The Haldane Society of Socialist Lawyers

Consultation Response: "Transforming legal aid: delivering a more credible and efficient system"

1. Introduction and Summary

1.1 This is the response of the Haldane Society of Socialist Lawyers (the "**Haldane Society**") to the MoJ's consultation document: "Transforming Legal Aid".

1.2 Legal aid is one of the key components of the welfare state and criminal legal aid is a vital part of the overall scheme. Since its creation in 1949, criminal legal aid has revolutionised the justice system in England & Wales. England and Wales have an international reputation for excellence in our legal system. One of the main reasons for that reputation is criminal defendants, whatever their means, receive excellent legal representation which helps to ensure that justice is done, that respect for the rule of law is maintained and preserves equality of arms in the courtroom. The wealthy defendant cannot buy his or her way out of a conviction and the poor defendant does not suffer because of his or her lack of resources.

1.3 Many individuals who are accused of crime are exceptionally vulnerable. There are a large number of mentally disordered defendants, for example, and many come from backgrounds where they have been subjected to, amongst other things, abuse, homelessness and deprivation. Some have developed addictions to alcohol or illicit drugs; others are barely literate. They are a group of people who need to be treated with respect, and for whom great skill and experience is required to represent legally. Our criminal justice system is predicated on the presumption of innocence and defendants require nothing less than expert advice at the police station, high quality case preparation and excellent advocacy in court.

1.4 Despite the safeguards built into our jury system and confirmed by the Human Rights Act there always remains a risk of miscarriages of justice if the prosecution and the defence are not properly represented. Cases such as the Guildford Four, the Birmingham Six and the initial attempts to investigate and prosecute the racist murderers of Stephen Lawrence are reminders of the consequences when the system does not work properly.

1.5 The only way of attempting to ensure that miscarriages of justice are eradicated from our system is to ensure that the quality of representation of individuals at the police station and in the criminal courts is excellent. The legal aid scheme provides for excellence, ensuring that the finest legal minds in the country are instructed in the most serious cases, regardless of the accused's ability to pay. The relatively small number of criminal convictions overturned by the Court of Appeal each year is testament to the fact that the vast majority of criminal trials are fairly and accurately conducted. This is due to the skill of excellent advocates who have been instructed by solicitors who have prepared the case to a very high standard.

1.6 We believe that, if these proposals are implemented, price competitive tendering will result in criminal defence services being procured on the basis of low price rather than quality of legal service. The proposals will also create a two-tier justice system with only poor quality, bargain basement providers available for vulnerable criminal defendants. We believe that the cuts to civil legal aid, in addition to the cuts contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('**LAPSO**'), will decimate civil legal aid providers, leading to a real risk that civil legal aid will no longer be available in practice. We call on the government to withdraw these proposals.

1.7 The Haldane's response is divided into comments on the following sections of the consultation document:

- a short description of the Haldane Society of Socialist Lawyers;
- Chapter 3: “eligibility, scope and merits”;
- Chapters 4 and 5: “introducing competition in the criminal legal aid market” and “reforming fees in criminal legal aid”
- Chapter 6: “reforming fees in civil legal aid”;
- Chapter 7: “expert fees in civil, family and criminal proceedings”; and
- Comments on the Equalities Impact, Annex K.

1.8 Our comments on each of these sections are detailed further in the responses below. The Haldane has provided a response only to certain parts of this consultation. It should be noted that our choice not to respond on a particular section of the proposals is not an indication that we agree with these proposals. The Haldane Society rejects the proposals as outlined by the consultation in their entirety.

1.9 Additionally, the Haldane Society adopts the contents of the response of the Immigration Law Practitioners' Association (ILPA), submitted on 3 June 2013.

2. The Haldane Society of Socialist Lawyers

2.1 Since its foundation in 1930, the Haldane Society has provided a forum for the discussion and analysis of both national and international law and legal systems from a socialist perspective. The Haldane Society is independent of any political party but has trade union and labour affiliates. Its membership consists of qualified lawyers, academics, students and legal workers.

2.2 The Haldane Society is an active member of the European Association of Lawyers for Democracy and Human Rights and the International Association of Democratic Lawyers. We were the initiators and co-organisers of a recent conference “Defending Human Rights Defenders”, held in London in February 2012, co-hosted with Amnesty International and the European Association of Lawyers for Democracy and Human Rights.

2.3 In 2011, together with Young Legal Aid Lawyers, we organised a Commission of Inquiry into Legal Aid. The commission members were Dr Evan Harris; Diana Holland, Assistant General Secretary of Unite the Union and the Reverend Professor Nicholas Sagovsky. The Commission received written testimony from a large number of individuals who had benefited from legal aid and this was presented at an event in Parliament on 2 February 2011. A report: “Unequal before the law? The future of legal aid” was published by the Solicitors Journal Justice Gap series in June 2011.

2.4 The Haldane Society has also recently responded to the Government's consultations on the Justice and Security Bill, the reform of Judicial Review and the consultation on a Bill of Rights. For more information about our work, please see www.haldane.org.

3. Response to Chapter 3 - Eligibility, Scope and Merits

3.1 The Haldane Society is extremely concerned that the Government seems to have decided to find ways of slashing figures without properly considering the consequences of their proposals.

