



## BRIEFING PAPER

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# Changes to criminal legal aid

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## Summary

On 28 January 2016 the Lord Chancellor and Secretary of State for Justice, Michael Gove, told the House of Commons that his department would no longer pursue the introduction of the 'dual contracting' scheme for the provision of criminal litigation services in England and Wales. He also announced the suspension of a second reduction in solicitors' fees. The change in policy ended the long-running dispute between the Ministry of Justice (MoJ) and the legal profession over changes to criminal legal aid.

In April 2013 the MoJ published the consultation paper *Transforming Legal Aid: Delivering a More Credible and Efficient System*. It set out a range of reforms to civil and criminal legal aid with the aim of saving around £220 million per year by 2018/19. Some proposals proved to be particularly controversial, not least the proposal for price competitive tendering of criminal legal aid services. Concerns were expressed that the proposals would undermine quality, lead to miscarriages of justice and put many firms out of business. The consultation closed in June 2013. Following much public debate, in July 2013 the then Lord Chancellor and Secretary of State for Justice, Chris Grayling, announced that the MoJ would hold a second consultation on revised proposals.

In September 2013, the MoJ published, *Transforming Legal Aid: Next Steps*, setting out the proposals from its initial consultation with which it had decided to proceed and its revised proposals for the contracting of criminal legal aid services and the remuneration of Crown Court advocacy work. The revised contracting proposals no longer featured tendering based on price. Instead, contracts would be awarded based on provider capacity and quality.

The MoJ responded to the consultation in February 2014, setting out its final proposals for the contracting of criminal legal aid services and the remuneration of Crown Court advocacy work. Its final proposals featured a competition for a limited amount of contracts for Duty Provider Work (under which successful bidders would be contracted to provide a share of advice and assistance in police stations in a particular area) but would also allow qualified providers to take on an unlimited amount of Own Client Work. The MoJ said the proposals would help in achieving its aim of consolidating the criminal legal services market.

The London Criminal Courts Solicitors Association (LCCSA) and the Criminal Law Solicitors Association (CLSA) forced a further consultation in September 2014 by successfully challenging the failure of the Lord Chancellor to publish or consult on the expert reports on which the MoJ had decided the limited number of Duty Provider Work contracts. Mr Justice Burnett upheld the claim for judicial review having found the Lord Chancellor's decision making process 'so unfair as to result in illegality'.

Responding to this consultation Chris Grayling announced the commencement of a tender process for 527 Duty Provider Work contracts. A further court challenge by the LCCSA and CLSA temporarily suspended the tender process but their judicial review was dismissed by the High Court, a decision upheld by the Court of Appeal.

On 15 October 2015 criminal solicitors learnt whether or not their bids had been successful. However on 14 October 2015 an assessor of the tender bids made a series of claims to the Law Gazette criticising the assessment process. The allegations were denied

by the Legal Aid Agency (LAA). 99 separate legal challenges to the procurement process delayed the commencement of work under new contracts.

These contracts were abandoned altogether as a result of the new Lord Chancellor Michael Gove's decision not to go ahead with the introduction of the dual contracting system. Criminal legal aid solicitors continue to work under now extended 2010 contracts. In June 2016 the Legal Aid Agency commenced a snap consultation on new criminal legal aid contracts with the Law Society, Bar Council, Legal Aid Practitioners Group and Advice Services Alliance and sought a further extension to the current 'contingency' contracts to 31 March 2017.

# 1. First consultation: initial proposals

On 9 April 2013, the Ministry of Justice (MoJ) published the consultation paper [\*Transforming Legal Aid: Delivering a More Credible and Efficient System\*](#). The paper set out a number of proposed reforms to civil and criminal legal aid with the aim of saving £220 million per year by 2018/19.

Several of the paper's proposals proved to be particularly controversial, not least, the introduction of competitive tendering in nearly all areas of criminal legal aid. The paper also proposed fee reductions of up to 30% for a range of civil and criminal legal aid services.

