



Secretary of State
Ministry of Justice
102 Petty France
London SW1H 9AJ

Also by email: Emily.branagh@justice.gsi.gov.uk

Dear Sir

Proposed claim for judicial review by the Bar Council

1. We have been instructed to write to you by the General Council of the Bar of England and Wales (the Bar Council). It is based at 289-293 High Holborn London WC1V 7HZ. This letter is written under the pre action protocol for judicial review claims and the April 2009 practice direction on pre action correspondence. It concerns unlawful decision making about Very High Cost (Crime) Cases and Advocates' Graduated Fees. Our client proposes to challenge this by means of a claim for judicial review (seeking any interim relief necessary to preserve the current position) unless the steps outlined below at paragraph 85 are taken.
2. We are writing in similar terms to the Legal Services Commission (LSC), who are also party to the decisions in issue.

The details of the matter being challenged

3. These are:
 - (i) the decision communicated in Lord Bach's letter of 30 January 2010, written on behalf of the Ministry of Justice (MoJ) and the LSC. In that letter, Lord Bach rejected our clients' request that the MoJ and LSC combine the deadlines for responses to the above consultations and join them to the time-table for the response to the proposed consultation on a single graduated fee for Crown Court cases;
 - (ii) the failure to discharge the duties in section 71(1) Race Relations Act 1971 and section 76A(1) of the Sex Discrimination Act 1975 (the general equality duties);

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- (iii) the linked failure to produce lawful equality impact assessments produced in support of the proposals for Very High Cost (Crime) Cases and Advocates' Graduated Fees; and
- (iv) the decision to proceed with the proposal to reduce Advocates' Graduated Fees without having fulfilled the general equality duties.

Factual background

4. On 20 August 2009, the MoJ published a consultation document (CP 18/09) entitled "Legal Aid: Funding Reforms" (the initial consultation document). The Foreword stated that the economic downturn made it necessary to find efficiency savings across all areas of public spending, including the legal aid system. It continued:

The Ministry of Justice has to contribute to those efficiency savings and needs to make £1 billion of efficiency savings in the period to March 2011.

The Executive Summary added that:

The proposed changes will generate savings which will help to sustain the legal aid budget over the next spending review period.

5. The initial consultation document included the proposal to reduce the fees payable to defence advocates to bring them broadly in line with those payable by the CPS to prosecution advocates, which are on average 23% less (although this figure was subsequently revised to 18%). It is suggested that the CPS has no difficulty in attracting suitably experienced advocates while paying such rates. This assertion, however, appears to have been based solely on the CPS not having reported difficulties of this kind.
6. The initial consultation document also indicated that a consultation paper to be published later in the year would present options for a new VHCC scheme designed to deliver savings of 5%.
7. The initial consultation document included an initial equality impact assessment. This included the following passage:

Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people? If so what are the gaps in the information and how and when do you plan to collect additional information?

The LSC does not hold data on payments to individual barristers that would enable us to assess the diversity impact of proposal 3 [*i.e. the proposal to bring rates paid for advocates for defence work more*

closely into line with the rates paid by the Crown Prosecution Service]. The LSRC has undertaken a workforce survey of barristers, which showed that 38.6% (1,752) of those barristers responding practised in crime. Of these 92.7% reported doing legal aid work. Overall, 36.8% of female barristers practised in crime, compared with 39.4% of male barristers and 42.1% of BME barristers practised in crime compared with 36.8% of white barristers. The survey also showed that 34.2% of barristers with a health problem or disability practises in crime, compared with 38.9% of barristers without a health problem or disability.

8. The assessment ends by saying:

A full impact assessment and updated EIA will accompany the response to consultation.
9. On 13 October 2009 the Chairman of the Bar wrote to Lord Bach about, among other things, the inadequacy of the impact assessment. Among the matters raised was the MoJ's failure to carry out any or any adequate impact assessment which, he said, made it difficult to evaluate or respond to the proposals in the consultation process. He also made clear that any such assessment needed to be undertaken before proposals were formulated rather than at a later date once proposals had already been adopted. His approach was endorsed by the President of the Law Society.
10. In his response on 28 October 2009, Lord Bach accepted that "we need to consider the impacts of what we might do as part of the process of formulating our policy". He said that the initial EIA did not identify any adverse impact on any particular groups in relation to the AGFS proposal "but it did acknowledge that the LSC did not hold information on payments to individual barristers that would enable us to assess the diversity impact of the proposal." He went on to make clear that if the MoJ decided to proceed, there would be a further consultation exercise, including a draft impact assessment.
11. In his letter of 3 November, the Chairman of the Bar wrote reiterating that the MoJ was obliged to secure the data it needed before formulating policy.
12. On 6 November, Lord Bach replied that the EIA

...is a living document and as a general rule will be refined and updated as research and consultation is [*sic*] undertaken. Having identified gaps in the existing research on the issue, it was entirely appropriate to ask respondents to the consultation for any further information or data that they could provide. This will assist us in updating the EIA, and will itself inform the decision whether to proceed with the proposal to the next stage of consultation. This in itself indicates that the EIA is integral to the ongoing formulation and development of the policy.