3.2 There are many ways in which the Government could cut legal aid fees without taking a broad brush approach to legal aid itself. For example, better decision making by the Crown Prosecution Service would mean that weak prosecutions would be discontinued at an earlier stage, which in turn would reduce the fees paid to criminal defence solicitors and barristers. Similarly, many immigration decisions are successfully appealed in the First-tier Tribunal because of poor decision making of the United Kingdom Border's Agency.

Restriction of criminal legal aid for prison law

3.3 The Haldane Society does not agree with the proposals for restricting legal aid for prison law. The MoJ has said that it wants to bring down the level of funding for legal aid for prison law to the level that it was in 2008/09. This was £21 million as opposed to the £23 million that was spent in 2011/2012. The proposal therefore plans only to reduce spending by £2 million. However, If the figures are analysed properly, legal aid for prison law has, in fact, decreased in real terms. If the Government had spent the same on legal aid in 2011/2012 as it had done in 2008/2009, taking into account inflation, the figure for 2011/2012 would have been £23.52 million. So in real terms, the amount spent on legal aid for prison law has already decreased by £520,000.

3.4 Additionally, the consultation document has not taken into account the fact that the prison population has increased by over 5,000 inmates from 82,572 in 2008 to 87,799 in 2012, which inevitably has an impact on the demand for legal representation in prisons and consequently the amount spent on legal aid.

3.5 The Haldane Society is pleased to see that the MoJ does not intend to remove legal aid for cases that involve the determination of a criminal charge or the right to have on-going detention reviewed. We agree that the first port of call for prisoners should be through the internal prisoner complaints system, prisoner discipline procedures and the probation complaints system.

3.6 Nevertheless, these systems themselves cannot ensure that prisoners' rights are completely protected and we are concerned that the MoJ's plans to cut legal aid for treatment, disciplinary/adjudications matters (where there is no risk of extra days being added to a sentence) and some sentencing matters. This will mean that prisoners will not be able to effectively challenge, for example, the reasons why they have been placed in solitary confinement, which is one of the most punitive prison measures.

3.7 The Haldane Society is extremely concerned that these proposals come at a time when prisons are being privatised and the MoJ is proposing to privatise the probation service. Profit will be the main motive for the private providers of these services and, in those circumstances, there will be an even greater need to safeguard prisoners' rights to challenge decision makers with the assistance of legal aid.

Criminal cases in the Crown Court

3.8 The proposal to introduce a financial eligibility threshold on applications for legal aid in the Crown Court has been badly thought through and has been set at an inappropriate level.

3.9 No explanation has been provided as to what is taken as "disposable household income" and there is no acknowledgment that different households may have different numbers of dependents. Also, although the MoJ acknowledges that the legal fees for different types of

crimes will vary significantly, it has proposed a flat-rate disposable income figure. This is despite the fact that a murder trial or a serious and complex fraud case could cost significantly more than £37,500.

3.10 Finally, the MoJ does not seem to have assessed whether the decision to impose a financial eligibility threshold will mean that private legal fees would impact on the amount that the Legal Aid Agency will have to pay in legal fees.

Limiting legal aid to those with a strong connection with the UK

3.11 It appears from the consultation document that the MoJ proposes to cut legal aid in all circumstances for people who have not lawfully resided in the UK for more than twelve months. Again this appears to be a broad brush approach, simply trying to cut legal aid without taking into account the fact that there will be a plethora of individual circumstances. These circumstances could include, for example, an EU citizen exercising his or her EU Treaty rights to work in the UK, a tourist, family visitors, students, over-stayers, or someone who has been trafficked into the country for the purposes of sexual of labour exploitation. The consultation document does not seem to acknowledge that there are many different reasons why people come to the UK and why they may need to access legal aid.

3.12 There may be many reasons why a foreign national may need access to free legal advice. It is worth remembering that there are very few areas left in scope and those areas for which legal aid is still available are generally areas where the individual is challenging wrong decisions of state agencies. The residence test would mean that foreign nationals whose resources are not sufficient to pay for legal representation would not be able to challenge decisions to make care orders or adoption orders in respect of their children; immigration detainees who have been in immigration detention for years pending removal would not be able to challenge the lawfulness of their detention; challenges to a local authority's decision not to provide services to a destitute child solely on the basis that the parent is an overstayer or in the UK unlawfully would not be possible. In the latter case, the child would be punished as a result of his or her parent's immigration status.

3.13 The residence test would also prevent legitimate challenges from being brought against the British armed forces where service personnel are accused of committing acts of torture in times of war, where they have effective control over a territory. If victims of the unlawful acts of British service personnel are not able to hold the armed forces to account in the UK courts, there is a risk that the armed forces will be able to act with impunity.

3.14 Finally, the proposals around the exception to asylum seekers are, quite frankly, bizarre. Particularly troubling is that, under the proposals, asylum seekers would not be entitled to apply for criminal legal aid if they are charged with criminal offences even though the MoJ acknowledges that asylum seekers are in the UK lawfully. Additionally, once they have been granted asylum, they would not be able to apply for civil and family legal aid for a period of twelve months despite the fact that they would have been in the UK lawfully before the decision to grant asylum had been made. Under normal circumstances, when the Government grants asylum, an applicant is given leave to remain for five years. This in itself ought to be enough to satisfy the Government that the person has sufficient connections to the UK.