In a written ministerial statement announcing the consultation, the then Lord Chancellor and Secretary of State for Justice, Chris Grayling, argued reforms and further savings in legal aid were needed to restore public confidence in the system:

(...) Against a backdrop of continuing pressure on public finances, we need to continue to bear down on the cost of legal aid to ensure we are getting the best deal for the taxpayer and that the system commands the confidence of the public. These new proposals aim to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system.<sup>1</sup>

In summary, the MoJ proposed reforms in five areas: eligibility, scope and merits; competition in the criminal legal aid market; fees in criminal legal aid; fees in civil legal aid; and expert fees in civil, family and criminal cases.

## 1.1 Eligibility, Scope and Merits

To limit the availability of legal aid, the MoJ set out changes to the eligibility, scope and merits criteria in civil and criminal cases. Proposals included: restricting the scope of legal aid for prison law cases; the introduction of a financial eligibility threshold in the Crown Court; reducing payments for judicial review work; and no longer funding civil cases with a "borderline" chance of success (less than 50%).<sup>2</sup>

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<sup>1</sup> [HC Deb 15 April 2013 c19WS](#)

<sup>2</sup> MoJ, [\*Transforming Legal Aid: Delivering a more credible and efficient system\*](#) (CP14/2013) 9 April 2013, Chapter 3 pp17-36

## 1.2 Competition in the Criminal Legal Aid Market

The MoJ argued that the best way to ensure long-term sustainability and value for money in the legal aid market was to move away from administratively-set fees and towards competition.<sup>3</sup>

The MoJ proposed the introduction of price competitive tendering for contracts for work in all areas of criminal legal aid except Crown Court advocacy and Very High Cost Cases (VHCCs) (these were dealt with separately).

In short, contracts to provide a share of legal aid work in a particular geographical area would be awarded to successful bidders. Only successful bidders would be allowed to work in a specified area and they would be required to provide a full range of services (although providers would be able to use agents to deliver services). Clients would be allocated a provider and would only be allowed to change provider in exceptional circumstances. Providers would be paid according to predominantly fixed fees.

Plans for competitive tendering in legal aid were not new; they were recommended in 2006 by Lord Carter's [Review of Legal Aid Procurement](#). Lord Carter's review argued that the selection of legal aid providers should be based on their ability to deliver work of sufficient quality and quantity at the best price. The MoJ stated that they still supported the conclusions of Lord Carter's review.

## 1.3 Fees in Criminal Legal Aid

Proposals were also made for savings in the parts of criminal legal aid excluded from competitive tendering: Crown Court advocacy and VHCCs. The MoJ proposed replacing the different fees paid for Crown Court advocacy with one fixed fee, and reducing all fees paid in VHCCs by 30%. The MoJ also set out plans to restrict the use of multiple advocates in Crown Court cases.<sup>4</sup> The proposal for one fixed fee for Crown Court advocacy proved to be one of the most controversial. Some commentators said it would create perverse incentives and lead to defendants being encouraged to enter early guilty pleas.

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<sup>3</sup> MoJ, [Transforming Legal Aid: Delivering a more credible and efficient system](#) (CP14/2013) 9 April 2013, Chapter 4 pp37-71

<sup>4</sup> MoJ, [Transforming Legal Aid: Delivering a more credible and efficient system](#) (CP14/2013) 9 April 2013, Chapter 5, pp72-84

## 1.4 Expert Fees in Civil, Family and Criminal Proceedings

The MoJ proposed reducing the fees paid for experts in legal aid cases by 20%. The MoJ wanted to align expert rates in legal aid with rates for comparable work elsewhere.<sup>5</sup>

## 1.5 Reaction

Although some commentators accepted the need to make savings, the MoJ's proposals were met with strong opposition, particularly from the legal profession.<sup>6</sup> Much opposition focused on the introduction of competition in the criminal legal aid market and fee changes.

Opponents of the proposed reforms questioned the economic case for competitive tendering, doubted the proposed timeline and expressed concerns that competition based on price would undermine quality. Particularly fierce criticism was aimed at the removal of client choice in the proposed model, which opponents said would damage public confidence in the criminal justice system, damage quality of representation (by reducing the incentive for firms to provide anything above the minimum standard), and possibly be unlawful under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Bar Council said that removing client choice would lead to a "two tier system", where only those who can afford it, have the right to choose.<sup>7</sup>

On the changes to criminal fees, as well as arguing that the supplier base would be too fragile to absorb the reductions, critics of the proposed reforms were especially concerned about changes to the fee structure that would mean the same fee would be paid for a guilty plea as for a not guilty plea. Critics said that this would create perverse incentives for providers and lead to pressure on defendants to plead guilty for the sake of a shorter and cheaper (for the provider) trial. Some opponents suggested that the combination of the potential reductions in quality standards (as a consequence of competition based on price) and the guilty plea fee reforms could lead to an increased number of miscarriages of justice.