13. In its response to the initial consultation document, the Bar commented on the data on which the EIA was based, i.e. the Legal Services Research Centre study entitled “Barrister Workforce Profile” from February 2008, as follows:

56. An examination of this data shows that 44.7% of BME practitioners practised in crime compared to 36.8% of white self-employed practitioners. Nearly all criminal practitioners in the survey (99.7%) reported doing legally aided work. Any reduction in defence rates will have a disproportionate effect on BME self-employed barristers. Further examination of this data is required and an analysis of payments made to self-employed barristers is needed to determine the impact and to discharge the Ministry’s equality impact assessment duty. The reduction in fee rates will have an adverse impact on those groups whose practices are wholly or mainly reliant on criminal legal aid earnings. It is incumbent on the Ministry to gather such further evidence as is necessary to determine the nature and extent of such impact...

59. The initial data from the Workforce Profile indicates an adverse racial impact. Further collection and examination of relevant data and consultation on the findings should occur before any policy changes are taken forward to reduce fee rates for defence work.

14. The MoJ’s Response to consultation (CP(R) 18/09) (the Response) was published on 16 December 2009. In this document the MoJ noted that in addition to the £1 billion efficiency savings required by March 2011, in his Pre-Budget Report, the Chancellor had announced that an additional £360 million of efficiency savings would be realised in the Criminal Justice System, in part through reforming legal aid.
15. The Response indicated the MoJ’s intention to press ahead with the proposal to reduce Advocates’ Graduated Fees to approximately the level paid to prosecution advocates. In particular the Response reiterated the assertion expressed in the initial consultation document, that the rates paid by the CPS are sufficient to attract a sufficient number of suitable advocates to this work. The MoJ said that it would be launching a second consultation shortly (including consultation on the scale of a reduction), which would include an impact assessment.
16. The MoJ also made clear that it had accepted the Carter recommendations on AGFS as part of a package of measures intended to lead to a single graduated fee and price competition. Thus, paragraph 71 of the Response said:

Lord Carter recommended a single graduated fee leading to price competition by 2009. While the Government accepted Lord Carter’s report at the time neither a single fee nor price competition has been introduced, yet, in Crown Court work, though we plan to consult in the New Year on proposals for a single fee pilot. Lord Carter supposed that competition would have led to a decrease in costs through competition. As we have not gone down that route for Crown Court work at this stage we need to look at administratively

set rates again and consider whatever changes might be appropriate. This is particularly so as, 2.5 years later, the CPS is still attracting advocates of sufficient quality to prosecute cases at rates that are on average 18% less than the defence is paid. One barrister quoted the then Lord Chancellor in 2007 saying that parity was not necessary, which we accepted was the case at the time as Lord Carter's recommendations were transitional on the route to competition by 2009.

17. The Response recorded concerns about the impact assessments. It did not record the Bar's concern about the inadequacy of the information available on equality issues. It recorded concern that no overall impact assessment had been undertaken (i.e. an assessment of the combined effects of the proposals in the different permutations they might take), that there was a failure to take account of the wider implications of the proposed reforms and that they had no regard to long term effects. Paragraph 81 responded:

We believe that impact assessments for individual proposals are easier for respondents to follow as, for example, some solicitors firms may do advocacy work in house and others may not. By analysing impacts separately, rather than in a combined assessment it is easier for respondents to focus on the issues that may affect them, so we believe a combined assessment would not be useful in this case.

18. The Response did record the overriding concern amongst barrister respondents that any change to AGFS would affect disproportionately junior practitioners who already had low income and that:

In the longer term it would see a less diverse profession and will undo recent work over the years to make the profession available to all regardless of background, gender and ethnicity which in turn would affect the make-up of the judiciary.

19. Paragraph 85 responded that an impact assessment in relation to the AGFS proposals would be published with the second consultation shortly.

20. The MoJ then published the consultation paper Legal Aid: Reforming Advocates Graduated Fees CP 54/09 (the AGFS consultation), on the same day. The consultation is due to end on 24 February 2010. It consults on two options

- (i) a one-off reduction across the board i.e. every fee within the AGFS would be reduced by 17.9% (option 1);
- (ii) staged reduction over three years of 4.5% in April each year (a total reduction of 13.5% by year three - April 2012) (option 2).

21. The document makes clear throughout that there is a necessary link between option 2 and the proposal, on which the LSC was separately consulting, to move cases due to last between 40 and 60 days at trial from the VHCC scheme to GFS (see paragraph 26 below). The executive summary makes clear that the government are aiming to save £47-48 m from advocates' fees in order to contribute towards overall efficiency savings. Option 2 on its own would not produce the required level of savings, as is made clear in paragraph 26:

... this option would only achieve the required level of saving if graduated fees for advocates were extended to cover cases due to last up to 60 days at trial as set out in the Legal Services Commission's consultation paper "Very High Cost (Crime) Cases 2010" published on 2 December 2009. Currently cases due to last 40 to 60 days are generally taken under VHCC contract by the LSC. Moving those cases into the graduated fees schemes would, we estimate, save around 30% on the amount we would pay under VHCC contract. Therefore, we could factor that saving into the overall savings we are seeking to achieve.

