will have a disastrous career effect on the judiciary;

- History of competitive tendering trends towards lower quality. It will create a deterrent to new entrants to the profession;
 - The April 2013 Model relies on a rational market. The current market is not rational.
193. A number of individual practitioners cited the same concerns and criticisms of the April 2013 Model. One such practitioner argued that the economy of scope argument is flawed, as there is very little duplication in the current system.
194. The Judicial Executive Board (JEB), in its response, commented on the impact such a proposal may have on the operation of the Crown Court, particularly with regard to any lowering of quality standards both for litigation or advocacy.

Government response

195. Whilst a number of respondents expressed some serious misgivings about the principle of competitive tendering for criminal legal aid services and about the overall April 2013 Model, some of those same respondents accepted that the current market structure is not sustainable in the longer term. They cited a number of reasons for this, including reducing crime numbers, the effect of earlier fee reductions, and ultimately the effect of too many providers chasing too little work.
196. The Government still believes that the only way to ensure a sustainable market is to enable providers to explore opportunities to consolidate and in turn exploit the economies of scale of a less fragmented market. The Government continues to believe that without any Government intervention the market will not take any action to consolidate. Any disruption in the provision of legal services may lead to advice deserts. This would not be in the interests of clients, providers or the taxpayer.
197. The Government believes that the best possible way to achieve such a sustainable market is through a procurement process that involves an element of competition. However, having heard strong views from respondents and having had lengthy discussions with the Law Society, we are 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.
198. In light of all the responses considered, the Government accepts that some of the elements of the April 2013 Model should be modified to meet some of the concerns raised while ensuring sustainable procurement in the future. In the paragraphs that follow we address each of those elements.

(i) Scope of the contract

199. The proposed scope of the criminal legal aid contract in the April 2013 Model included all litigation services⁵⁴ (with the exception of Very High Cost Cases (Crime) (VHCCs)) and magistrates' court advocacy services.

⁵⁴ References to 'litigation services' throughout this chapter means all services currently in scope of the 2010 Standard Crime Contract.

200. The consultation proposed the exclusion of certain services (Crown Court advocacy, VHCCs and call centre services) from the scope of the contract, replicating the same contract scope as is currently in place.
201. Under the proposed scope, remuneration for only certain services would be subjected to price competition; the other services would be set administratively. The consultation asked:

Question 7: Do you agree with the proposed scope of criminal legal aid services to be competed? Please give reasons.

Question 8: Do you agree that given the need to deliver further savings, a 17.5% reduction in the rates payable for those classes of work not determined by the price competition is reasonable? Please give reasons.

Key issues raised during consultation

202. Whilst the majority of respondents stated their objections to the entire competitive tendering proposal, a number of respondents did engage with the specific question.
203. The Law Society argued that the proposal that all firms undertake prison law and appeals and reviews work would be inappropriate. A number of other respondents supported this view, including the Association of Prison Lawyers (APL). APL argued that the proposal to require all holders of the new criminal legal aid contract to deliver all services, including prison law and appeals and reviews work is not viable. APL argued that prison law work is distinct from other types of criminal legal aid and is quality assured in a different way, using specific quality criteria. They suggested that requiring providers to deliver prison law and appeals and reviews work alongside all other criminal legal aid services will see the end of specialist providers, resulting in a lowering of quality.
204. With regard to VHCC work, the CLSA argued that firms wishing to undertake VHCC work should also be required to have a general crime contract, thereby stopping cherry picking of the more lucrative VHCC work. The Law Society suggested that there is scope for significantly greater savings from VHCC work by exploring a different way to remunerate those cases, e.g. including the work in the graduated fee scheme and amending that scheme accordingly.
205. The Law Society also argued that there are significant savings that can be made by looking at a different approach for dealing with the work currently provided by the Defence Solicitor Call Centre (DSCC). A number of respondents supported this view. An individual practitioner argued there is no evidence to demonstrate that the DSCC and the Criminal Defence Direct (CDD) Contracts deliver improved value for money for the taxpayer; it was argued that they duplicate the work undertaken by providers and do not provide direct access between the client and solicitor.
206. A number of respondents wanted the Government to go further in consolidating criminal defence work and at least one firm of solicitors suggested there was no compelling reason why Crown Court advocacy should be excluded from the scope of the competition.
207. With regard to the proposal to apply a 17.5% reduction in the rates payable for those classes of work not determined by the price competition, the Bar Council, in its response to consultation stated that it would make some services “uneconomically viable”. They went further in arguing that there is no evidence offered in the

consultation as to the 'reasonableness' or otherwise of cuts of 17.5%, either in relation to classes of work excluded from scope or through means of a price cap for work subject to competitive tendering. They suggest that firms will go out of business leading to advice deserts that are likely to expand.

208. On the same point, the LCCSA argued that the volume of work would not sustain such a reduction in rates. The LAPG supported this view arguing that the market is already competitive whereby firms are innovating to survive.
209. The CBA argued in its response that the result of such a reduction will be to place all Crown Court cases, with the exception of VHCCs into the hands of the lowest bidder. They explained that whilst the advocacy element in the Crown Court alone would not fall within the contract, the provision of the work to the Bar would be entirely in the gift of the provider, who will have financial profit as their sole incentive and not quality. This, they suggested, will provide for a natural 'next step' by which the providers would bring all advocacy in house and thereby destroy entirely the Bar as an independent referral profession.
210. A number of barristers responding to these questions suggested that in order to save the Bar from the impact of price competitive tendering, they would in fact tolerate a further cut in rates as an alternative. Other barristers and solicitors alike disagreed, arguing that it would be financially impossible for a sufficient proportion of the existing supplier base to bear these costs, recognising that the current supplier base is already fragile.
211. A great many respondents questioned the need to make reductions at all, arguing that there is a reduction in criminal cases overall and with large cuts already made (three successive reductions in AGFS rates from 2010 to 2012 following the Legal Aid Funding Reforms consultation; and further the reductions made in criminal legal aid remuneration following the Legal Aid Reform consultation) a further rate reduction is not necessary.

Government response

212. With the exception of appeals and reviews and the proposed approach to prison law services, the scope of the criminal legal aid contract proposed in the April 2013 Model is consistent with the current scope of the 2010 Standard Crime Contract.
213. The DSCC and CDD contracts have been awarded through competitive tendering processes and offer a different type of service to that delivered under current mainstream criminal legal aid contracts. Whilst we acknowledge the views expressed with regard to the services delivered by the DSCC and the CDD contracted providers, both services delivered savings to the legal aid fund and therefore the Government is not persuaded that those services should either be delivered as part of the mainstream provision or that the alternative suggestion for delivering those services would deliver better value for money at the present time. We will take into consideration the views expressed by respondents with regard to exploring efficiency improvements when we need to commission these services again once current contracts expire.
214. We do accept however that those providers wishing to apply to deliver only prison law and/or appeals and reviews services should not be prohibited from doing so. Whilst the Government is not necessarily convinced that prison law or appeals and reviews services are niche areas of law (the majority of current 2010 Standard Crime Contract

holders deliver those services alongside all other criminal legal aid services), they are not part of the mainstream criminal legal aid provision. Therefore, the Government believes the criminal legal aid contract should be structured in such a way to enable providers to apply to deliver prison law and/or appeals and reviews services only.

215. The Government maintains the view that Crown Court advocacy should be excluded from the scope of the contract. We remain convinced that whilst there are a small number of chambers and/or groups of barristers that would be in a position to enter into a contract with the Government to provide a full range of litigation and advocacy services, the majority of chambers would not. With approximately 75% of Crown Court advocacy services being delivered by the independent referral Bar, we do not consider it would be appropriate at this stage to include such services in the scope of a contract. We consider that, despite the concerns raised by the Bar Council, the CBA and individual barristers that solicitors' organisations will retain more advocacy work in house, solicitors acting in accordance with their professional code of conduct would continue to instruct members of the independent referral Bar where it is appropriate to do so. However, we stand by the view expressed in the consultation paper that whilst the majority of barristers and chambers are not yet in a position to apply for a criminal legal aid contract, there have been no obstacles introduced by Government which would prevent them from restructuring to enable them to do so.
216. In fact, we are encouraged by the recent changes introduced by the Bar Standards Board (BSB) which should aid those wishing to make such changes to enable them to bid directly for criminal legal aid contracts. The BSB recently announced that numerous practising restrictions would be lifted through their new Code of Conduct, whereby self-employed barristers will be able to apply for an extension to their practising certificate to conduct litigation (both publicly funded and privately funded); and previous rules preventing self-employed barristers from sharing premises and forming associations with non-barristers have been removed, allowing barristers to pool together risks and resources.
217. The Government also maintains its view with regard to VHCCs. In light of the change to the definition of VHCCs for litigators made in October 2011, the LAA classifies only 15 to 18 cases as VHCCs each year. Due to the relative infrequency, length of the case, the amount of evidence served by the prosecution, the complexity of issues that arise and the need to closely manage such cases with regard to expenditure, we remain convinced that VHCCs should continue to operate under a separate individual case contracting scheme and that we continue to enter into contracts with only those providers that are able to demonstrate the necessary skills and experience to manage such cases.
218. The modified model presented in Chapter 3 of this paper therefore involves a criminal legal aid contract which excludes Crown Court advocacy, VHCCs, DSCC services and CDD services.
219. With regard to the proposed reduction in administrative fees by 17.5%, we acknowledged in the April 2013 consultation paper that the current provider base would not be able to sustain such a fee reduction without some form of market restructuring and consolidation. Some providers have indicated they would be able to sustain such a fee reduction if they had enough work in order to exploit economies of scale. The

Otterburn report⁵⁵ provided by the Law Society in its response supports this view. If it is possible to deliver the same quality legal aid services as now at 17.5% below the current price⁵⁶, the Government believes that it is self-evident that the current system is not delivering the best value for money for the taxpayer.

220. The modified model presented in chapter 3 would deliver savings of the same magnitude as the April 2013 Model.

(ii) Contract length

221. The proposed contract length in the April 2013 Model was a three year term, with the option of extending the contract term by up to two further years. In addition, it was proposed that the new contract would contain a six month no fault termination clause but would be modified to include provision for compensation in certain circumstances for early termination of the contract by the Lord Chancellor. The consultation asked:

Question 9: Do you agree with the proposal under the competition model that three years, with the possibility of extending the contract term by up to two further years and a provision for compensation in certain circumstances for early termination is an appropriate length of contract? Please give reasons.

Key issues raised in consultation

222. Again, the majority of responses to this question reiterated the objections to the entire competitive tendering proposal. However, a number of respondents did engage with the specific question.
223. The Law Society highlighted that the proposed model would require firms to invest significantly in order to restructure to deliver services in the way the Government requires. They argued that a three year contract is inadequate to recover and secure a return on that investment, a view that is supported by other respondents including the CLSA and individual practitioners who explained that banks are highly unlikely to lend to those firms practising in criminal legal aid. In support of their argument, the Law Society made reference to the Otterburn report accompanying its response which indicated that in most regions of the country, a three year contract on the terms proposed is a guaranteed loss-making proposition.
224. The Law Society however also set out a number of dangers in a lengthy contract period, for example, likely changes in the criminal justice system, for example as a result of declining criminal activity, may not be financially viable. They argued that a contract entered into may not be manageable after even three years if there is no certainty of work. This, they suggested would not lead to a sustainable or stable system for providers. The Law Society proposed that firms should deliver services on an unlimited contract term basis provided that the market exists and they can meet the appropriate quality thresholds. These same views were expressed in the response

⁵⁵ <http://www.lawsociety.org.uk/representation/policy-discussion/transforming-legal-aid-consultation-law-society-response/>

⁵⁶ By current price 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 February 2014 (see paragraphs 3.52 to 3.55 of Chapter 3 on a proposed interim fee reduction).

from the Bar Council who also argued that there is a lack of evidence on which to base the proposed length of contract.

225. Some individual respondents argued that if the proposed competitive tendering model were implemented, the contract should be restricted to three years maximum. Other respondents argued that in fact five years would give greater certainty and allow for greater planning. They argued that three years is simply not sufficient to proceed with any certainty.

Government response

226. 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, particularly in light of the views from a number of respondents about the inevitability and impact of change in the criminal justice system.
227. In light of those responses, we are minded to extend the proposed contract term 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).
228. The modified model presented in Chapter 3 proposes a four year contract term (with in relation to Duty Provider Work only, 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 services

229. Subject to a number of exceptions, the April 2013 Model described procurement areas based on the current 42 CJS areas, whereby applicants would be invited to tender to provide the full range of services within that area.
230. For the purposes of competitive tendering, the consultation proposed to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas. Given the volume of criminal legal aid work delivered in London, it was not considered feasible to require providers to cover the whole London CJS area. Therefore, the proposal was to break London into three procurement areas aligned with the area boundaries used by the Crown Prosecution Service (CPS). The consultation asked:

Question 10: Do you agree with the proposal under the competition model that with the exception of London, Warwickshire/West Mercia and Avon and Somerset/Gloucestershire, procurement areas should be set by the current criminal justice system areas? Please give reasons.

Question 11: Do you agree with the proposal under the competition model to join the following CJS areas: Warwickshire with West Mercia; and Gloucestershire with Avon and Somerset, to form two new procurement areas? Please give reasons.