The reforms to civil legal aid were also strongly criticised. Critics of the proposed reforms said that, following the reductions in the scope of legal aid under the 2012 Act, the further restrictions in civil legal aid proposed, such as a residency test, would limit access to justice for some of the most vulnerable. Some critics also said that limiting the availability of legal aid for judicial review would "immunise" the government from effective legal challenge and undermine the rule of law.

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<sup>5</sup> MoJ, [Transforming Legal Aid: Delivering a more credible and efficient system](#) (CP14/2013) 9 April 2013, Chapter 7, pp97-99

<sup>6</sup> Sadiq Khan, [Legal aid cuts will lead to state-sponsored miscarriages of justice](#), *the Guardian*, 20 May 2013

<sup>7</sup> Bar Council, [Legal Aid Consultation Paper Core Case](#), 9 May 2013

For further reaction and response to the consultation, see:

- Law Society, '[Government legal aid proposals: economically unworkable, possibly unlawful](#)', 2 May 2013
- Law Society, '[Transforming Legal Aid consultation: Law Society response](#)', 4 June 2013
- Bar Council press release, '[Bar Council responds to legal aid consultation](#)', 4 June 2013
- Criminal Law Solicitors' Association, '[Response to PCT Consultation](#)', 10 April 2013
- Bar Council, Legal Aid Consultation Paper Core Case, 9 May 2013
- Howard League for Penal Reform, '[Response to Transforming Legal Aid](#)', June 2013

## 2. Second consultation: revised proposals

On 5 September 2013 the MoJ published [Transforming Legal Aid: Next Steps](#), presenting its revised proposals for criminal legal aid contracting and Crown Court advocacy fees. The MoJ also identified the proposals from its initial consultation which it would be implementing.

### 2.1 Criminal legal aid contracting

The MoJ's revised proposals for the procurement of legal aid services would no longer be based on price competitive tendering and the restriction of client choice.

The revised model for the procurement of criminal legal aid services would comprise two different contract types: a limited number of contracts for Duty Provider Work and an unlimited number of contracts for Own Client Work. The revised model was the result of detailed discussions between the MoJ, the Law Society and others.<sup>8</sup>

A set number of contracts for Duty Provider Work (such as advice at police stations and magistrates' courts) would be awarded in each geographic area through a competitive tendering process based on the capacity of the provider to deliver services at the right quality. Price would no longer be used as an award criterion. A smaller number of contracts would be available than currently, although joint bids and the use of agents would be allowed. The MoJ said the model would encourage the market consolidation necessary to ensure the long-term sustainability of the service.

An unlimited number of contracts for Own Client Work would be available to any provider who satisfied the quality requirements. Own Client contracts would allow providers to undertake work anywhere across the country and, significantly, allow clients to choose a solicitor in the same way as they can now.

There would be a slower timetable for the implementation of the new contracts and fee reductions of 17.5%, with new contracts commencing in spring 2015 and fee reductions staggered over two years from 2014. The MoJ also announced proposals for an expanded system of interim payments for long running cases.

### 2.2 Crown Court advocacy fees

Two revised fee schemes were presented for consultation, including one put forward by the Bar Council. The MoJ said both represented a sensible way to reduce fees and simplify the administration of the legal

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<sup>8</sup> MoJ, [Transforming Legal Aid: Next Steps](#), 5 September 2013, pp25-46

aid system. Significantly, unlike the initial MoJ proposals, the revised schemes would pay different rates for trials and early guilty pleas.<sup>9</sup>

## 2.3 Confirmed proposals from initial consultation

The MoJ also set out the proposals from the initial consultation that it would be implementing, some with modifications.

