

TRANSFORMING LEGAL AID: NEXT STEPS

(CP/2013)

CONSULTATION RESPONSE

BY

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CRIMINAL COURT

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OVERVIEW

By this Consultation Paper, *Transforming Legal Aid: Next Steps*, H.M. Government has indicated that it rejects or can ignore much of the content of the thousands of Consultation Responses to its April Paper CP14/2013, particularly as to the future effect on the supply and quality of criminal advocacy services from the proposed changes to legal aid funding.

Instead, this second stage:

- Treats as settled the principle of massive (30%) reductions to VHCC fees, but from a mistaken base and with no good policy justification;
- Seeks only to consult on the mechanism for introducing further big reductions in fees for Crown Court advocacy (the AGFS changes);
- Assumes that these changes will have no effect on the provision of advocacy services; and
- At the same time, suggests that those effects are unquantifiable and so invites consultee assistance as to their impact.

The Treasury Counsel team at the Old Bailey considers that:

- (1) These proposals come as publicly funded fees for criminal advocacy are in the middle of a very steep, downward trajectory (25% savings over 4 years and continuing), the end point and consequences of which are neither complete nor known or understood by policymakers;
- (2) The current commercial state of the criminal Bar is precarious, as a result of previous policy implementation, so that even small changes in income will now have very significant effects;
- (3) there is no demonstrable need further to cut the very low rates for advocacy under the VHCC scheme and that by doing so both the quality and, more importantly, the supply of appropriate advocacy services will be badly affected, probably immediately on implementation;
- (4) each of the optional proposals to reduce AGFS is based on flawed analysis, so that their true deleterious effect has not been worked out or understood;
- (5) the Ministry of Justice admittedly has no proper basis for the steady state assumptions upon which these proposals have been worked up and considered; and

the team offers:

- (6) assistance properly to identify and assess the effect of these proposals.

We do so from our standpoint of daily practice in criminal advocacy in the Crown and Appellate Courts of England and Wales. Between us we have 408 years' experience in practice. None of us is routinely remunerated under the schemes in question. Almost every one of our opponents is.

TREASURY COUNSEL IN CRIME

At any one time, there are about eighteen senior members of the Bar of England and Wales, specialising in criminal work, who have been appointed by H.M. Attorney General to represent the Crown. They advise and appear in the most serious or complex cases, especially those of difficulty, sensitivity or profile. They are routinely instructed by many agencies and Departments of H.M. Government, including the Treasury Solicitor. They undertake work at all levels, from the Supreme Court to the Magistrates' Court, and in the Administrative Court, Courts Martial and elsewhere. Their core work includes cases involving terrorism and official secrets, as well as homicide and other crime. They advise the Law Officers of the Crown on, among other things, unduly lenient sentences.

There are two levels of appointment. Current Treasury Counsel are:

First Senior Treasury Counsel: Richard Whittam QC

Senior Treasury Counsel: Simon Denison QC
Crispin Aylett QC
Edward Brown QC
Andrew Edis QC
Mark Heywood QC
Jonathan Rees QC
Zoe Johnson QC
Bobbie Cheema QC

Junior Treasury Counsel: Duncan Penny
Sarah Whitehouse
Michelle Nelson
Oliver Glasgow
Duncan Atkinson
Louis Mably
Julian Evans
Tom Little
Alison Morgan

During appointment, which can last for about 12 to 15 years, they remain independent and continue in private practice as members of their individual Chambers. Each is appointed from the ranks of the criminal Bar. His or her training for appointment came from individual private practice, including defending in publicly funded work (one of the indicative application criteria), followed by competitive selection for a two-year period of monitoring and then further competition for appointment. Without prior training and experience both prosecuting and defending criminal cases, each would lack the necessary skill and experience to represent the Crown at this level.