22. Paragraph 28 of the AGFS consultation underlines the inter-dependence of this consultation and that relating to VHCCs, making clear that

...it does depend on the outcome of the VHCC consultation as we could only afford to go down this route if we decide to extend graduated fees to cases due to last up to 60 days. In arriving at a decision on this consultation we shall take into account the views expressed in response to the VHCC consultation.

23. Paragraph 29 (which is repeated at 3.12 of the impact assessment) makes clear that option 2 is also largely dependent on the outcome of an as yet unpublished consultation on the introduction of a single graduated fee. It says:

As this option delivers less savings than option 1, we plan to consult early in the New Year on proposals to pilot a single graduated fee, as was originally recommended by Lord Carter. If we proceed to implement a single fee we anticipate that we might make some further savings that would help to make option 2 sustainable in the longer term. (emphasis added)

24. The AGFS is accompanied by an impact assessment (IA) and an equality impact assessment (EIA).

25. The following points should be made:

- a. Paragraph 1.1 of the IA identifies the policy objective underlying the consultation as

to ensure that the legal aid budget is sustainable and meeting the savings announced in CSR 2007 and the 2008 & 2009 PBRs.

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- b. The EIA contains little information beyond what was included in the EIA with the original consultation. We attach a comparison showing the parts added or deleted in the AGFS consultation. Most if not all of the additional information is taken from Lord Carter's report (as to which see subparagraph f below). No further study appears to have been undertaken, less still the gathering of data anticipated.
 - c. Neither assessment assesses the impact on suppliers of the combined effect of option 2 and the extension of the scope of AGFS to include 40-60 day cases. Nor is any such assessment attempted in the LSC's VHCC consultation;
 - d. By contrast, when seeking to assess savings, paragraph 3.4 of the IA notes that

In order to be able to compare Option 1 with Option 2 below, we have included the savings that would be generated from 40-60 days VHCCs.

- e. The EIA recites the concerns expressed in the consultation process about possible disproportionate adverse impact on black and minority ethnic (BME) and female practitioners, who tend to appear in shorter cases and are concentrated in the junior Bar.

In our initial consultation on the principles behind this measure (Legal Aid: Funding Reforms) some respondents argued that this proposal would have an adverse impact on BME and female practitioners. It was suggested that BME and female practitioners tend to be instructed more often in shorter cases than white male colleagues. It is important to note that although a reduction in AGFS is proposed, the architecture of the Carter scheme is being maintained. As a result of Lord Carter's review more money was put into shorter cases, in order to benefit the more junior members of the Bar. The proportionality is being maintained in our proposal, so junior members of the Bar will continue to be no worse off (and indeed better off, if Option 2 is implemented) than they were prior to the implementation of the Carter changes. The anecdotal evidence of the Bar Council, and others, is that the more junior Bar is more diverse than the more senior Bar and QCs. The reasons why women and BME practitioners tend to do less remunerative work is not clear, though fees alone cannot be the sole reason. The Bar itself needs to address issues of diversity to ensure that women and BME practitioners have the opportunity to develop their careers in the same way as their white male counterparts and eventually undertake better paid cases, that they are suitably qualified to undertake.

The impact of the AGFS rates proposed by Lord Carter had been assessed against a basket of different Crown Court cases and showed that the changes to different elements within the revised graduated fee scheme would change the value of cases by between -3 to +20% (see table below). Most of the

rebalancing had been directed towards the sorts of cases undertaken by the more junior, and typically more diverse, advocates, such as shorter cases. Therefore, the fee reduction proposed under Option 1 would see advocates of up to 10 years call no worse off than they had been prior to the Carter review. If Option 2 were implemented then advocates of up to 10 years call would be better off by 4-6% than they had been prior to 2007.

- f. The first part of the second paragraph quoted above is transposed virtually word for word from paragraph 71 of Chapter 5 of the Carter report. However, the second sentence omits part of what Lord Carter wrote. The full sentence reads as follows:

Most of the rebalancing has been directed towards the sorts of cases undertaken by more junior advocates as these cases have had their rates held flat longer than others over the past 10 years (emphasis added)

- g. Thus the EIA purports to assess the impact on suppliers by comparing their position under the proposed changes, not with their current position but with the position as it was before the increase in remuneration consequent upon the Carter reforms. So far as concerns the remuneration of the junior Bar, the comparison is with rates of remuneration which date back to 1997. By contrast, departmental budget savings are quantified by comparison with the base case/‘do nothing’ option: see for example IA paragraphs 3.3, 3.6, 3.13.

26. Separately, in December 2009 the LSC published Very High Cost (Crime) Cases 2010 (the VHCC consultation), with a closing date for consultation responses of 8 February 2010. Much of the thinking in this document was the fruit of discussion between the LSC and the professions. However, at a late stage the MoJ asked the LSC to include in the consultation the proposal to extend the range of cases within the AGFS and their consequent exclusion from the VHCC scheme.