The proposals relating to eligibility, scope and merits of legal aid would mostly be implemented without modification. This included introducing a financial eligibility threshold of £37,500 (disposable household income) in the Crown Court.<sup>10</sup>

Proposals relating to reforming civil and criminal fees and expert fees (such as a 30% reduction of fees paid in VHCCs) would be implemented with minor modifications. Proposals to limit the use of multiple advocates would also be implemented.

## 2.4 Reaction to the revised proposals

The Law Society welcomed the MoJ's contracting revisions but still expressed concern about the effect of fee reductions on the legal aid supplier base. It said many criminal legal aid firms were in a fragile condition and a cut of 17.5% would present a significant risk for many. The Law Society also said it opposed the introduction of fixed and flat fees for work under the new contracts.<sup>11</sup>

The Bar Council strongly opposed the reforms and argued that the MoJ was putting instant savings above the long-term health of the justice system. The Bar Council questioned the need for fee reductions and criticised the MoJ's comparison between the legal aid system in England and Wales and that of other countries. Stressing this point, the Bar Council compared legal aid to the health service, arguing that

it would be astonishing if politicians looked for another country which spent less on healthcare than we do and concluded we ought to do the same.<sup>12</sup>

The contribution of the legal services industry to the UK economy was also highlighted.

The then Shadow Justice Secretary, Sadiq Khan, also responded to the revised proposals. He said many small and medium sized firms would struggle to absorb a 17.5% cut and questioned the estimated impact on high street firms and access to solicitors in rural areas.<sup>13</sup>

<sup>9</sup> MoJ, [Transforming Legal Aid: Next Steps](#), 5 September 2013, pp47-52

<sup>10</sup> MoJ, [Transforming Legal Aid: Next Steps](#), 5 September 2013, pp12-21

<sup>11</sup> Law Society press release, '[Law Society response to Ministry of Justice consultation: Transforming Legal Aid: Next Steps](#)', 31 October 2013

<sup>12</sup> Bar Council press release, '[MoJ is putting cuts before justice](#)', 1 November 2013

<sup>13</sup> [HC Deb 5 September 2013 cc494-5](#)

## 3. Government's final proposals

On 27 February 2014, the MoJ published its response to the *Transforming Legal Aid: Next Steps* consultation paper, setting out its final proposals for the contracting of criminal legal aid services and the remuneration of Crown Court advocacy work.

### 3.1 Criminal legal aid contracting

The MoJ confirmed that it would be proceeding with the revised model outlined in the second consultation. There would be no price competitive tendering.

As discussed above, there would be a limited number of contracts for Duty Provider Work and an unlimited number of Own Client contracts. Contracts for Duty Provider Work would be awarded through competitive tendering based on quality and capacity, not price. Following the recommendation of independent research from Otterburn Legal Consulting and KPMG LLP, there would be 525 contracts available in 97 geographic procurement areas across England and Wales (more than the 400 initially proposed by the MoJ in April 2013). An unlimited number of contracts to provide Own Client work to clients who choose their own solicitor would be available to providers who satisfied the requirements of the tendering process. Contracts would be for four years.<sup>14</sup>

Fixed fees would apply to most work (for example, police station attendance and magistrates' court representation). Fees would continue to be set administratively, rather than through competition, but would be reduced by 17.5%. Fee reductions would be phased in in two stages: an initial 8.75% cut in March 2014 and another 8.75% with the commencement of the new Duty Provider and Own Client contracts in June 2015.<sup>15</sup>

The MoJ said it had moved a long way from its initial proposals in April 2013. It said that it had made important and necessary changes suggested by the Law Society and others, but that the revised model would maintain its principle objective of ensuring long-term sustainability through consolidation of the legal aid market. The MoJ said the revised model would offer providers larger, more certain returns with increased opportunities to scale-up, achieve economies of scale and provide a more efficient service.<sup>16</sup>

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<sup>14</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp8-17

<sup>15</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp14-20

<sup>16</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp6-7

The MoJ committed to a review of the new model after a year of operation, in summer 2016.<sup>17</sup>

### 3.2 Crown Court advocacy fees

The MoJ confirmed that it would be proceeding with the fee option put forward by the Bar Council in the second consultation. This option would represent an average reduction in barristers' fees of 6% and would achieve the level of savings required by the MoJ. The technicalities of the proposed fee structure were discussed in detail in the MoJ's response.<sup>18</sup>