Question 12: Do you agree with the proposal under the competition model that London should be divided into three procurement areas be aligned with the area boundaries used by the Crown Prosecution Service? Please give reasons.

Question 13: Do you agree with the proposal under the competition model that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas? Please give reasons.

Key issues raised during consultation

231. The proposed procurement areas attracted a significant amount of criticism, from providers working in both urban and rural areas. In its response the Law Society referred to both the Otterburn and Deloitte reports⁵⁷, which stated that “the proposal fails in its aim to deliver a sustainable service where the benefits created by offering greater case volume is negated by a requirement for firms to cover a wide geographic area.” They argue that if firms are to absorb significant costs, they need to be able to generate additional volumes within their current local markets and in a way that does not require significant additional infrastructure.
232. The Law Society goes on to summarise the many local problems highlighted by firms operating in the areas. Their examples include:
- In the North East, Northumbria CJS area is vast, running from Berwick near the Scottish border, Hexham over in the West and down as far as Gateshead, Sunderland, Newcastle and North and South Tyneside. They suggest it is very hard to imagine any crime firm being geared up to deal with the whole of that area at the moment; significant expansion would be required, which, they suggested, is almost certainly not possible in the time frame proposed (referring to the reasons they outlined elsewhere in their response).
 - They suggested that vast distances from one side to the other of the Devon and Cornwall CJS area make it impractical for firms to operate to the model proposed, while the Solent causes its own unique problems for Hampshire and the Isle of Wight.
233. Both examples were also given by practitioners in their own individual responses. One provider based in Somerset argued that although Bristol is a large conurbation the rest of the work/suppliers are spread out over a large rural area with poor communication. One practitioner respondent argued that Hampshire is vast, with challenging rural travel links which are particularly difficult for providing services on the Isle of Wight.
234. Similar views were offered by practitioners working in Dyfed-Powys and Northumberland. With particular regard to CJS areas in Wales, a number of respondents highlighted the need for services delivered by providers to clients who request such services in Welsh.
235. A number of respondents, including the Law Society, Bar Council and almost all specialist associations, highlighted the difficulties such a proposal would cause for clients who would face significant travel to see their provider in the proposed new area. They suggested that it is highly unlikely that providers would be prepared to travel the same distances to see clients for the low fixed fees proposed. The Law Society set out by way of example, a provider in Gloucestershire who would be required to make a four hour round trip to represent a client in Yeovil Magistrates Court.

⁵⁷ Both reports are available on the Law Society website at: <http://www.lawsociety.org.uk/representation/policy-discussion/transforming-legal-aid-consultation-law-society-response/>

236. The Law Society acknowledged that delivery of services through the use of agents or a potential merger may provide a solution but they highlighted that it would take time to identify and establish such relationships and such a process can be expensive.
237. The Bar Council suggested that the proposed procurement areas would severely restrict access to justice in parts of the country – particularly for vulnerable clients and clients with a protected characteristic. The CBA argued that the proposed procurement areas are set by arbitrary geographical lines that fail to take into account the huge number of variables that arise in criminal litigation including: client access, diversity, local knowledge and the cost to the system caused by delay. The importance of maintaining providers with local knowledge was shared by a significant number of respondents citing the importance of relationships between the community, police, prosecution, defence and judiciary which have taken years to develop and maintain.
238. The Legal Aid Practitioners Group agreed that the CJS areas are a useful starting point but suggested that the Government consult with practitioners more locally to determine an appropriate division of work. They went on to highlight that in considering any geographic boundaries it is important to remember that there may be a need for specialist advice and access to such advice may be inhibited if strict rules on cross boundary working are applied.
239. In response to the proposal to align the procurement areas in London with the three CPS London operational areas, the Bar Council pointed out that CPS London has been geographically reorganised no fewer than three times over the last few years: in 2008, 2011 and 2012. The recent split into three areas has only been in place since October 2012 and it has not had an opportunity to ‘bed down’.
240. The Law Society added that with regard to London the areas currently proposed are too big and the proposed contract values too small. Central & West London comprises 9 court centres and 76 police stations. 38 contracts in Central & West London equates to £690,000 pa per contract. For most firms that will be a substantial reduction in revenue but with an increased number of courts and police stations to cover. They suggested that this would mean most firms, far from being more efficient would become less efficient.
241. Both the LCCSA and LAPG developed this argument, stating that such an approach would impact disproportionately on BAME firms as many are based in London. The CBA cited the following reasons why such a proposal would not work:
- i. Logistical difficulties – Providers would be required to cover a large area comprising multiple police stations, both magistrates’ and Crown Court and criminal activity covering a very broad range of classes and types of offence; and
 - ii. Specialisation – The current system is designed to deal with the huge variety of cases and the specialist types of expertise that are required to conduct them. The proposed scheme does not. For example, there are designated court centres that try fraud, serious and organised crime, murder and terrorism cases, irrespective of where the defendant may have been arrested. Especially in London the court location may well fall outside of the designated procurement area.
242. Not all respondents felt that the proposed procurement areas were inappropriate. Some felt that for their areas the proposals were adequately sized. For example, a number of respondents suggested that the proposed procurement area and number of contracts were appropriate for the areas in which they worked. Some respondents

agreed with the proposal to align the London areas with the CPS boundaries. A number of respondents in fact questioned whether procuring the whole London CJS area would be the best way to achieve true economies of scale.

243. With regard to the proposal that work tendered should be exclusively available to those who have won competitively tendered contracts within the applicable procurement areas, a number of individual respondents agreed that such an approach would be necessary to ensure the volume of cases to providers in that area. However, others felt that to do so is just another means of stifling competition and quality and provided their objections to the principle of competitive tendering in response to this question.

Government response

244. The Government continues to believe that for much of the country the use of CJS areas for letting contracts for duty work is appropriate. However, in the light of the responses to this element of the April 2013 model and the views expressed at the consultation events, we are persuaded that some modifications need to be made.
245. We accept that for Duty Provider Work some CJS areas are simply too large geographically for providers to cover the geographic spread of police stations and courts. The Government has therefore concluded that, whilst CJS areas are appropriate for the majority of procurement areas, we would look to deviate where circumstances necessitate relying instead on Local Justice Areas or combinations of police station duty scheme areas.
246. In the modified model presented in Chapter 3 we have examined what we consider, for Duty Provider Work, to be an appropriate divide for those CJS areas where practitioners expressed concern in response to consultation.

(iv) Number of contracts

247. The April 2013 Model was designed to deliver fewer, larger contracts, creating opportunities for providers to grow their businesses and invest in the restructuring required to achieve economies of scale and scope. In turn, providers would be able to deliver a more efficient service at a price that offers a saving to the public and is sustainable.
248. It was proposed that the number of contracts on offer in each procurement area would be based on the following four key factors:
- Sufficient supply to deal with potential conflicts of interest
 - Sufficient case volume to allow fixed fee schemes to work
 - Market agility
 - Sustainable procurement
249. The consultation paper included an illustrative number of contracts based on LAA claim data for the period October 2010 to September 2011.
250. It was proposed that the Public Defender Service (PDS) continue to operate in those areas where the PDS is currently established but it would be allocated one share of the

work in those areas automatically (i.e. they would not be required to compete). The consultation asked:

Question 14: Do you agree with the proposal under the competition model to vary the number of contracts in each procurement area? Please give reasons.

Question 15: Do you agree with the factors that we propose to take into consideration and are there any other factors that should be taken into consideration in determining the appropriate number of contracts in each procurement area under the competition model? Please give reasons.

Key issues raised during consultation

251. A significant number of respondents again provided their general objections to competitive tendering in response to this question. Some however commented on the proposed methodology for calculating the number of contracts under the April 2013 Model.
252. The Law Society argued that the contract sizes would be too inflexible and uncertain for firms to make money and in fact believed that a more appropriate way of managing services would be to offer an unrestricted number of contracts to those that meet certain standards. Whilst they did agree that the number of contracts should vary by area, the Law Society raised some concerns over the mechanism by which the contract numbers were determined. They queried for example that South London would have half the number of contracts compared with West and Central London, yet the total amount of work is of the same magnitude.
253. As with a number of other providers, the Law Society highlighted that the data used to calculate the number of contracts per area is out of date and point out that declining volumes will also play a part in the calculations when they are updated.
254. However, the analysis provided by Otterburn which accompanied the Law Society response to consultation supported the case that consolidation was necessary, agreeing that fewer, larger contracts were necessary in order for the market to be sustainable.
255. Both the LAPG and the CLSA expressed concern that such a model would create an oligopoly which will cause problems at the next tender round. They suggested it may also lead to cartelisation. The CBA raised a different concern in considering the impact on the current provider base that current providers would need to increase capacity by at least 250% to cope with the size of contract on offer. They argued that in many areas no provider exists that can fulfil such criteria.
256. Conversely, a number of large organisations (members of the Big Firm Group) argued that the proposed reduction in contract numbers coupled with the removal of client choice would mean that those providers with a large share of the market currently would have to scale their businesses down.
257. The CBA also highlighted the impact such a reduction on contract numbers would have on new entrants wishing to enter the market in subsequent rounds of contract tendering. They argued that experienced practitioners would gradually disappear from the market, making it more and more difficult for any new organisation to find the skilled and experienced professionals it would need to deliver criminal legal aid services. The Judicial Executive Board also raised this concern as did a number of individual practitioner respondents.

258. The Law Society also argued that BAME practitioners who tend to practise in smaller firms would be disadvantaged compared with larger providers by an approach that relied heavily on fewer, larger contracts. They suggested that the only way they could survive would be by acting as agents or sub-contractors for the larger firms and required to work at unsustainable levels of remuneration.
259. A number of individual practitioners expressed concern about the proposed number of contracts to deal with conflicts of interest between co-defendants. They gave examples of scenarios involving cases with more than four defendants all of whom were blaming one another and therefore four providers would be insufficient in managing such a case. They argued this was not uncommon.
260. Other factors highlighted by providers for consideration in determining contracts numbers included:
- the prevalence of particular types of case influenced by the charging practice of prosecuting agencies;
 - contracts in an area where Her Majesty's Revenue and Customs customs evasion cases are charged, or where Serious Organised Crime Agency departments are based or regional fraud courts are located will influence the type of case within those procurement areas, producing for example, a higher proportion of multi-defendant, document-heavy cases which do not easily fit within the standard model;
 - provision needs to be made to cater for under-represented groups to have their ethnicity/culture recognised; and
 - the geographical requirements of each procurement area.
261. A number of practitioners and representative bodies raised concerns regarding the impact of the proposed reduction in contract numbers on Welsh language provision. They claimed that clients seeking criminal legal aid services in Welsh would find it more difficult if not impossible to source such provision from the limited number of contractors in their area. They cited occasions where, in certain parts of Wales, entire criminal trials were held in Welsh. They suggested that as a result of the proposed limitation on the number of contracts (and the geographic restrictions with regard to the proposed procurement areas and the proposal to remove client choice) would also have a detrimental impact on such provision.
262. Whilst the consultation did not seek views on the proposed ring fencing of work for the PDS, a number of respondents commented, arguing that there is no basis for protecting the PDS from competitive tendering. The Law Society argued that they see no reason why shares of work should be ring-fenced for the PDS. They queried that if the PDS offices are truly cost-effective, what is there to prevent them from bidding for a contract on the same basis as everyone else. The Law Society went on to state that in fact based on the 2007 evaluation report, '*Evaluation of the Public Defender Service in England and Wales*'⁵⁸, it was more expensive to provide services using the PDS than private practice. A number of individual practitioner respondents also questioned the proposed ring fencing of the PDS. Some argued that the proposal was anti-competitive and that it was in fact speculative to suggest the PDS would act as a benchmark.

⁵⁸ (Lee Bridges, Ed Cape et al), 2007 - <http://www.law.cf.ac.uk/research/pubs/repository/1622.pdf>

Government response

263. The Government remains of the view that variable contract numbers for each procurement area is the correct approach with regard to Duty Provider Work. This is reflected in the modified model set out in Chapter 3 which is developed having regard to the factors set out there..
264. In considering the impact of the proposals on Welsh language provision we have taken into consideration the views expressed by respondents. We are confident the modified model set out in Chapter 3 would deliver the same access to criminal legal aid services in Welsh where it is required. Providers delivering services in those procurement areas in Wales would be required, to ensure that services are accessible to, and understandable by, clients whose language of choice is Welsh, in accordance with the Welsh Language Act 1993 (as amended) and Welsh Language (Wales) Measure 2011.
265. The Government remains convinced of the importance of retaining a PDS for all of the reasons set out in the April 2013 consultation paper. The PDS is not currently a contracted provider; it is a body we have established to deliver criminal legal aid services on behalf of the Government. The arguments made by respondents that the PDS is more expensive to run are based on a report published in 2007. Since that time, the PDS has made a number of changes to the way it delivers its service and the way it is structured to ensure it remains cost effective.
266. Under the modified model set out in Chapter 3, we propose to maintain the PDS and to ring fence a share of work in the areas the PDS is currently established.