27. The document also includes, but does not consult upon, what it calls “the long-term approach to finding an acceptable replacement scheme for advocates” (page 5). The document explains that while the LSC considers that the Advocate Sub-group’s proposal for a GFS Plus scheme is “heading in the right direction” they are not yet in a position to put it forward as an option for a replacement scheme. At paragraph 1.3, the LSC notes:

Whilst in principle we like the concept of a graduated fee type scheme for VHCCs, our primary concern, shared by other members of the Working Group, including the Advocate Sub-group, is the lack of data available to test the validity (and importantly the new

elements) of the scheme. This creates a huge risk to both the legal aid fund and to advocates (emphasis added)

28. The lack of data about GFS Plus is further explained at paragraphs 4.3 and 4.4.
29. The consultation includes an impact assessment and an equality impact assessment. The LSC estimates that the extension of AGFS will result in a reduction in remuneration of approximately 30% (3.24 on page 71). Table 7 on page 72 shows the estimated direct financial impact of extending AGFS per advocate role.
30. As to equality issues, table 16 on page 94 estimates the impact on advocate spend on new VHCCS in the financial year 2010/11 of extending AGFS to 60 days and reducing fees by 4.92% in cases over 60 days. There is no combined assessment of the impact on advocates of (a) extending AGFS to cases of 40-60 days and (b) reducing the AGFS. Thus the assessment deals only with the remuneration of those involved in cases exceeding 60 days, in terms of average fee reduction per VHCC. There is no assessment of their position overall, broken down by ethnicity, gender, disability or age.
31. On 21 January 2010, the Chairmen of the Bar Council and the Criminal Bar Association wrote to the MoJ and the LSC asking that the deadlines for responses to the two current consultations be extended and joined to the time-table for the response to the single fee consultation. They also asked Lord Bach to supply the research that is held about the market and which underpins the view that the market is ready for the introduction of a single graduated fee.
32. In his response dated 30 January 2010, Lord Bach indicated that the two current consultations were “not totally interdependent” and he could see no difficulty in responding to them separately within the existing deadlines. He also indicated that the further planned consultation related to a proposal to pilot a single graduated fee, and he did not accept that it was impossible to respond to the current proposals without sight of the proposals for a single fee pilot. Lord Bach did not respond to the request for information, other than to say that the further consultation document would set out the Government’s reasons for believing that the time is right to consider the introduction of a pilot.
33. The Bar Council and the Criminal Bar Association have told the LSC that, in such circumstances, they are simply not in a position to respond to the VHCC consultation in a meaningful way. They will face similar difficulties in relation to the AGFS consultation: while they will try to submit a partial response, the information currently available makes it impossible to make an informed choice between the options on which the MoJ are consulting. The reasons are explained at paragraphs 43ff below.

34. Our clients have sent us a copy of Lord Bach's letter to the Chairman of the Bar Council and the Criminal Bar Association, received on 15 February 2010. In this letter Lord Bach has offered to extend until 3 March the deadline to respond to the "overall fees issues". However, an extended deadline would make no difference in the absence of adequate impact assessments (as to which see paragraphs 52ff below) or information about the proposed single graduated fee.
35. Mention should also be made of certain other documents.
36. The first are the MoJ's race and gender equality schemes, which emphasise the need to assess and consult upon the likely equality impact of proposed policies and the publication of the results of such assessments. The race equality scheme identifies addressing the "disproportionate representation of BME people in all aspects of the [criminal justice system] compared to their white counterparts" as a key priority 2 and sets as target aims:
- Improve the collection and quality of ethnicity data at key stages within the criminal justice process;
 - Improve use of ethnicity data and other diagnostic tools by local Criminal Justice agencies to identify, examine and understand disproportionate over- or under-representation within the CJS of people from Black and Minority Ethnic (BME) communities; and
 - Ensure that every criminal justice area has in place a robust and measurable strategy to address any identified race disproportionality which cannot be explained or objectively justified, which is jointly owned, implemented, monitored and reviewed by all CJS agencies.

In both equality schemes, section 5.1 refers to the need to monitor supplier diversity, and both refer to the need to increase diversity within the legal profession.

37. The EHRC guidance on race equality impact assessments, published in April 2009, emphasises the importance of collecting information and commissioning studies if necessary to ascertain whether there is adverse impact. Reference should be made in particular to stage 2, full assessment, and the need to answer, inter alia, the following questions:
- What sort of information are you likely to need to develop an effective policy that benefits all racial groups equally?
 - ...
 - Is the available information sufficiently detailed to permit analysis of disparities between small groups?
 - Is the information up to date relevant and reliable?

and

- Will the information need to be supplemented through new research, or specially commissioned qualitative or quantitative surveys, or consultation exercises designed to fill gaps in the information about certain groups?

38. Similar guidance has been produced on gender equality impact assessments.

39. The EHRC's generic equality impact assessment guidance, published in November 2009, is designed to ensure that each of the general equality duties is addressed. It directs that, at stage 2, public authorities should ask themselves, inter alia, the following questions:

- Could the policy outcomes differ according to people's ethnic group, gender, age, disability, religion or belief, or sexual orientation? For example, because they have particular needs, experiences, concerns or priorities in relation to the issues addressed by the policy or practice?
- Is there evidence of higher or lower participation or uptake by different groups?
- Could the policy or practice affect different groups disproportionately? For example, are more women than men affected, more disabled people, etc?
- If there will be a greater impact on one group, is that appropriate and consistent with the policy objective?

The guidance goes on to advise on adjustments to policy to better promote equality:

In considering how to adjust the policy, two possible courses of action will need to be considered. Firstly, it may be possible to remove or change the aspect of the policy that creates the unwanted impact. This simply relates to the particular aspect of the policy and does not mean that the whole policy will have to be abandoned.

