



A RESPONSE BY

**THE CHARTERED INSTITUTE OF LEGAL
EXECUTIVES**

TO

**TRANSFORMING LEGAL AID: DELIVERING A
MORE CREDIBLE AND EFFICIENT SYSTEM**

4 June 2013

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Introduction

1. This response is submitted by the Chartered Institute of Legal Executives (CILEx) as an Approved Regulator (AR) under the Legal Services Act 2007. This consultation response follows a call for evidence to our criminal law practitioners, and to our wider membership, and was followed by a meeting of the CILEx Legal Aid Working Party.
2. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and in the public interest. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform discourse relating to justice issues.
3. As it contributes to policy and law reform, CILEx endeavours to ensure adequate regard is given equality and human rights, and to the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this within Government and will advocate for such reform.

General observations

4. Legal Aid remains the cornerstone of our justice system, providing help and assistance for many of the most vulnerable members of our society. However, the supplier base is getting smaller and the age profile of legal aid practitioners is getting older; there is little incentive for indebted law students to be attracted by legal aid work when rewards in the private and

commercial sector are much higher¹. This in turn is damaging access to justice for many of the most vulnerable in society.

5. CILEx believes that all members of society are entitled to be represented in cases that fundamentally affect their everyday lives. It is a basic right in our democratic society.
6. The consultation proposals, especially in relation to criminal legal aid, raise many issues of concern. The proposals include significant risks, especially because of the scale and timing of reforms. There is a very real risk that price competition may not attract sufficient number of applicants² and disturb the market irreversibly.
7. In view of the above, and the other points raised throughout the consultation response we are urging the Ministry of Justice to reconsider its plans to introduce further changes to civil and family legal aid and to introduce Price Competitive Tendering (PCT) for criminal legal aid. Cumulatively, these changes will cause irreparable harm to criminal legal aid provision, access to justice, and will damage the reputation of our justice system all over the world.
8. The Chartered Institute of Legal Executives is particularly concerned by the removal of client choice. Client choice is widely regarded as an important driver of quality in the justice system. The Chartered Institute of Legal Executives is alarmed that the Government is prepared to sacrifice this important principle. The Impact Assessment indicates that quality may suffer as a result³ of the introduction of PCT. The level of quality in advocacy has to reflect the incoming Quality Assurance Scheme for Advocates (QASA).

¹ Career Choices in Law A Survey of Law Students Study 50; and Career Choices in Law A Survey of Trainee Solicitors Study 51 February 2004.

² Transforming Legal Aid: Introducing Competition in the Criminal Legal Aid Market- Impact Assessment (IA) at paragraph 32.

³ Ibid. paragraph 23.

9. CILEx is also gravely concerned with the proposals to reduce funding for Judicial Review cases described as ‘weak cases’. This proposal is wholly unacceptable. There are already procedures in place to filter out weak and unmeritorious applications. It is the cases that are borderline that invariably have a public interest element and progress the common law in a new direction by reason of disputed law fact or expert evidence or by way of statutory interpretation. It is very easy to fund a legal aid system where clear cut court cases are eliminated early, and very successful cases are funded knowing you will get your money back easily. Civil justice is all about the borderline cases. Judicial Review proceedings represent a crucial way of ensuring that state power is exercised responsibly.
10. The proposal to pay the same basic fee for early guilty pleas, cracked and contested trials is fundamentally flawed. Having one fixed fee irrespective of whether the client is guilty or innocent may create a perception that independent legal advice is compromised in ways that will be difficult to detect, resulting in innocent people being pressured to plead guilty. Despite the Government’s suggestion, there is no mileage in the argument that a legal aid lawyer will ‘string’ out a case to a hearing, when it should have been settled by an early guilty plea. Such an argument also ignores the Code of Conduct that the lawyer is subject to, and the duties he/she owes to the client and to the Court.
11. The entire basis of the current consultation is that the current legal aid system (both criminal and legal) has lost much of its credibility with the public, and that such fundamental changes need to be introduced to boost public confidence due to the costs of the system ‘spiralling out of control. However, this has been supported by no empirical evidence whatsoever, save for a comment by the Justice Secretary that he has received ‘lots of

letters and e-mails' from people concerned about entitlement to legal aid.⁴

12. On the issue of credibility, as a result of this consultation, the Bar Council commissioned a study, undertaken by ComRes⁵. This was a poll undertaken by 2,033 adults, and results found that 83% believed that people accused of a crime should be treated as innocent until proven guilty. 71% of people were worried that innocent people could be convicted of crimes they did not commit if they are forced to use the cheapest defence lawyer available. Furthermore, 68% agreed that at less than 0.5% of the annual Government spending, legal aid is a worthwhile investment in our basic freedoms.