(v) Types of provider

267. The consultation paper described the flexibility of delivering services through the use of agents or by forming joint ventures or an Alternative Business Structure with other providers.
268. There was no specific question on this element of the April 2013 Model. However, a number of respondents argued that the use of agents or subcontracting would be unprofitable and the time available to establish any relationships in which to create a joint venture is insufficient.
269. The Law Society did suggest that any model must take into consideration more flexible business approaches. For example, some of the proposed areas are large – e.g. Devon and Cornwall, North Wales – and the Law Society suggested that it is simply not practical for firms to instruct agents on the other side of the county to undertake court hearings and police station attendances. The Law Society proposed that providers be able to deliver the service:
- through the use of both agents and consultants, not necessarily employed by the firm on traditional employment contracts;
 - through using "virtual" offices or temporary premises in order to cover the whole CJS area;
 - through employees working from home, or wherever is most convenient to service the police stations and courts in the area;
 - through use of technology to advise clients, e.g. video conferencing, Skype.

270. The Law Society made a number of suggestions for any future tendering process. They agreed that providers will require a base / office of some sort within each CJS area, or in many cases more than one office since the areas are so large. They suggested that there must also be flexibility over the use of agents, who should be able to work for more than one contract holder in a CJS area; and contract holders should also be allowed to use other contract holders as agents.

Government response

271. In light of the views in response to this element and also in response to the implementation timetable set out in the consultation paper, we propose, as part of the modified model set out in Chapter 3, to extend the timetable for the procurement process. This we believe would give potential applicants more time to explore opportunities, such as setting up or adapting a business structure which uses agents; or alternatively to establish a joint venture. One approach may be more desirable to some providers when considering profitability and other factors; others might take a different approach. We maintain the view that any new criminal legal aid scheme must offer more flexibility to providers in terms of structuring their business than exists currently.

(vi) Contract value

272. The April 2013 Model described the allocation of an equal share of volume of police station attendance work in the given procurement area over the life of the contract. Legal aid for all follow-on work (i.e. subsequent criminal proceedings in the magistrates' court and/or Crown Court) would be accessible by the provider allocated. The consultation asked:

Question 16: Do you agree with the proposal under the competition model that work would be shared equally between providers in each procurement area? Please give reasons.

Key issues raised during consultation

273. While some respondents supported the proposal to share work equally between providers in each procurement area, the majority expressed general disagreement. Respondents raised a number of concerns about the potential difficulty of ensuring an equal share of police station attendance work in practice, as well as the proposal's possible impact on competition, provider sustainability, provider growth, and service quality.
274. In its response, the Law Society suggested that the proposal may not ensure an equal share of work for providers in practice. They were concerned that each individual case was not equal - requiring differing amounts of work depending on whether it was ultimately dealt with in the police station, or progressed to a magistrates' court or the Crown Court. They also explained that other factors like the location of a police station could impact on the type of cases available for providers in that area. They gave an example of police stations near a port or airport possibly having more drug-smuggling cases than police stations elsewhere in that CJS area or police stations in another area.
275. The Bar Council, specialist associations and some individual practitioners considered the proposal to be anti-competitive, providing no incentive for any provider to grow their

business. The LAPG suggested that it would provide insufficient work for large firms and too much work for small ones. One firm of solicitors explained that those firms that had worked hard to build their own client base and gain a large market share would be penalised, and that the proposal would prevent growth.

276. Respondents criticised the proposal for appearing to ignore the importance of quality in criminal legal aid services. An individual barrister questioned what incentive there would be for providers to maintain a high quality service if they were effectively assured an equal share of the work, apparently irrespective of the quality of their service.
277. Respondents also expressed considerable concern about the general future and sustainability of the criminal legal aid market. Existing providers felt that they would face the prospect of decreased volumes of work at reduced rates. The Law Society saw the proposal as a 'recipe for market stagnation, rather than a vibrant sustainable market', mirroring the view of one solicitor, who felt that the proposal would lead to a homogenised market. To help new providers entering the market, CLSA suggested that the April 2013 Model needed to facilitate the keeping back of a proportion of cases for new providers.
278. Alternative suggestions for the allocation process were also proposed. One respondent suggested that allocation should be based on a firm's ability to meet the volume of work, with another proposing that work should be allocated under a duty rota which would not be dependent on the number of duty solicitors employed, but rather the capacity to do the work by appropriate fee earners.

Government response

279. We recognise that the April 2013 Model means that some current providers may have had to change the way in which they delivered their services, whether that meant scaling up or scaling down. Having taken into consideration the views expressed in consultation and the desire from some providers to expand their businesses, we have explored how we might address these concerns in the modified model.
280. The modified model presented in Chapter 3 would give providers the opportunity to apply for a contract which would give unrestricted access to Own Client Work. With regard to Duty Provider Work, the model would maintain the proposal to allocate equal shares of work amongst a limited number of providers who successfully tendered and were awarded contracts to deliver Duty Provider Work.

(vii) Client choice

281. The April 2013 Model included the proposal that clients would generally have no choice in the provider allocated to them at the point of request for advice. However, it was proposed that there would be a number of exceptional circumstances where the client might seek a transfer to a different provider, including where there was a conflict of interest or where some other substantial compelling reason exists why that provider should not be appointed or why a change in provider is needed. For example, where a client who is detained at the police station has particular needs which cannot be addressed by the allocated provider, a change in provider may be authorised. The consultation asked:

Question 17: Do you agree with the proposal under the competition model that clients would generally have no choice in the representative allocated to them at the outset? Please give reasons.

Key issues raised during consultation

282. This element of the April 2013 Model was widely criticised [by 99%] based on three key arguments.
283. First, respondents argued that client choice is an essential driver of quality. The LCCSA argued that to remove such choice would “diminish trust and confidence” and many practitioners agreed, stressing that a crucial element in delivering a quality service is the importance of trust between client and lawyer. They argued that removing the choice a client has in selecting their trusted provider is more likely to lead to an increase in litigants in person. This they suggested is likely to lead to slower court processes, trials will take longer and ultimately legal aid and wider costs will increase.
284. The CBA cited Lord Carter’s Review of Legal Aid procurement in making an argument to retain client choice: “Clients need to have confidence in their legal representative in order for justice to be fair and effective”⁵⁹. The CBA suggest that there are many reasons why an accused person may wish to choose a particular solicitor or firm. Most commonly they include:
- An earlier and possibly longstanding association with the solicitor or firm;
 - A solicitor or firm possesses particular qualities, experience or personnel rendering it most suitable to deal with his or her case;
 - Ethnic, cultural and language reasons; and
 - Location.
285. The JEB commented that where a defendant has been given no choice as to representation it is much more likely that they will seek a change of representative at some later stage leading to greater costs.
286. Second, respondents argued that the removal of client choice is an attack on a fundamental human right. They argued that the proposal, if implemented, would be in breach of both domestic and European law. The Law Society and a number of other respondents suggested that introducing the proposal through secondary legislation would be ultra vires and said they would legally challenge the decision to do so.
287. Third, a number of respondents, including the Law Society argued that the proposed removal of choice would adversely affect clients with a protected characteristic. The LCCSA developed this argument further in its response claiming that the proposal is discriminatory for the young, vulnerable and “those who feel most invested in a lawyer from a BAME firm”.
288. The Bar Council argued that the extent to which the proposal would impact on both BAME clients and BAME practitioners is ‘seriously underestimated’. They go on to suggest that such an approach would not only have a profound effect on the wider communities BAME providers serve and support but also on the profession as a whole,

⁵⁹ ‘Legal Aid: A market-based approach to reform’, July 2006, Lord Carter of Coles, paragraph 5, page 94, <http://www.legalaidprocurementreview.org.uk/docs/carter-review-p2.pdf>

submitting that it would have “an obvious retrograde impact on the enormous progress that has been made in recent years in improving the diversity of the Bar and the judiciary”.

289. A number of respondents, including the Bar Council, suggested that the proposal to remove choice goes against the Government’s July 2011 White Paper on ‘Open Public Services’. Contrasting the proposed approach to that taken for other public services, one individual practitioner noted that “... people have the right to choose a doctor, whether life may be at stake. People have the choice to choose a dentist, their method of travel, schools their children attend, employment, a bank -- but in terms of their liberty, they are not [under the April 2013 Model] allowed to choose their own solicitor/lawyer.” One respondent argued: “The state chooses who will prosecute the individual. It is a fundamental freedom in a democracy that the accused can choose who will defend him/her. It is frankly sinister that the State can impose a representative on those it accuses.”

Government response

290. The rationale for proposing this change was to give greater certainty of case volume for providers, making it easier and more predictable for them to organise their businesses to provide the most cost-effective service to the taxpayer. It was not a policy objective in its own right. In light of the strong views expressed by all but a few practitioners that client choice is fundamental to any future criminal legal aid scheme, we have considered how to develop a model of competitive tendering which includes client choice. For example, we have explored what modifications would be necessary to the proposed procurement areas, the fixed fee remuneration scheme and the structure and number of the contract(s).
291. The modified model presented in Chapter 3 would retain the same level of choice for clients seeking criminal legal aid as now.

(viii) Case allocation

292. The April 2013 Model set out in the consultation paper included a number of options to seek views from respondents on the most appropriate way to allocate cases under a new criminal legal aid scheme.
293. Outlined in the paper were two broad options for case allocation: allocate on a case by case basis; or allocate by way of duty slots. A number of sub-options were highlighted to initiate discussion.
294. The consultation paper also set out the proposal that once allocated, the general principle would be that the provider allocated would deliver all criminal legal aid litigation services subject to the client changing provider in exceptional circumstances. The consultation asked:

Question 18: Which of the following police station case allocation methods should feature in the competition model? Please give reasons.

- **Option 1(a) – cases allocated on a case by case basis**
- **Option 1(b) – cases allocated based on the client’s day of month of birth**
- **Option 1(c) – cases allocated based on the client’s surname initial**

- Option 2 – cases allocated to the provider on duty
- Other

Question 19: Do you agree with the proposal under the competition model that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the LAA or the Court), the client should be allocated to the next available nearest provider in a different procurement area? Please give reasons.

Question 20: Do you agree with the proposal under the competition model that clients would be required to stay with their allocated provider for the duration of the case, subject to exceptional circumstances? Please give reasons.

Key issues raised during consultation

295. Whilst a number of respondents did choose between one of the options of case allocation presented in the consultation paper, again a significant number of respondents repeated their general concerns about competitive tendering.
296. In its response, the Law Society stated that it felt none of the case allocation models proposed take account of the effect of the prolific offender whereby under option 1(a), that offender would end up with several solicitors to whom he/she had been assigned simply because they were next on the rota. In doing so, the Law Society argued that the benefits for the client in being represented by a provider they trust and who is aware of their individual circumstances would be lost. Under Options 1 (b) and (c) they would avoid the problem of multiple representation, but would not address the issue of client confidence in his/her solicitor, since that solicitor would not have been chosen by the client.
297. The Law Society also highlighted its concern that providers would not get a truly equal share of cases as in practice the variation of case type generally and by area is quite diverse. Some firms would get more clients than they should, others would get fewer; some would get a disproportionate number of cases which are resource intensive; others would get cases that are less so. They argue that “[w]hile this can be adjusted over time, given the marginal economics of this model, the Government cannot be confident that the firm will not be insolvent before this happens....”
298. The Law Society claimed that option 2 would still not address the issues of client care, client confidence, saving of time, duplication of representation, increased costs of multiple representation, etc but said that at least it enables a firm to deal with all the work at one police station at any given time. They suggested that this would allow economies of scale by cutting out travel and waiting for the additional clients detained at that police station during the duty period. They argued that any of the other methods would mean firms only ever getting one person at a time at each police station, thereby increasing average costs per case from those currently.
299. The CBA argued in its response that “under the current system firms of solicitors thrive by their reputation, experience and expertise, and this enables them to have a particular share of the market. Under the proposals the allocation of work by arbitrary or random means cannot be an improvement nor would it promote true competition.”
300. Some respondents made suggestions on how to improve the current duty solicitor slot allocation scheme. For example, a number of individual practitioners complained that the current system enables providers to use ‘ghost’ solicitors (i.e. solicitors that no

longer practise, do not reside in the country or who have died) to apply for a greater share of duty slots. Another respondent suggested that the scheme should be modified so that it operates a rota for each custody unit and linked police stations in each CJS area for 24 hour periods allocating a different provider to each rota.

301. With regard to the proposal that for clients who cannot be represented by one of the contracted providers in the procurement area (for a reason agreed by the LAA or the court), the client should be allocated to the next available nearest provider in a different procurement area, there was a difference of opinion. The Law Society submitted that “in the context of the proposed model, this is about the most practical solution”. Whereas the CBA claimed “it is arbitrary in its application, which cannot be right where an individual is at peril of loss of liberty”.
302. With regard to the principle of continuing representation, the Law Society agreed with the suggestion that firms should in principle be able to represent a client all the way through the case from start to finish. A number of individual practitioner respondents agreed with this view, submitting that “it is necessary to protect the public purse from clients who continuously change lawyers”. But this view was not unanimous; a number of respondents argued that forcing clients to stay with a provider they are not happy with will increase litigants in person and consequently costs. Others argued that clients should be able to move to an alternative provider if they are genuinely unhappy with the service received.

Government response

303. It follows from the Government’s decision set out above (paragraphs 290 to 291) that clients would be able to choose any provider that holds a contract in England and Wales. Therefore, the case allocation method for Own Client Work would operate as now.
304. However, the method of allocating cases for those clients who do not select their own provider still needs to be considered. Having considered the views of respondents on the options presented in the consultation paper, we consider the most appropriate mechanism would be to allocate those cases through a duty rota system. Under such a system, providers with a contract to deliver Duty Provider Work would be entered onto a duty rota to cover police stations and magistrates’ courts in their procurement area.
305. We acknowledge that a number of respondents expressed some serious concerns about the way in which the current duty slot allocation mechanism operates. The modified model presented in Chapter 3 proposes the allocation of an equal share of duty slots to those organisations who have demonstrated their capacity to deliver the service.