3.15 The proposals to introduce a residence requirement will inevitably lead to many more violations of Article 3 (freedom from torture and cruel degrading and inhuman treatment) Article 6 (right to a fair trial) and Article 8 (a right to a private and family life) ECHR.

Payment of fees in judicial review only where permission is granted

3.16 We do not agree with the MOJ's proposals to remove legal aid for the permission stages of judicial review, where permission is not granted because 28% of cases are not successful or are not settled at the permission stage. It follows that around 70% of cases have resulted in some substantial benefit to the client or have been granted permission and proceeded to full hearing. By their very nature, legal proceedings are uncertain. Legal aid providers have to advise clients on the prospects of success before any claim in judicial review can be issued, and cases will only be granted legal aid where the provider believes that the case has moderate prospects of success (or borderline prospects in some very specific circumstances). Legal advice is not an exact science. The result of any permission application will depend on several factors and cannot always be definitively predicted in advance. Our experienced practitioners can all testify to cases where they have advised that one outcome is probable, but the Judge makes a different decision.

3.17 The Haldane Society does not believe that providers should the carry the risk so that they would not be paid for preparation for and representation at hearings if permission is not granted, especially as it is only just over a quarter of cases that do not have a positive outcome at the permission stage. This is not a point made on lawyers' behalf: the danger is that there will be meritorious claims that do not get taken up because providers will refuse to take the risk. Many legal aid practitioners already do a huge number of pro bono hours. The proposals could mean that some, or even all, of the best practitioners may not take on legal aid work and this will restrict access to justice to vulnerable clients. The proposals could also mean that providers are very reluctant to advise positively where there might be risks involved such as a novel point of law or an important point of law where these are based on unattractive facts.

3.18 Permission hearings are often the first time that the public body in question will begin to engage with the case and look at the merits of it. The responsibility for that delay lies not with the claimant, or his or her legal representatives, but with the public body itself. Judicial review is only brought as a last resort and public bodies will have been notified well in advance that the decision under scrutiny is said to be wrong in law and will have been asked to reconsider the decision without the need to issue judicial review proceedings. This is a requirement of the pre-action protocol on judicial review. In our experience, the pre-action protocol provides the bare minimum of notification and most public bodies will have received numerous requests to reconsider the relevant decision even before the pre-action protocol letter is sent. If the need to issue judicial review proceedings has resulted from the inactivity of the public body under scrutiny that is not the fault of the legally-aided claimant.

3.19 Often public bodies will argue at permission stage that a claimant should not be granted permission even where the case is clearly arguable. If public bodies did not challenge cases where they are clearly arguable, the amount of fees that the Legal Aid Agency would have to pay to barristers at those hearings would be reduced significantly.

3.20 In our experience, since public bodies tend only to engage with the issue in a judicial review claim after the issue of proceedings (instead of responding to the pre-action protocol notification), by the time that permission is considered, the claim has frequently become academic and permission is refused for that reason. Recent case-law has held that in those circumstances the defendant should normally pay the claimant's costs, thus compensating the Legal Aid Agency. However, public bodies will resist costs order against them and Judges are often reluctant to review the merits and make costs orders where the claim has become academic. If this proposal were to be implemented, there should be concurrent amendment of the Civil Procedure Rules to create a presumption that the defendant will pay the claimant's costs where the claim has become academic.

Removal of legal aid for cases assessed as having "borderline" prospects of success

3.21 We support the current merits test applied by the Legal Aid Agency. We agree that most legally aided cases should only receive public funding if their prospects of success are 50% or more and that those where the prospects of success are "poor" should not receive funding. There is no funding for “borderline” cases where the only issue is damages, those claims have to have at least “moderate” prospects of success. We support the retention of the current merits test.

3.22 However both regimes recognised that there are certain cases where: it cannot be said on the information available at the time that the prospects are poor; and the issues at stake are of overwhelming importance to the individual or have significant wider public interest. In other words, something more than damages must be at stake and the prospects of success must not be less than 50%. In these circumstances legal aid should continue to be provided until such time as a more definitive analysis of the prospects of success can be given.

3.23 Cases with “borderline” prospects of success which currently receive funding are only:

- those with significant wider public interest or of overwhelming importance to the individual (Regulation 43 Civil Legal Aid (Merits) Regulations 2013); or
- investigative help for public law claims (Regulation 56);
- immigration cases, where the case has significant wider public interest, is of overwhelming importance to the individual or relates to a breach of Convention rights (Regulation 60);
- cases relating to the possession of an individual's home (Regulation 61);
- public law cases involving children (Regulation 66);
- family cases where domestic violence is an issue (Regulation 67);
- private law children's cases or cases involving a breach of international treaties relating to children (Regulation 68); and
- other family cases with significant wider public interest, or those of overwhelming importance to the individual or those which relate to a breach of Convention rights (Regulation 69).

3.24 In each of those cases, something more than money is at stake. The issue might be a person's right to remain in the UK, or potential loss of his or her home, whether or not children should be removed from their parents, or family disputes where domestic violence is at stake or a parent has abducted the child. We believe that it would be wrong for legal aid not to be available at an early stage until a definitive assessment of merits can be undertaken.