The changes would be brought in by secondary legislation in summer 2014, and again, the MoJ committed to reviewing the new model one year after implementation.<sup>19</sup>

### 3.3 Transitional support package

To help providers adapt to the reforms and fee reductions, the MoJ announced a package of transitional support measures, including advice about restructuring and the provision of loan guarantees for providers seeking to deliver the new contracts.<sup>20</sup>

The MoJ also confirmed that it would introduce an enhanced system of interim payments for long running cases, to help firms with cashflow as they adapted to fee reductions. The system would be implemented through the new contracts and secondary legislation to be laid in 2014 and 2015.<sup>21</sup>

### 3.4 Reaction

The Law Society said that, although positive changes had been made, it still opposed fee reductions. It cited the transitional support measures, such as loan guarantees, now being offered by the MoJ and said it would continue to press for further support for practitioners.<sup>22</sup>

The Bar Council also said it was disappointed that the MoJ was proceeding with significant cuts to legal aid rates for Crown Court advocacy. It argued that the cuts were financially unnecessary, because the cost of the criminal justice system was falling, and that they would

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<sup>17</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, p19

<sup>18</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp20-22

<sup>19</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, p21

<sup>20</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp17-19

<sup>21</sup> MoJ, [Transforming Legal Aid – Next Steps: Government Response](#) 27 February 2014, pp22-23

<sup>22</sup> Law Society press release, [‘Law Society publishes initial response to Ministry of Justice criminal legal aid cuts’](#), 27 February 2014

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cause significant damage to the justice system, driving skilled advocates away from publicly funded work.<sup>23</sup>

Sadiq Khan argued that the reforms would prevent many vulnerable groups from challenging wrong decisions by the state and that any savings would be dwarfed by displacement costs on other arms of government. He said that the MoJ had missed the chance to be radical and deliver considerable efficiency savings by, for example, streamlining the courts system and using town halls for low-level proceedings. He said that the MoJ had gone for the easy option of salami-slicing legal aid.<sup>24</sup>

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<sup>23</sup> Bar Council press release, '[Unsustainable and unnecessary legal aid cuts confirm our worst fears](#)', 27 February 2014

<sup>24</sup> Sadiq Khan, '[Cutting legal aid is an easy gimmick – this is part of a pattern](#)', *the Guardian*, 27 February 2014

## 4. Protests by the legal profession

On 7 March 2014, more than 1000 barristers and solicitors staged a walkout for the second time since the MoJ announced its original proposals in April 2013, disrupting court proceedings across England and Wales.<sup>25</sup> The first walkout took place in January 2014.<sup>26</sup>

On 27 March 2014 it was reported that criminal barristers had called off their industrial action after reaching a deal with the MoJ to suspend cuts until after the next general election in May 2015. The Guardian reported the responses of Chris Grayling and that of the chairman of the Criminal Bar Association:

The justice secretary, said: "Following constructive discussion with leaders of the bar and Law Society, we have agreed further measures to help lawyers as they prepare for legal aid savings. In return the leaders of the bar have dropped their objection to working at reduced rates on very high cost cases, and have agreed to call off their action to disrupt courts.

"An efficient and fair criminal justice system – both for the public and people that work within it – is my top priority, and I believe this agreement is a positive step forward."

He added: "I have always said that, given the current economic climate, I have no choice but to make savings, but that I also wanted to do what I could to ease their effects on lawyers. Hopefully today's agreement proves that I am true to my word."

[...]

Nigel Lithman QC, the CBA chairman, said: "We are glad that we have persuaded the government to recognise that further cuts to the junior bar are unnecessary and would jeopardise the existence of the profession ... This gives 89% of the criminal bar – those that do not do VHCC [very high cost crime fraud] cases – what they have demanded. The criminal bar has displayed what unity and resolve can achieve. In relation to VHCC cases, whilst it is for each individual barrister to choose what work they undertake, there is no objection in principle to barristers who want to work on VHCCs undertaking such cases if they choose to do so."<sup>27</sup>

On 8 July there were further media reports that agreement had been reached on VHCCs.<sup>28</sup> A joint statement gave the details:

<sup>25</sup> ['Lawyers stage second walkout over legal aid cuts'](#), BBC, 7 March 2014