Secondly, the policymaker may introduce additional measures to reduce or mitigate the potential impact - by setting out the steps that the public authority will take to remove or reduce the potential impact. This could be an adjustment to the policy, substantially replacing the policy with a different approach or introducing additional measures that counteract the unwanted impacts.

40. The Cabinet Office's Code of Practice on Consultation, published in July 2008, sets out as the third consultation criterion "clarity of scope and impact", i.e.

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Legal issues

41. For the reasons set out below, we consider that the current consultation is unfair and unlawful for two principal reasons:
- (i) by declining to join the current consultations to the proposed consultation on a single graduated fee, the MoJ and the LSC have failed to conduct an adequate consultation;
 - (ii) by failing properly to gather adequate information about, or assess and consider, the effects of the proposals on, in particular, women and BME advocates, the MoJ and the LSC have failed to discharge their general equality duties under section 71 of the Race Relations Act 1976 and section 76A(1) of the Sex Discrimination Act 1975.

Consultation

42. The requirements of adequate consultation are well known. They are summarised in the judgment of the Court of Appeal in *R v North East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [108]:

To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

This is echoed in the Cabinet Office Code mentioned above.

43. The manner in which these consultations are being conducted makes it impossible for respondents, including the Bar Council, to give the proposals intelligent consideration or an intelligent response.
44. The core objection is that the options to be consulted upon in the AGFS consultation are entirely hypothetical and contingent. The tenor of the paper is that options 1 and 2 are real and effective choices. However, option 2 is only viable by selecting the extension of graduated fees from 40 - 60 days in the LSC consultation. The combined effect of these related proposals on suppliers is nowhere assessed, making an intelligent or informed choice difficult.

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45. But in any event, paragraph 29 of the AGFS consultation renders option 2 too vague to be consulted over. The clear implication is that option 2 is in effect unsustainable unless yet further savings are realised, this time from the introduction of a single graduated fee system. This must be read in the light of the policy objective underlying the consultation, which is identified as:
- to ensure that the legal aid budget is sustainable and meeting the savings announced in CSR 2007 and the 2008 & 2009 PBRs. (See 25a above)
46. The proposed consultation on single graduated fees is an extremely controversial proposal. It contemplates in essence that all legal aid moneys payable for a case - including the component that would be payable for advocacy - be allocated under LSC contracts to solicitors. The sum payable to counsel, if instructed, will then have to be negotiated between the solicitor and the barrister. In contrast, that fee is currently not subject to negotiation because it is set at a pre-determined level authorised by statutory instrument. Further, the advocacy fee is paid direct to the barrister instructed. A single graduated fee system thus dramatically alters the balance between solicitors and barristers in circumstances where the solicitor holds the total fee and can simply exclude the barrister from the work if the barrister does not accept the fee offered. That is true of privately funded work, of course. But what is radically different under the single graduated fee system is that solicitors have a direct financial interest in barristers accepting low fees.
47. The LSC sought to consult on this issue about 3 years ago. At that point the proposal was called "OCOF" - "One case one fee". The proposal was acknowledged to be very controversial at the time and it was not in the event proceeded with.
48. The effect of this is that if a consultee is attracted to option 2 as (superficially) the less unattractive of the two options, there is no way of measuring or assessing how attractive that option is because it is linked to the real possibility that it will only be introduced if the Government subsequently introduces a single graduated fee system. Responding now in favour of option 2 therefore carries with it the contingent risk that it may apply only for a limited transitional period, to be replaced by and as yet undisclosed and unquantified single graduated fee. But whether this will in fact happen, and if so on what basis, is entirely unclear. This makes option 2 hypothetical, contingent and opaque. It also makes it impossible to assess, and therefore to take a position in response to, the relative benefits of option 1.
49. As presently proposed, neither option can be sensibly consulted over. This consultation is an attempt to force the Bar into making

choices when the consequences are in fact dependent on the outcome of another consultation process that has not even begun. That does not merely inhibit free choice; it renders it illusory and meaningless.

50. In his letter of 30 January 2010, Lord Bach drew attention to the fact that the proposal was only to pilot a single graduated fee. However, paragraph 71 of the MoJ's response to the initial consultation repeated that the Government had accepted Lord Carter's recommendation for a single graduated fee leading to price competition by 2009 (see paragraph 16 above). The Government appears therefore to have accepted the principle of a single graduated fee. We do not consider that any rational distinction can be made on the basis suggested in Lord Bach's letter.
51. Lord Bach's most recent letter gives further cause for concern. Originally, the single graduated fee proposals were to be published "early in the New Year". It is now not envisaged that the consultation proposals will be published before June or July 2010. Moreover, Lord Bach makes clear that it is unlikely that they would take place until around early 2011. This emphasises the impossibility of giving any sensible and coherent response; and the time-table as now envisaged must impact upon the value of any savings from a single graduated fee, and therefore upon the sustainability of AGFS option 2.