INTRODUCTION

- 1.1 It is necessary to be clear. The motivation for these proposals is simple and not in doubt: it is to “achieve savings”, part of H.M. Government’s need to meet “wider fiscal challenges”. That reason is described as the “key driver”.
- 1.2 In both the previous and the current consultation paper, criminal legal aid remuneration is identified as an appropriate target for “reduction”: this is based on a “belief”. The belief is that “further efficiency and cost savings in criminal legal aid remuneration” are both possible and sustainable¹.
- 1.3 Fee reductions are of course achievable; they may simply be imposed, as publicly funded defence advocacy cannot be a true market. It is instead one where a single purchaser now sets its price unilaterally by the device of subordinate legislation.
- 1.4 But the proposed reductions are not, in our view, sustainable. Nor, overall, do they give any value. These conclusions are based on our own, informed assessment of their inevitable effect, particularly on the criminal Bar, who provide most trial services.
- 1.5 At the end of his foreword to the Next Steps Consultation Paper, the Minister of State said:
“This is a comprehensive package of reform, based on extensive consultation. I believe it offers value for the taxpayer, stability for the professions, and access to justice for all.”
- 1.6 Each of these asserted products, “value”, “stability” and “access for all”, requires assessment in order to be shown to be a true belief: and yet the Impact Assessment attached to the new Paper simply makes no attempt to evaluate or monetise the behavioural changes that will most certainly result from its proposals. Instead, those are said to be “uncertain”. In truth, they are not. Most are entirely predictable to those who, like us, are wholly familiar with the business of advocacy in the Crown Courts of England and Wales.
- 1.7 The entirely obvious and predictable outcomes are lost quality and reduced supply. These are airbrushed in the Impact Assessment by repeated “steady state” assumptions. The behavioural changes are not then, uncertain. Neither will any steady state remain. They are, though, unpalatable; they will not improve the public interest. In a telling acknowledgment of this, the Ministry in its new consultation paper wholly abdicates its responsibility for this assessment by

¹ Transforming Legal Aid: Next Steps, Impact Assessment (IA No.197MoJ)

first making neutral assumptions and then asking the consultees what the impact will be². The Minister of State has lifted his telescope to his bad eye.

- 1.8 Aside from this core, the Paper contains many other expressions of attendant policy. Each of these is in reality based on a flawed hope, which itself is counter-intuitive; it is that further significant reductions in fees for advocacy can be done without loss of provision or quality – or even that these might be improved by dramatically cutting fees! At best, this hope is unfounded. At worst it is the cynical and platitudinous suggestion of illusory benefit.
- 1.9 The bottom-line hope expressed is that the AGFS proposals will save £15m and will have beneficial effect³. Our assessment is that, on top of reductions since 2007 and cumulative changes since 1997, they will do significant harm to the operation of the criminal justice system by damaging the supply and the quality of criminal advocacy services. This is because they represent a cumulative, real terms cut of nearly 50% since 2007. In particular, they will have both an adverse and disproportionate effect on the supply of such services by the acknowledged experts – the criminal Bar.
- 1.10 As to VHCC, other than to save 30% on an existing spend (estimated in the previous Paper to amount to about £20m from a £92m total), there has never been any claimed policy justification for the reduction in VHCC fees beyond a vague assertion that to do so would “improve public confidence in the scheme”⁴. No indicator of lacking confidence was given. No evidence for the assertion was identified and no impact assessment carried out. No understanding was evident and no attempt was made to explain or to acknowledge the enduring nature and complexity of the work involved in the 15 or so such cases each year. The only treatment of this in the second Paper by the Ministry of Justice is this: “*we are confident that defendants will continue to receive effective representation under the revised rates*”⁵. This confidence is, from our standpoint embedded amongst providers, completely misplaced. Its manner of expression reveals that it has no foundation.
- 1.11 These proposals should be set aside. They cut radically at the depressed remuneration of the criminal Bar and go deeply into the bone. We judge that they will undoubtedly affect both the quantum and quality of supply, in the case of VHCC work probably immediately. They will compromise the Ministry’s new buzz-aspiration “right first time”.

² As above and see Chap. 5, Q7-Q9; Annex F, paragraph 6.10; “... provider response ... remains unquantifiable”

³ Transforming Legal Aid: Next Steps, Impact Assessment (IA No.197MoJ)

⁴ See CP 14/2013, Part 5, at paragraph 5.23.

