

2014

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Smith, T. (2014) 'Justice For Sale': An Empirical Examination of the Attitudes of Criminal Defence Lawyers Towards Legal Aid Reform', Plymouth Law and Criminal Justice Review, 6, pp. 14-40. Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/9003>
<http://hdl.handle.net/10026.1/9003>

The Plymouth Law & Criminal Justice Review
University of Plymouth

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**‘JUSTICE FOR SALE’:
AN EMPIRICAL EXAMINATION OF THE
ATTITUDES OF CRIMINAL DEFENCE
LAWYERS TOWARDS LEGAL AID
REFORM**

Tom Smith*

Abstract

This article discusses empirical fieldwork undertaken at the ‘Justice For Sale’ meeting of criminal defence lawyers, in May 2013. The fieldwork aimed to explore the views of defence lawyers in relation to the ongoing programme of reforms in their area of practice – particularly those launched by the ‘Transforming Legal Aid’ consultation in April 2013. Combining quantitative and qualitative methods, the fieldwork asked respondents about price-competitive tendering (PCT), client choice, QASA, direct action, their relationship with the Government and the impact the reforms would have on the service provided to suspects and defendants. The article examines the data collected and its meaning, identifying patterns in the responses provided. It concludes by discussing developments in the area since the fieldwork, and speculating on the next steps that may be taken by the criminal defence community in this year of significant change for criminal legal aid.

Keywords: Criminal defence lawyers, legal aid, reform, PCT, choice, QASA, cuts, direct action empirical fieldwork

Introduction

When it comes to voicing protest, the legal profession is not regarded as militant and has often been ineffective in defending its interests in the past. Yet, in 2013 much of this appears to have changed; criminal defence lawyers have been jolted into action by the impending threat many perceive in the Coalition Government’s proposed reforms to the funding and structure of legal aid, outlined in the Ministry of Justice consultation paper, ‘Transforming Legal Aid: Delivering a more credible and efficient system’.¹ On 22 May 2013, approximately 1,200 defence practitioners attended an historic meeting at the Friends Meeting House, Euston, London. Entitled ‘Justice for Sale’, the meeting sought

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¹ Ministry of Justice, *Transforming Legal Aid: delivering a more credible and efficient system* (The Stationery Office, 2013), Consultation Paper CP14/2013
<https://consult.justice.gov.uk/digital-communications/transforming-legal-aid>

to discuss the implications of the proposed reforms. This was organised by several bodies representing rank-and-file defence lawyers, including the Criminal Law Solicitors Association (CLSA), the Criminal Bar Association (CBA), and the Law Society. As an academic specifically interested in the role of criminal defence lawyers, I felt that this unprecedented meeting presented a unique opportunity to engage directly with practitioners, examine the practical impact of the proposed reforms as voiced by those affected, and provide an empirical account of how the defence community are reacting to change. This article will detail fieldwork conducted at the meeting, which was first reported in 'Criminal Law & Justice Weekly' (2013) 177 *JPN* 599.² The article will provide an overview of the methodological aspects of the fieldwork, examine the data obtained, and draw conclusions about the general attitudes of criminal defence lawyers to reform, their relationship with the Government, and the implications for future developments in this area.

1 Objectives and Research Questions

The decision to engage in fieldwork at this time was primarily motivated by the confluence of several themes of reform in relation to criminal defence practice. Alongside the multifarious changes proposed in the 'Transforming Legal Aid' consultation, 2013 has also seen calls for reform of the Cab Rank Rule, and the commencement of registration for the Quality Assurance Scheme for Advocates (QASA).³ All have potential implications for the provision of criminal defence services and have attracted opposition or criticism from the criminal defence community. I felt that the 'Justice For Sale' meeting provided a unique opportunity to explore these issues in the field, engage with an under-explored community of research subjects and attempt to take a comprehensive inventory of the mood of the defence profession toward its role, regulation, reform and funding in a year of substantial change for their practice. As such, the fieldwork had three main objectives:

- To explore the views of practising criminal defence lawyers on changes to the provision of legally aided criminal defence
- To engage in analysis of the reform of criminal defence services and its impact on professional practice
- To contribute some empirical data to the ongoing debate about the reform of legally aided criminal defence.

With these aims in mind, I considered the following to represent the overarching research question:

² <http://www.criminallawandjustice.co.uk/form/Register?destination=node/24841>

³ Flood J., Hviid M., 'The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market (2013, Legal Services Board): https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf; 'About QASA': <http://www.qasa.org.uk/about-qasa.html>

What are the views of criminal defence lawyers in relation to reforms in their area of practice?

To answer this question adequately, a number of sub-questions needed to be addressed:

1. What are the views of criminal defence lawyers regarding the proposed reforms specified in the 'Transforming Legal Aid' consultation?
2. What are the views of criminal defence lawyers regarding the quality assessment of advocates?
3. What are the views of criminal defence lawyers regarding the Cab Rank Rule?
4. What impact do criminal defence lawyers believe reform will have on the service provided to suspects and defendants?
5. What are the views of criminal defence lawyers regarding the future of criminal defence services?

2 Design, Conduct and Analysis

I was invited to attend the meeting by the CLSA and opted to undertake fieldwork in the form of a survey. The survey was planned with the circumstances in mind, aiming to strike a balance between reducing rates of non-response whilst remaining meaningful and penetrating. The survey combined both quantitative and qualitative empirical methods. In light of the size of the target sample (1,000 respondents) and the setting, I considered it necessary for practical reasons for the majority of the questions to be quantitative. Such questions are generally easier to administer, encourage general engagement and provide more objective, measurable data but can be 'too atomistic in focusing on individuals and ignoring the context in which [they] find themselves'.⁴ As such, I felt that inclusion of a qualitative element would add depth and detail to data obtained, addressing this limitation. The complementarity of a mixed methods approach such as this would hopefully 'generate better understanding... than [a study] bounded by a single methodological tradition'.⁵ The survey consisted of 18 quantitative questions – in the form of dichotomous 'yes/no' and Likert Scale questions (to which respondents could append comments)⁶ – and two qualitative questions, which allowed respondents to write open-ended responses.

2.1 Question Design

The questions aimed to gauge the behaviour, beliefs and attitudes of the respondents in relation to several topics, broadly centred around the legal aid reforms announced in April 2013 and other issues pertinent to criminal defence practice. I endeavoured to keep

⁴ Somekh B., Lewin C., *Theory and Methods in Social Research* (2012) SAGE, 201.

⁵ *Ibid.*, 260.

⁶ The survey presented tick boxes in which respondents could register a 'yes' or 'no' response. The data presented here also includes the percentage of respondents that 'did not indicate' (DNI) any answer i.e. where tick boxes were left blank. Likert Scale questions asked respondents to 'rate' a statement or concept on a scale of 1-5, indicating the direction, extremity and intensity of their attitude towards that statement.

the questions simple, short and focused. To achieve this, it was necessary for the wording of these questions to limit the concepts covered and minimise the provision of contextual detail. Whilst this allowed some varied interpretation by the respondents and introduced some ambiguity about meaning, it was necessary for the design to achieve the requisite brevity.