13. CILEx is enormously concerned that the Government is seeking to introduce such radical changes through secondary legislation, so they will not be subject to proper debate and scrutiny in Parliament.

14. Subject to the above, we address the points in the order that they are raised in the consultation.

Chapter 3: Eligibility, Scope and Merits

Restricting the scope of legal aid for prison law.

15. CILEx does not agree with this proposal for a number of reasons. Firstly, treatment issues encompass prisoner concerns about discrimination, communications, mother and baby issues, and concerns about the behaviour of staff, such as bullying.

⁴ <http://www.lawgazette.co.uk/features/interview-chris-grayling>

⁵ http://www.barcouncil.org.uk/media/210826/headline_findings_-_comres_poll_-_may_2013.pdf

16. The current system allows prisoners to apply for advice and assistance funded by criminal legal aid on matters relating to treatment issues that are not suitable to be resolved through the internal prisoner complaints system. Strict criteria already exist for prisoners accessing legal aid in treatment cases. Withdrawing legal aid altogether will remove safeguards and increase the potential for prisoners' rights to be violated.
17. Cutting such a vital recourse to justice for some of the most vulnerable members of our society is neither a just nor an equitable way to make savings. The poor literacy levels, the high levels of mental health problems and significant learning difficulties within the prison service are well documented. In a recent letter in the Guardian⁶, for example, it was made clear that Prisoners already have to exhaust internal complaints remedies before applying to the court to review the legality of a Prison Service Decision. CILEx particularly reinforces the following sentiments:

“Prisoners' ability to access the courts in such cases provides them with a means of understanding and engaging with the system when it appears to have failed and acted unlawfully, and has enabled many to access rehabilitative opportunities sooner and be released either earlier or better prepared for life outside than they would otherwise have been if the prison authorities had proceeded without independent court scrutiny. There is a name for it. It's called the rule of law”⁷

18. Finally, Legal Aid for almost all prisoner complaints was removed by the previous Government in 2010, requiring prior authority from the (then) Legal Services Commission. CILEx also seeks clarification as to how the Government has calculated savings of £4m per year and 11,000 fewer cases.

⁶ <http://www.guardian.co.uk/law/2013/apr/29/legal-aid-funding-cuts-prisoners>

⁷ *ibid*

Imposing a financial eligibility threshold in the Crown Court

19. In principle, CILEx accepts that the tax payer should not routinely fund legal aid costs for defendants who are of particularly high net worth. However, we are not convinced that the proposed threshold figure of £37,500 is appropriate. Very few people would consider that a person in this position could be considered as particularly high net worth.
20. The new proposal would give the Legal Aid Agency (LAA) discretion as to whether to grant help in the first place to the better off. CILEx fears that it could, for instance, unfairly affect people who are of modest means (but not of great wealth) who are drawn into the criminal justice process and not given legal aid to fight their case. If acquitted they would be left with a bill for their defence costs which they could not recover fully save for legal aid rates and only if they applied for legal aid in the first place. Further, as the consultation paper recognises at paragraph 3.30 private rates vary and that in many cases they will be higher than legal aid rates. We would urge the Government to gather evidence from practitioners regarding the true private costs for a wide range of offences tried in the Crown Court. An appropriate figure cannot be arrived at until such evidence has been gathered.
21. In terms of the hardship fund, CILEx seeks further clarification as to what amounts to additional allowable expenditure.

Introducing a residence test

22. In the absence of evidence The Chartered Institute of Legal Executives is not convinced that the availability of legal aid for cases brought in this country, irrespective of the person's connection to this country, is encouraging people to bring disputes here. This is a sweeping statement not backed by any evidence in the Impact Assessment or elsewhere. Justice should be available for all lawful residents whether it be after one day or after a year. The 12 month habitual residency test appears to be arbitrary and ignores intention to remain in the UK, which is a settled principle in Social Security habitual residency cases.