3.25 We note that the impact assessment predicts that £1 million per annum would be saved by this proposal. It notes that there would be some administration costs for the Legal Aid Agency including costs incurred as a result of increase in requests for review to the LAA and appeals to the Independent Funding Adjudicator. It is our view that there will be a considerable increase in requests for review and appeals and the assumption under-estimates this impact.

3.26 We also note that it is assumed that there will be a decrease in civil cases going to courts/tribunals. We believe that this assumption is wrong. It is our view that there is likely

to be an increase in litigants in person taking, defending or pursuing cases where lawyers have advised that the prospects of success are borderline and legal aid is refused. In those circumstances, the applicant has not been advised that his or her case should not be pursued, or that an early settlement should be sought. Instead, he or she will have been told that the merits cannot be assessed. We would expect many individuals – who want to defend their home, pursue their immigration claim or retain residence of their children – to start or continue with their claims. Courts are already experiencing a significant increase in the number of litigants in person, who take up a disproportionate amount of court time and resources. Removing legal aid for borderline cases – where the cases concern such important issues – is likely to increase the number of litigants in person. The Impact Assessment has failed to take account of the potential increase in costs as a result.

3.27 Finally, we note that the Impact Assessment assumes that this proposal will lead to an increase in public confidence in the legal aid system. We believe that the opposite is the case. It is our view that any individual, told by a lawyer that his or her case was important and that the prospects of success could not be accurately predicted at this stage, but that legal aid was not available, would have very little confidence in the legal aid system.

4. Response to Chapters 4 and 5 – Introducing Competition in the Criminal Legal Aid Market; and Reforming Fees in Criminal Legal Aid

Competition in the criminal legal aid market

4.1 The criminal legal profession already competes heavily and effectively on the quality of services that it provides. Successful solicitors firms thrive because of their reputation and because they are trusted in their communities. An excellent solicitor will receive repeat business and will build his or her practice on word of mouth recommendations; a criminal barrister will receive instructions based on the way he or she conducts cases.

4.2 The proposals seek to end competition based on quality and replace it with competition based on price which will lead to the devastation of the criminal justice system. The highest quality providers will lose out in a race to the bottom, which will mean that only minimum quality standards will be aimed for. In a situation of blind tendering where the lowest bidder wins, a firm which provides standards of client care and case preparation which exceed the bare minimum will be easily beaten by a cheaper provider who will provide only a minimum, base-line service. Rather than driving up standards, price based competition will have the effect of driving them down. It is inevitable that miscarriages of justice will occur because cases will be poorly prepared and important points of law or fact will be missed.

Removal of choice

4.3 The quality of criminal legal advice will be further eroded by the removal of the defendant's right to choose a solicitor. Instead they will be forced to instruct a Government chosen provider, regardless of that provider's reputation, or their previous success in representing the defendant. There will be no incentive for contract holders to provide excellent representation, as there will be no repeat business or word of mouth recommendations – criminal defendants will be forced to instruct them for the duration of the contract. In order to bid for a subsequent contract (if they wished to) they will simply have to have shown an adherence to bare minimum quality standards during the initial contract period.

4.4 LAPSO specifically states that those in receipt of criminal legal aid will have the right to choose a representative: s.27(4) "*An individual who qualifies under this Part for representation for the purposes of criminal proceedings by virtue of a determination under section 16 may select any representative or representatives willing to act for the individual, subject to regulations under subsection (6).*"

4.5 On 6 September 2011, during the Committee Stage of LASPO, Jonathan Djangoly, then Parliamentary Under-Secretary of State in the MoJ said:

> *"Our intention is that in criminal cases, as at the moment, an individual must select a provider with whom the Lord Chancellor has entered into a contract or other arrangements. The Government believe that it is important that only those providers that have been assessed as having the necessary capability to deliver legal aid services can be paid under the legal aid scheme."*

4.6 In our view there is no good reason to deprive criminal defendants of the ability to instruct a representative of their choice. Article 6(3) of the ECHR states:

> *"Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
>
> *(b) to have adequate time and facilities for the preparation of his defence;*
>
> *(c)* ***to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require****; (our emphasis)*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. "*

4.7 The removal of choice is in stark contrast to the Government's attitude to choice in other public services. During the passage of the Health and Social Care Act 2012, for example, the Government made it clear that "our policy on competition in the NHS is and always has been that it should be based on quality rather than price". The Coalition agreement stated that they would "find intelligent ways to encourage, support and enable people to make better choices for themselves". It goes on to state that they would "give every patient the power to choose any healthcare provider that meets NHS standards, within NHS prices"; "give every patient the right to choose to register with the GP they want, without being restricted by where they live" and "give greater powers to parents and pupils to choose a good school". This is because of the devastating effect that price based competition would have had on quality of healthcare and education services provided. The situation is no different in respect of criminal legal aid – price based competition will decimate quality and lead to a significant lowering of service provision.