2.2 The Sample

The fieldwork represents an example of ‘non-probability’ or ‘convenience’ sampling; that is, sampling ‘a group... that the researcher has easy access to or has selected for a particular reason’.⁷ In this case, the sample consisted of criminal defence lawyers attending the ‘Justice For Sale’ meeting. The sample is therefore not representative of the general population of criminal defence lawyers; this limits the generalizability of the data but does not strip such fieldwork of value:

Some research is not all that interested in working out what proportion of the population gives a particular response but rather in obtaining an idea of the range of responses or ideas that people have.⁸

This accurately summarises the broad objective of this fieldwork. Non-probability sampling can also introduce bias, relevant in the case of this fieldwork. The clearly stated objective of the meeting was to discuss the defence community’s opposition to the reforms; as such, the potential bias to be aware of is a disproportionately negative disposition of the sample towards the reforms. Any defence lawyers who were supportive of the reforms would be unlikely to attend this sort of meeting. One must therefore remember these issues in assessing the validity of the data.

2.3 Administration

With the aid of several CLSA volunteers – to whom I owe a great debt for making the work possible – I distributed 1,000 surveys around the venue prior to the arrival of attendees. In a general announcement by the Chair of the Meeting, the sample was informed that the survey was being conducted by myself and they were encouraged to complete it. No individuals were directly asked to complete the survey. Attendees were left to self-complete during the 4 hour duration of the meeting. A major benefit of this approach is avoidance of ‘interviewer subversion’;⁹ that is, a distorting influence on answers provided by respondents. I was keen to ensure that respondents did not provide

⁷ Somekh, *Theory and Methods*, 224.

⁸ De Vaus D., *Surveys In Social Research (Social Research Today)* (2001, Routledge), 90.

⁹ *Ibid.*, 130.

'acceptable rather than true answers', by avoiding direct contact with them.¹⁰ The surveys were provided with envelopes so that respondents could confidentially return them to the volunteers. Respondents were provided with an Ethical Guarantee attached to the survey, assuring them that their responses would be confidential and anonymised. It also outlined a right of withdrawal, provided information about the use of data collected, and confirmed that responses would be taken as the personal views of individual respondents. Respondents were asked to sign the surveys to confirm these protections, but were not compelled to do so. Respondents could voluntarily provide their name, contact details and professional status, in order that I could provide them with updates on the fieldwork and contact them to organise future research. After completing and submitting the survey, respondents who provided contact details were emailed a withdrawal deadline (10 June 2013), after which analysis of responses began.

2.4 Responses

363 responses were submitted on the day and 4 posted directly afterwards – a total of 367 completed surveys. Of these, 188 were solicitors (51%), 59 were barristers (16%), 80 were solicitor advocates (22%), 21 were others (6%) and 19 were unknown (5%). The overall response rate of around 37% was positive considering the extremely short time frame for the fieldwork and the context in which it was completed. The method used resembled a postal questionnaire – where respondents are approached, provided with a survey which they self-complete, and submit, without the researcher's involvement, by post. For such surveys 'a response rate of 40% is typical to the original letter and questionnaire'.¹¹ Given the similarity of the method used in this fieldwork and the circumstances – a very busy, fast-paced, large-scale meeting – this could be considered a normal response rate. I would argue it represents a statistically significant sample both in its size and distribution of professional status; the sample included solicitors, barristers (including QCs and judges), solicitor advocates, trainees, paralegals, legal executives, consultants, practice managers and others. The experience of practitioners ranged from several decades to just a few months. While respondents were not asked about their geographical location, the meeting was attended by defence lawyers from across England and Wales and this spread was likely to be represented in the sample.

2.5 Ethics

A fieldwork proposal was submitted to and approved by the Research Ethics Committee of the Faculty of Business, Plymouth University and the fieldwork was conducted with the approval of the CLSA, who were primarily responsible for organising the meeting. Since the potential respondents were non-vulnerable adult professionals, it was felt that there

¹⁰ *Ibid.*

¹¹ Somekh, *Theory and Methods*, 226.

would be few ethical issues. Nonetheless, the aforementioned Ethical Guarantee was provided to every participant, outlining the purpose of the fieldwork, my details and providing the ethical guarantees mentioned above. Once submitted, the physical copies of the surveys remained in my possession until destruction. Personal details were recorded, for the uses outlined, in a password-protected document. These details were then physically anonymised for the process of analysis. All responses were anonymously recorded in an Excel spreadsheet and Word documents. Once recorded, physical copies of the surveys were destroyed.

3 Findings: The Quantitative Data

In attributing comments, each respondent will be referred to as ‘R’ followed by their assigned number. Professional status will be indicated as follows: solicitors as ‘S’; barristers as ‘B’; solicitor advocates as ‘SA’; and others will be fully identified. As such, ‘Respondent 1, Solicitor’ would be referred to as ‘R1:S’. For the quantitative data, comments appended to answers by respondents are detailed after the presentation of the results.

Question 1: *Do you think price-competitive tendering should be introduced for criminal defence services?’*

YES	NO	DNI
0%	99.5%	0.5%

Question 2: *Do you think a market with unlimited competitors improves criminal defence services?’*

YES	NO	DNI
76%	21.3%	2.7%

In relation to an unrestricted market of competing providers – in essence, the status quo – one respondent asserted that it ‘increases quality of work’ (R160:S). In contrast, one respondent opposed an unlimited market on the basis that it would encourage non-legal entities to provide defence services:

Extending the market to non-legal firms operating on a bulk purchase model is not good for clients or justice and will encourage profit based decisions e.g. early guilty plea and not effectively challenging the prosecution case. (R315:S)

Question 3: *Do you think it is necessary to make cost savings in the criminal legal aid system?’*

YES	NO	DNI
21%	76.3%	2.7%

Those who opposed cost savings argued that the 'legal aid budget has been decreasing for several years' (R260: SA) and that the Government had 'already cut hard enough' (R213:B). Those respondents who accepted the need for savings suggested that this should be focused 'where there is waste' (R160:S). It was also asserted that tackling this issue should include 'an injection of alternative sources of income' (R107:B), such as 'paying legal costs out of restrained funds' (R162:S).

Question 4: *Do you think that clients should pay a contribution toward their legally aided defence upon conviction?*

YES	NO	DNI
63.8%	30.5%	5.7%

Respondents insisted contributions must be 'fair and proportionate' (R181:S) and must be in 'direct relation to their income' (R194:SA). Respondents who opposed the idea argued that it 'wouldn't work' (R164:S), that 'most defendants couldn't pay anyway' (R69:S), and suggested that clients 'get legal aid because they can't afford representation' (R326:S), rendering the proposal self-defeating.

Question 5: *Do you think advocates should have their quality of service formally assessed?*

YES	NO	DNI
40.9%	54.8%	4.3%

Respondents narrowly rejected further quality assessment, saying, 'we've already had many qualifications and assessments to get where we are' (R101:S) and arguing that 'the quality of advocates is assessed by the "consumer" and peers' (R160:S). One respondent specifically criticised QASA, condemning the proposition that judges assess the advocates appearing before them by arguing that it 'will result in advocates trying to please the assessor - not fight the case' (R273:B). Those who accepted the need for assessment suggested this was conditional on two fairly vague factors: that any scheme 'should be imposed fairly' (R303:B) and should 'adequately assess quality' (R23:B).

Question 6: *Do you think that QASA should include a "non-trial advocates" category?*

YES	NO	DNI
36.8%	56.1%	7.1%

One respondent explained his/her opposition to non-trial advocates – who would only undertake guilty plea work – arguing, ‘if an advocate cannot conduct a trial or sentence, they cannot have the expertise to properly advise’ (R8:B).

Question 7: *In its present format, will you register for QASA when you are eligible?’*

YES	NO	DNI	N/A
21.3%	53.7%	8.1%	16.9%

Those respondents who said they would register for QASA stated that this was ‘only through obligation’ (R175:S) and because they were ‘required by the Law Society to do so’ (R320:B).