(ix) Remuneration

306. In an effort to simplify the administration of the criminal legal aid scheme, under the April 2013 Model, as far as reasonably and economically practicable, providers would be remunerated by way of a fixed fee scheme for their criminal legal aid services.
307. The provider would be remunerated for each stage of the case (police station attendance, magistrates’ court representation etc) but at the price they bid as part of their tender. It was proposed that due to the nature of the top 5% of Crown Court

cases, the current graduated fee scheme should be maintained for cases where the count of prosecution pages of evidence exceeds 500.

308. As part of the fixed fee scheme, it was proposed that magistrates' court duty work would not be remunerated separately but the cost of delivering such a service would be factored into the price of the magistrates' court representation work. It was also proposed that travel and subsistence disbursements be included within fixed fee bids. The consultation asked:

Question 21: Do you agree with the following proposed remuneration mechanism under the competition model. Please give reasons.

- **Block payment for all police station attendance work per provider per procurement area based on the historical volume in area and the bid price**
- **Fixed fee per provider per procurement area based on their bid price for magistrates' court representation**
- **Fixed fee per provider per procurement area based on their bid price for Crown Court litigation (for cases where the pages of prosecution evidence does not exceed 500)**
- **Current graduated fee scheme for Crown Court litigation (for cases where the pages of prosecution evidence exceed 500 only) but at discounted rates as proposed by each provider in the procurement area**

Question 22: Do you agree with the proposal under the competition model that applicants be required to include the cost of any travel and subsistence disbursements under each fixed fee and the graduated fee when submitting their bids? Please give reasons.

Key issues raised during consultation

309. In its response to the consultation, the Law Society commented on each of the proposed levels of remuneration.

a) Police station attendance block payment

The Law Society argued that a block payment for police station attendances is problematic because the volumes can change, potentially significantly, for reasons not within the control of the provider. The Law Society suggests that if such a mechanism were implemented, a clear tolerance which would trigger an additional sum or require retender should be considered. In the event a fixed fee were implemented, the Law Society argued that it should contain an escape mechanism for exceptional cases.

b) Representation in the magistrates' court

The Law Society disagreed strongly with the proposal not to have any sort of escape mechanism in the remuneration for magistrates' court cases. They argued that firms would be at permanent risk of being destabilised financially.

Whilst recognising the proposal to include the cost of magistrates' court duty work in the fixed fee for all other magistrates' court representation, the Law Society highlighted the very real concern that the arrangements for court duty have been significantly under estimated, failing to take account of potential increases in volume.

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

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

The Law Society highlighted their concern that the fee structure for the Litigator Graduated Fee Scheme (LGFS) was already skewed in favour of the higher page count cases to the detriment of the majority of routine cases. The Law Society suggested continuing the dialogue with the Ministry of Justice on how to restructure the LGFS in order to remunerate cases more fairly.

310. With regard to the proposal to include the cost of travel and subsistence disbursements in the fixed fees, the Law Society argued that such a proposal would not be financially viable for providers. They argued that on top of a fee cut of over 17.5%, suppliers will be expected to absorb an unknown amount for travel and subsistence costs. They suggest travel distances would be completely unknown, as would other possible disbursements. The LAPG supported this view.
311. In addition to those arguments by the Law Society set out above, a number of specialist associations commented on the proposed remuneration mechanism. The LCCSA argued that the proposed fixed fee scheme would undermine the relationship between lawyer and client as it would create a perverse incentive in relation to advising clients on how to plead.
312. The CBA argued that a block payment at discounted rates would lead to an acute conflict of interest for many, if not all providers. They argued that the financial pressure to maximise profit under a contract, which rewards volume alone will place the provider at odds with appropriate and effective client service.
313. A number of individual practitioners responded to this question. One such respondent argued that there should be one fee scale for all providers - not their individual bid fees. Once the bidding is over the bid prices for the successful number of providers should be averaged so that they all get the same rate of remuneration.
314. Another practitioner suggested that magistrates' court work should be remunerated by way of a graduated fee scheme with a sliding scale based on the nature of the offence and estimated length of time to resolve, as currently happens in the Crown Court.
315. A number of individual respondents argued that under the proposed remuneration mechanism providers will do the least amount of work possible. Others argued that the Government was "labouring under the misapprehension that lawyers spin cases out in order to milk the system".

Government response

316. We maintain the view that the current remuneration mechanism is unnecessarily complex but in light of responses to these questions the Government accepts that a fixed fee without any escape mechanism for the remuneration of magistrates' court representation would not be economically viable for providers.
317. Similarly, we accept the views made by a number of individual practitioners that one fixed fee for all Crown Court work with less than 500 pages of prosecution evidence would create too much of a financial risk for providers.

318. We have therefore explored modifications to the proposed remuneration mechanism in the model presented in Chapter 3.
319. The modifications to address these points would also help to mitigate the increased level of uncertainty with regard to case volumes as a result of including client choice. Without exploring such modifications, in order to counteract the increased level of uncertainty, we would need to increase the contract size, thereby reducing the number of contracts on offer. However, the proposed remuneration mechanism set out in the modified model looks to mitigate the need to reduce contract numbers so significantly.
320. In light of the proposal to distinguish between Duty Provider Work and Own Client Work in the modified model presented in Chapter 3, we also propose to modify the remuneration mechanism for police station attendance. Under the model we propose that police station attendance be remunerated on a case by case basis under a fixed fee scheme, rather than a block payment.
321. The suggestion made at paragraph 313 above with regard averaging the bid prices would not be an acceptable mechanism, in our view, to set the price for all winning applicants. Such an approach would lead to a protracted negotiation period with applicants to determine the final price. In any event, the modified model set out in Chapter 3 proposes a non-price based competitive tendering process. We believe 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.
322. Finally, we acknowledge the views from respondents that magistrates' court duty work should continue to be remunerated by way of hourly rates. Whilst the intention behind the original proposal was to streamline the payment mechanisms, we are persuaded that such an approach would be more complex for providers to plan the financial viability of the proposed scheme. We are also minded to keep the payment of travel and subsistence disbursements separate from the fixed fees.

(x) Procurement process

323. The consultation paper included a section to explain how the LAA intended to run the competitive procurement process to procure new crime contracts. The consultation sought views on any other factors to be taken into consideration in designing the criteria.
324. The April 2013 Model also included the proposal to introduce a price cap for each fixed fee and graduated fee under which applicants would be asked to submit bids. The proposal was to introduce a price cap at 17.5% below current levels of remuneration. The consultation asked:

Question 23: Are there any other factors to be taken into consideration in designing the technical criteria for the Pre Qualification Questionnaire stage of the tendering process under the competition model? Please give reasons.

Question 24: Are there any other factors to be taken into consideration in designing the criteria against which to test the Delivery Plan submitted by applicants in response to the Invitation to Tender under the competition model? Please give reasons.

Question 25: Do you agree with the proposal under the competition model to impose a price cap for each fixed fee and graduated fee and to ask applicants to bid a price for each fixed fee and a discount on the graduated fee below the relevant price cap? Please give reasons.

Key issues raised during consultation

325. Whilst very few respondents made suggestions on what other factors should be taken into consideration when designing criteria for any future tendering process, some respondents commented on the proposed criteria set out in the consultation paper.
326. The Law Society explained in its response that they have contacted a number of banks who told them that they could not guarantee investment in a business that first has no guarantee of a contract at all, and secondly even if they do obtain a contract, it will be for only 3 years with no guarantee of an extension or a new contract. They argued that the notion that firms will be ready with guaranteed finance at the point of bidding on such an uncertain basis was completely unrealistic. The CBA supported this view.
327. The CBA highlighted the importance of not only assessing the quality of a supplier but also the quality of services supplied. However, they made no suggestions as to what factors should be considered in doing so.
328. A number of individual practitioner respondents made suggestions on factors that should be taken into consideration when designing criteria, including the following specific comments:
- Experience of managing a legal team and preparing complex cases;
 - At the very least, the existence of a functioning, staffed office within the CJS area, and should be able to demonstrate experience of legal services work, not merely comparable work;
 - The necessary standard of professional qualification to provide legal advice;
 - The most crucial aspect of tender should be quality;
 - Any adverse observations made by judges during court proceedings;
 - References in support of applications, provided by other practitioners and/or judges;
 - There should be requirements as to numbers of qualified staff and minimum number of years experience in the relevant area of law;
 - Regulatory compliance;
 - Previous peer reviews, quality, ability, experience and past performance;
 - Priority for established professionals; those with local links. Disqualification for non-lawyers with no local links, and for unrealistically low bids; and
 - Providers need to demonstrate up front that they can provide the cover required.
329. With regard the proposed price cap, the Law Society believed it to be economically unsustainable and the LAPG considered the price cap to be anti-competitive.

Government response

330. The Government will take into consideration the suggestions made by respondents when designing the procurement process.
331. As explained at paragraph 197 above, we are persuaded that a competitive tendering process where price is set administratively would still achieve our overall policy objectives of delivering a sustainable and more efficient service at a price the taxpayer can afford. However, with regard to the complaint that such a reduction in fees would not be economically viable, it is important to highlight the work presented by Otterburn in support of the Law Society response which showed that 25% of current providers surveyed said they could sustain a reduction in fees of 17.5% without making any structural changes and without the redistribution of work from those providers that would leave the market.
332. The modified model set out in Chapter 3 proposes a non-price based competitive tendering model but sets prices administratively at 17.5% below current rates⁶⁰.

(xi) Contract award / implementation

333. It was proposed that subject to the outcome of the consultation the competitive tendering process would commence in all procurement areas in October 2013 with a new contract commencing in September 2014. The consultation paper included an indicative milestone timetable.
334. Whilst there was no specific question on this element of the April 2013 Model, a number of respondents provided comments as set out below.

Key issues raised during consultation

335. The majority of respondents, including the representative bodies and specialist associations argued that the implementation timetable set out in the consultation paper was unworkable for a number of reasons.
336. The Law Society explained in its response that it would take longer than proposed for both new entrants and existing providers to establish the viable businesses necessary to submit an application. The reports from Otterburn and Deloitte commissioned by the Law Society set out what the Law Society described as the difficulties with the proposed timescales in terms of obtaining:
- Finance
 - Accommodation
 - IT systems
 - Staffing
 - Regulatory approvals

⁶⁰ 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 February 2014 (see paragraphs 3.52 to 3.55 on a proposed interim fee reduction).

337. Specifically with regard to the financial requirements, the Law Society explained that two major high street banks they spoke to expressed concerns regarding the “uncertainties inherent in the contract model proposed, and the timescales within which firms would need to secure investment.”
338. In addition, the Law Society suggested that whilst larger organisations may already have the necessary expertise in place for advising on tendering, the majority of current providers would need external professional advice on how to prepare an application for a large public contract. This, the Law Society submitted, would give an unfair advantage to larger organisations, contrary to EU Treaty principles.

Government response

339. The Government acknowledges the concern that successful applicants would need longer than the proposed three month mobilisation period to secure all necessary resources to deliver services effectively at the point of Service Commencement. Therefore, we are proposing a more appropriate mobilisation period.
340. In light of this further consultation we are proposing to move the start date of the procurement process for the modified model to early 2014.

Conclusion

341. Having considered, and given due weight to the responses to the consultation on the April 2013 Model, the Government has decided to consult on a modified model which seeks to address many of the concerns expressed in response to the original proposal. The details of the modified model are set out in Chapter 3 and we seek views on the proposal.

Interim Payments

342. 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.
343. Current Regulations make explicit provision for interim payments to be made in longer Crown Court cases and cases of hardship. However, the LAA receive very few claims under these provisions. The existing Staged Payment facility under the Advocates’ Graduated Fee Scheme (AGFS) allows for interim payments to be made in cases where 100 hours of preparation has been carried out and it is estimated that the case will last a year from sending for trial to disposal. Alternatively, there is also a hardship provision for all providers, which currently require the provider to show instruction was over six months ago; no payment is likely in the next three months; and the provider can show to a determining officer that they are suffering financial hardship.
344. The LAA will work with professions’ 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

Introduction

345. Chapter 5 of the consultation document set out a number of proposed reforms to remuneration under the criminal legal aid scheme with a view to delivering further savings in areas not included in the proposed model of competition and complementing work in the wider criminal justice system to embed the principle of “right first time”.

Restructuring the Advocates’ Graduated Fee Scheme

346. The consultation paper proposed restructuring the current Advocates’ Graduated Fee Scheme (AGFS) to encourage earlier resolution and more efficient working through a harmonisation of guilty plea, cracked trial and basic trial fee rates to the cracked trial rate, and a reduction in and tapering of daily trial attendance rates from day 3. The consultation asked:

Question 26: Do you agree with the proposals to amend the Advocates’ Graduated Fee Scheme to:

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

Please give reasons.