⁵ See Transforming Legal Aid: Next Steps, at paragraph 2.46

- 1.12 Their supposed saving benefit could be found by many other means, not least the proper working through of existing changes. Or, for example, in the proper letting and administration of government contracts for CJS services; court interpreters, custodians and other activities are telling examples of incompetent administration and wasting money – and these on services ancillary to the main process, that are provided by trading companies rather than professionally regulated people.

FRAMEWORK

The Relevant Changes Proposed

- 2.1 By its paper Transforming Legal Aid (CP14/2013) the Ministry of Justice proposed changes to the structure and payment for the provision of publicly funded criminal work. In significant measure the structural elements have been set aside as unworkable and restrictive of consumer choice. In relation to advocacy services, the Paper proposed reductions in VHCC fees at a projected rate of 30%, reductions in all graduated fees (the AGFS system) and reducing the instruction of two advocates. To indicate extent, it was suggested that, taken together, these latest changes would result in an average fall in gross fee income of 26% for the most senior. The changes are represented as having less effect on others. That is not true. Overall, the proposals are not unfairly summarised from the defence advocate’s standpoint as “more work for even less pay; very much less”.
- 2.2 The new Paper sets out the response to the first consultation (in Part One) and then (Part Two) raises a further consultation process. In summary, the relevant proposals concerning Crown and Appellate Court presentation are:
- (1) an adoption of the existing proposal to cut VHCC rates for all existing and future contracts by 30% from December 2013;
 - (2) litigation and advocacy fees in AGFS Crown Court work will be further cut by up to 18%, phased in over two years from 2014 by one of two model options;
 - (3) a reduction of the number of cases involving ‘multiple advocates’ by criteria to be given effect by the Presiding Judges;
 - (4) fees for expert witnesses in civil and criminal cases will be reduced by 20%, with some exceptions.

The true starting point of the changes proposed

- 2.3 A government is responsible for the rule of law. One of its core purposes is the security and safety of citizens. The criminal justice system is its delivery mechanism and so the efficacy of the CJS is a clear and visible metric of government functioning. In England and Wales, that

system is adversarial and, for crimes of seriousness, involves trial by jury and punishment set by judge. Representation is a guaranteed right of an accused. But beyond that, skilled and effective representation is fundamental both to the process and to its proper outcome.

- 2.4 The total spend on criminal legal aid has fallen from £1.175bn in 2008/9 to £975m in 2012/13 (against a fall in work of about 10%, i.e. 1.5-1.35m “acts of assistance”)⁶, before deduction of VAT. Note that this reduction has been achieved despite the raising of the VAT rate in January 2010 from 15-17.5% and in January 2011 from 17.5-20%. Net of VAT at the contemporary rate, these sums are £1.022bn reduced to £813m; a headline fall of 25% in four years.
- 2.5 Of this most recent current level (£975m, including VAT), fees for advocacy services amount to just £242m for graduated fees and £67m for complex crime (VHCC). Only £8m more is spent on all appeals. So, all of the frontline Crown Court and appellate work of advocacy, upon which the public credibility of the CJS so crucially depends, is therefore done for less than one third of the total spend; that really is value. The overwhelming majority of that, including all of the most complex, is done by those who presently are trained for and capable of doing it: barristers.
- 2.6 The existing projected total spend for criminal legal aid for 2013/14 is much less: £941m⁷.

Further Context

- 2.7 Up to 2010, fees for criminal legal aid advocacy had been effectively static in nominal terms since the introduction of graduated fees in 1997, apart from some minor changes in 2007 following the Carter Review. To date, retail prices have increased by at least 54% during that 15 year period⁸. In real terms, that overall stasis represents a reduction in real gross fee income of nearly one third. By comparison, during that same period, median public sector pay has increased by about 49.9% in nominal terms, despite the moratorium in recent times⁹.
- 2.8 But that is merely the original starting point. Fees for defence advocates have not just withered on the vine: they have been actively cut down. The ten steps in that process are described in detail in the Consultation Response of the Bar Council to CP14/2013, at paragraph 87. In summary, fees remained at rates first set in 1995 until 2007, losing 26% to inflation. In 2007 Carter resulted in some selective increases, that did not make good for inflation. From 2010,