23. Moreover, by cutting legal aid in such cases the Government is forcing particularly vulnerable individuals to go to court on their own to argue complex cases. Self-representation would be further complicated by language barriers and a range of issues commonly experienced by asylum seekers such as experience of trauma, mental and physical health problems, and isolation and cultural unfamiliarity with legal processes, making asylum seekers particularly vulnerable.

24. The proposals also give little regard to the following:

- Some immigration issues involve involuntary personal separation with British partners or children and not a matter of personal choice.
- The Home Office may choose to be represented.

- Consideration of Human Rights legislation is complex and a profoundly difficult area of law.

25. There is evidence from the Anti-Trafficking Legal Project ⁸ that demonstrates a number of areas where lack of access to legal aid would have resulted in family separation, human trafficking and other criminal activity being undetected.

26. The proposals are a false economy. They will increase costs in other Government departments, and at local Government level. Where a child or young person has a pure immigration case and no legal aid funding is available, it will fall to the Local Authority to pay privately for legal representation. Failure to assist a child or young person to resolve their immigration status could leave Local Authorities open to challenge. The reason for this is that the Local Authority is under a duty to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children, and a key part of a Local Authority care plan is the development of a “long-term plan” for the child’s future.

27. A child’s immigration status is a key aspect of planning for their future and is always likely to be in the child’s best interests. It is vital that a child receives timely legal advice, which will inform any further action that might need to be taken. We would urge the MoJ to reflect and review the proposals as the status of immigration children or consider an exception.

28. If the current proposals were introduced, it would prevent many trafficked persons obtaining legal aid. These people are likely to need assistance when they first come to the attention of the authorities.

⁸ <http://www.atlep.org.uk/policy-work-and-publications/publications-list/legal-aid-reforms-consultation-response/>

29. The Chartered Institute of Legal Executives also understands that if such a test had been in place, the family of Jean Charles de Menezes would not have qualified for legal aid to assist them in their legal action.

Paying for permission to work in judicial review cases

30. CILEx remain extremely concerned that the Government is proceeding with changes which affect the ability of the citizen to access the court. There is no evidence that judicial review cases are undermining the public confidence in the system. The right of the citizen to hold the state to account through the medium of judicial review is fundamental.

31. These proposals would make it more difficult to hold the Government and other bodies to account. The Chartered Institute of Legal Executives cannot state strongly enough how important it is to maintain this accountability. The Ministry of Justice made a statement in its 2010 Consultation paper⁹ stating that

“...proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.”

CILEx doesn't believe that the Government has provided justification as to why it considers that the situation has changed.

32. The principal difficulty with permission cases is that many cases settle prior to permission being granted but nonetheless achieve an obvious benefit to the client. Those cases will no longer be funded. Lawyers

⁹ “Proposals for the reform of legal aid in England and Wales” at paragraph 4.16

undertaking this type of work will simply not be able to take the risk of carrying out substantial amounts of complex work that they may not be paid for¹⁰.

33. A recurrent theme in recent Government changes to the legal aid system is the utter failure to properly assess the impact of the proposals. Here, no account is taken of the adverse impact of the removal of legal aid for significant numbers of permission applications, beyond the impact on around 330 cases in which permission was refused but in which the client nonetheless experienced a benefit of some sort¹¹. The Government accept that such claimants would lose out. But no account is taken of the impact on cases in which although proceedings are issued, the case is resolved prior to the 'permission' stage being reached.

34. In terms of 'borderline' cases, civil justice is all about the borderline cases; such cases raise questionable issues of fact, or are cases that require a judgement about differing expert evidence, or are cases where the law is not clear. That is where we get justice in its truest sense; that is why we have judges and why we have a litigation system designed precisely to deal with borderline cases. The proposals would mean that some of the landmark cases of yesteryear would not have seen the light of day if they were subject to the proposals advanced. An important example is the landmark case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223.

¹⁰ It is to be noted that there is no suggestion that where the Government's *own* lawyers are unsuccessful in defending a claim for judicial review, they will not be paid.