Price based tendering

4.8 This is a highly damaging proposal, which will lead to a two tier justice system – poor quality, bargain basement providers for those on low or without incomes and high quality lawyers for those who can afford to pay. Profit seeking organisations with no experience of the legal profession (and a doubtful commitment to justice and human rights) will be the only beneficiaries. Excellent solicitors firms who have striven to promote the rule of law and who have assisted the public and the courts for years will be driven out of business, unable to compete on price with larger suppliers, and will never be replaced. Legal aid will be

provided by those who have cut corners at every possible opportunity in order to be able to reduce their costs so as to win a contract.

4.9 We believe that this proposal has been designed as part of a wider assault on the welfare state. It is coupled with an assault on Crown Court advocacy rates which will drive many dedicated practitioners out of business altogether – those who conduct the most complicated and serious cases are to have their daily rates of pay slashed. By way of example, a barrister conducting a complicated case involving extremely serious allegations such as robbery, possession of firearms, female circumcision or inciting racial hatred would see his or her daily rate being cut to £75 a day by the end of a 4 week trial. If the trial lasted 8 weeks, the daily rate would be cut to just £14 a day. Criminal defence lawyers are dedicated and committed to providing the best possible representation to their clients, but will simply not be able to afford to provide high quality legal services at the rates proposed.

4.10 There is also a significant risk that, as larger providers force out smaller providers of legal aid services in greater numbers, competition will be reduced allowing monopoly entities to emerge. Over-reliance by the Government on such entities may result in a situation where providers are in a position to drive legal aid costs up.

5. Response to Chapter 6 – Reforming Fees in Civil Legal Aid

5.1 As drafted, these proposals will result in advocacy services (whether provided by barristers or solicitors) simply not being cost-effective.

5.2 The availability of a cadre of barristers skilled in civil trials (including unlawful detention and false imprisonment actions in civil courts, homelessness appeals, possession hearings and contested allegations of anti-social behaviour) who are able to undertake advocacy provides a service to publicly-funded solicitors operating in this area. It allows them to secure advocacy services as and when they need them without having to go to the expense of maintaining in-house advocates. Securing advocacy services from barristers on a case-by-case basis broadens access to justice in a cost effective way as a relatively small pool of barristers can provide a service a much larger pool of solicitors.

5.3 We question the assumption of the Impact Assessment that the supply of solicitors willing to undertake publicly funded advocacy at the current solicitors' rates is sufficient and that the quality of services supplied will remain the same. In our experience, solicitors do not undertake the amount, or type, of advocacy that civil barristers undertake. This is because the rate of £60 per hour is not considered cost-effective and many solicitors prefer that the advocacy role, at least in complex cases, is undertaken by specialist advocates. The legal skills involved in preparing and conducting litigation is different to that required for advocacy. The two sets of skills are complementary rather than interchangeable.

5.4 The rates proposed are uneconomical. (It must be borne in mind that barristers must deduct their expenses and costs such as chambers rent, insurance etc from any fees received and that what remains is income that will be substantially less than the £60 hourly rate.) At this rate, there will be fewer barristers wiling to undertake advocacy and there will not be sufficient solicitors to fill that gap.

6. Response to Chapter 7 – Expert Fees in Civil, Family and Criminal Proceedings

6.1 We do not agree with the proposal that fees paid to experts should be reduced by 20%. The justification for this (to bring experts' fees into closer alignment with fees currently paid by the CPS in criminal cases) is flawed as the proposal does not align non-CPS and CPS fees, all it does is arbitrarily reduce the former. Under the CPS scheme, the majority of experts can be paid up to £100 per hour whereas the proposals are to pay a maximum of £72 per

hour. No justification is put forward as to why experts instructed by legal aid practitioners should have maximum fees at significantly lower rates than their CPS counterparts.

6.2 By way of example, under LASPO legal aid remains available for housing disrepair cases where a claim is needed to remove or reduce a serious risk of harm to the health or safety of occupants. This requires expert assessment. As recently as October 2012, the MoJ accepted research that there were few surveyors who were available to be instructed as experts in legal aid housing disrepair cases and agreed to set rates at £85 - £115 per hour for these experts. The rates under the current proposals of £68 - £85 per hour, are inconsistent with the MoJ's earlier acceptance that specialist surveyors would withdraw at rates lower than those provided for under LASPO.

6.3 Similarly, legal aid remains available in employment cases involving discrimination or trafficking and in family disputes relating to residence or contact where domestic violence is involved. Many of these cases involve expert evidence. If, in practice, these rates drive available experts away from instruction on legal aid rates, it will be harder, if not impossible, for members of the public who are eligible for legal aid to obtain expert evidence.

6.4 We disagree that a reduction in the fees paid to experts instructed on legal aid is unlikely to have any negative equality impact on legal aid clients. In our view, a number of experts will respond by ceasing to make themselves available on legal aid rates. We are aware that this is already the case in the clinical negligence field where legal aid clinical negligence solicitors report that they find it very difficult or even impossible to find experts who will accept instruction at legal aid rates. It should be remembered that experts can make themselves available to be instructed by insurance companies, or public authorities, at significantly higher rates and that most experts have access to other forms of better-paid work.