Key issues raised

347. Most respondents disagreed with the introduction of a harmonised Basic Fee payable for guilty pleas, cracked trials and trials. Respondents, including the Bar Council and the CBA opposed the proposals on the grounds that there have already been substantial cuts in recent years and savings are also being achieved from the decline in cases. Many respondents said that it was unfair to harmonise trials with cracked trials and guilty pleas, given the fact that trials require more work, and more skilled work. Some felt the proposals would place an incentive on lawyers to advise a plea of guilty. A small number of respondents, including the Law Society, said that they understood why the fees for an early guilty plea and a cracked trial could possibly be harmonised. The Bar Council suggested that the increase in fees for guilty pleas would provide an incentive for solicitors to keep as much guilty plea work in house as possible.
348. Most respondents said that it was wrong to target reductions on the longest, most complex, cases. It was argued that defence advocates have little influence over the length of a trial, which can be affected by any number of factors such as other work judges have to fit into the court day or the timely production of defendants from custody. Respondents felt that advocates were being penalised for something that was largely beyond their control and that the initial reduction in daily attendance fees was too harsh in itself, but made worse in longer cases most affected by the taper. While not commenting directly on the proposed taper in daily attendance rates, the JEB supported the idea of effective preparation and the expeditious conduct of trials.

349. Many respondents did not agree that the proposals would affect the advocates with the highest fee income most and have little impact on the the advocates with the lowest fee income. They argued that the combined effect of the proposals for competition and the proposed fee changes would affect the behaviour of solicitors and advocates and reduce the work available for the most junior barristers.
350. Consultees suggested that, contrary to our expectations, the combined impact of our criminal fee proposals, and competition proposals, would most affect the junior Bar, as senior advocates would 'cherry pick' the more profitable cases. Consultees also suggested that competition proposals for litigation would drive solicitors to do as much magistrates' courts advocacy and non-trial Crown Court work in house as possible, rather than instruct the junior Bar. It was suggested this would drive people away from advocacy as a profession and adversely affect clients, victims and witnesses if there were insufficient quality advocates available.

Government response

351. The existing Basic Fees within the graduated fees scheme are proxies for work done. Different cases within each of the categories of guilty pleas, cracked trials and contested trials may require significantly different amounts of preparation, but within each category, all cases receive the same Basic Fee. The scheme relies on proxies for complexity that determine an average payment for a case of each type, which does not necessarily reflect the amount of preparation undertaken in an individual case, but over an average workload will ensure fair compensation overall. Our proposal was based on the same principles and on simplifying the fee scheme further by eliminating the separate categories of guilty pleas, cracked trials and trials.
352. However, in the light of responses to consultation we have reconsidered our approach. We have always accepted that in many cases the amount of preparation will be greater in contested trials. We have concluded that harmonisation of the Basic Fee for trials with those for cracked trials and guilty pleas would lead to too great a discrepancy between the amount of preparation required and the fee payable. We have been persuaded by consultees that such a payment system would not be a fair reflection of the amount of work undertaken. We have also been persuaded that the proposed approach to tapering daily attendance payments for trials should be reviewed in order to ensure that very long trials are not disproportionately affected. We have set out, in Chapter 4, our proposed alternative approaches for reforming advocacy fees on which we are now seeking views.

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

353. This proposed to reduce the rates for all Very High Cost Crime cases by 30%. We asked:

Question 27: Do you agree that Very High Cost Case (Crime) fees should be reduced by 30%? Please give reasons.

Question 28: Do you agree that the reduction should be applied to future work under current contracts as well as future contracts? Please give reasons.

Key issues raised

354. Most respondents disagreed with the proposed reduction in fees and the application to future work in current VHCCs. However, some respondents, including the Law Society and the CLSA, accepted there was potential to reduce fees in VHCCs. Other respondents argued that a reduction in fees of 30% was not sustainable and that the contracting regime was inefficient and resource intensive. Some also suggested that a system based on hourly rates did not provide an incentive for efficiency. It was also argued that there was no rationale supporting a cut of 30% and that a marked difference between prosecution and defence VHCC rates would violate the principle of 'equality of arms'. Some suggested that an alternative scheme proposed by the Bar Council in 2009, known as 'GFS Plus', was a better way to achieve savings.
355. Some respondents suggested there would be a significant impact on senior advocates, whereas others argued that the impact would be greater on junior advocates as their senior colleagues would avoid taking on VHCCs and concentrate on graduated fee cases instead.
356. There was agreement among respondents that the reduction should not apply to future work in current cases. There were concerns that it would be unfair and unlawful unilaterally to change the terms of a contract that had already been entered into. It was suggested there was a risk that some advocates would return briefs in on-going cases if fees were reduced and that this would lead to increased expenditure paying new advocates to get up to speed.
357. As set out above, consultees suggested that, contrary to our expectations, the combined impact of our criminal fee proposals, and competition proposals, would most affect the junior Bar. It was suggested that these potential effects would impact disproportionately on female and BAME barristers, who are better represented among the junior Bar.

Government response

358. As set out in our revised proposals for the procurement of criminal legal aid services, VHCC litigation and Crown Court advocacy services are not included within the new approach to procurement. Our rationale for proposing a reduction of 30% in fees is to reduce spending in these long-running cases, which attract a disproportionately high proportion of legal aid expenditure. Some respondents to consultation explicitly accepted that this was an area where savings could be made.
359. As we said in the consultation document, VHCCs are high value, long duration cases that bring certainty of income for providers, so we believe a reduction of 30% is sustainable in this context. VHCC work is typically undertaken by more senior advocates and established firms of solicitors and, in our assessment, a reduction of this level is sustainable for individuals and firms with the highest fee income. We noted in the consultation paper that our indicative analysis showed that 12% of advocates received fee income of over £100,000 and 3% received fee income of over £200,000. In 2012/13, more than half of those with fee income over £200,000 worked on VHCCs, compared to just 20% of those with fee income between £100,000 and £200,000. Just 4% of barristers who earned below £100,000 worked on a VHCC in 2012/13. We believe it is right that our reductions should affect such advocates rather than those who are on much lower fee income. That said, the response of higher earning advocates to our proposed rate reduction may be to seek to undertake more non-VHCC criminal work, which could have some impact on the generally lower earning

advocates currently doing such work, although there is a limit on their capacity to undertake non-VHCC work. In any event, if higher earning advocates did respond in this way, then lower earners might have increased access to VHCC work.

360. Given the overall costs and exceptional nature of these cases we believe that the current contracting regime is necessary to scrutinise costs in each individual case. While we generally support graduated or fixed fees to promote efficiency, the exceptional nature of these cases make a system of graduated fees (such as the GFS Plus model outlined below) impractical as it would less closely reflect the amount of work that is generally required on a case, which means that those who take on a simpler case are likely to benefit, whilst those who take on more complex cases would lose out. This is a particular problem in VHCCs as the small volume of these cases means that suppliers will not necessarily be undertaking a mixed basket of cases over a given time.
361. The GFS Plus model favoured by some respondents, was first proposed in 2009 by the Bar Council as a potential scheme that they believed would be acceptable to advocates wishing to conduct VHCC work as a long-term sustainable solution (given there had been difficulties with the panel scheme that was then in place).
362. The scheme created two new proxies for complexity that would have been factors in working out the appropriate level of fees. Those proxies were the seriousness of the case and the defendant's role. While it might be possible to define case seriousness, the role of a defendant is largely subjective. With the prospect of the introduction of new proxies, it was considered essential in 2009 that sufficient modelling was undertaken to ensure that the impact was understood. In the absence of robust data there would be no way to tell if the proposal would cost more or less than the VHCC scheme.
363. In order to test the validity of that scheme, data was required on concluded VHCCs, which the Bar Council offered to collect from their members to test the scheme. It would have also given the then Legal Services Commission (LSC) the opportunity to test the proposals on the basis of the financial impact. Despite a great amount of work by the Bar and others, the response rate from advocates remained low. Only 24 data collection forms were found to contain sufficient information to be usable by the LSC analysts. Given that the scheme was modelled on a very small number of cases, we are not convinced that the GFS Plus model is sufficiently robust nor can we be certain that it would achieve savings.
364. It was also accepted in 2009 by the Bar that even if GFS Plus were implemented there would need to be an escape to hourly rates in exceptional cases. We agree and accept that hourly rates will always be needed for the most exceptional cases, so GFS Plus alone would never be a complete answer. Since 2009 the scope of the VHCC scheme has been significantly reduced and there are now only approximately 15 new VHCC cases that are contracted per annum. Introducing a new GFS Plus scheme, plus a separate hourly scheme for exceptional cases is not, in our view, justified for such a small number of cases.
365. We do not accept that a distinction in legal aid and CPS rates for VHCCs undermines the principle of 'equality of arms' solely because legal aid rates for VHCCs are lower than the CPS rates. We are confident that defendants will continue to receive effective representation under the revised rates. The vast majority of VHCCs have multiple defendants and only one prosecution team; the prosecution team therefore has a

different role to perform than defence teams in VHCC cases, which is reflected in differences in remuneration. Moreover, the CPS scheme and the defence scheme differ in a number of ways which undermine direct comparison, for example, the CPS scheme covers cases over 40 days, rather than 60 days.

366. We consider it appropriate to apply the fee reduction to existing cases as well as any case classified on or after the implementation date. In order to bear down on the cost of these expensive cases, which typically run for several years, we need to ensure that the rates being paid on an on-going basis represent value for money. In line with the approach taken on our standard legal aid contracts, the Lord Chancellor may make secondary legislation to include the rates applicable to VHCC cases and amend the applicable contract arrangements/documents to reflect these legislative changes.
367. Even after a 30% reduction VHCCs will remain high value, long duration cases that bring certainty of income for providers, which is important, particularly for self-employed advocates. For that reason, in addition to their professional obligations to clients, we do not consider there is a significant risk that advocates will return briefs or that solicitors will exercise their unilateral right of termination under their VHCC contracts.
368. We have decided to apply the reduction to individual VHCC contracts issued since July 2010 and VHCC 2008 Panel contracts. There are a small number of pre-panel cases that remain live, but the outstanding work is negligible, so we are not amending rates under pre-2008 contracts.
369. Given the high value and long duration of VHCC cases and certainty of income for providers that they provide, we believe a reduction of 30% is sustainable in this context. VHCC cases will remain attractive as they will still be high paying cases that provide certainty of income over a sustained period, which is important to providers seeking to increase the volume of work they undertake. VHCCs tend to be high profile cases which are also attractive from the point of view of career progression and reputation, so it is less likely that suppliers will turn away from the work. LAA analysis of fraud⁶¹ VHCCs shows that the average value of a contract is £1m and contracts run for three to four years on average.
370. Our revised analysis of the equality impacts of the reforms is addressed at Annex F.

Conclusion

371. 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 cases⁶².
372. It is currently anticipated that this proposal will be implemented through secondary legislation, subject to Parliamentary approval, and changes to contracts later this year.

⁶¹ Most VHCCs are now fraud cases.

⁶² i.e. live cases being run under the 2008 VHCC Panel Scheme or under the VHCC Arrangements 2010.

Reducing the use of multiple advocates

373. The consultation proposed to tighten the rules governing the decision to appoint multiple counsel in a case, changes to litigator contracts to require greater support to counsel from the litigation team, and the introduction of a more robust and consistent system of decision-making. The consultation asked:

Question 29: Do you agree with the proposals:

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

Please give reasons.

Key issues raised

374. Most respondents, including the Council of HM Circuit Judges, disagreed with these proposals and felt any change was unnecessary, both in terms of the criteria used to make decisions and the involvement of Presiding Judges. Respondents said that there was no evidence that two advocates were being allowed too often and it was not unexpected that the small number of courts where the most serious cases are heard allow more than one advocate more often than other courts. Many suggested that trial judges were best placed to make these decisions as they knew the details of the case and that seeking the approval of Presiding Judges was an unnecessary burden that might cause delay. Given that decisions are made on the individual facts of a case, respondents suggested that Presiding Judges would not be able to make decision-making more consistent. Many respondents said that it was not common for every single defendant to be allowed multiple advocates in multi-handed cases; usually leading counsel would be restricted to the main players in a case. However, the JEB said there were very few cases where the volume of paperwork or other business meant that two or even three advocates are necessary or where even a highly competent leading advocate would be overwhelmed.
375. Some respondents said that where the prosecution had more than one advocate then the defence should also have more than one to ensure equality of arms. The JEB said there was a need to preserve the incentive to engage experienced trial advocates, including Queen's Counsel, where they were needed.
376. We received mixed responses to the question of greater litigator support to Crown Court advocates. Solicitors said they could not afford to provide more support at present and would be even less able to if fees were reduced by 17.5% as proposed under the model of competitive tendering for criminal legal aid in the consultation. Advocates generally welcomed greater support, but some suggested this was a not a substitute for a second advocate in appropriate cases.

Government response

377. We acknowledge that there are circumstances in which it is necessary and appropriate for the defence to engage more than one advocate where the prosecution has done so.

However, we remain concerned that there are too many cases where multiple advocates are being appointed unnecessarily, particularly in cases with multiple defendants, particularly where each and every defence team is being allowed two advocates.⁶³ In our view, change is necessary. There is evidence that two advocates are being allowed more often than necessary. The JEB referred to a considerable body of anecdotal reports from the judiciary that the “second” advocate position has been filled by advocates with rights of audience who played no real part in the conduct of the case.