General equality duties

52. Under section 71(1) of the Race Relations Act 1976 as amended ("the RRA") a series of relevant, linked duties arise during the course of a consultation exercise of this kind. It provides:
- Every body or other person specified [in the Schedules to the Amendment Act], in carrying out its functions, shall have due regard to the need-
- (a) to eliminate unlawful racial discrimination; and
 - (b) to promote equality of opportunity and good relations between persons of different racial groups.
53. Similarly, section 76A(1) of the SDA provides:
- A public authority shall in carrying out its functions have due regard to the need-
- (a) to eliminate unlawful discrimination and harassment, and
 - (b) to promote equality of opportunity between men and women.
54. There is a low threshold for triggering the duties. They apply whenever "an issue" to be addressed arises in decision or policy

making to which they may be relevant: see *Secretary of State for Defence v Elias* at first instance [2006] 1 WLR 3213, [2006] EWCA Civ 1293. It appears to be accepted that both are engaged here.

55. Compliance is required at the formative stage of decision making. It should never be treated as a “rearguard action following a concluded decision” but exists as an “essential preliminary” inattention to which “is both unlawful and bad government”: see *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] All ER (D) 172 (Nov), [2007] EWCA Civ 1139 per Sedley LJ at [3]. The normal remedy for a failure to discharge such a duty at the appropriate, preliminary stage of decision making will therefore be a quashing order: see *R (C) v Secretary of State for Justice* [2009] QB 657, [2008] EWCA Civ 882.
56. To date, the Courts have held that section 71(1) (and by analogy, section 76A(1)) need not always be discharged through a formal equality impact assessment process. However, where a public authority has elected to undertake such an assessment, it must do so consistently with its own assessment policies and rationally: see *R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 at [27]. Further, whether through an impact assessment or otherwise, there are certain steps that must be taken if lawful due regard is to be had.
57. First, the decision maker must gather sufficient information to reach an adequate decision on any adverse impact and properly understand it. This is so because, although the positive equality duties do not require a particular outcome, there can be no lawful exercise of discretion to proceed with a policy notwithstanding an adverse impact if the decision maker does not properly understand “the problem, its degree and extent”: see *R (Lunt) v Liverpool City Council* [2009] All ER (D) 07 (Aug), [2009] EWHC 2356 (Admin) at [43] and [44]. The focus then, is on the “seriousness of the detriment to the disadvantaged group” see *R (E) v JFS* [2010] 2 WLR 153, [2009] UKSC 15 at [100]. A failure to gather adequate information to that end will breach the duty to ensure that conclusions of fact are supported by adequate material of probative value: see *Secretary of State v Tameside MBC* [1977] AC 1014, *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541 and *R v Inner London Crown Court, ex p. Provis* [2000] COD 481. A failure to understand the information that has been gathered will be an error of fundamental fact: see *E v Secretary of State* [2004] QB 1044, [2004] EWCA Civ 49 at 61.
58. Second, this exercise may show that there is an adverse impact for particular racial groups or a particular gender which would amount to unlawful indirect discrimination were there no justification. The decision maker must then, as part of their discharge of the duty, weigh any justification they have in mind

against the discriminatory effect identified: see *R (Eisai) v National Institute for Clinical Excellence & Others* [2007] All ER (D) 67 (Aug), [2007] EWHC (Admin) 1941 at [92], [93] and [96] *Kaur* at [43]. The steps that might be taken to mitigate or eliminate that effect must be identified as part of the reasoning process: see *R (E) v JFS* at first instance [2008] All ER (D) 54 (Jul), [2008] EWHC 1535/1536 (Admin) at [213]. The decision maker must also consider whether there is an alternative, less or non discriminatory means of achieving the aim of the policy: see *JFS* in the Supreme Court at [212].

59. In its consideration of the current, and the unpublished, proposals the MoJ and the LSC have failed to meet these requirements in several respects.

Lack of reliable information

60. Both the initial consultation and the AGFS consultation assessments identify the LSC's lack of information on payments to individual barristers as a gap in the information which makes it difficult or impossible to form an opinion on the diversity effect of the proposals (see paragraph 7 above). That admission was telling. Yet no steps were taken between the end of the initial consultation and publication of the AGFS consultation to collect additional information, as the MoJ's own policy reflected in its assessment template requires. This was despite the availability of evidence that BME barristers are proportionately over-represented in the criminal Bar and that women and BME barristers are proportionately over-represented in the junior Bar.
61. It was no answer to suggest that consultees might remedy the MoJ's failure by providing the information that was needed in their responses. The section 71 and 76A(1) duties are non-delegable: see *Eisai* at [92] and [96].
62. In any event, the lack of supplier information held centrally by the LSC was a subject of severe criticism in the report of the National Audit Office (NAO), The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission, published on 27 November 2009. Thus in paragraph 8 on page 5, the NAO noted:

The Commission should do more to understand the market for criminal legal aid to help it make fully informed decisions. In particular, it lacks a firm grasp of the cost structures and profit margins of different types of legal aid firms and how these vary geographically. While it holds good information locally about its suppliers, through its Relationship Managers and Account Managers, who are responsible for managing the day-to-day relationships with individual firms, it does not bring this information together centrally. Better use of this local information, supplemented as necessary by further research of its suppliers, would help the Commission to establish whether it is paying a fair price for criminal

legal aid. Such analysis would also help it forecast the impact of changes to criminal legal aid on the provision of the service.