6.5 It is our view that these proposals, if implemented, will lead to the availability of expert evidence being very significantly reduced in cases funded by legal aid. Where an expert might be available to be instructed at legal aid rates, the disparity in payment rates will mean that – where there is a conflict of expert evidence – the experts will not be seen as having equal standing in the courtroom. The reduction in payment rates is another step towards a two-tier system of justice. Litigants who can afford to pay the market rate for expert evidence will find that they have a larger pool of better qualified and experienced experts to instruct. Legally-aided litigants will only have access to a smaller pool of lower-paid, often lower-qualified experts at best, and may not have access to expert evidence at all.

7. Response to Annex K – Equalities Impact

The Public Sector Equality Duty

7.1 Under the Equality Act 2010 there is a public sector general equality duty (s.149) ('**PSED**'). Those subject to the duty must in exercising their functions have due regard to the need to:

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

7.2 These are often referred to as the three arms of the general equality duty. Under the first arm conduct prohibited by the Act would include breaches of discrimination legislation.

7.3 The Act also explains that having due regard for advancing equality involves having due regard to the need to:

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in life or in any other activity in which participation by such persons is disproportionately low." (s.149(3)).

7.4 The PSED requires public authorities to be proactive in respect of equality, as opposed to responding to an equalities issue, when there is a complaint or claim from an individual group.

7.5 However the need to have due regard to equality is not the same thing as an obligation to achieve a result, rather, the public authority must decide what weight needs to be given to each of the three arms of the general equality duty in proportion to their relevance to a particular function.

7.6 The term "protected characteristic" covers the following protected characteristics: age; disability; gender reassignment; pregnancy and maternity; race, ethnic or national origins, colour or nationality; religion or belief; sex and sexual orientation. The duty also covers marriages and civil partnerships in respect of eliminating unlawful discrimination but not to advancing equality and fostering good relations.

7.7 The word 'function' refers to the full range of the public sector's activities, duties and powers. A public function is a function of a public nature. The general equality duty came into force on 5 April 2011 in England, Wales and Scotland. It applies to public authorities listed in Schedule 19(2) of the Act and under Section 19 applies to all ministers of the Crown and government departments. The PSED therefore applies to the Legal Aid Agency which forms part of the MoJ.

7.8 The Equality Act also contains an unimplemented socio-economic duty in section 1. The Haldane Society's position is that implementation of this duty is vital and that all the proposals in Transforming Legal Aid will be in breach of it.

Annex K: methodology

7.9 We note that the applicability of the PSED is acknowledged in paragraphs 1.1 and 1.2 of Annex K and that the methodology used is said to be in adherence with the Equality and Human Rights Commission's technical guidance to the operation of the PSED.

7.10 The Haldane Society does not believe that the Equality Impact Assessment adequately addresses the impact of the proposed changes and should be completely revised along the lines suggested in this section below.

7.11 We are concerned that the data sources relied upon have serious limitations (indeed, paragraph 3.2 notes these limitations). None of the data covers all the protected characteristics provided for under the Act. The statistical analysis only considers data on age, sex, race and disability. In addition the impact assessment acknowledges that the

Legal Aid Agency ('**LAA**') client data has been recorded by providers and not by legally-aided clients themselves and is therefore unlikely to be as accurate as self-defined data, particularly in respect of disability/illness and race.

7.12 As the MoJ acknowledges the quality of LAA client data is affected by the omission of data regarding illness, disability status and race. This data is completely inadequate to base any meaningful type of Equality Impact Assessment and this means that the changes proposed in transforming legal aid could be implemented with significant discriminatory impact on many of the most vulnerable individuals in society.

7.13 The Legal Services Research Centre ('**LSRC**') data is based on a survey of the diversity profile of providers who have collectively had a 69% response rate. In particular, the LSRC's data is significantly flawed as it only reflects the diversity profile of those managing and controlling Legal Aid providers.

7.14 The LSRC's data only provides a limited picture of the composition of solicitors' firms, focusing on owners and managers only. However, solicitors' firms also consist of employed lawyers and non-qualified support staff who full fill a variety of professional and support functions. It is acknowledged elsewhere, in Annex K, that there are self-employed solicitors who do significant amounts of Legal Aid work however, they are not included in the impact Assessment.

7.15 There are a number of better sources of data which could and should have been obtained for the purposes of the Equality Impact Assessment, amongst them data from the court and prison services, the Criminal Process Review Commission and campaigning charities such as the Howard League for Penal Reform. The data relied on by the Equality Impact Assessment is completely inadequate.

7.16 BME lawyers are strongly represented among current contract holders as owners and managers. The reasons for this are complex but among them are the development of legal aid practices which specialise in providing services to particular sections of the community and barriers to BME lawyers finding employment in larger firms. Many BME owned firms are smaller and serve particular communities and are too small to be able to mount a successful bid and will find it difficult to survive in the new environment

7.17 The data analysis in respect of both BME lawyers and clients is seriously flawed as it fails to differentiate in relation to impact assessment of the proposals between different BME communities. This data is available from the LSRC, Bar Council and is also held by the LAA. The Crim 1 form records 18 different ethnic identities and it is likely that the reforms will have distinct impacts on each of these. It is essential that available BME data is properly analysed for the Equality Impact Assessment to be meaningful.

7.18 The same issue applies to the data for clients and lawyers with disabilities - the impact assessment is inadequate as data has not been recorded on the impact of the proposals on different categories of disabilities. The impact on clients with a visual disability will be completely different, for example, from those with a mental health issue or with a learning disability.