Question 8: *Do you think the proposed reforms will discourage the provision of a full and thorough defence for clients?’*

YES	NO	DNI
94.6%	4.6%	0.8%

Question 9: *Do you think that Solicitors and Barristers have been ‘united’ in opposing the proposed reforms?’*

YES	NO	DNI
94.3%	4.6%	1.1%

Some respondents suggested that the ‘Justice For Sale’ meeting marked a turning point in terms of unity, commenting that the profession had not been united ‘particularly until now’ (R272:B), but that they would be ‘after today’ (R334:S).

Question 10: *If you answered yes to Q9, do you think it is important that they remain united?’*

YES	NO	DNI
94.9%	0.5%	4.6%

Question 11: *At present, do you believe the defence community can work with the Government and regulators to reach consensus on the proposed reforms?’*

YES	NO	DNI
30.2%	67.3%	2.5%

Respondents did not believe that the Government were 'prepared to engage with [the] defence community' (R191:B) and were 'diametrically opposed to amendments' (R8:B). One respondent did not believe that the Ministry of Justice was truly driving the agenda, commenting: 'I personally believe that the Treasury leads any negotiation, without regard to justice.' (R72:B)

While some respondents were sceptical about the Government's 'willingness to compromise' (R130:S), a substantial minority believed that there 'should be some dialogue' (R282:B), that they 'would like the Government to negotiate' (R10:B), and perhaps more tellingly that they would 'have to try' (R169:B). However, respondents felt that the Government needed to 'take away the threat' (R119:S) perceived in PCT. One respondent suggested that a working relationship was only possible if 'we start again from scratch' (R213:B).

Question 12: *Do you think that the defence community should engage in direct action (such as a 'walk out' or protest) to demonstrate opposition to the Government's reform proposals?'*

YES	NO	DNI
91.6%	6%	2.4%

Comments in favour of direct action ranged from 'definitely' to 'if necessary'. Others were more cautious, suggesting direct action should be 'a last resort' (R154:B) which should be timed carefully, otherwise the defence community would 'risk losing public support if [we] strike too early' (R154:B). In opposition, one respondent reiterated the above point, commenting that past direct action had 'resulted in bad press' (R137:S), undermining the cause. Another was concerned about the effect of direct action on system users, opposing it if 'it impacts on defendants [and] witnesses' (R42:B).

Question 13: *What do you think are the Government's objectives in introducing the proposed reforms? Please rate the following answers, where 5 is "strongly agree" and 1 is "strongly disagree"*

	1	2	3	4	5	DNI
Increased	90%	0.80%	0.3%	0.3%	6.2%	2.4%

expertise						
Higher quality	90%	0.5%	0.3%	0.5%	6.2%	2.4%
More efficiency	73%	7.9%	7.9%	3%	5.7%	2.4%
Enhanced credibility	84.5%	3%	2.2%	0.8%	6.5%	3%
Lower cost	15%	0.3%	3%	3.2%	76.6%	2%
Greater speed	35.1%	3.5%	12%	7.4%	38.4%	3.5%
Public interest	75.2%	5.7%	5.4%	1.4%	8.7%	3.5%
Wider competition	74.7%	3.3%	3.3%	1.6%	13.9%	3.3%

One respondent believed that the reforms were 'all about saving money... they do not care about justice' (R124:S).

Question 14: *Where 5 is 'important' and 1 is 'not important', how important do you think the 'cab rank rule' is?*

1	2	3	4	5	DNI
13.10%	5.70%	16.10%	11.20%	38.10%	15.80%

Only one respondent commented, suggesting that the rule was 'vital' and that 'we have forgotten why it is so important' (R8:B).

Question 15: *Where 5 is 'important' and 1 is 'not important', how important do you think client choice is?*

1	2	3	4	5	DNI
4.10%	0%	0.80%	1.40%	91.80%	1.90%

Only one respondent identified why he/she considered choice important, stating that it 'assists in more speedy representation' (R160:S).

Question 16: *Where 5 is 'important' and 1 is 'not important', how important do you think a lawyer's local knowledge is?*

1	2	3	4	5	DNI
3.50%	1.90%	5.20%	13%	73.80%	2.50%

Question 17: *Where 5 is 'important' and 1 is 'not important', how important are the following issues to you?*

	1	2	3	4	5	DNI
Reduction in the number of criminal legal aid providers	28.30%	3.30%	11.20%	6.30%	46.30%	4.60%
The introduction of PCT	30%	0.30%	0.80%	0.50%	63.20%	5.20%
17.5% reduction in rates	24.80%	1.60%	2.20%	3.80%	62.10%	5.40%
The restriction on market share in service areas	25%	0.80%	4.60%	3%	60.50%	6%

This question had substantial methodological problems. Comments appended to the responses suggested significant confusion about the meaning of the question, with respondents describing it as 'ambiguous' (R8:B) and 'unclear' (R9:B). Respondents were uncertain as to whether they were being asked to rate the importance of supporting or opposing the reforms. For example, one respondent stated, 'they are important issues but I object to them all' (R58:SA), a sentiment echoed in near identical wording by several respondents. Respondents suggested alternative wording for the question, including 'how important is opposition to the following issues' (R85:SA). Due to the methodological issues with this question, the validity of this data is questionable.

Question 18: *What, in your view, is 'effective' criminal defence? Please rate the following answers, where 5 is 'accurate' and 1 is 'not accurate'?*

	1	2	3	4	5	DNI
Convicting the guilty and acquitting the innocent	5.20%	1.90%	4.90%	4.10%	80.10%	3.80%
Protecting the rights of all defendants	2.20%	0%	0%	2.50%	92.60%	2.70%
Being fair to victims and witnesses	1.90%	1.30%	5.40%	7.60%	80.70%	3%

Reducing delays and adjournments	3.30%	4.60%	17.40%	14.70%	56.40%	3.50%
Victory for the client, within the law	5.70%	3.30%	13.90%	12.30%	59.40%	5.40%

One respondent believed that aiding convictions and acquittals ‘subject to proper investigation and compliance [with] disclosure... by police’ (R119:S) constituted effective defence. One respondent seemed to find the concept of ‘victory for the client’ a little distasteful, stating, ‘I wouldn't put it like that’ (R213:B).

4 Findings: Qualitative Responses

Questions 19 and 20 allowed respondents to provide open-ended comments. The majority of respondents provided written answers to these questions, ranging from one word descriptions to extensive comments on the reforms. The two questions were as follows:

Question 19: *What affect, if any, do you think the current proposals for reform will have on:*
The day-to-day representation of suspects and defendants?
Access to justice generally?

Question 20: *Do you have any other comments you would like to make?*

The responses provided to both questions frequently overlapped and had clear inter-connection; as such, I chose to analyse the responses to these questions together. Six clear themes could be identified: money; quality; justice; people; government; and response.