63. Dealing specifically with the setting of the threshold for VHCCs, the NAO said that the LSC
- ...does not have sufficient data ... to establish whether the threshold is set (in terms of trial length or amount of pages of evidence) at a level which it is most effective to use contracts for individual trials. The Commission does not know therefore whether contracting for these Crown Court cases offers value for money when compared to other types of payment.
64. Particular mention is made of the fact that the LSC
- ...only started to routinely collect the data necessary to make robust cost comparisons between VHCCs and graduated fees in 2009. As a result, the Commission does not expect to make any change to the definition of a VHCC for the 2010 contracting round.
65. This lack of necessary data is not new. It was the subject of criticism in the report of the House of Commons Constitutional Affairs Committee's report on the Implementation of the Carter Review of Legal Aid (HC 223-I) published on 1 May 2007: see, in particular, paragraphs 125ff in Chapter 3 and paragraphs 18ff in Chapter 9.
66. The criticisms voiced by the NAO were largely echoed by the Public Accounts Committee (PAC), whose report, The Procurement of Legal Aid in England and Wales by the Legal Services Commission, was published on 2 February 2010. As well as commenting on its poor financial management, the PAC concluded that
- constant changes in staff at senior level—which have been costly and disruptive—and poor planning of the changes has meant that reforms have often been delayed, have not always kept to their timetable and have not been properly evaluated to assess their impact.
67. The original EIA recognised the lack of information, if not the significance of the omission. So did the Minister in correspondence. No effort has been made to fill the gaps in the information held which would enable the LSC and the MoJ to assess the impact of the measures it is proposing. The section 71 and 76A duties cannot be lawfully discharged in such circumstances; and such is the extent of the flaw that our client is entitled to challenge it now rather than await the outcome of the consultation.

Failure to assess the impact of the measures combined

68. At paragraph 81 of the response to the initial consultation, the MoJ indicated that the impact of each of its proposed measures would be assessed separately (see paragraph 17 above). As a result, none of the assessments sets out the overall effect of the proposed measures on potentially disadvantaged groups. The explanation for taking such an approach is wholly opaque.
69. We do not understand how the MoJ and the LSC can begin to comply with their general equality duty without such an overall assessment. If the cumulative effects of the various permutations is not assessed, due regard simply cannot be had to the statutory objectives. This problem is particularly acute in relation to AGFS option 2, which is wholly dependent on the extension of AGFS to cases lasting more than 40 days.

Adopting the wrong comparison for equality impact assessment

70. To have due regard for the need to eliminate discrimination and promote equality of opportunity, it is necessary to identify the impact of the proposed policy. The proper approach is to compare the position of potentially affected groups under the proposed measure(s), were they implemented, with their position as it is now. The particular issue is the effect on junior members of the Bar, where women and BME barristers are proportionately over-represented.
71. This is not what the AGFS EIA does. It compares their position under the proposed changes with the position as it was in 2007 before the Carter reforms were introduced. This leads to the conclusion that
- ... junior members of the Bar will continue to be no worse off (and indeed better off, if Option 2 is implemented) than they were prior to the implementation of the Carter changes.
- ... the fee reduction proposed under Option 1 would see advocates of up to 10 years call no worse off than they had been prior to the Carter review. If Option 2 were implemented then advocates of up to 10 years call would be better off by 4-6% than they had been prior to 2007
72. Moreover, in seeking to draw the above comparison, the AGFS EIA misrepresents the position as it was pre-Carter, in a way which stultifies any sensible comparison. As we have indicated above (see paragraph 25g), the EIA omits any reference to the fact, reported by Lord Carter, that fees for the sorts of cases undertaken by more junior advocates “have had their rates held flat longer than others over the past 10 years”. It also omits reference to the fact, found by Lord Carter, that the value of some AGFS cases had decreased by 5-30% in real terms (chapter

5, paragraph 70). The NAO reports that the Carter increase in 2007 was between 11% and 15%.

73. Thus the EIA seeks to compare the position under the proposed options with remuneration at rates which, until 2007, had been static since 1997.
74. That is not a proper basis on which to assess whether the proposal in question serves the policy ends of the elimination of discrimination and the promotion of equality of opportunity. Such an analysis can only proceed from the position as it is now.

Failure to analyse or take account of available data

75. The EIAs, in particular that relating to AGFS, failed to take account of or analyse available data which confirms the potential adverse impact of the proposed measures.
76. In November 2007 the LSC surveyed the Bar as part of the development of the Quality Assurance for Advocates (QAA) scheme.
77. Analysis of the data obtained in the QAA survey shows that, across the Bar as a whole, there are significantly fewer BME and female advocates represented in Silk than there are white men. In terms of years of call, female practitioners are disproportionately represented at 0 to 10 years by comparison with men. Across all areas of practice, BME and female practitioners are more likely to undertake legal aid work as a far greater proportion of their practice than are white men.
78. Criminal work constitutes the specialist area of work for about a quarter of the Bar. Amongst criminal specialists, white and BME men are represented almost equally, and at around 6% greater in number than are women. This relatively even split between the genders and across ethnicity is unusual in the Bar as a whole and reflects the increased proportions of women and BME barristers specialising in crime as compared with other areas of work.
79. The survey shows that criminal specialists rely much more heavily upon legal aid than those in other areas of work, with publicly funded work constituting over half of the practice for almost 90% of criminal specialists. BME and female advocates who specialise in crime are far more likely than white men to bill under £80,000 (gross) per annum.
80. This diversity research endorses what the AGFS EIA describes as anecdotal accounts which report that more women and BME practitioners specialise in crime, particularly at the junior, low earning end. It also highlights the extent to which criminal practitioners rely on publicly funded work.