¹¹ See paragraph 3.73, page 32 "Transforming Legal Aid: Delivering a more credible and efficient system"

Chapter 4: Introducing Competition in the Criminal Legal Aid Market

Case for reform

35. The Government recognises in its consultation that the 2006 Lord Carter review of Legal Aid made a “...*compelling case for moving to a market based approach to legal aid procurement*”. However, when the previous Government attempted to introduce PCT, albeit under a different name, the Conservative and Liberal Democrats were in opposition, with Mr Dominic Grieve raising concern about “...*the lasting damage that could be done if we’ve got this wrong. It could permanently damage the provision of legal aid*”. CILEx still considers the potential for permanent damage to be very real.

36. When Lord Carter made his recommendations, he recognised that in the need for reform, fundamental changes were required so that, amongst other things, clients would have access to good quality legal advice and representation, and that a good quality, efficient supplier base thrives and remains sustainable. Lord Carter recognised that the aim of a procurement system is to:

“...ensure value for money, without compromising quality and access to legal advice. A reformed procurement system should pay fair market prices to sustain a pool of suppliers delivering predictable volumes of good and efficient legal services for all eligible clients.”¹²

Client choice ensures a level of quality, and competition based solely on price would be inappropriate for the legal aid market.

¹² “Legal Aid - A market based approach to reform” 2006. Chapter 3, Page 53, Paragraph 14

37. When the Chartered Institute of Legal Executives responded to the Legal Services Commission consultation paper regarding Best Value Tendering in 2009, it was concerned about the extent to which the aims and potential benefits of a market-based model could be achieved in practice. CILEx raised concerns that firms may be in a position where they did not have the relevant resources or procedures in place to make realistic bids. Consequently, there would be a risk that, either knowingly or inadvertently, bids could be set at unsustainably low levels for the life of the tendered contract. CILEx raised as an issue at the time that there was not a 'floor' in the bidding process, which remains a genuine concern with the current proposals. The lack of such a 'floor' is problematic as unrealistic bidding is not prevented, which would destabilise the market. If suppliers miscalculate their bids, and as such were unable to fulfil the contracts, they would be forced to leave the market place with unpredictable consequences for client and access to justice. The same is true for purchasers unable to maintain quality as a result of an unsustainable bid.

Proposal

38. The examples provided in the consultation paper¹³ relating to previous experience of Price Competitive Tendering (PCT) are not appropriate. For example the Defence Solicitor Call Centre (DSCC) is not the same set up at all. There is no legal representation, or element of law involved, and there is a low level of law involved with Criminal Defence Direct (CD Direct). These contracts do not potentially involve someone's liberty. There is no correlation between these contracts and those in the current proposals.

¹³ Paragraph 4.10, page 38 "Transforming Legal Aid: Delivering a more credible and efficient system"

39. Furthermore, CILEx reminds the Government of the problems which continue following the Court Translator contracts. Whilst it is a different situation, the MoJ should be mindful of the recommendations made by the Public Accounts Committee regarding its ‘shambolic’ handling of the contract. The Court Translator contracts were introduced with the intention of saving £18 million per year; however such a saving did not, and has not yet transpired.

Key features of proposed competitive tendering model

Economies of scale, Economies of scope

40. The Government declares throughout Chapter 4 of the consultation that it considers the opportunity for access to greater volumes of work and the control of the case from end to end would encourage providers to scale up to achieve economies of scale and provide a more efficient service. This is the main driver for the PCT it proposes.

41. CILEx has always strongly advocated that quality is paramount if the procurement of publicly funded legal services moved to competitive tendering. The Government recognises in its Impact Assessment (IA No:MoJ199) at paragraph 23 as a risk and uncertainty that:

“Client choice may in certain circumstances (where quality is easy to measure and clients have good information about the relative effectiveness of different providers) give an incentive to provide a legal aid service of a level of quality above the acceptable level specified by the LAA, as firms effectively compete on quality rather than price. The

removal of choice may reduce the extent to which firms offer services above acceptable levels. We will ensure the quality does not fall below acceptable levels by carefully monitor [sic] quality and institute robust quality assurance processes to ensure it does not fall to an unacceptable level. We will also work with regulators to ensure they are aware of such risk and through the enforcement of the relevant Codes of Conduct, identify and address any shortfall in standards.”