⁶<http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-statistics-tables-12-13.xlsx>

⁷ Legal Aid Authority Business Plan 2013/14, on inception 1st April 2013, at p.23

⁸ Based on the data available, i.e. RPI: <http://www.ons.gov.uk/ons/datasets-and-tables/data-selector.html?cdid=CHAW&dataset=mm23&table-id=2.1>

⁹ <http://www.ons.gov.uk/ons/rel/ashe/patterns-of-pay/1997-to-2012-ashe-results/ref-tables-pop-2012.xls>

fees under both VHCC and the graduated scheme have been reduced, the latter by incremental reductions to be phased in over three years. The effect of all of this is not yet complete and is not fully known.

- 2.9 The average annual payment to criminal barristers made by the LSC, including all graduated and VHCC cases, in the year 2011/12 was £52,051¹⁰. This might be compared to the middle of the London pay scale rate of £66,976 for a Senior Crown Advocate employed by the Crown Prosecution Service. The latter has no real costs of employment to defray and enjoys very considerable, costly benefits. All of his/her practice expenses and whole retirement are paid for by the taxpayer. He/she does not pay to train his/her younger colleagues or contribute to their outgoings in order to foster their professional development.
- 2.10 The AGFS or VHCC fee income of barristers pays for the whole of the cost of their providing criminal advocacy services: administration, practice accommodation, travel, legal research tools, legal dress, membership of professional bodies, regulation of the profession and the provision of legal services, professional insurance, student loan, initial and continuing compulsory professional education and training and then retirement.
- 2.11 Although independent individual providers with no real competitive financial advantage, criminal barristers also fund, provide and deliver high quality education to entrants to the profession. There is no other means to fund these things. Many CPS employees and other HCAs first qualify and do pupillage at the Bar, at its members' expense. Neither is there any natural support for criminal advocacy from other sectors of the profession; the modern Bar is specialist in nature. The days of the common lawyer spanning jurisdictions to diversify income sources are gone.
- 2.12 In most sets of barristers' Chambers costs are widely shared so as to reduce individual outgoings and also borne in a manner that is to an extent proportional to income. The more senior and better paid carry a heavier load.
- 2.13 There is also one big canard to be despatched once and for all. The Ministry of Justice repeatedly claims that ours is the most expensive system of publicly funded criminal justice in the world. Despite often being held up as the best, it is not more expensive. The numbers routinely deployed are merely computed on a per capita of population basis: they ignore even the most basic of other considerations, namely how many prosecutions there are and for what

¹⁰ <https://www.gov.uk/government/uploads/system>

proportion of serious offences. Adjusted correctly for this, we pay no more than other jury systems.

- 2.14 Comparisons with other, non-common law systems should first be adjusted for the proportional extra costs of the court, the prosecution and investigation; the role of the defence is very different in those jurisdictions. No attempt has yet been made to do that. Were it to be done, England and Wales would be a very long way down the list. Why has it not been and why formulate policy without it?

VERY HIGH COST CASE FEES

- 3.1 We refer to this in this consultation response, even though it was first dealt with in the previous one, because the process in the earlier exercise was flawed and because VHCC and AGFS cannot be viewed apart.
- 3.2 The flaw is that the target was a £20m reduction. The approach was to describe VHCCs as 8% of the total legal aid spend in 2011/12; that was a figure of £1.101bn. It was being claimed therefore that the VHCC spend was about £88m (although it was expressed at £592m!). The (amended) published claim was that it was £92m¹¹. In fact, at the time the first Consultation Paper was being prepared, in 2012/13 it was £67m, down from £91m in the previous year alone¹². The £20m target has already been more than achieved and that expenditure number will continue to fall because of existing changes.
- 3.3 The so called “need” for reduction or to bear down from an identifiable point does not exist.
- 3.4 This is symptomatic of the approach. Previous cuts are working their way through the system and have not been assessed and *neither has their effect*. This is self-evident; and because the Ministry says so¹³.
- 3.5 The value placed on the provision of publicly funded criminal advocacy services is indicated by the price the State sets for it. The rate imposed affects who undertakes that work and with what level of invested skill and application. No rational individual will borrow to learn, qualify for a prized Chambers seat, then graft for years on reduced AGFS rates if the ultimate rates available at the top of the profession do not attract or eventually reward that endeavour.