7.19 The LSRC's data does record gender balance among women employees in firms and shows that women make up slightly over half of employed solicitors and just over 75% of non-solicitor fee-earners. This suggests that there have been structural barriers which have prevented women progressing within the solicitors' profession and this issue needs to be evaluated as part of any meaningful equality impact assessment. Young women, like all new entrants coming into the profession, will start off with debts of around £60,000 and now will have to work for several years (often as volunteers) before securing a training

contract which may not happen until they are in their late 20s or early 30s . Very few legal aid firms are able to offer more than the minimum maternity pay. The proposed cuts will mean that even fewer do so and this will increase the financial barriers to mothers who do not have another means of support from remaining and progressing in the profession.

7.20 The proposals are likely to have a catastrophic effect on opportunities for training and career advancement for younger lawyers generally who do have another means of support. Legal training costs at least £60,000. The cuts will make it far more difficult for firms to undertake the financial commitment involved in offering training contracts and there will be far fewer opportunities for lawyers who do qualify to progress.

7.21 Data indicates that lawyers with disabilities are already under-represented in the profession compared with the general population which suggests that there are already structural barriers to individuals with disabilities entering into and progressing within the profession. The impact assessment does not address those barriers or make any proposals to alleviate them.

7.22 Many groups who will be affected by these proposals have not been consulted There are a number of organizations who represent solicitors with protected characteristics, for example the Association of Black and Lawyers, the Association of Women Lawyers, The Association of Young Lawyers, Young Legal Aid Lawyers and the Association of Lawyers with Disabilities who should be consulted.

7.23 Additionally, there are no proposals to monitor the ongoing impact of the changes on those affected or the effect of the proposals on equality and diversity in the bar. The LSRC was disbanded on 1st of April 2013 and no information has been provided how the ongoing impact on both providers and clients will be assessed.

7.24 The Bar Council currently funds a biennial study of barristers' working lives and this shows that the bar has improved equality and diversity amongst its members although it is acknowledged that there are still disproportionate numbers of white males in the profession. The fee cuts proposed are likely to make it difficult or impossible for legal aid practitioners at the bar to fund pupilages and consequently entry to the profession. It is likely that the increased diversity in entry to the bar gained in recent years will be reversed as all the barriers affecting BME candidates, women, younger lawyers and those with disabilities outlined for solicitors will exist to a higher degree for the bar. As the majority of members of the judiciary are drawn from the bar this will also impact on the quality and diversity of future members of the judiciary.

7.25 All the proposals will have an adverse effect on poorer individuals whether seeking legal aid or entry into the professions.

7.26 The consultation states that the primary objective of the proposed 'reform' package is to "*bear down on the cost of legal aid*". Our view is that cuts in legal aid are a false economy and will simply spread the costs to other government departments particularly the courts, prisons, and benefits. Research shows that £1 for £1 targeted spending on legal aid leads to substantial savings in other government departments. There is no evidence that the proposals have followed the ECHR with respect to cross-referencing the decision with the impact of decisions made across other departments. The mantra that reducing the costs of legal aid justifies the impacts on disadvantaged groups where identified is completely inadequate.

7.27 The Haldane Society believes that the proposals will reduce the quality of representation and consequently miscarriages of justice and the rectification of these will come at considerable future cost. Additionally the implementation of the proposed reforms will

generate other unspecified costs. The proposals fail to explore other ways of funding legal representation, for example a levy on financial services. The proper way to explore costs savings in legal aid should be done as part of a review of the entire criminal justice system.

7.28 It is of great concern that the important protected characteristics listed in this section are not part of the impact assessment. It is self-evident that the proposals, which impact on the poor and marginalised sections of society, will impact on individuals of non-British nationalities who are disproportionately represented in the criminal and civil justice system. We disagree that clients will not be directly impacted if the proposals to reduce remuneration are passed. In fact it is highly likely that clients will be impacted and that there will be disproportionate impact on young people, black and ethnic minorities, possibly on clients who do not have heterosexual orientations and certainly on clients who are disabled.

Prisoners

7.29 We welcome the acknowledgment that these proposals will have a disproportionate impact on men, BME individuals and those with learning disabilities. The desired savings are not a proportionate aim. Individuals from these groups are vastly over represented in the prison population and the disproportionate impact is vast. The data used is here is from the LAA. A far more appropriate estimation of the prison population could have been obtained from prison service data.

Impact on Providers

7.30 We accept that the data available appears to show that the firms affected are disproportionately owned by men and BME and that the proposals will have a disproportionate impact on these individuals. We repeat our earlier remarks about analysis of firm ownership being an inadequate measure of the impact on providers as the data used ignores employees and contractors. Additionally a proper analysis would look at the reasons for the disproportionate representation of these groups in the ownership and management of firms.

7.31 BME providers provide important culturally sensitive services to their own communities. The over-representation of BME lawyers in legal aid should be looked at in the context of barriers to BME lawyers working in other parts of the legal sector which particularly affects longer qualified lawyers.

7.32 The under-representation of women in the ownership of firms is a source of concern and is out of line with a profession which now has a majority of women. Successive legal aid cuts have hindered the progression of women. The cuts will also disproportionately affect young lawyers who are less likely to find employment and more likely to have insecure employment. The proposals are also likely to affect BME contractors particularly interpreters who are BME and/or non-British.