42. CILEx is concerned about this statement for a number of reasons. CILEx has always strongly advocated that retention of quality is imperative in the criminal justice system, and so is the right of the client to choose their representative. There are large number of efficiencies within the criminal justice system, which are as a direct result of the relationship between a client and his/her lawyer. A client may choose a lawyer, on the basis of recommendation, or due to previous dealings with the lawyer. In a majority of cases, there will be a vital relationship between the client and lawyer, which will involve trust and confidence in the advice provided. In such a situation, the lawyer is likely to have personal knowledge of the client, which is often gained from acting for the person, or their family or friends over a period of time. A client will be more prepared to accept advice from a lawyer they trust, which ensures smoother running of the system. This will be lost if a client is unable to choose the lawyer that represents them.

43. Furthermore, there are lawyers which specialise in a particular area of criminal law. A client may choose a lawyer because of their expertise in a particular type of criminal law, for example, protest law, actions against the police or fraud. The Criminal Justice system will lose many areas of expertise under these proposals. If a specialist firm, is unable to offer all of the other areas expected in order to compete for the contract, or is unable to compete price wise, then it may close down altogether, leaving that

area of law unrepresented altogether. Potentially leading to 'advice deserts' in rural areas.

44. In an interview with Law Society Gazette the Lord Chancellor and Justice Secretary defended the removal of client choice by stating *"I don't believe that most people who find themselves in our criminal justice system are great connoisseurs of legal skills. We know the people in our prisons and who come into our courts often come from the most difficult and challenged backgrounds"*. CILEx strongly argues that this entirely misses the very real point that any member of the public could find themselves in need of representation in the criminal courts. For example, someone with no previous dealings in the criminal justice system, after a moment of inattention on the road, could find themselves facing charge of death by careless driving, or someone who objects to the way that youths are behaving near his home, challenges them, and is subsequently involved in a fracas which results in a charge for assault. Furthermore, it suggests that everyone who enters the criminal justice system is a criminal, and to a certain extent, assumes guilt rather than innocence.

45. CILEx is also concerned regarding the intention to 'monitor'. There has been no suggestion of the costs of such a scheme, but will clearly not be inexpensive. Furthermore, there is nothing included within the proposals or Impact Assessments to suggest how they would deal with the contract not be carried out at an acceptable level, which returns us to the problematic issue of providers leaving the market place, and the potentially destabilising consequences this could have.

46. The Government has taken the exact opposite view in relation to informed client choice in all other sectors, and CILEx cannot agree that it is justified not to maintain client choice in the criminal justice system.

Savings objective

47. CILEx is in agreement that there is an argument for reducing the supplier base and that economies of scales are necessary. However, the Government proposals are crude, extreme and unmeasured. To reduce the supplier base by 75% is simply not acceptable. It is far too low. This combined with the 17.5% price cap under which bids must be made, will simply mean that firms cannot afford to invest. Despite the Government assertions that they would be in a position to scale up, and increase their investment in IT etc, CILEx does not believe this will be the case. There will be firms that will not have the money to invest, and it is unlikely they will be in a position to receive affordable loans from the bank, based on the proposed contracts.

Exclusions from contract scope

48. CILEx takes on board the comments made in relation to the majority of Crown Court advocacy being undertaken by self-employed Barristers, and that introducing PCT for this type of work would 'likely affect the long-term sustainability of the Bar as an independent referral profession'. However, CILEx does not accept that by simply excluding Crown Court work from the PCT that the Bar will not be affected. Going forwards, it is likely that more solicitors will gain higher rights of audience, and in order to increase their income, will carry out more Crown Court work. They will likely undertake more of the Guilty Plea work, leaving trial work (which is worth the same fee, but obviously involves much more work) to the Bar. This may make Crown Court work uneconomical for the Bar, which may leave some in a position where continued practice is not viable.

49. The potential knock on effect of this is huge. Many barristers undertaking criminal work both defend and prosecute. If the Barristers who defend leave the legal system, there will be less Barristers to prosecute. Once they have left the profession the pool from which our judges are chosen will diminish significantly.

Contract length

50. Although provision is made in the consultation for the new contract to be modified to include provision for compensation in certain circumstances for early termination of a contract by the Lord Chancellor, no further detail is provided. CILEx does feel however, that if such a clause were in the contract then it may increase the confidence of suppliers.