4.1 Money

Several respondents suggested that the proposed reforms, contrary to the Government’s stated aims, would be ‘highly likely’ (R213:B) to increase costs in the administration of criminal justice, or at least would achieve ‘less cost savings than expected’ (R35:S). Respondent 271 (S) argued that ‘we save money because we know [clients]’, a benefit that would be lost under the proposed system of random allocation. As such, any savings would ‘be lost in increased delays in the justice system with poorly represented or unrepresented defendants’ (R123:S). Respondents argued that the reforms placed too much ‘focus on cost saving... over proper representation’ (R3:S) and that ‘efficiency, justice [and] freedom of choice are being ignored’ (R174:SA). One respondent suggested whilst he/she was not oblivious to the economic climate, it was imperative that an effective, fair and quality system be maintained:

I understand the need to save money generally. But not at the price of justice, true justice that is, not Government justice that equates it directly to the conviction rate. (R206:SA)

Respondents argued that insufficient remuneration would prevent or deter 'proper representation' (R3:S) as 'the only incentive is to "win" the contract and then try to survive' (R333:S). It was argued that 'fast and cheap cases... [would] override proper consideration and fairness' (R110:S); clients would be processed by defence lawyers on a 'conveyor belt system of justice' (R231:S) and 'be treated as currency; stack them high, sell them cheap' (R139: Clerk).

It was argued that PCT would be a 'death knell for numerous small businesses' (R29:S) as 'many firms will not be able to afford to bid' (R101:S). Individual respondents, reflecting on their own circumstances, seemed to confirm this view. Respondent 145 (Unknown) said, 'if PCT comes in it is impossible for me to put a bid in', whilst Respondent 320 (B) said that he/she 'will not bid for a contract under PCT [because] the choice is between instant death and death by a thousand cuts.' One respondent pointedly remarked that 'some firms [are] already closing because of poor remuneration and that's before any changes are implemented' (R101:S), suggesting that the impact of the reforms on an already fragile market would be devastating. It was suggested that small, local, community-based entities would be most affected. One respondent stated, 'I simply do not see how most high street solicitors can survive' (R22:B) while another considered it 'the end' (R271:S) for such firms. Concerns were also expressed on behalf of rural providers, with one respondent commenting that such practices 'cannot absorb disbursements like in urban areas' (R168:S). A Cumbrian practitioner questioned whether the proposals were physically workable, highlighting that the proposed plan for his/her area meant that 'four providers will have to cover... approximately 4000 square miles' (R226:S).

Some respondents believed the proposals had been designed to exclude the current crop of small and medium sized providers, instead encouraging 'large "corporations"' (R273:B) and 'co-operate companies' (R331:S) to enter the market and 'take over' (R320:B). It was suggested that such entities would 'undoubtedly [be] the only organisations that will bid for contracts' (R331:S) since they would be able to 'practice an economy of scale' (R273:B). This was regarded as negative for clients, as providers 'will look to profits and not to keeping levels to a high standard' (R331:S). Another felt that whilst this would financially benefit 'the owners of the entity that wins a bid', employed defence lawyers would suffer:

The winners of the bid... may turn a profit but any employed solicitor will face a heavy workload and a reduction in salary' (R349:SA)

Only one respondent suggested that consolidation was a necessary, if painful, requirement:

There are far too many suppliers in most urban areas – with falling volumes and approximately 15% cuts over the last 4 years, the status quo is no good. (R362:S)

Respondent 286 (S) seemed to summarise the majority view, painting a grim picture of both the past and the future:

I have been qualified for 27 years and I have run my own law firm for the last 17 years. Everything I have worked for will be wiped out and we will have to tell our clients that we have closed our law firm. Forget the reduction in fees or own solicitor advice; there will be no work to earn fees or retain clients.

4.2 Quality

'We aim for excellence to maintain our client base. This will go.' (R212:S)

Respondents argued that quality defence representation would become 'a thing of the past' (R65:B), because the PCT model – under which the lowest bidder wins the service contract – would encourage a 'race to the bottom' (R148:S) where 'representation will be focused on who can offer it at the cheapest rate, not on quality' (R272:B). This, combined with cuts, led respondents to conclude that 'standards will fall because it will not be economically possible to maintain them' (R355:B). It was thought that 'only the least effective firms will apply – working from home without a proper office, [which] may reduce quality' (R101:S). Respondents argued that "fast food"... legal advisers' (R160:S) – prioritising speed and low cost over thorough representation – would become the norm, doing only 'the minimum they have to do in most cases' (R316:SA). Respondents concluded that services provided by 'disinterested, substandard lawyers' (R232:SA) would mean that 'defendants will undoubtedly suffer' (R272:B). In general, respondents felt that the proposals amounted to a 'dumbing down' (R186:S) and a 'deskilling' (R3:S) of the legal profession.

It was suggested that the financial implications of the proposals would deter defence lawyers from undertaking lengthy, complex or additional work. It was asserted that the current system was 'often heavily dependent on defence lawyers going the extra mile' (R316:SA) and that defence lawyers were 'predominantly responsible for correcting the shortcomings of other areas' (R334:S). Under the proposals, it was argued that 'defence lawyers will not do the additional work they do now which enables the system to function effectively' (R316:SA), meaning 'a poorer defence will lead to a poorer system' (R334:S).

One respondent stated that his/her firm would 'have to refuse to undertake difficult cases or clients as the fee will not reflect the work needed' (R124:S). Another provided a practical example of this:

It recently took me 13 hearings to secure a fair, and successful, trial on a common assault charge for a client due to CPS failings and court delays. Who will do 13 hearings for £300 fixed fee?' (R270: Paralegal)

The bottom line was made clear by Respondent 124 (S): 'We are a business not a charity. We have to make money to survive.'

A central issue for many respondents was the impact of the proposed removal of client choice. Choice was described by respondents as 'the sole driver of quality' (R206:SA) and 'the single most important factor in keeping the integrity of the system in tact' (R42:B). Respondents argued that the removal of choice would 'take a sledge hammer to quality' (R261:B) as it would 'undermine the service-focussed and accountability of the solicitor-client relationship' (R90:SA). Several respondents felt that the removal of client choice was anti-competitive as it was designed to guarantee a market share for providers. Respondents argued that since 'providing a quality service has no affect on the quantity of work' there would be 'no incentive to provide one' (R310:SA). It was asserted that 'lawyers do not need to encourage repeat business' (R232:SA) as they would be guaranteed clients; it was feared that this would 'create monopolies without the quality mark competition provides' (R162:S). It was argued that random assignment of clients to service providers – potentially at each separate stage of the justice process – would 'no longer give clients continuity of representation/care' (R69:S).

Respondents argued that 'experienced practitioners won't work in this environment' (R21:B) and that the 'most gifted' and 'most qualified' lawyers would feel 'let down by the Government' (R142:S). Consequently, the best practitioners would 'leave crime in their droves' (R194:SA) and 'quality will deteriorate' (R63:S). This was exemplified by one respondent – a QC and Recorder with 26 years' experience – who stated 'I would rather leave the profession... than work under these proposals' (R40:S). Respondents suggested two reasons for this predicted exodus – defence work would become financially unviable and the morale of practitioners would collapse. On the first point, respondents argued that defence lawyers 'can't do a proper job for the money available on PCT' (R63:S) and will be 'unable to financially continue in this line of work' (R194:SA). One respondent suggested that the current proposals would be the final straw for practitioners, asserting that 'most of our profession are now considering their "exit" strategy, even without this' (R142:S). Another seemed to agree, suggesting that there

were 'no perks at present, long hours, no pension' and that in the wake of the current proposals 'commitment to the cause will longer in itself be viable' (R194:SA). On the second point, respondents felt that the proposals 'undervalue the work carried out by defence lawyers' (R69:S), moreso than 'any other traditional profession' (R194:SA). Respondents considered the proposals to be 'insulting' (R61:S), devaluing the commitment and training required to practice as a criminal defence lawyer:

Solicitors choose to be legal aid defence solicitors because they care about justice and equality of arms and democracy and human rights. I work late every night and weekends. I spend all night in police stations for a fixed fee then get up early and spend all day in court. I am lucky to earn £30k for my commitment and work – less than a tube driver. I have spent years qualifying and have £20k debt to be rewarded with this' (R124:S)

In summary, respondents believed that criminal justice would be transformed into 'a sausage meat factory churning through cases at a break-neck speed at the loss of quality and justice.' (R252:SA). They felt that the proposals would destroy the 'integrity and reputation' (R175:S) of a 'first rate system – envied around the world' (R75:B), which had been carefully 'built over decades' (R103:S).