¹¹https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaidconsultationchanges.pdf

¹²<http://www.justice.gov.uk/downloads/publications/corporate-reports/lsc/legal-aid-statistics-tables-12-13.xlsx>

¹³ Transforming Legal Aid (CP14/2013), Annex K, paragraph 4.6 and similar repeats; and Impact Assessments

3.6 A proposal to cut by 30%, on the back of the previous reductions, will not only wholly fail properly to reward existing providers, it will withdraw incentive to entrants. We assess that this really will affect sustainability. It will cause the best to diversify and leave. We reach that assessment from the following:

- (1) Knowledge of the falling state of applications for entry to our own sets of Chambers;
- (2) Familiarity with the aspirations of student entrants to the Bar through the Inns of Court and at the Universities;
- (3) Observation of existing behaviour of leading defenders at the criminal Bar; and
- (4) Observation of the Treasury Counsel applications process and with it the up-coming stars of the young criminal Bar.

3.7 What is not well understood (and so there is no reflection of it in either Consultation Paper) is the degree to which skilled and experienced defence advocates, whose capacity and ability inspires the confidence of the court, the prosecution and their professional and lay clients, can affect the process. Most defendants do not want to be apprehended, tried and punished. The more serious the allegation and the likely penalty, the more that is true. The criminal trial process is one vulnerable to derailment. Many defendants would achieve it in a moment if they could (and they can). Good, skilful and experienced defence advocates shorten, straighten, sustain and hasten the trial process: their continued presence is nothing less than vital. For a recent example of what happens in a serious terrorism case when that quality is absent, even in part, see the judgment of the Lord Chief Justice in R. v. Farooqi, Newton and Malik [2013] EWCA Crim. 1649¹⁴. The result is “*wrong first time; pay again second time*” – or even a third time if a successful appeal results in an order for a retrial.

3.8 In addition, from our perspective, we perceive a likely increase in large and complex criminal work from its low current number for the following reasons:

- (1) The prosecuting and investigating authorities are resurgent (e.g. SOCA, SFO, HMRC);
- (2) Public confidence, and so political will, has demanded more rigour in complex investigations and prosecutions (e.g. Libor rate fixing, terrorism, organised crime - as opposed to the previous stance; see e.g. BAE);
- (3) As commercial and other activity becomes ever more complex, so does the detection and prosecution of unlawful behaviour within that activity;

¹⁴ <http://www.judiciary.gov.uk/media/judgments/2013/r-v-farooqi-others-judgment>

- (4) We perceive an increased readiness among large, commercial “victims” of crime to complain and support investigation and prosecution by the State, possibly so as to avoid the commitment of resources to civil process; and
- (5) We perceive an increased readiness among individuals and not-for-profit organisations to complain of large scale unlawful behaviour.
- 3.9 We already see a rush to escape from the penalty of a case being designated VHCC, even at current rates. In practice, advocates already avoid them in droves. That is the real reason why the numbers of such cases are falling so dramatically. The rates are less than for other work; the administration is many times multiplied even before the remunerative work begins. On top of that, it is necessary to make a case to a contract manager to do any work at all, even the obvious.
- 3.10 We are in no doubt whatever that no leading advocate will willingly take on an onerous VHCC case at the proposed rates. The figures are derisory for someone whose qualification and experience may be very considerable. The refresher rate proposed for a Silk is £333.20; even on the AGFS as proposed, that equates to the fee uplift payable for a led junior for a day in a Section 18 violence case (£322). The rates for preparation, often done at night and weekends in this kind of case, are no better (as low as £63ph for a Silk in category 3 & 4 cases).
- 3.11 We assess the mood within the profession as one of deepest conviction: we predict that were these proposals given effect, no existing VHCC contract would continue without difficulty. If any one of us was prosecuting and that occurred, we would not lightly be able to submit to the court that the case should continue. We also predict that only the ill-qualified and the short of experience will even contemplate signing a new one. Neither, we judge, will the profession, or the public, fall for the sop of withdrawal to implementation only on future contracts.
- 3.12 Instead, we suggest that the costly apparatus of the entire scheme be abolished and proper fixed rates applied (AGFS+). That would additionally do away with a raft of very expensive administration, as is described in the LAA Budget for 2013/14.