51. The consultation is not clear on whether there will be the opportunity to firms to enter the market should a contract 'space' become available. CILEx raises the concern that there would be no opportunity, and no incentive, for new firms to enter the market.

52. There is also concern that the Legal Aid Agency ('LAA') could be 'held to ransom' by the contract holders in the next round of bidding once the initial contracts have come to an end.

Number of contracts

53. CILEx believes that reducing the number of contracts by 75% will have a disastrous effect, and does not share the view that giving providers

exclusive access to a significant share of the work available will provide the certainty the Government suggests.

54. CILEx notes that in determining the number of contracts in each procurement area that the key factors considered have been:

- Sufficient supply to deal with potential conflicts of interest;
- Sufficient case volume to allow fixed fee schemes to work;
- Market agility; and
- Sustainable procurement.

55. It is acknowledged in the consultation paper¹⁴ that taking into account all of the above, and LAA claim data that current providers would need to grow their businesses on average by 250%. This is simply not realistic for a number of practitioners, which will more than likely lead to the closure of a number of firms, some of which may be experts in specialised areas, and will ultimately provide advice deserts, particularly in rural areas.

56. The Government suggestion that firms can 'join together' and bid as joint ventures is simply not workable, and has been made without consideration of the way in which law firms operate. Investment would simply not happen as the Government has suggested, and the economies of scale mentioned will not be available to all firms. There will be firms who are unable to leave premises due to property leases, or without incurring other business costs. It is extremely unlikely to be viable for firms to merge for the purposes of obtaining contracts.

57. Considering the proposed procurement areas, some of these cover a potentially huge area, with very few contracts being offered. For example, Thames Valley has four contracts suggested (for the purposes of the

¹⁴ paragraph 4.65, page 52 "Transforming Legal Aid: Delivering a more credible and efficient system"

illustration in the consultation paper). Thames Valley is a huge area, covering from Milton Keynes, to Slough, to Oxford and to Reading. CILEx considers that it would not be workable for someone who is, for example, next on the rota and based in Milton Keynes, to attend a police station in Slough, whilst swallowing up the costs in their bid as they will no longer receive travel expenses. This is simply not sustainable. The Government have confirmed in the paper that the client will not be able to change lawyers, unless 'particular circumstances' arise. It cannot be an advantage to the client or the lawyer for this situation to arise.

Case allocation

58. An equal share of work in the procurement area is promised to successful applicants in each procurement area. It is this which is designed to give confidence to applicants to make competitive tenders.

59. In exploring the options on how to allocate the cases, the Government contradicts this assertion. For example, if cases are allocated on a case by case basis using option 1(b) (allocating based on day and month of birth) or 1(c) (allocating clients based on surname initial), this will not provide an equal allocation of the work. Option 1(c) is particularly flawed. There is no equal spread of surnames; some surnames are far more common than others. There is also the issue of the geographical spread of surnames. Some surnames are far more prevalent in some areas than others, no consideration is given to this issue. CILEx also questions what would happen with a suspect who may, for various reasons, go under different surnames (for example, a woman using a maiden name professionally, but using her married name otherwise). Furthermore, there

is the potential for those being arrested giving false details, which may not be discovered until after allocation to a lawyer.

60. Even if allocation is dealt with on a genuine case by case basis it will not prevent problems arising which will cause inefficiencies in the system. A Chartered Legal Executive Advocate provided CILEx with an example of a situation he had recently been involved in. He was approached by a client, who he had previously represented, who had returned to our member because he was satisfied with the quality of service that he had received previously. The client had been charged with nine separate offences. Our member represented him in relation to all of these matters. Under the proposed system (on the literal case by case basis), upon each arrest, the client would have been allocated to a different 'supplier'. This example happened in Hertfordshire, where seven contracts are proposed. The client involved had significant mental health issues, and it was necessary for our member to obtain a medical report. As a result of the client/lawyer relationship they had, and the fact that our member was dealing with all of the matters, he was able to negotiate with the Crown efficiently. Our member represented the client in relation to all of the matters, which ensured a much more efficient running of the system. It cost significantly less to the tax payer for this to happen than it would under the current proposals, with nine separate payments being made. Not to mention the delay and expense that would have been incurred by each of those individual contract holders obtaining medical evidence etc. Court time would doubtless have been wasted, and there would have been no benefit to any parties involved.