<sup>26</sup> ['Lawyers protesting outside courts over legal aid cuts'](#), BBC, 6 January 2014

<sup>27</sup> ['Barristers call off walkout after legal aid cuts suspended'](#), the Guardian, 27 March 2014

<sup>28</sup> ['Grayling agrees legal aid truce with barristers over complex fraud trials'](#), the Guardian, 8 July 2014; ['Agreement reached between MoJ and Bar over VHCCs'](#), Solicitors Journal, 8 July 2014; See also [Justice Secretary uncorrected oral evidence to Justice Select Committee](#), Q47, 8 July 2014

**Joint Statement by the Bar Council, the Criminal Bar Association, the Circuit Leaders and the Ministry of Justice**

7 July 2014

Arrangements have been put in place, under which self-employed barristers have been instructed to represent defendants in a number of Very High Cost Cases (VHCC). Given that normal working relationships have been restored, the Government has confirmed that there is no need to expand the PDS further. The Bar Council, together with the Criminal Bar Association and the Circuit Leaders, have agreed with the Government to resume discussions as soon as possible on an alternative to the VHCC scheme and on the long term future of criminal advocacy, including the review of the Advocates Graduated Fee Scheme.<sup>29</sup>

In May 2014 a decision to halt a VHCC due to a lack of legal representation blamed on cuts to legal aid was overturned by the Court of Appeal.<sup>30</sup>

A MoJ webpage, last updated 22 April 2014, gave the timetable for implementation of changes to legal aid.<sup>31</sup>

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<sup>29</sup> <http://www.barcouncil.org.uk/media-centre/news-and-pressreleases/2014/july/joint-statement-by-the-bar-council,-the-criminal-barassociation,-the-circuit-leaders-and-the-ministry-of-justice/>

<sup>30</sup> 'Fraud trial legal aid ruling overturned by court of appeal', *the Guardian*, 21 May 2014

<sup>31</sup> [Legal Aid Transformation](#), Ministry of Justice

## 5. Duty solicitor contracts: new consultations, tenders and litigation

A [High Court judgment](#) in September 2014 found that a new consultation about the duty solicitor contracts should take place, since independent research had not been made public before the end of the consultation.

The [New Law Journal](#) of 23 September 2014 reported:

Criminal legal aid lawyers have won a victory in the high court after Mr Justice Burnett ruled the Lord Chancellor acted unlawfully over duty solicitor reforms.

Burnett J held the Lord Chancellor's decision to withhold two key reports—one from Otterburn Consulting and another from accountants KPMG—until after the consultation “so unfair as to be unlawful”, in *R (on the application of the Criminal Law Solicitors Association and London Criminal Courts Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin).

He quashed the government's decision to cut the number of contracts for duty solicitor work from 1,600 to 525, and advised that a fresh consultation take place. However, the first tranche of 8.75% fee cuts, which were introduced in March, will stay in place as it is “unrealistic” that a different decision would have been reached on the phased introduction of legal aid fees.<sup>32</sup>

In response to the judgment, the MoJ launched a further consultation five days later on 24 September: *Transforming Legal Aid: Crime Duty Contracts*. The consultation initially ran to 15 October, an unusually short period of three weeks. It was extended to 1 November 2014.

A number of bodies, including the Law Society, responded. They remain critical of the proposed changes. See:

- [Law Society Response 14 October 2014](#)  
This offers a very detailed response to the assumptions made in the independent research.
- [Legal Aid Group 25 September 2014](#)  
This noted that due to the increased time for consultation, the deadline for announcing final tender results was likely to slip to early March 2015, very close to the general election purdah period.

### 5.1 MoJ response to the consultation

The MoJ published its [consultation response](#) on 27 November 2014. The consultation website summarised the response:

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<sup>32</sup> ‘Duty solicitor reforms “unlawful”’, *New Law Journal*, 23 September 2014

In summary the key decisions are:

- to tender 527 duty provider contracts, two more than originally proposed in February.
- to introduce payment for travelling times in excess of 1.5 hours and to relax the office requirements in the split procurement areas.
- the tender for the Duty Provider Contracts will also open on 27 November, and will remain open until 29 January. Services under both new contracts will start on 01 October 2015.
- subject to the additional consideration we announced in March 2014, it remains our intention to implement the second fee reduction in July 2015.<sup>33</sup>

The response announced the timetable for letting the contracts:

Procurement process

3.1

Today we are launching a tender for 527 duty provider contracts.