378. We accept that there will be a small number of courts where the most serious cases are heard and so might allow more than one advocate more often than other courts. Nonetheless, we think multiple advocates are being used too routinely even in such cases. We also accept that Presiding Judges may 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 consistency of approach between court centres, where differing practices may have evolved over time. We consider it appropriate that Presiding Judges have appropriate oversight of the grant of QCs and multiple advocates and that initial recommendations are made by resident judges to ensure consistent principles are being applied at each court centre.
379. We originally considered that delegation of that function may be necessary in London in relation to cases heard at the Central Criminal Court and Southwark given the high volume of applications for multiple advocates at those court centres. However, having considered respondents’ views on the potential for delay we intend to give all Presiding Judges the power to delegate their function (e.g. to a resident judge) where they consider it appropriate. We consider this will provide flexibility to ensure that bureaucracy and delay might be minimised.
380. For the reasons set out in the consultation paper, we intend to amend the prosecution condition criterion for the appointment of multiple advocates to make clear that it is not sufficient to demonstrate the need for multiple advocates for each and every defendant just because the prosecution have multiple advocates. Many respondents said this was unnecessary, but we are satisfied that there is sufficient evidence of cases where defendants are granted multiple advocates unnecessarily, for example those who face trial on lesser offences, and that it is appropriate to tighten the criteria.
381. 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, rather than making a decision on a single aspect of a new contract at this stage.

Conclusion

382. Having considered, and given due regard to the responses to the consultation, the Government has decided to change the prosecution criterion applicable to determining the selection of multiple advocates and the process for determining the appointment of QCs and multiple counsel.
383. It is intended that we will introduce these reforms, subject to Parliamentary approval, through amendments to secondary legislation later this year.

⁶³ Exceptionally three advocates might be allowed, but only in cases prosecuted by the Serious Fraud Office.

384. We will take forward the question of litigator support for advocates separately as we develop the policy on future contracts.

Reforming Fees Civil Legal Aid

385. The consultation sought views on three proposed reforms to remuneration in civil and family proceedings.
386. Many respondents raised concerns that the proposed fee reforms threatened the ability of providers to deliver legally aided services. Responses to specific questions relating to civil and family fees are considered below.

Payments to family solicitors

387. The consultation asked:

Question 30: Do you agree with the proposal that the public family law representation fee should be reduced by 10%? Please give reasons.

Key issues raised

388. There was general opposition from respondents to this proposal, particularly from solicitors and barristers. This included both the Law Society and the Bar Council who felt that the legal profession had already suffered, in real terms, from an income cut as a result of the previous Legal Aid Reform fee changes and a continuing inflationary freeze. Several respondents also argued that the Government was acting in bad faith in trying to reduce payments for legal services so soon after the new contracts had commenced.
389. Some respondents also argued that the workload reductions anticipated as a consequence of the Family Justice Review (FJR) reforms had not yet been delivered and should not be used by Government as the basis for immediate cuts. Some respondents went further and disagreed that the FJR reforms, in particular those being made in relation to experts, would deliver any reductions in workload, taking the view that the absence of expert reports would require solicitors to work more in gathering evidence themselves. Also, some argued that the focus on the earlier settlement of cases under the revised Public Law Outline (PLO) would require greater preparation up front.
390. Some respondents, including the Bar Council, expressed the view that reducing the fixed representation fees would increase costs as the escape threshold would be reached more quickly. Generally, respondents from all sectors argued that the Government had given insufficient consideration to the impact of the proposed fee cut on the reforms already taking place as a result of FJR and the delivery of those reforms. Respondents claimed that such cuts would lead to experienced practitioners leaving the market, affecting the quality of service. There was particular concern about the impact on small firms and those who undertook both family and criminal work.
391. Overall, there was general consensus that Government should await the outcome of the full impacts of LASPO and the FJR reforms before trying to implement further changes.

392. Respondents took the view that if providers left the market as a result of a fee cut, this would impact on vulnerable groups of people, particularly children, by reducing the availability of publicly funded advice and the timely resolution of family cases. Some respondents suggested that previous fee cuts had already resulted in experienced practitioners withdrawing from legal aid work and a further fee cut would exacerbate this problem which would have the greatest impact on women, BAME and disabled legal aid clients.
393. Some respondents suggested that an alternative means of delivering savings would be to address the current regional price differentials that existed in the Care Proceedings Graduated Fees scheme.

Government response

394. 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 becomes more streamlined and efficient, the Government remains of the view that these fees increasingly do not necessarily represent value for money.
395. One of the key findings of the FJR was the fact that unnecessary and inappropriate expert reports were being commissioned, usually in public law family cases, resulting in delays in case resolution. Where no or fewer experts were used, the length of care proceedings decreased significantly⁶⁴. The Government has already accepted the FJR recommendation in this area which resulted in changes being made to the Family Procedure Rules which came into effect on 31 January 2013. In addition, other reforms including the implementation of a revised PLO for care cases (which is currently being piloted and which seeks to streamline the court process thereby reducing the number of hearings), are also likely to lead to a reduction in case duration and, therefore, to a reduction in workload. Latest court statistics for Q1 2013 show that the average duration of court proceedings has already fallen to 42 weeks, down 24% since Q1 2012⁶⁵.
396. Therefore, while the Government notes stakeholders' views about the delivery of the FJR reforms, it considers that with continuing fiscal pressures and the pressing need to deliver immediate savings from legal aid fee reforms, it is essential for Government to ensure that the fees paid for public family law proceedings represent value for money. This means reflecting more closely the amount of work involved, including the reduction in the duration of cases already being seen, as well as the likely reduction in the amount of work involved in care cases that is anticipated from the full implementation of the FJR reforms. In this context, while it recognises that there may also be changes to the stage at which particular work must be completed, the Government remains of the firm view that a reduction in the use of experts and the other procedural improvements being introduced by the FJR reforms will reduce the overall amount of work required of solicitors on a case. We consider that the proposed 10% reduction represents a reasonable reflection of these efficiencies.
397. As set out in paragraph 6.13 of the consultation paper we intend to introduce revised fees to coincide with the introduction of the Single Family Court in April 2014, by which time the key elements of the FJR reforms will have already been in place for a period of

⁶⁴ Cassidy, D and Davey S (2011) Family Justice Children's Proceedings – Review of Public and Private Law Case files in England & Wales, Ministry of Justice.

⁶⁵ Court Statistics Quarterly January-March 2013.

time. The Government is satisfied that this will give providers sufficient opportunity to adjust to these new requirements before the new fees take effect.

398. Hourly rates are currently - and will continue to be - payable in the most complex cases where the issues are such that the time that a provider must take on the case reaches the escape threshold, which is currently calculated by using the hourly rates payable on escape. However, as set out in paragraph 6.11 of the consultation, these rates will be reduced by 10% to promote the efficient resolution of cases and avoid creating any incentive to delay. Our intention is to continue to use the hourly rates, revised as proposed in the consultation, to calculate the escape threshold, on the basis that this will ensure that only those types of cases that reach the escape threshold now continue to do so in future. As now, the LAA will continue to assess these costs and the Government is satisfied that this will be sufficient to manage the likelihood of providers inappropriately and routinely claiming hourly rates
399. The proposed reform will necessarily reduce the income of affected providers but this is on the basis that they will need to do less work on these cases, therefore providing an opportunity to take on other work. While the ability of providers in this market to take on private work is unclear, the rising volume of public family law cases is likely to provide potential additional work for providers in this sector.
400. The general thrust of responses to the consultation suggested that the proposed reduction would not be sustainable and would impact on market supply, disproportionately affecting vulnerable groups who would not be able to access services. Similar arguments have been made in respect of each proposed reform to civil legal aid remuneration since the introduction of Phase I of the fixed fee scheme in 2007. Despite this there have remained significant numbers of providers working in this area who, where they represent children, must independently demonstrate that they meet the necessary quality standards for undertaking such work by being registered on the Law Society's Children's Panel.
401. The only firm indication of market reaction, - the outcome of the 2013 civil legal aid tender process for contracts (which reflect the LASPO scope reforms) suggests that this remains the case. While the outcome of this tender process indicated a very small reduction in the actual number of contracted firms bidding for contracts, there was an increase in the number of offices from which those firms planned to deliver family services (see Annex D). Given that this market reaction was in the light of the significant reductions in publicly funded family work under LASPO, this could arguably indicate that there currently remains a strong appetite amongst providers to do legal aid work and that overall the market should be able to meet the future levels of expected demand at current prices. This does not tell us whether there will be a sufficient number of providers in the market in the long-term, the actual current viability of any contracted firm or how this might be impacted by the fee changes. However, it does suggest that there is currently competition for work and therefore scope for at least some providers to withdraw from the market while still maintaining a sustainable market supply.
402. Taking into account all of the available data, on balance the Government considers that the proposed reductions are likely to be sustainable. We consider that they draw an appropriate balance between the need to reduce spending, taking account of the opportunities and efficiencies provided by wider system reforms, and ensuring that clients can continue to access legally aided services. Our revised analysis of the equality impacts of the reforms is addressed in Annex F. Although there is a risk of

short term disruption to supply in some areas if providers withdraw from the market, we are confident that these could be dealt with should they arise by appropriate mitigation action by the LAA, such as distributing additional work to other providers in the area and running additional bid rounds to find new suppliers.

403. The Government has considered an alternative approach suggested by respondents which would involve removing regional price differentials. However, the effect of removing these could be to reduce rates for solicitors and barristers in affected areas of civil and family work by up to 34% depending on the level at which any revised fee was set. The main differentials are in public family law cases and were initially introduced in 2007 on a temporary basis to ensure the sustainability of market supply in the four regions ahead of the potential introduction of competitive tendering for services. The Government takes the view that their long term retention would only be justifiable in the context of market supply shortages and, therefore, does intend to address these in due course. However, the current assessment is that given the recent changes to scope introduced under LASPO which are yet to fully impact on providers, a cut of that size, may not be sustainable at this time. Instead we intend to review the existing regional price differentials in light of the impact of both the LASPO scope changes and the reforms that are implemented following this consultation.

Conclusion

404. For the reasons set out above, the Government has decided to proceed with the proposal as set out in the consultation paper to implement the proposed 10% reduction to the:
- fixed representation fee; and
 - the hourly rates that apply when a case reaches the escape threshold
405. The revised hourly rates will be used for the purpose of calculating the escape threshold from the fixed fee scheme.
406. The revised rates that will apply are set out at Tables 1 and 2 of Annex E.
407. It is intended that these changes will be introduced by way of amendments to secondary legislation, subject to Parliamentary approval, 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.

Payments to civil barristers

408. The consultation asked:

Question 31: Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the county court and High Court should be harmonised with those for other advocates in those courts. Please give reasons.

Key issues raised

409. Some respondents, including the Law Society and a number of solicitors, agreed that the fee differential between barristers and other advocates should not continue.

However, most respondents, in particular self-employed barristers but also some solicitors, disagreed with the proposed reform. Barrister respondents were particularly concerned about the impact on the junior Bar, suggesting that the proposed change would be likely to make civil legal aid commercially unviable for them. They argued that this would be damaging to the make-up of the Bar as lower fees were likely to restrict the ability of people from poor socio-economic backgrounds to enter the Bar which would have a disproportionate impact on representation from women and BAME groups. This in turn would impact on judicial diversity.

410. A major concern amongst barristers was the lack of certainty around fee income that this proposal would introduce. Some respondents argued that there were fundamental differences between the two sectors that justified the retention of a different fee structure, including the higher personal overheads faced by barristers and the fact that they tended to focus on particular specialised fields of law.
411. Respondents generally argued that the type of cases remaining within the scope of civil legal aid following the implementation of LASPO were typically complex matters that required specialist representation and were not usually undertaken by solicitor advocates. They argued that the proposed fee reduction would therefore impact on the market supply of advocates in these areas.
412. Barrister respondents also argued that any harmonisation should be to the Treasury Solicitor's Department (TSol) panel rates as opposed to the current legal aid rates for other advocates, on the basis that this group tended to appear in similar cases. Other suggestions included harmonising self-employed barrister and other advocate fees at a set fee, for example £100 per hour with a limited range of enhancements, on the basis that this would reduce the administrative burden and make the scheme more feasible.

Government response

413. The Government made clear in its 2010 consultation on legal aid reform that our long term intention was to pay advocates working on civil (non-family) cases similar rates for advocacy and related tasks, regardless of whether they were solicitors or barristers⁶⁶. The Government considers that paying higher rates may be justifiable where work differs significantly, but does not believe there is any justification for using public money to pay one particular group routinely higher rates where the basic work being undertaken is similar in nature to that undertaken by others at lower rates, simply because they belong to different branches of the legal profession.
414. As set out in the response to its 2010 consultation, the Government takes the view that the amount that it pays for any service must represent maximum value for money and must ensure that it pays only those fees that are absolutely necessary to secure the level of services that are required.⁶⁷ In this context, the Government does not accept that any variation in fees as between the claimant and defence undermines the principle of equality of arms, rather it is satisfied that the market should determine what rates are necessary to secure effective representation. We take the firm view that increasing the standard fees currently payable to other advocates, generally, is unlikely to deliver value for money and would necessarily fail to deliver the necessary level of savings.

⁶⁶ Paragraph 7.10 of the Reform of Legal Aid in England and Wales – Consultation Paper.

⁶⁷ Paragraph 6.13 of the general specification of the Standard Civil Legal Aid Contract 2013.