Principle of continued representation

61. CILEx notes the proposal that after allocation a client remains represented throughout a case by the same lawyer is subject to 'exceptional circumstances' which are in any event limited. The Government expects contract applicants to factor in, amongst other things, the possibility of carrying out work in other procurement areas, and continuing to represent them. This is not realistic. The situation could arise where, for example a successful applicant in south of the Essex Procurement area, was called to cover a matter in the North of the Suffolk procurement area. This is not going to be common, but it is possible, and extremely difficult to realistically factor in to any bid.
62. The potential difficulty that has been raised with multiple clients/defendants is a very real one. Simply providing a client with a representative from an alternative procurement area may not be workable in practice, when taking into account travel time etc. Again, the local knowledge will be lost.
63. It is very easy to foresee how this proposed system could be stretched. For example, it is conceivable that in East Anglia, there could be a serious organised crime case with 30+ defendants, involving a major port and major road route into the country, with a total of 19 contracts for that area, (Norfolk – four, Suffolk – four, Essex – seven, and Cambridgeshire – four) it is clear to see that difficulties will arise, and once again, these are not easy to factor in to any potential bids.

Remuneration

64. CILEx is pleased to read that the LAA is currently reviewing its claiming processes to reduce the administrative bureaucracy on providers and the LAA. CILEx hopes that the LAA is speaking with providers about this, so that they are taking into account the views of those that use the system. CILEx has always maintained that there should be efficiencies made in the system, and that the legal aid lawyers should not be the only parties who should be relied upon to make them.

65. CILEx does not agree with the arbitrary price cap of 17.5% that has been applied, for bids to be made at that level or below, with no 'floor' being set (as referred to above). There is no explanation for the figure that has been provided. It is even more inappropriate that it is fixed on the 'average' of existing costs, thereby not taking into account the differences in current matters.

66. CILEx believes that to say that 'no change is simply not an option', is not acceptable when, taking into account that all of these proposals together will result in potentially devastating and irreversible consequences to the justice system in England and Wales.

Procurement Process

67. CILEx is alarmed at the timescale in which the Government intends to introduce these proposals.

68. The majority of the proposals begin by stating that up to date figures and information will be provided prior to the start of the bidding process, and

therefore firms, or other potential providers, cannot realistically consider the viability of a contract.

69. The LAA is making no express commitment regarding the tender process, so once again it is not sufficient information for serious consideration to be given.

70. The Lord Chancellor said in an interview with The Law Society Gazette¹⁵ that ‘unless somebody’s got a stunning alternative to PCT’ that it will go ahead in some form. This consultation has been open for only eight weeks, which is significantly much less time than the MoJ have been considering introducing these changes, and looking into the economics of the same.

71. CILEx is further alarmed that there is to be no pilot scheme, and that the Government intends simply to introduce the changes wholesale, with no regard of the potential consequences. This is of particular concern in the light of the fact that the Government is expecting to receive bids from those who are new to working in the criminal justice system, which will include some people who may not have the same standards to adhere to as the current lawyers who provide such services, and who will hold a primary responsibility to shareholders and not to the clients.

72. Despite the Government providing assurances regarding low bids and stating that it “...reserves the right to conduct a due diligence assessment of the price bids from applicants’ in the event that an ‘abnormally low’ bid is made”, CILEx remains extremely concerned. Throughout the entire consultation paper, during a number of interviews during the consultation period with the Justice Minister, and in various meetings with stakeholders

¹⁵ <http://www.lawgazette.co.uk/features/interview-chris-grayling>

and professionals, the Government and its representatives have focused directly on the need to save money. The MoJ have also made it clear (referred to above) that they are aware that quality will suffer as a result of the proposals. CILEx is mindful of the controversy around the Court Interpreter scheme, the West Coast Rail franchise and G4S's bid for the Olympics Security Contract. Each of these situations have cost significantly more to correct than they had intended to save.

73. Despite the Lord Chancellor's dismissal of the concern which has been raised of the potential bids by such companies as Serco and G4S as 'scare stories', the potential for those to bid for contracts remains a real concern for CILEx. If bids were received from and granted to firms such as these, there is the real potential of conflicts of interest to arise, with the potential of those who provide representation to the client also, for example, running the prison that they are going to be kept in if they are found guilty.