Full details can be found at

<https://www.gov.uk/government/publications/legal-aid-crimetender-2015>. The indicative timetable is as follows:

29 January 2015 – tender closes

12 June 2015 – notification of tender outcomes

July 2015 – subject to further consideration, second fee cut implemented

1 October 2015 – service commencement

## 5.2 The tender and further litigation

The tender was suspended on 23 December 2014 when the High Court granted an application for an interim injunction brought by the London Criminal Courts Solicitors Association (LCCSA) and the Criminal Law Solicitors Association (CLSA) with the support of the Law Society. However on 18 February 2015 the High Court [dismissed the judicial review](#) and that decision was [upheld by the Court of Appeal](#) on 25 March 2015.

These decisions were welcomed by the MoJ, which announced on 27 March 2015 that the [invitation to tender would continue](#).

Criminal solicitors were informed on 15 October 2015 if their bids were successful.

On 14 October 2015 an assessor of the tender bids made a series of claims to the [Law Society Gazette](#) and criticised the assessment

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<sup>33</sup> <https://www.gov.uk/government/consultations/transforming-legal-aid-crime-duty-contracts>

process.<sup>34</sup> He alleged that staff assessing the bids had no knowledge of legal aid or previous experience of public sector procurement and worked to a timetable that did not allow for due consideration of the bids. The allegations were denied by the LAA.

On 3 November 2015 the *Law Society Gazette* [reported that around 90 firms unsuccessful in their bids would commence legal challenges](#) to the awards of contracts.<sup>35</sup> Separate judicial review proceedings were initiated by other firms who allege the assessment process suffered from 'serious structural flaws giving rise to an unacceptable risk of unlawful decision-making'.

These claims delayed the LAA and successful firms entering into contracts and forced the MoJ to offer those firms holding 2010 Standard Crime Contracts a [contingency extension](#). The commencement of work under new contracts was postponed until 1 April 2016.<sup>36</sup> The *Independent* reported that due to the likelihood of protracted litigation the MoJ left open the [option of a further delay](#) to 2017.<sup>37</sup>

On 9 December 2015 Mr Justice Stuart-Smith granted the Fair Crime Contracts Alliance, a newly formed grouping of solicitors firms challenging the tendering procurement process, permission to bring its judicial review claim.<sup>38</sup>

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<sup>34</sup> 'Whistleblower claims legal aid contracting process flawed', *Law Society Gazette*, 14 October 2015

<sup>35</sup> 'Agency faces two-pronged attack over tenders', *Law Society Gazette*, 3 November 2015

<sup>36</sup> The Legal Aid Agency issued guidance on guidance on the contingency extension and answered questions on the delay: [Frequently asked questions – 2010 Standard Crime Contract contingency extension](#), 13 November 2015

<sup>37</sup> 'Legal aid cuts: MoJ puts brakes on changes as solicitors revolt', *Independent*, 15 November 2015

<sup>38</sup> ["More nuclear" judicial review of legal aid tender a "complete mess"](#), Solicitors' Journal, 9 December 2015

## 6. The scrapping of dual contracts

### 6.1 Michael Gove's decision

Following the 2015 General Election Michael Gove replaced Chris Grayling as Lord Chancellor and Secretary of State for Justice.

On 28 January 2016 Mr Gove announced the MoJ would not go ahead with the introduction of the dual contracting system. He also suspended for 12 months a second reduction in solicitors' fees. In a [statement to the House of Commons](#)<sup>39</sup> he said two developments allowed him to reconsider the 'delicately balanced' competing arguments and not to press ahead with implementation of the new contracts:

Since July 2015, however, two significant developments have occurred.

Firstly, thanks to economies I have made elsewhere in my department HM Treasury have given me a settlement which allows me greater flexibility in the allocation of funds for legal aid.

Secondly, it has become clear, following legal challenges mounted against our procurement process, that there are real problems in pressing ahead as initially proposed.

My Department currently faces 99 separate legal challenges over the procurement process, which has required us, anyway, to stay the award of new contracts at least until April.

[...]