4.3 Justice

Many respondents felt that the proposals could deny or restrict access to justice for suspects and defendants. Respondents believed there would be a 'significant reduction... [and] deprivation of access in many cases' (R97:S), suggesting the emergence of advice "deserts" for 'large swathes of the community' (R298:SA). It was suggested that the removal of client choice would be a primary cause for this as it was 'clearly a fundamental aspect of accessing justice' (R346:S). Some respondents commented that access would become 'non-existent' (R20: Unknown). However, others felt that 'access to justice will remain... but not justice as any right thinking member of the public would expect' (R72:B), arguing that because 'defendants will be poorly defended' they would 'therefore not have "access to justice"' (R233:SA), inferring access is largely dependent on representation by a quality lawyer. These comments therefore distinguish between two elements of access to justice – access to *representation* would remain but access to an *effective defence* would be denied or at least restricted, undermining the concept of access generally. The latter conclusion was reflected in the language used by some respondents, who commented that there would not be 'real' (R34:B) or 'proper' (R257:B) access to justice; in short, defence representation would be rendered largely symbolic.

Several respondents believed that the proposals, taken as a whole, would lead to an increase in miscarriages of justice. Respondents argued that the proposals would not

only lead to the 'conviction of the innocent' (R229:SA) but to an 'increase in the guilty being acquitted' (R306:S). It was felt that unjust decisions would be 'widespread' (R175:S) and occur 'on a daily basis' (R341:S) because of a reduction in the quality of representation. One respondent argued that 'defendants will be convicted or acquitted on pure luck and not... preparation of the case' (R255:S). Another agreed, stating that the proposals would make it a 'necessity to reduce case input to ensure financial viability' (R70:S). This lowering of standards would mean that clients would receive a 'poor quality defence... resulting in many acts of injustice and costly appeals' (R274: Consultant). Other respondents argued that miscarriages of justice would increase if 'commercial profits become the principle goal' (R328), delivered by 'new legal ventures, unsuited to conduct crucial defence work' (R328:B). Respondents also felt the removal of client choice would contribute to an increase in miscarriages of justice. It was argued that without choice, ties between lawyers and regular clients would be severed. This would mean 'more defendants will appear in court unrepresented' (R116:SA), without qualified and experienced representation. As a result, respondents believed 'miscarriages of justice will see a sharp increase' (R272:B). Additionally, respondents foresaw the unpleasant side-effect of an increase in 'witnesses being cross-examined by defendants' (R332:S), exacerbating the already stressful nature of criminal proceedings for third parties and reducing the likelihood of witnesses providing best evidence.

It was felt the reforms would generate more delays and inefficiency at all stages of the justice process. Respondents argued that the proposals would cause the 'clogging up of police stations' (R96:SA) and make 'efficiency in the courts... something we enjoyed – once upon a time' (R72:B). It was suggested that there would be a 'lack of preparation or investigation of [a] defence' causing 'delays for all concerned' (R42:B) and that this would be a self-perpetuating cycle, with an impact on accuracy:

There will be delays in court – which will increase pressure on advocates – [and] mistakes will be made. (R185:SA)

Respondents cited the quality of the lawyers available under the new market as a cause for delays, arguing that 'the courts will be clogged up due to poor quality and inefficient lawyers' (R268:SA) and 'inexperienced representation' (R141: Trainee Solicitor). Respondents also suggested that the removal of client choice would impact on efficiency. It was argued that trust-based client-lawyer relationships allowed defence lawyers 'to deal with [a client's] case much more swiftly and efficiently' (R25:S), something which 'assists not only [clients] but the administration of justice' (R351:S). This was particularly true for long-term professional relationships:

Some of our clients I have known for 17 years. They trust us and we understand each other. They accept my advice and act on it. (R58:SA)

It was argued that the removal of client choice would 'break... the link between lawyer and client' (R134). Instead, clients would be randomly allocated an unfamiliar lawyer, possibly with no existing knowledge or understanding of their background or needs. It was argued that clients 'may not talk to a lawyer they do not know' and, if they did, would be 'unlikely to follow their advice' (R58:SA). This 'lack of cooperation' (R35:S) between lawyer and client would mean that 'cases will not progress as smoothly as they would due to lack of trust' (R273:B). As a result, respondents foresaw 'courts clogged up by unhappy clients' (R257:B) and 'adjournments due to litigants in person' (R141: Trainee Solicitor), with an 'adverse effect on the daily administration of justice' (R162:S). Another predicted 'many no comment interviews' at police stations from suspects who 'will not want to deal with pre-determined solicitors' (R96:SA).

Respondents raised fears that the proposed harmonisation of fees for guilty pleas and trials could create 'incentives... to conclude matters as quickly as possible to maximise profits' (R61:S), leading to 'conflicts of lawyers' financial interests and client's best interests' (R342:S). Respondents argued that clients – under pressure from time-pressed lawyers – could be 'railroaded' (R133:SA) into guilty pleas 'regardless of instructions or strength/weaknesses in evidence' (R325:S). Respondents were concerned that the financial realities of the proposed system meant there was 'no incentive to run a trial for a defendant' (R323:B), as this could be long and costly. Respondents felt that lawyers would be under 'increased pressure to "finish" the case quickly' (R66: Unknown) and that this inevitable 'change [in] the ability of advisers to spend sufficient time on a case' (R90:SA) would 'leave vast numbers of defendants without adequate representation as busy solicitors rush to provide a low quality service' (R157:SA). This would be a particular danger in the case of, what one respondent described as, 'firms with few morals' (R101:S). In this environment, clients unsure of their position or anxious about the stress of fighting their case might be convinced to 'take [the] easy way out [and] plead guilty... when they are innocent' (R221:S). Respondent 133 (SA) speculated that where clients prove 'strong enough to resist the advice to plead' they would 'receive a substandard service'. Respondents believed that such behaviour 'would not be lost on the clients' and that they would 'lose faith in the lawyer forced upon them which will increase the incidence of self-represented defendants' (R61:S). As such, the pressure to resolve proceedings quickly could have the unintended result of lengthening them since 'such defendants create delays in the system and take up unnecessary court time' (R61:S).

In general, the respondents' comments were overwhelmingly negative about the impact of the proposals on justice. Respondents believed the proposals displayed 'contempt for the rule of law and lack of consideration for individual rights' (R305:S). It was argued that the proposals undermined the ability of defence lawyers to provide an adequate service; therefore, clients would 'not [be] given a fair representation' (R288:S). It was argued that the proposed removal of client choice and the severe reduction in the number of providers available would leave only a small pool of state-selected entities delivering defence services. As such, defence lawyers would effectively be 'chosen by the Government, part of the same institution that prosecutes' (R333:S). Respondent 38 asserted that 'it cannot be right that a man accused and prosecuted by the state should be defended by a lawyer "appointed" by the state.' Respondents thought that the proposed reforms would cause 'massive disruption' (R60: Trainee Solicitor) to the day-to-day workings of the criminal justice system.