Chapter 5: Reforming Fees in Criminal Legal Aid

Restructuring the Advocates' Graduated Fee Scheme

74. Having one fixed fee irrespective of whether the client is guilty or innocent creates a perception that independent legal advice is compromised in ways that will be difficult to detect, resulting in innocent people being pressured to plead guilty. This is unacceptable. It also gives the unreasonable perception that defence lawyers only advise a client to plead not guilty to line their own pockets and not because the defendant might be innocent or the prosecution case might be flawed or misconceived. In view of this we feel that this harmonisation is fundamentally flawed.

Reducing Litigator and advocate fees in Very High Costs Cases (Crime)

75. CILEx recognises that Very High Costs Cases are a large cost to the criminal legal aid spend. However, by definition these are the most difficult cases in the system.

76. A range of reforms, including to procedure, need to be undertaken rather than simply a crude cut in fees, although a reduction in fees may be part of the wider range of reforms.

Reducing the use of multiple advocates

77. We are not wholly convinced that the rule relating to multiple advocates are a cause of concern and as such need tightening. The consultation paper itself at paragraph 5.43 provides evidence that between the periods 2009 and 2012 the number of cases with more than one advocate reduced by around 28%¹⁶. An assessment of the need for more than one advocate to defend a case will always depend on the circumstances and facts of a case and the Judge's discretion having regard to the criteria contained in the Criminal legal Aid (Determination by a Court and Choice of Representative) Regulations 2013 (The 2013 Regulations). The 2013 Regulations reinforce the limited circumstances in which a Judge can exercise the discretion to allow the use of two counsel. CILEx feels that this can be given more weight by further guidance from the President of the Queen's Bench Division thus leaving the discretionary power with the Judiciary.

¹⁶ CREST system, HM Courts and Tribunals Service.

Chapter 6: Reforming Fees in Civil Legal Aid

78. CILEx does not agree with further reductions to the civil legal aid changes. The Consultation paper recognises that there is little scope for making further substantial cost reductions in civil legal aid cases. These proposals come on the back of the wholesale changes to civil legal aid introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
79. The public might not feel particularly sympathetic when lawyers complain that their fees are to be cut. That is mainly because of the Government's repeated and cynical characterisation of all legal aid lawyers as 'fat cats'. High earnings are simply not the reality of practice for lawyers specialising in legal aid work; indeed no other area of public service has borne the level of cuts applied to legal aid. Legal aid practice is likely to be unsustainable for many firms if the proposed cuts are implemented, and young lawyers will turn away from such work rather than aspiring to it.
80. However, the most serious adverse effect of this will be not be on the lawyers, but on those individuals who will then be unable to get proper legal advice.

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

81. The current codified rates for experts were only introduced in October 2011. More research needs to be undertaken to enable the MoJ to understand how the market would cope with further reductions in expert fees. CILEx has real concerns that there would be a large number of experts who simply will not deal with legal aid cases, in turn causing inefficient issues within the court system.

82. CILEx would wish to avoid any situations, where matters were interrupted due to experts not attending court etc. With a well-documented example of a murder trial which came to a halt as the interpreter did not attend Court as he was supposed to because it was ‘not worthwhile’ as he ‘would not make enough money’¹⁷.

83. It is imperative to strike the right balance and avoid restructuring the fees to a level that undermines the availability of experts in legal aid cases. More robust evidence is required.

84. The Chartered Institute of Legal Executives are exceptionally concerned over the lack of weight that the Government has afforded to the considered views of practitioners and experts in recent consultations, instead charging ahead with reforms without satisfactory evidence. CILEx urges the Government to sincerely consider the responses to this consultation and consider alternative ways of making savings elsewhere not destroying the well-respected criminal justice system in England and Wales.

85. The consultation paper at the outset says that a fair justice system with “fair outcomes” is essential in our democratic society, and that legal aid is the “hallmark of a fair, open justice system”. The cumulative effect of these proposals will seriously undermine the rule of law; they will leave many of society’s most vulnerable people without access to any specialist legal advice and representation. The Chartered Institute of Legal Executives would urge the Government to reflect, review and reverse the proposals.

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¹⁷ <http://www.bbc.co.uk/news/uk-england-northamptonshire-22483076>