My decision is driven in part by the recognition that the litigation will be time consuming and costly for all parties, whatever the outcome. I do not want my department and the legal aid market to face months if not years of continuing uncertainty, and expensive litigation, while it is heard.

### 6.2 Reaction from the legal profession

The decision was welcomed by the legal profession. Jonathan Smithers, president of the Law Society, said:

The Law Society is pleased that the Lord Chancellor has listened and recognised that the current situation is untenable. It is clear that a competitive approach to the provision of criminal legal aid services is not appropriate. Criminal legal aid solicitors provide 24-hour cover so that anyone accused of wrongdoing, including some of the most vulnerable in society, have access to expert legal advice. The assurance that there will be no competitive tendering in the future gives practitioners greater certainty for the future.

[...]

We were concerned that firms could not continue to operate at reduced rates in the current market. Many criminal legal aid

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<sup>39</sup> HCWS499

solicitors also faced costly litigation because of the significant and widespread concerns that the process of evaluation of the criminal legal aid duty solicitor tenders was flawed. We are pleased that this litigation can now be brought to a swift conclusion.<sup>40</sup>

Mark Fenhalls QC, chair of the Criminal Bar Association, said:

The CBA applauds the Lord Chancellor's decision to abandon the Ministry of Justice's flawed plans to reform the duty contracts for legal aid solicitors. It takes courage to make such decisions.

The CBA is wholly committed to working with the Ministry and the solicitors' profession to build reforms to make sure the public is once more served by an efficient and world class criminal justice system.<sup>41</sup>

Steve Hynes, director of the Legal Action Group, said:

In its planning and execution the MoJ has demonstrated shocking incompetence with this tender exercise. The criminal justice system would be best served by a period of reflection and above all consultation by the justice secretary, rather than rushing to take decisions which could be as equally ill fated.<sup>42</sup>

### 6.3 Cost of the tendering process

A number of Parliamentary Questions have sought to clarify the cost to the taxpayer of the criminal legal aid tendering process. Responding for the Government Shailesh Vara said the information could only be obtained at disproportionate cost. However he was able to say how much the MoJ spent in in legal fees in relation to dual contracts:

To the end of December 2015, the Legal Aid Agency incurred a total of £141,519 in relation to external legal fees associated with the criminal legal aid contracts.

The external legal advice assisted the GLD commercial team with the drafting of the 2015 Own Client and 2015 Duty Provider contracts.

It is not possible to distinguish the cost of work relating to the criminal legal aid contracts incurred by the Agency's internal legal teams from other work undertaken.<sup>43</sup>

### 6.4 Snap consultation and extension of contingency contracts

On 8 June 2016 the LAA commenced a snap, three week consultation with representative bodies on new contracts for criminal legal aid. It said it will invite organisations to tender for this contract once the

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<sup>40</sup> [Law Society press release](#), 28 January 2016

<sup>41</sup> Criminal Bar Association statement, 28 January 2016

<sup>42</sup> '[Michael Gove in U-turn over legal aid fund](#)', *the Guardian*, 28 January 2016

<sup>43</sup> PQ 24906, 3 February 2016

consultation has been completed.<sup>44</sup> The representative bodies consulted are the Law Society, Bar Council, Legal Aid Practitioners Group and Advice Services Alliance.<sup>45</sup> Both the LCCSA and the CLSA, the two main practitioner groups, protested at their exclusion from the consultation.<sup>46</sup>

On 10 June 2016 the LAA wrote to those firms holding extended 2010 Standard Crime Contracts offering a further extension. The contingency contracts were due to expire on 10 January 2017. If the offer is accepted by firms the contracts will run until 31 March 2017. The letter explained:

The extension is necessary to allow the tender and mobilisation period to be completed and to ensure continuity of crime services from 11 January 2017 to the point of service commencement under the replacement crime contract.<sup>47</sup>

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<sup>44</sup> Legal Aid Agency, [Crime news: 30 June deadline to accept contract extension](#), 8 June 2016

<sup>45</sup> '[Snap consultation on criminal legal aid contracts](#)', *Law Gazette*, 9 June 2016

<sup>46</sup> Ibid

<sup>47</sup> Legal Aid Agency, [Crime Contingency Contract - notice of further extension](#), 10 June 2016

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