4.4 People

Respondents believed that the proposed reforms would leave 'large portions of [the] public disenfranchised' (R42:B) and were particularly concerned that the proposals would 'let down' (R103:S) defendants with mental illnesses, '[the] illiterate', 'the young' (R103:S), 'the uneducated', 'racial minorities', and 'the poor' (R210: Unknown). Respondents felt that such defendants would be 'left without support' (R258:B) as they would not be 'understood/represented properly' (R35:S) by randomly allocated representatives. As mentioned above, respondents believed the proposals would discourage lawyers from undertaking complex and time-consuming work, meaning that 'the most vulnerable... will be refused' (R124:S); in short, those 'who need protection' (R363:S) would be 'hardest hit' (R298) by the changes. Respondents believed that those in 'rural communities will have restricted access' (R58:SA), specifically suggesting that the proposals were 'unworkable in rural Wales' (R150:S) and in Cumbria (R226:S). Respondents generally felt that the proposals would leave 'vulnerable people weaker' and make 'society less and less cohesive' (R294:S). Some respondents implied this was a deliberate strategy, suggesting that the proposals amounted to a form of 'social engineering' (R210: Unknown) and an 'assault by the Government on the poor' (R102:S).

Several respondents commented that the proposals would have the effect of creating a 'two tier system', divided between 'those who can afford to choose [and] those who cannot' (R87:S). It was argued that the removal of client choice for legally aided suspects and defendants targeted 'those of lower economic standing' (R125:S). Respondents

believed the proposals would 'disadvantage the poor' (R163:B) since the wealthy are generally not reliant on the state for representation. As such, 'those who cannot afford [private representation]' would be left with 'a budget service or no service at all' (R192:B). In essence, the reforms would mean that 'someone accused of an offence would get the quality of representation that they can afford to pay for' (R279:SA), undermining the principle that the ability of the accused to defend themselves should not be determined by means. Since respondents believed that the proposals primarily threatened locally based, "high street" lawyers, it was suggested that poor clients 'living on £60 per week benefits' could be forced to 'spend a large percentage of income travelling to see representatives' (R298:SA). Moreover, respondents believed that relationships between local firms and their clients would be destroyed:

We know [the client], we know their families, we know about mental health problems and addictions. We help people who struggle to communicate, to make sure they are properly defended and fairly treated' (R271:S)

Randomly allocated lawyers with no existing relationship with a client would have 'a lack of understanding and empathy' (R157:SA) and 'a total lack of incentive to form relationships and trust with vulnerable people' (R315:S). Respondents believed the detrimental effects of the proposals would 'affect victims as well as defendants' (R2:SA), in the form of delays, damaged relations between the prosecution and defence (R280:S), and the likelihood that 'victims will be confronted by their attackers in self-represented... trials' (R315:S).

4.5 Government

A consistent theme in responses to Question 20 was distrust of the Government and doubts about its ability to competently reform the criminal justice system. Respondents believed the reforms were 'ideological' (R65:B) and 'politically motivated' (R102:S), and that the Ministry of Justice's consultation had been 'dishonest' (R106:B) and 'a sham' (R231:S). Respondents believed that the Government was 'misleading the general public in order to save money' (R124:S) and had selected criminal defence services for cuts because it was 'an easy target' (R247:S). Some respondents believed that the Government wished to 'restrict avenues of complaint by its "subjects"' (R102:S) and was 'determined to dumb down the best legal system in the world' (R219:S), by undermining both the financial stability and general credibility of defence lawyers. Respondents believed that the Government had attempted to undermine them by portraying legal aid practitioners as 'fat cat lawyers' (R124:S), therefore implying that 'defence advocates are wholly motivated by money' (R35:S). Respondents believed that the reforms had been designed by people 'with no idea about the criminal justice system and/or who don't care' (R16:SA). It was asserted that the Lord Chancellor, Chris Grayling (the first non-lawyer in

the post for three centuries),¹² did not 'have a clue regarding the day to day workings of the criminal court system' (R175:S). Respondents asserted that 'no one should have any confidence' in the Ministry of Justice, who were described as 'serially-incompetent' (R22:B).

Several respondents questioned the rationale for the reforms, describing the proposals as 'ill-conceived and rushed' (R193:S) and criticised the Government for offering 'no empirical evidence as to why these changes are required' (R121:S). Respondents felt that, in justifying the reforms, the Government had made assertions which were 'plain wrong' (R213:B). An example cited was the oft repeated claim that 'the cost of legal aid has "spiralled out of control" when [the] 2011/2012 cost [was] less than the actual cost in 2003/2004' (R213:B). Other respondents concurred, noting that the 'crime bill is reducing [with] less defendants and lower bills already' (R320:B). Respondents therefore argued that there was 'no economic basis for the cuts at all' (R53:SA), highlighting the criminal justice system had already achieved 'substantial savings' (R58:SA). Respondents believed this was especially true amongst smaller firms, arguing that in 'the high street...savings have been achieved year on year' (R70:S) by 'small practices... many of which are highly efficient, cost effective and provide a high level of service' (R316:SA). Further cuts were considered 'unsustainable' (R213:B) in a system that was 'already working on bare bones' (R103:S).

Respondents were equally critical of the Government's proposed shift to PCT for defence services. One respondent branded it 'Wednesbury Unreasonable' (R185:SA) – presumably implying that it was 'outrageous in its defiance of logic or of accepted moral standards'.¹³ Respondents asserted that the introduction of PCT was 'not supported by any figures or successful model' (R219:S) and that the Government should not 'dictat[e]... how defence lawyers should structure their businesses' (R316:SA). Rather, they should simply 'set the rates and leave the independent profession to decide how to structure itself to deliver' (R316:SA). Respondents also commented on the Government's failure to consider wider economic issues, arguing that 'redundancy, loss of income tax revenue, and support of benefits costs for redundant staff [has] not [been] factored into cost/benefit analysis' (R316:SA). In conclusion, the proposals were described as

¹² Fraser R., 'In the future our police, lawyers and jails will be run by G4S', *New Statesman*, 22 April 2013

<http://www.newstatesman.com/2013/04/future-our-police-lawyers-and-jails-will-be-run-g4s%20>

¹³ This was Lord Diplock's summary of 'Wednesbury Unreasonableness' in *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6; the test, applied to the decisions of public bodies, was first established in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1.

'financially illiterate' (R262:S) and 'economically unworkable for any size of firm' (R210: Unknown). Several respondents considered it imperative that the Government fully consult and work with the profession in order to rectify the 'ill-thought through' proposals, which had been 'drafted without asking the views of any practising solicitor, barrister or judge' (R213:B). It was argued that the 'Ministry of Justice should engage with the Law Society and the CLSA to formulate alternatives' (R306:S), because the 'legal profession [is] ideally placed to act with Government to design a trimmed legal aid budget that is fit for purpose and keeps our standing as the envy of the world in defence provision' (R21:B).