7.33 We do not agree that this proposal is justified We are concerned that the proposal to involve NOMS more heavily in helping prisoners with learning difficulties to access the prisoner complaints system will merely shift support from one area of public expenditure to another from an established independent service to a another wing of the criminal justice system.

Introducing a Residence Test

7.34 It is inevitable that this will have an impact on clients who are non-British nationals who are also likely to be BME. Withdrawing Civil Legal aid is also likely to impact disproportionately on women.

Introducing Competition in the criminal legal aid market

7.35 This will have substantial impact on BME clients. Many BME providers specialise in serving their own communities in a culturally sensitive manner and the removal of client choice is a PCP which will adversely affect BME clients.

7.36 Language specialists among providers save money in relation to interpreters fees. The criteria for changing provider are very narrow and do not provide a satisfactory safeguard. Current providers provide specialist services for particular client groups or particular type of cases. For example, Christian Khan solicitors provide specialist services for those facing prosecution for assault charges involving HIV infection. If client choice is removed this group (who are classed as disabled) will not have access to an appropriate specialist provider.

7.37 Other categories of clients in need of specialist services will also be less likely to be able to access appropriate providers, for example young people who are more likely to be disproportionately disadvantaged by reduced access to protest lawyers.

Civil Merits Test: Removing Legal Aid for borderline cases.

7.38 We anticipate the proposal will have an adverse impact on civil Legal Aid clients in certain cases, in particular housing, family, immigration and claims against public authorities and public law where the case has a less than 50% chance of success. We note that the LAA data concerning the 100 (rounded) cases per annum will be affected by the proposal to suggest that disabled clients, and those aged 25 to 64, are over represented as compared to the general population so may be disproportionately affected by the proposal.

7.39 We do not accept that the proposal is a proportionate means for achieving the additional aims set out in Section 4. There is a strong possibility that the savings will be limited and this is not a proportionate means of achieving a legitimate end. This will limit the ability of individuals to challenge administrative decisions. It may also impact on many more challenges which never got to Court.

Restructuring the advocates' graduated fee scheme

7.40 This proposal will have the dual effect of putting advocates in conflict with their clients' interests as guilty pleas will be incentivised. The reduction in advocates' fees will also threaten the independent Bar and the financial viability of solicitors' firms.

7.41 The data shows that men and those of white ethnicity are over represented among those engaged in criminal work at the Bar. The Bar has made considerable progress in recent years in widening access and this trend will be reversed as only individuals with private incomes will be able to go to the Bar under the new proposals. This will have an adverse impact on younger members of the Bar. It will have an adverse impact on the diversity on future members of the judiciary. It will be far more difficult for women and BME entrants to enter the profession. Younger members of the Bar will barely have an income and this will have a discriminatory effect against female members, who will find even more barriers against having children. There does not appear to have been any meaningful consultation prior to this proposal with the affected professional or client groups. The proposal is also likely to result in miscarriages of justice.

7.42 The assessed impact on higher courts advocates is, again, flawed as the income generated by higher courts advocates does not only affect the owners of the firms but also the employees and there has been no data analysis on the effect on these individuals. It is of great concern that this will impact disproportionately on firms who are more likely to be managed by BME individuals representing their own communities.

7.43 It is also unclear what evidence is used to support the proposition that more female or BME barristers are instructed in relation to guilty pleas. We cannot see how this will enhance equality of opportunities when the whole structure of the Bar will be destroyed.

Reducing fees in VHCC cases

7.44 We agree that this proposal will have an adverse effect on litigators.

7.45 The proposals will also disproportionately impact on BME firms and their clients and will impact adversely impact on barristers, including those with protected characteristics, as the proposal will de-stabilize the whole system of the Bar.

7.46 We note with disappointment that there has been no proper analysis of the protected characteristics of barristers and higher rights advocates working on these cases. This data would not be difficult to obtain. There will be data held by the VHCC organisation showing the details of the people involved in this.

Reducing the fixed representation fees paid to solicitors covered by Care Proceedings and graduated fee schemes

7.47 We agree the impacted proposal would be adverse. The (unanswered) question is what should be done to encourage representative ownership of firms. Additionally, data in relation to the staff and contractor make-up of these firms should be obtained and analysed.

7.48 The proposal will have an additional impact on firms already hard hit by the implications of LASPO. The detriment to clients will be clear as providers are de-stabilized. Family firms who also have criminal departments are likely to be de-stabilized by the changes in criminal Legal Aid and tendering.

7.49 The issues in relation to guaranteed level of fees and enhancement do not seem to have been explored nor does there appear to have been any consultation with those affected. We cannot see how this enhances the quality of opportunity. Any benefits will be offset by the de-stabilising of the whole system.

Removing uplift and immigration asylum of Tribunal appeals.

7.50 Again, these proposals will disproportionately impact on women, BME, and disabled persons which has not been adequately assessed.

7.51 There appears to be no data of the impact of the proposals in providers which is an omission. This will have a negative impact on Legal Aid clients as experts may no longer participate in the system. No consultation or examination with representative organizations has been conducted.