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81. One of Lord Carter's aims was to redress this imbalance by directing funds into the work which was thought to be, and is now known to be, disproportionately undertaken by BME and female advocates. The EIA on the proposed extension of AGFS fails to take any account of the fact that the proposals will result in a reversion to, at best, the pre-Carter levels of remuneration, cancelling Lord Carter's correction of the disadvantage suffered by the junior Bar.
82. Table 7 in the impact assessment at Annex 3 of the VHCC consultation (page 72) also bears out the likely effect of the extension of AGFS on the junior Bar. It shows that while the reduction for a QC in a category 4 case would be 15%, for leading junior and junior alone it would be 30%; and for a led junior, it would be 48%. Led juniors in VHCC cases come mostly from the junior Bar. While the table shows increases for junior alone in category 2 and 3 cases, these are the more serious ones, in which a junior of only a few years' call is less likely to be instructed. The table does not break down junior alone instructions by length of call. By contrast, a junior is most likely to be instructed alone in the simplest, category 4, cases, where a 30% reduction would follow from the extension of AGFS to cases over 40 days. This is the category of case most likely to be affected by the extension of AGFS.
83. This potential for adverse impact is not pursued in the EIA at page 94 of the VHCC consultation. The EIA notes that female advocates would see a greater reduction in fees compared with male advocates but appears to qualify this because "the sample size of female advocates is small compared to that of male advocates". The sample size is 7. By contrast, the EIA asserts without qualification that the proposal to extend AGFS "would see a greater reduction for White advocates compared to mixed ethnicity or BME advocates", although the sample size is 4. The LSC concludes that

Based on the data in these tables, we feel that the proposals will have no unjustifiable impact on any providers based on their ethnicity, gender or disability.

While the LSC commits to collecting more data to develop the assessment in readiness for the final impact assessment, information on gender and ethnicity is not identified on page 95 as a point meriting a particular commitment to address.

84. Further, the EIA's only substantive response to what is referred to as anecdotal evidence that the more junior Bar is more diverse than the more senior Bar and QCs is to suggest that

The Bar itself needs to address issues of diversity to ensure that women and BME practitioners have the opportunity to develop their careers in the same way as their white male counterparts and

eventually undertake better paid cases, that they are suitably qualified to undertake.

This cannot be regarded as a satisfactory response to the MoJ's non-delegable general equality duty.

The details of the action that the defendants are expected to take

85. For the reasons set out in this letter, we invite the MoJ and the LSC to:
- (i) withdraw the current defective impact assessments, conduct a full impact assessment of the combined effect of the current proposals and the proposed single graduated fee, and undertake to publish it in a lawful form;
 - (ii) if it is intended to proceed with the proposals after such assessment, publish the consultation on the proposed single graduated fee and join the current consultations with it; and
 - (iii) set a revised deadline for consultation on all three proposals allowing a proper, coherent response to be made to the information in the fresh impact assessment(s).
86. We also invite the MoJ and the LSC to suspend any further action on the current proposals while you are considering this matter.

The details of the legal advisers, if any, dealing with this claim

87. The matter is being dealt with at this firm by Stephen Grosz and John Halford.

The details of any interested parties

88. The Law Society, 113 Chancery Lane, London WC2A 1PL.

The details of any information sought and documents that are considered relevant and necessary

89. Please address the following questions/requests using the enumeration below. Where you are unable or unwilling to do so, please say so in terms and give full reasons.
90. Please provide the following:
- (i) (other than those mentioned above) details and supporting documentation that relates to of any equality and diversity studies examining the impact of the proposed measures which are the subject of the current

- consultations, undertaken either before publication of the initial consultation document or since;
- (ii) the like information in respect of the proposal to introduce single graduated fee;
 - (iii) details of any studies undertaken by the MoJ or the LSC, or other information available to them, to support the proposition that the CPS is still attracting advocates of sufficient quality to prosecute cases at rates;
 - (iv) any documented information or analysis currently available to the MoJ or the LSC as to the savings which might be made by the introduction of a single graduated fee, and the contribution which might thus be made to the long term sustainability of AGFS option 2;
 - (v) Lord Carter explained that the Crown Court graduated fee schemes were designed to allow harmonisation of the schemes in to a single graduated fee for all defence services in the Crown Court, for implementation as soon as possible after 2009, when the market had stabilised. Please disclose the evidence available to the MoJ and the LSC that this position has now been reached. This information was sought in the letter to Lord Bach dated 21 January, but no satisfactory reply has been received.

The address for reply and service of court documents

91. Please reply to us at the above address, which is also the address for service of any documents.

Proposed reply date

92. We look forward to receiving your reply by 4 March 2010.

Yours faithfully

Bindmans LLP

BINDMANS LLP