4.6 Response

Many respondents also used Question 20 to address the issue of how the defence community should respond to the proposed reforms. Several adopted a combative and uncompromising stance, arguing that the defence community 'cannot allow this to happen' (R236:S) and should 'resist any compromise' (R75:B). They also underlined the importance of unity, reflecting responses to Question 10. Respondents urged all defence lawyers to 'come together to defeat these proposals' (R75:B) and warned that disunity could 'undermine the fight', particularly if firms and chambers 'cave in or fear' (R92:S). Several respondents clearly indicated that direct action was necessary to prevent the reforms going ahead. It was considered 'vital that we take effective action... to protect access to justice and the rule of law itself', and that this should include 'withdrawal of our services' (R75:B). Most respondents were vague on this subject, simply arguing the defence community should 'unite and strike' (R239:S) and not 'participate in PCT' (R283:SA). One respondent was a little more specific, arguing that 'Higher Court Advocates and the Bar should be unavailable for Crown Court work' (R90:SA). One respondent believed that pre-emptive action was imperative, arguing, 'we need to act now while we can influence the MoJ' (R90:SA). In general, the attitude of the respondents was akin to that of embattled protestors or campaigners, with several of the qualitative responses including the simple slogan, 'no to PCT' (R82:SA, R201:S, R216:S, R295: Unknown, R307:S, R342:S). However, respondents believed that 'whilst protest is important' (R223:SA), it was clear that a 'viable alternative to PCT [is] needed' (R53:SA) and that defence lawyers should therefore 'advance and publicise reasoned arguments against the proposals' (R75:B), rather than simply refuse to cooperate. It was argued that the defence community might be better using its organisational capabilities to 'engage... local courts and solicitors on how to save money and put forward proposals' (R96:SA). Questioning whether 'the Government [is] likely to back down completely', one respondent considered it important to have 'a Plan B for negotiations' (R300:S). Without

doing so, respondents feared that 'these proposals will just go through and most of us will be out of work' (R223:SA).

Respondents suggested alternative targets for cuts. One respondent felt that the Government should 'reduce expert fees' (R116:SA), while another argued that the Government should 'get rid of the Duty Solicitor Call Centre' (R245: Trainee Solicitor). It was suggested that cost savings could be achieved by 'reduc[ing] court sitting time' (R116:SA). It was argued that since 'less persons [are] being prosecuted... [there is] not enough work in court to justify sitting 5 days a week', and that it would be more sensible to 'open all the court for 3 days' (R116:SA). One respondent stated that 'a number of hearings are still ineffective' (R173:S) and should be dealt with as a priority; additionally, he/she believed that 'attending court for preliminary hearings and case management reviews are unnecessary and could be done by letter/conference call'. One respondent stated that there were 'numerous funding alternatives' (R17), such as a 'contribution from all litigants within Criminal System where possible' – reflecting some of the responses to Question 4 – and an obligation on 'all legal transactions to contribute to cost' (R17:B). One respondent did suggest a 'compromise' in the form of 'a rate cut and a move towards larger firms', which would lead to 'a consolidation of the market place' (R164:S) – perhaps suggesting that while changes could be made at a slow pace, PCT would be an unacceptable method of achieving it. Other suggestions entirely contradicted the objectives of cost-saving and consolidation. One respondent argued that the defence community should 'seek increases in future rates to protect the system [or] else we will forever be at this crisis point' (R202:S) while another believed that the Government should 'ring fence criminal legal aid' (R313: Unknown).

Conclusion

The fieldwork yielded a large amount of data, varying in detail, but with a clear message: the criminal defence community were deeply opposed to the proposed reforms to legal aid. The degree of unity across the sample was striking. This was most apparent in the respondents' condemnation of PCT, a model that a majority believed would decimate the criminal defence profession, lower the standards of defence services, encourage corporate monopoly and undermine the rights of suspects and defendants. It should however be remembered that this was a non-probability sample of 367 practitioners from a total population of several thousand practising criminal defence lawyers. There was a clear determination to actively oppose the reforms through protest and direct action if necessary. That being said, a significant portion of the respondents sampled felt that dialogue and negotiation were necessary, not just because it was practical and realistic,

but because there was an argument to be made that reform is needed. None, however, believed that the extent of change proposed by the Government, and the methods for achieving it, were necessary, fair or even workable.

The data suggested that the defence community wished to present a strong, united front, not unwilling to negotiate but with clear red-lines that cannot be crossed. However, it also portrayed a profession that has been disdained and degraded, subjected to cuts over many years, that is demoralised by hard work for little reward, and frustrated by the failure of the Government and the public to appreciate the importance of their service. As such, the data suggested a community exhausted of patience and options, ready to take whatever action is necessary to protect the rights of clients, the integrity of the system and their own livelihoods. Several respondents understood the general necessity for cost-effectiveness and recognised that waste and bureaucracy are fettering the delivery of justice. As practitioners, the respondents felt they were in a position to help achieve these goals without pursuing what they perceived as the highly damaging strategy proposed by the Government. However, they felt shut out of the debate, only invited to join in at the (very short) public consultation stage. This treatment, alongside clear ideological differences between the profession and government, appeared to have created an almost insurmountable barrier of distrust. Therefore, many believed that the only way of changing the Government's mind was direct action. Many respondents felt pained by this conclusion but could see no other choice.

Since the fieldwork was completed there have been significant developments. The consultation closed in June 2013, with approximately 16,000 responses received by the Government.¹⁴ In early July 2013, the Justice Secretary abandoned the removal of client choice.¹⁵ In September 2013, the Government responded to the consultation feedback with a revised set of proposals – constructed, it said, in negotiation with the Law Society.¹⁶ Among a variety of changes, the Government abandoned the introduction of the PCT model, disowned by the Justice Secretary as originally the Labour Party's idea.¹⁷ However, the proposed cuts of 17.5% were retained, to be directly applied to fees

¹⁴ Ministry of Justice, *Transforming Legal Aid: Next Steps* (The Stationary Office, 2013), [1.8], 6.

¹⁵ Grice A., 'Justice Secretary Chris Grayling in U-turn: Defendants on legal aid will still be able to choose their solicitor', *The Independent*, 1 July 2013.

<http://www.independent.co.uk/news/uk/politics/justice-secretary-chris-grayling-in-uturn-defendants-on-legal-aid-will-still-be-able-to-choose-their-solicitor-8682397.html>

¹⁶ *Transforming Legal Aid*, Ministerial Foreword, 3.

¹⁷ Commons Debate, *Daily Hansard*, 2 July 2013, Col 744.

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130702/debtext/130702-0001.htm#13070275001498>

in two stages.¹⁸ A second consultation, 'Transforming Legal Aid: Next Steps', closed in November 2013. These events suggest that the Government and *some* sections of the defence community have been willing to compromise. However, the retention of substantial cuts remains a critical obstacle to any resolution; they arguably present the biggest threat to the operational viability and survival of many firms and chambers. The Law Society admitted the cuts would be 'very challenging' for the defence community,¹⁹ whilst the Bar Council described the cuts as 'the harshest in the public sector' which would 'heavily impact' on quality.²⁰

Although PCT has been withdrawn, hostilities between the defence community and the Government have continued. In addition, the Law Society have been heavily criticised by members of the defence community for its 'abject surrender' to the Ministry of Justice in negotiating changes to the reforms.²¹ The Society's executives now face a vote of 'no confidence' in December 2013.²² Whilst the Government's change in direction initially bought some time for the defence community to propose alternatives, little appears to have changed. The defence community have remained doggedly critical of the proposed fee cuts and the Government appears determined to push ahead, with several reforms taking effect in December 2013.²³ Among these are large reductions in fees for existing Very High Cost Cases (VHCCs), which barristers appear ready to reject.²⁴ The CBA has announced the first 'strike' action in response to the reforms – a half day of 'non-attendance' in January 2014 – leading one to conclude that meaningful negotiation between the defence community and the Government appears increasingly unlikely.²⁵

¹⁸ Baksi C., 'Grayling confirms legal aid concessions', *The Law Gazette*, 5 September 2013.