415. Although the Government recognises that remunerating all civil advocates on a common basis as proposed in the consultation would result in some uncertainty for civil barristers as to the total remuneration that they would receive on a particular case. This was, to some extent the situation preceding the codification of civil (non-family) barrister rates in October 2011. Prior to that time, while the then LSC did pay barristers with reference to benchmark rates it was possible (and still is in some limited areas⁶⁸) for total remuneration to vary, especially where a case was assessed by the court.
416. While the Government understands the concern that can accompany any change in approach, we do not agree that the current scheme, which provides up to £135 per hour for advocacy services provided by a newly qualified junior barrister⁶⁹ appearing in a simple case but only £59.40 in respect of similar services provided by any other advocate in the same type of case, represents value for money. Instead it takes the view that the proposed scheme, which explicitly provides for the complexity of the case and the role/performance of the advocate to be taken into account through the availability of enhancements, to be a more effective way of ensuring appropriate remuneration for self-employed civil barristers while also delivering value for money to the taxpayer.
417. While the proposed change would result in lower guaranteed rates applying, if as has been suggested by the Bar Council and others, self-employed civil barristers focus on complex cases in specialised areas of law where they add real value to the resolution of the case, there is no reason that they should not be confident about routinely satisfying the criteria for substantive enhancements to be paid in those cases in which they appear. For example, depending on the complexity of the case, the manner in which the barrister conducted the case and their particular role in that case, the rate paid for advocacy services provided by a self-employed barrister under the harmonised scheme could be increased from:
- a minimum of £59.40 per hour to up to £89.10 per hour for a county court case; and,
 - a minimum of £67.50 per hour to up to £135.00 per hour for a High Court case.
418. Indeed, taking into account that the hourly rate payable to an advocate for preparation work in the High Court or Upper Tribunal is around 6% higher⁷⁰ than the fee for advocacy, the availability of enhancements would mean that some barristers could receive more under this proposal than under either the TSol panel rates or, in some cases, the current civil legal aid fee scheme.
419. The proposed reform would therefore ensure that self-employed barristers were appropriately remunerated through the availability of enhancements which would explicitly permit case complexity and the skills brought by the barrister to that case to be recognised on top of the guaranteed minimum standard fee, which will be paid to provide a certainty of income. These enhancements would allow, for example, a self-employed barrister undertaking preparatory work to be paid up to £94.50 per hour for a complex county court case in London and up to £143.10 per hour (which would be higher than current specified rates) for a complex High Court case. It would be the case

⁶⁸ See Regulation 7(3) of the Civil Legal Aid (Remuneration) Regulations 2013.

⁶⁹ The rate currently payable for any junior appearing in any civil cases in the county court in London.

⁷⁰ The standard rate for preparation in the High Court and Upper tribunal is £71.55 compared to £67.50 for advocacy. See Table 10(a) of Part 3 of Schedule 1 of the Civil Legal Aid (remuneration) regulations 2013.

that if, as suggested by the Association of Prison Lawyers, newly qualified juniors appear, at least initially, in simpler cases in order to develop their skills, they would be unlikely to satisfy the criteria for a maximum enhancement. However, under these proposals, all self-employed junior barristers would still be paid a minimum for £59.40 per hour for advocacy services in the county court, representing an annualised salary of around £95,000 per annum assuming that they worked full-time at that minimum rate only.

420. Our revised analysis of the equality impacts of the reforms is addressed in Annex F. The Government takes the view that the specific level of representation within given practice areas at the Bar is primarily the responsibility of the Bar in ensuring equality of opportunity to all areas of practice. Although it is mindful of the need to encourage those with a protected characteristic to participate in public life and the need to advance equality of opportunity generally, the Government does not believe that legal aid remuneration is the most appropriate policy instrument by which to achieve judicial diversity.
421. Taking into account all of the available data, on balance the Government considers that the proposed reform is likely to be sustainable. It considers that an appropriate balance has been drawn between the need to reduce spending whilst ensuring that clients can continue to access legally aided services. The Government acknowledges that as with any change there is a risk of some short term disruption, for example, as barristers adjust to the new approach or some opt to leave the market and providers need to seek alternative sources of advocacy services. However, it is anticipated that the overall number of advocates willing to undertake legal aid work is likely to be sufficient to meet the reduced demands of the market following the implementation of the LASPO scope reforms.

Conclusion

422. For the reasons set out above, 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.
423. The effect of this will be that noters, pupils and second junior counsel will also become subject to the rates paid to other advocates and would receive the rates payable for *Attendance at court and conference with Counsel*. As is now the case for other advocates, while eligible, these rates are unlikely to attract enhancements.
424. The Government will also codify the current LAA practice of paying self-employed barristers appearing in civil (non-family) cases equivalent rates for travel as other advocates as set out in the consultation paper. As is now the case for other advocates, while eligible, these rates are unlikely to attract enhancements.
425. The revised rates that will apply are set out at Table 3 of Annex E⁷¹.
426. It is intended that the revised rates will be introduced, subject to Parliamentary approval, by way of secondary legislation later this year.

⁷¹ This includes a correction of an error in Table 16 as originally published on page 93 of the consultation document. The revised maximum rate payable for advocacy in the county court in London is £89.10, not £104.10 as set out there.

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

427. The consultation paper proposed to remove the 35% uplift in the rate for immigration and asylum Upper Tribunal appeal cases. The consultation paper asked:

Question 32: Do you agree with the proposal that the higher civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

Key issues raised

428. The majority of those who commented (in particular civil legal aid practitioners) opposed the Government's proposal. Respondents were particularly concerned that the proposal would represent a fee cut and argued that the uplift should remain. However, a number of respondents welcomed the proposal and agreed that it was reasonable to seek to reduce spend in this area when financial circumstances are challenging.
429. Respondents generally acknowledged that the uplift was introduced under an old scheme of retrospective funding which no longer applies. However those who opposed the proposal argued that the uplifted rate remains justified, on the grounds that the rates have not risen for over 10 years, even though the work has become more complex and expenses have increased. They argued that the uplift had been factored in (by providers and the LAA) every time rates were not increased. They argued that the proposed removal of the uplift represents a fee cut which (following the changes introduced by LASPO) will drive providers from the market, leading to cases not been taken forward.
430. Respondents further argued that the uplift should remain as, without the uplift, these cases will be paid at a lower level than the proposed standard advocates' fee for other Upper Tribunal cases and where there is an enhancement of the fee and for the High Court.
431. Some respondents also argued that the proposal would make it unworkable for specialist advocates to focus on immigration work and would violate the principle of equality of arms.
432. A number of respondents did agree with the proposal, for example, questioning how in a time of financial challenge any sort of uplift could even be considered.

Government response

433. The Government's view remains that there is no justification for the continuing payment of the higher rate. Under the previous scheme (abolished in 2010) a Tribunal judge awarded a cost order retrospectively at the end of a reconsideration (full) hearing based on their assessment as to whether a case had significant prospects of success at the time the review application was made. If a permission application did not succeed and a reconsideration hearing was not ordered, the application was not funded and the supplier received no payment. If a reconsideration hearing was ordered, the costs of the permission application and the reconsideration hearing itself were dependent on the judge determining at the end of the case that a costs order should be made. A risk premium of 35% was therefore added to mitigate the risk of providers taking forward review and reconsideration work.

434. However, under current arrangements, the costs order element and judicial assessment as to the award of costs have been abolished. Only work on the application for permission to appeal to the Upper Tribunal is at risk. Although payment may only be made at the end of a case, payment is now guaranteed⁷² once a case has been granted permission. We therefore consider this reduction in risk removes the justification for a compensatory uplift. Although the uplift has remained in place since 2010, its continuing availability was not intended to compensate providers for a lack of fee increase.
435. The Government considers that a difference in fee levels between the fee paid for immigration and asylum Upper Tribunal appeals and the fee paid for other civil cases heard in the Upper Tribunal is justified. Immigration and asylum cases in the Upper Tribunal are funded as Controlled Work; other civil cases in the Upper Tribunal are funded as Licensed Work. We do not accept that a difference in rates as between claimants and defendants alone undermines equality of arms. We are confident that legal aid recipients will continue to receive effective representation under the revised rates for the reasons set out below.
436. Whilst the Government recognises fees have not increased in several years, we consider that the market is sufficiently able to continue to provide a high quality service to enable individuals to be adequately represented with the removal of the uplift. The 2013 civil legal aid tender that introduced the LASPO scope reforms demonstrated that for immigration and asylum there was a significant increase in the number of firms bidding for contracts and over three times as many bids for Matter Starts than cases available.
437. Although the general thrust of responses to the consultation suggested that the proposed reduction would not be sustainable, similar arguments have been made in respect of each proposed reform to civil legal aid remuneration since the introduction of Phase I of the fixed fee scheme in 2007. Despite this there have remained significant numbers of providers working in the civil area and the only firm indication of market reaction - the outcome of the 2013 civil legal aid tender process for contracts reflecting the LASPO scope reforms – suggests that this remains the case. While the outcome of the 2013 tender indicated a very small reduction in the actual number of contracted firms, there was around a 20% increase in the number of offices bidding for contracts in 2013 compared to 2010, and the total number of offices bidding for contracts in 2013 was almost twice as high as the number of existing contract holders at that point. Given that this market reaction was in the light of the significant reductions in publicly funded asylum and immigration work under LASPO, this could arguably indicate that there currently remains a strong appetite amongst providers to do legal aid work and that overall the market should be able to meet the future levels of expected demand at current prices. This does not tell us whether there will be a sufficient number of providers in the market in the long-term, the actual current viability of any contracted firm or how this might be impacted by the fee changes. However, it does suggest that there is currently competition for work and therefore scope for at least some providers to withdraw from the market while still maintaining a sustainable market supply.
438. Taking into account all the information available, together with the current financial climate, and the purpose of the uplift no longer being applicable, the Government considers that the proposed removal of the uplift is justified and appropriate.

⁷² Subject to usual contractual assessment rules.

Conclusion

439. Having considered, and given due regard to the responses to the consultation, the Government has decided to proceed with the proposal to remove the current 35% uplift in the rate payable for immigration and asylum Upper tribunal cases.
440. The revised rates that will apply are at Table 4 of Annex E.
441. It is intended that the revised rates will be introduced, subject to Parliamentary approval, by way of secondary legislation, later this year.

Remuneration to experts in civil, family and criminal proceedings

442. The consultation paper sought views on a proposed 20% reduction in fees payable to experts in civil, family and criminal proceedings.

443. The consultation asked:

Question 33: Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons

Key issues raised

444. There was general opposition to the proposed reduction in fees paid to experts from all sectors, including the Law Society and the Bar Council, as well as expert groups, such as the Academy of Experts. While concerns focussed on the difficulties that the proposal would introduce in procuring experts, with respondents generally arguing that this would significantly reduce both the supply and quality of expert services, some respondents, especially experts, also commented on operational issues. These included problems with payment and in securing prior authority to pay higher rates or permission for an expert to spend a high number of hours in particular cases. In addition, some respondents, including the Academy of Experts, reported difficulties with late and/or unclear instructions from providers which sometimes resulted in experts being unable to take on a case and therefore impacted on market supply.
445. A number of respondents suggested that it was already difficult to find suitably qualified experts willing to work at current legal aid rates and that further reductions would increase this difficulty, as the most experienced experts would leave the market, impacting on quality which would have implications for vulnerable groups such as disabled clients, families and children who were dependent on legal aid. Particular concerns, including amongst the judiciary, were raised in relation to experts involved in specialised clinical negligence cases, for example those involving brain damaged babies, where it was argued the work was so specialised that there was a very limited supply of experts with the necessary expertise. Many respondents also noted that the Government had only recently reduced expert fees across the board in October 2011.
446. Some respondents, including members of the judiciary, argued that rates paid by the CPS were not an appropriate comparator, as the questions/issues that required analysis in CPS cases generally tended to be more focussed, for example, on a single individual where expert evidence was required to determine the issue of fitness to plea. By comparison, experts in other areas, such as those in public family law cases, were generally required to carry out a more complex assessment. Alongside this, a number of respondents, including the Bar Council and the JEB, noted that some of the criminal

legal aid rates, in particular those for many London based experts in crime, were already lower than those elsewhere and therefore already within the range of standard CPS rates. They were particularly concerned that the implementation of the proposed 20% reduction in these areas could result in lower rates being payable under legal aid than by the CPS which could impact on the number and/or the quality of experts available to parties funded under legal aid.

447. Some respondents also argued that the Government had not taken proper account of the cumulative impact of the proposed fee reductions and the proposed introduction of new quality standards for experts appearing in the family courts later this year, which could be expected to have an impact on market supply. They generally also took the view that the Government should await the savings resulting from the FJR as a result of the reduction in the use of experts in family proceedings and through the current standards being developed to ensure the level of expertise expected of experts before seeking to reduce fees further.
448. A number of suggestions were made about alternative ways of addressing expert fees. These included revising them in line with professional consensus on issues such as benchmarking and clearer definitions of the rates payable to experts against their professional titles/qualifications.