<http://www.lawgazette.co.uk/practice/grayling-confirms-legal-aid-concessions/5037355.article>

¹⁹ 'Law Society - legal aid proposals offer a challenging but sustainable future', *The Law Society*, 5 September 2013.

<http://www.lawsociety.org.uk/news/press-releases/law-society-legal-aid-proposals-offer-a-challenging-but-sustainable-future/>

²⁰ 'Bar Council Responds to New Legal Aid Consultation', *The Bar Council*, 5 September 2013.

<http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/september/bar-council-responds-to-new-legal-aid-consultation/>

²¹ Ames J., 'Law Society chiefs face confidence vote over "abject surrender" in legal aid battle', *The Lawyer*, 4 November 2013.

<http://www.thelawyer.com/news/law-society-chiefs-face-confidence-vote-over-abject-surrender-in-legal-aid-battle/3011905.article>

²² Bowcott O., 'Critics of legal aid cuts force Law Society vote', *The Guardian*, 19 November 2013.

<http://www.theguardian.com/law/2013/nov/19/legal-aid-cuts-law-society-vote>

²³ The Law Society, 'Transforming Legal Aid' changes to be implemented on 2 December 2013', 22 November 2013.

<http://www.lawsociety.org.uk/advice/articles/transforming-legal-aid-changes-to-be-implemented-on-2-december-2013/>

²⁴ 'Barristers refuse to act in 40 high cost legal aid cases', *Solicitors Journal*, 4 November 2013.

<http://www.solicitorsjournal.com/news/legal-profession/barristers/barristers-refuse-act-40-high-cost-legal-aid-cases>

²⁵ Bowcott O., 'Criminal barristers announce half-day refusal to work in legal aid protest', *The Guardian*, 3 December 2013.

Thereafter, the first round of fee cuts take effect in February 2014, with the second in May 2015. Whilst the concessions made by the Government initially appeared to leave the ball in the court of the defence community, to some their continued opposition may now resemble intransigence and inflexibility, notwithstanding their argument that further cuts would devastate the availability and quality of defence services. The Government claims to have genuinely engaged in a listening exercise and responded, despite claims by respondents that the consultation was 'a sham'. Indeed, by opening with the most unpalatable set of reforms imaginable and then gradually climbing down, this may well represent the end-stages of a smart political strategy by the Government to secure the savings it wants.

Are the defence community justified in their continued opposition? The respondents unanimously rejected PCT, the removal of choice and fee cuts. Whilst the first and second of these have been formally dropped, the threats posed by both arguably remain inherent in the third. PCT would have artificially reduced the number of providers with the potential impact on quality described by the respondents; swingeing cuts may achieve the same effect. If the fees offered make defence work financially unviable, firms and chambers will inevitably close. Over time (or possibly overnight considering the size of the cuts proposed), this would mean less competition and lower quality. This could also mean less choice for clients. Where clients are dependent on a local, familiar service provider which is forced to close, then the problems relating to trust and choice remain relevant. They may, in practice, be forced to opt for an unknown lawyer or else self-represent.²⁶ For those providers that stay in business, the fee cuts and the consequent problem of financial viability could create the pressures on time and resources described above. This may affect the delivery of quality services and the effectiveness of the justice process in the ways outlined by the respondents. In this sense, one could reasonably argue that whilst the Government appear to have tackled the objections of the defence community by abandoning PCT and the removal of client choice, the effect of the reforms is largely unaltered. In a sense, they have changed the reforms in letter but not in spirit.

Seven months on from 'Justice For Sale', the future now presents a seemingly unenviable choice for defence practitioners between direct action and acceptance of the

<http://www.theguardian.com/law/2013/dec/03/criminal-barristers-action-legal-aid-cuts>

²⁶ For more on the issue of choice of lawyer for clients, see Skinns L., 'The right to legal advice in the police station: past, present and future' (2011) 1 *Criminal Law Review* 19; and Smith T., 'Trust, choice and money: why the legal aid reform "u-turn" is essential for effective criminal defence' 11 *Criminal Law Review* 906.

reforms as they now are. For some, the latter may well be tempting; with lives to lead away from work, practitioners may not be able to afford the sacrifice of foregoing income.²⁷ For sole practitioners or small entities, mergers may be the only option for survival. This may be difficult within the aggressive timeframe for reform and will not necessarily guarantee profitable work – it is risky to predict the future state of a market, particularly one that will be subject to cuts and contraction in both supply and demand. For those who regard acceptance as unacceptable – for practical or ideological reasons – direct action appears to be the only route forward. For advocates, this will likely involve the return of VHCC instructions (on which the Bar Council has sought legal advice),²⁸ the rejection of future briefs for such work from April 2014, and refusal to register for QASA.²⁹ For solicitors, rolling ‘training days’ – during which court is not attended and clients are not seen – may be organised.³⁰ Such strike action may be the final roll of the dice for the defence community, a group described as a ‘wounded animal’ by Stobart Barristers’ boss, Trevor Howarth.³¹ It therefore seems this animal is finally willing to show its claws, and whilst one cannot blame the defence community for doing so, it must be questioned: in an age of austerity, coupled with media hostility towards industrial action, do the potential rewards outweigh the risks? Each practitioner must be aware of the potential professional consequences – strained relationships with unsympathetic judges, the risk of breaching professional codes, and (most importantly) clients left without representation.³² With these in mind, is direct action a sacrifice worth making? It is hard to gauge, but one suspects that, if asked, those defence lawyers now prepared to strike

²⁷ For example, under QASA, ‘advocates may only undertake criminal advocacy in courts in England and Wales if they have been accredited by their regulator in accordance with the Scheme (‘Application of the Scheme’, ‘QASA Handbook for Criminal Advocates’, Joint Advocacy Group, [2.7], 6). As such, refusing to register would prevent advocates from working.

<http://www.qasa.org.uk/QASA-Handbook.pdf>

²⁸ ‘Bar Council, ‘Update for the profession: Criminal Very High Cost Cases (VHCC) contracts’, 1 November 2013.

[http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/november/update-for-the-profession-criminal-very-high-cost-case-\(vhcc\)-contracts/](http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/november/update-for-the-profession-criminal-very-high-cost-case-(vhcc)-contracts/)

²⁹ Rose N., ‘Attorney General urges barristers to think again over QASA boycott and returning legal aid briefs’, *Legal Futures*, 4 November 2013.

<http://www.legalfutures.co.uk/latest-news/attorney-general-urges-barristers-think-qasa-boycott-returning-legal-aid-briefs>; ‘Criminal law solicitors call for QASA boycott’, *Solicitors Journal*, 3 October 2013.

<http://www.solicitorsjournal.com/news/crime/funding-legal-aid/criminal-law-solicitors-call-qasa-boycott>

³⁰ Baksi C., ‘Unanimous: profession votes for ‘training days’ action in protest over cuts’, *The Law Gazette*, 20 May 2013.

<http://www.lawgazette.co.uk/70996.article>

³¹ ‘Stobart Barristers sets sights on criminal legal aid contract’, *Legal Futures*, 1 May 2013.

<http://www.legalfutures.co.uk/latest-news/stobart-barristers-sets-sights-criminal-legal-aid-contract>

³² For example, questions might be raised about the compatibility of strike action with various sections of Part III of the Bar Standards Board Code of Conduct (‘fundamental principles’).

<https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-iii-fundamental-principles/>

would consider a full-blooded but fruitless battle to be more honourable than compliant surrender.