Government response

449. The amount that we pay out for any service must represent maximum value for money. In this context while the Government notes the views from stakeholders about fee levels taking more account of professional titles/qualifications, it considers that it needs to ensure it pays only those fees that are absolutely necessary to secure the level of services that are required. While the Government notes stakeholders' views about the delivery of the FJR reforms, we consider that given continuing fiscal pressures, it is essential that we take steps now to ensure that the fees paid for experts represent value for money, reflecting more closely the rates paid elsewhere for such services.
450. The majority of legal aid funded expert services are used in public law family proceedings. The Government acknowledges that there were operational difficulties in this area following the initial codification of expert rates in October 2011, particularly as providers and experts adjusted to the new fee scheme and there was a significant increase in the number of applications for prior authority. However, the Government is satisfied that appropriate mechanisms are now in place to deal with such matters. Current LAA data confirms that very few requests for prior authority to pay higher rates are now being received. This suggests that the market has now adjusted and there are a sufficient number of most expert types willing to provide services at existing rates. Alongside this, following discussions with Representative Bodies of contracted legal aid providers, the LAA introduced guidance on the number of hours routinely claimed by the most frequently used expert types in public family law proceedings, providing greater clarity for both providers and experts about when prior authority was necessary to exceed those hours, significantly reducing the numbers of applications being received.
451. While the length of time employed by a particular expert may differ depending on the type of case they are involved in, the Government considers that the expertise representative of their profession should not. It is reasonable therefore for similar hourly rates to be paid where the type of expert service required is the same, for example, a psychologist, reflecting the professionalism/expertise brought to the case.

The correct way to remunerate variation in the amount of work required in different cases is through allowing more hours to be claimed. In the case of, for example, a family expert who is required to consider significant amounts of evidence and interview multiple family members, the total amount of remuneration is likely to be higher than that paid to a similar expert in a criminal case who may only be carrying out an assessment of whether an individual is fit to plead, reflecting the amount of work involved. As set out in the consultation paper, it will remain possible to secure higher rates where absolutely necessary and the Government therefore takes the view that there is no justification for standard legal aid rates to be higher than those paid for similar services elsewhere.

452. The Government notes the reported difficulties with late and/or unclear instructions from providers and that this could impact on effective market supply. It is unclear why such difficulties should exist. However, this is an issue for experts and their instructing solicitor and the Law Society has recently developed new forms and procedures for providers to use when commissioning experts services. We intend to work with the sector to explore how best use can be made of this to support the effective commissioning of experts.
453. Following engagement with contracted legal aid providers who had expressed evidenced concerns about market supply, the Government had previously identified two specific areas, housing disrepair cases and clinical negligence (cerebral palsy) cases where it was necessary to authorise higher rates to ensure the availability of experts in these highly specialised areas. The higher rates were codified for surveyors in housing disrepair cases in April 2013 and new guidance was issued to LAA caseworkers in May 2013, authorising them to routinely pay specific higher rates to Neurologists, Neuroradiologists and Neonatologists working on clinical negligence (cerebral palsy) cases. Given the specialised nature of housing disrepair and clinical negligence (cerebral palsy) cases, the key role that these types of experts play and the very limited supply of these experts that has been evidenced by providers, the Government has decided to maintain the higher rates for these specific experts where they appear in these types of case.
454. Separately, the Government acknowledges that the current legal aid rate for interpreters in London is already below CPS rates and that the proposed 20% reduction to interpreter rates outside of London would take them below current CPS rates. We are not aware of any market supply issues with interpreters at the current legal aid rates but we accept that reducing the rates in and outside of London significantly below current CPS rates could give rise to market supply issues. The Government has therefore decided to retain the current legal aid rates for interpreters in London and limit the proposed reduction in interpreter rates outside of London to 12.5% to ensure that they remain within the range of current CPS pay rates.
455. The lack of a single representative body for experts means it is not possible to develop an accurate picture of either the total number of experts or the number of experts of a particular type working in legally aided cases. However, there are a number of websites that list numbers and locations of some of the most frequently used types. While the information contained on these sites varies, generally speaking, they do indicate that there are a significant number of experts willing to work at current legal aid rates, in particular in those areas where demand is currently highest, such as psychologists and psychiatrists in public family law care proceedings. The effect of the proposed new minimum standards for experts appearing in the family courts on this supply is unclear. On the one hand it could reduce the supply of experts available. However, on the other,

it would ensure that all experts appearing in those courts met necessary standards and so could assist to address existing perceived quality issues and mitigate concerns about the quality of expert reports in the future.

456. Given the lack of data, the market reaction by this disparate sector to the proposed fee reduction remains unclear. However, the Government takes the view that while it is possible that some experts may withdraw, the affect that this will have on overall market supply needs to be balanced against the:
- impact of the LASPO scope reforms, which will reduce the demand of experts (the full effect of which are yet to materialise);
 - FJR reforms, in particular the:
 - reforms to the use of experts, which are expected to significantly reduce the numbers commissioned (commenced in January 2013); and
 - proposed new minimum standards for experts in the family courts, which will ensure that only suitably qualified experts provide evidence, and are expected to come into effect later in 2013;
 - generally lower standard rates payable for experts elsewhere; and
 - the flexibility the LAA have to pay higher rates where these are appropriate and necessary.
457. Overall, this suggests that there is a potential for experts to withdraw from the market while still maintaining a sustainable market supply.
458. Taking into account all of the available data, on balance the Government considers that the proposed reform, as adjusted above, is likely to be sustainable. It considers that the rates proposed draw an appropriate balance between the need to reduce spending and ensuring that clients can continue to access legally aided services. Given the need for Government to continue to address the fiscal deficit and with the reduction in demand as a result of the FJR (through the use of fewer experts in family proceedings) and the introduction of new standards for experts in the family courts, it is not anticipated that the number of experts willing to undertake legal aid work is likely to decline sufficiently to render the market unsustainable.

Conclusion

459. For the reasons set out above, the Government has decided to proceed with the proposal to reduce the fees payable to experts in all civil, family and criminal proceedings by 20% as proposed in the consultation paper with the exception 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 rates codified in the Civil Legal Aid (Remuneration) Regulations 2013 will be retained; and
 - Interpreters, where the:
 1. current rates payable to interpreters inside London will be retained; and
 2. rates payable to interpreters outside London will be reduced by 12.5%.

460. The revised standard rates payable to all experts under the civil and criminal legal aid schemes are set out at Tables 5 and 6 of Annex E.
461. It is intended that the revised rates will be introduced, subject to Parliamentary approval, by way of secondary legislation, later this year.

Impact Assessments and Equality Statements

Introduction

462. Chapter 8 of the consultation document sought views on whether the Government had correctly identified the impact of the proposals, in particular on groups with protected characteristics. We asked:

Question 34: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Question 35: Do you agree that we have correctly identified the extent of the impacts under these proposals? Please give reasons.

Question 36: Are there forms of mitigation in relation to impacts that we have not considered?

463. A number of respondent highlighted data or information which could be used to support the impact assessment (IA) of the proposals and build on the analysis set out in the initial Impact Assessments and statement of Equalities Impact. We have considered this information and, where relevant and reliable, have taken it into account in the analysis in the relevant sections of the IAs and/or Equality Statement that accompanies this document.

Key issues raised

464. Comments on the IAs and statement of equalities impacts from respondents were largely negative.
465. Most respondents criticised the quality of the data used to determine the impact of the proposals. They criticised the Impact Assessments and equalities analysis, suggesting it had not identified the full range or extent of the equality impacts across all protected characteristics, particularly the potential for the proposals to affect children, women, Black and Minority Ethnic (BAME) and disabled people.
466. Many respondents argued the Government had not exhaustively met its obligations under the Public Sector Equality Duty (PSED) and had failed to consider the positive arms of the duty. This was thought to be particularly relevant to the proposal for price competitive tendering and the changes to remuneration of providers, with a significant proportion stating the proposals would not promote equality of opportunity or foster good relations.

467. Other key issues raised included that:

- the Impact Assessments did not sufficiently assess the sustainability of the proposals, nor did it quantify their knock-on, downstream impacts
- some data was out of date and insufficient attempt had been made to source and use non-legal aid data and research, leading to incomplete analysis of likely impacts;
- the proposals did not propose measures to enhance collection of and/or improve the quality of equalities data;
- those most likely to be affected by the proposals are vulnerable people such as children, disabled prisoners, refugees, the homeless, and victims of domestic violence, forced marriage, and human trafficking; and,
- the proposals may undermine efforts to broaden the diversity of the legal professions and, as a result, the judiciary.

468. Respondents also raised specific equalities issues and these are set out in more detail in the relevant chapters of this document and in the Equality Statement at Annex F which accompanies this response to consultation.

Government Response

469. The initial Impact Assessments and statement of equalities impact, which were published with the consultation Transforming Legal Aid: delivering a more credible and efficient system, set out our assessment of the potential impact of the reforms.

470. Following consultation we have decided to consult further on a modified model of procurement for criminal legal aid, two alternative graduated fees proposals for criminal advocacy fees and amended proposals for payment for permission work in judicial review cases. We have decided to press ahead, without modification, with the reforms relating to borderline cases, crown court eligibility, immigration and asylum uplift, reducing the public family law representation fee, and harmonising fees paid to self-employed barristers with other advocates. However, we have made modifications to our proposals relating to prison law, a residence test and expert fees with the aim of lessening the potential for negative equalities impacts and to ensure that their implementation is fully consistent with our wider objectives

471. We have therefore updated our Impact Assessments and statement of equalities impacts, reflecting these changes and incorporating feedback on the proposals and impact assessments from respondents to the consultation.

472. While we remain of the view that the initial Impact Assessments and equalities analysis appropriately identified the range and extent of the potential impacts of the consultation proposals, we have attempted where possible, to address the key criticisms of the IAs and equality analysis made by respondents to the consultation. For the proposals we are proceeding with as proposed or with some minor modifications, the final impact assessment documents and equality statement published alongside this Government response set out an assessment of the range and extent of the impacts that the proposals will have, based on the full range of evidence available. For the proposals on which we are further consulting, we set out our initial assessment of the equality impacts of the modified proposals in Annex F, building upon our previous analysis and the responses to consultation.

473. The Impact Assessments received for the limited assessment of sustainability on the proposed policies. It is extremely difficult to provide a definitive answer on sustainability for a reform package such as this. On the civil side, the most substantial piece of information was from the recent tender which was heavily over-subscribed. Although it does not give a definitive answer on future sustainability, it does show there is currently an over-supply of firms willing to provide civil Legal Aid services. Similarly on the criminal side, there is anecdotal evidence that there are too many firms, with too little work. The Impact Assessments were also criticised for the lack of detailed consideration about down-stream impacts of the policies; the specific issues raised were litigants in person and appeals. The Impact Assessments flagged these as risk areas, but behavioural responses such as these are very difficult to forecast and quantify. Investigating these impacts in more detail is unlikely to be enlightening given the uncertainty. These impacts were associated most with the credibility proposals, which in general tended to affect smaller numbers of individuals. Where respondents submitted additional information, we have considered it and taken it into account in assessing the range and extend of impacts where reliable and relevant. The Impact Assessments published alongside this document set out a comprehensive assessment of the impacts the proposals will have, based on the full range of evidence available.
474. We received a number of representations regarding the impact on Wales and Welsh language speakers of the proposed model of competitive tendering of criminal legal aid services. With regard to the provision of services in Wales, currently no change has been proposed regarding providers' obligation under the current 2010 Standard Crime Contract. Where a provider delivers contract work within Wales, it should ensure it is accessible to, and understandable by, clients whose language of choice is Welsh, in accordance with the Welsh Language Act 1993 (as amended) and Welsh Language (Wales) Measure 2011. We therefore consider that there will be no detrimental affect on services provided to the people in Wales. The impacts of the modified model on Wales and Welsh language speakers are addressed in Annex F.
475. Respondents to the consultation suggested a range of possible impacts on individuals based on their personal circumstances, in particular those deemed to be vulnerable. While our analysis of equalities impacts is focussed on the protected characteristics set out in the Equality Act 2010, we have, throughout, considered carefully the impact of our proposals on vulnerable groups, with particular regard to the best interests of children, as addressed in the relevant chapters, the IAs and the equality statement.
476. As indicated above, in finalising our analysis of the proposals with which we are proceeding and assessing the impact of the revised proposals on which we are seeking further views, we have taken account of respondents' additional information on the potential impacts of the original proposals. Where additional data or sources were suggested by respondents we have considered them and taken account of those which are reliable and relevant. However, overall, we remain of the view that our analysis based on LSC/LAA data is the most appropriate and robust way to assess the impact of the proposals on clients and providers.

477. We have used the available data and evidence sources we consider to be most relevant and reliable. In the absence of data on particular protected characteristics, we have assessed the impacts on the basis of what may be reasonably anticipated. For example, data on protected characteristics such as religion and belief is not routinely collected in respect of legal aid. In these instances we have done the best we can to consider possible impacts. Our approach throughout has always been to exercise caution, and take account of how robust the evidence is when drawing conclusions about the impacts the proposals are likely to have.
478. Consideration of how the reforms have been amended in light of feedback and how the impacts of the reforms for implementation are justified by the need to achieve the Government's objectives is set out in the relevant sections of the Government response and the accompanying combined Equality Statement at Annex F. As set out above, for the proposals on which we are consulting further, the likely impact of the revised proposals is addressed in the relevant sections of the document and in the Equality Statement at Annex F. Chapter 5 asks three impact and equality based questions in relation to these proposals on which we seek views.