AGFS

- 4.1 We consider that the proposed reductions, in whichever iteration, are unnecessary, have an effect much larger than claimed and will produce unsustainable results.
- 4.2 We are aware that an analysis of these proposals has been carried out and have performed analysis of our own. It closely compares with the work done by the members and leadership of

the Bar's Western Circuit. For a basis, reference should be made to Annex B of their Response to this Consultation.

- 4.3 The Ministry of Justice represents these proposals in the Consultation Paper and its Impact Assessment as aiming for a saving of £15m. The last available figures for annual AGFS spend suggest a total of £242m for 2012/13. That might suggest a proposed further reduction of a little more than 6%. But that bears no relation to the true effect of the changes *as they will impact upon the criminal Bar*. Again, no attempt has been made to identify this or to consider it.
- 4.4 For trial work, which occupies most of the time of criminal barristers, the cuts are swingeing. Their true cumulative effect is that, across the board from shoplifting to murder, the fees payable would be reduced in amount by 26% from 2007 to date. To that should be added a reckoning for inflation, which is rising. The product is that the proposals, with those already introduced, reduce actual fee income for this work in real terms by 41%.
- 4.5 Look more closely and the effect is even more concerning. Take murder; the stakes are the highest (life imprisonment, specified minimum terms to be served of 15 years to whole life). No one wants to be convicted of murder or even to be tried for it. Criminal Silks and juniors together work hard to secure this process every day. And yet, the net cumulative, inflation-adjusted consequence of these proposals is to reduce the fees by 50% since 2007.
- 4.6 There is simply no attempt made to assess the sustainability of this. Any such assessment, which involves predictions of future behaviour, is a matter of judgement. Ours, based on knowledge and experience (this is what we do), is that this will:
- (1) reduce the numbers of those prepared to continue to undertake this work overall;
 - (2) discourage those prepared to invest skill, time and resources in its provision;
 - (3) force the best to leave;
 - (4) foster a race to the bottom in service provision; and
 - (5) take away the incentive for quality entrants to enter this sector of the Bar's work.
- 4.7 The follow-on consequences of any of these are again obvious. What they mean is that the outfit that currently possesses the know-how to do and to teach this work will be in regression. Damage it or lose it and you lose:
- (1) defenders who are skilled;
 - (2) defenders whose ethos is high and is highly regulated (paid for by themselves);
 - (3) the pool from which your best prosecutors are drawn;

- (4) the pool from which your criminal judges are drawn (including among the senior judiciary);
- (5) a cohort of the Bar which makes up more than a third of those in independent practice;
- (6) a cornerstone of the CJS, the referral one that cannot be marginalised without quality loss;
- (7) a prime basis of the Privy Council jurisdiction;
- (8) the basis upon which the United Kingdom punches above its weight in foreign courts and in the international criminal court and other tribunals.

Claimed mitigation

- 4.8 The Ministry of Justice indicates that the effect of the latest proposals can be mitigated by increasing fees for guilty pleas under Option 1. The additional policy advantage that this will encourage early pleas is relied upon.
- 4.9 This entirely ignores that it is the defendant and not the advocate who pleads guilty, knowing that to do so *at the first reasonable opportunity* results in a discount on sentence of one third. It is his, and not the advocate's, motivation that should govern a guilty plea and the timing of it. Parliament intends this: it is set out in statute¹⁵. All advocates advise it and are bound to report to the court that they have done so. But the Ministry seeks to produce a scheme that gives the advocate a financial interest in the stance of his client and in the outcome of the criminal proceedings, in which the parties who gain are, apparently, the State and the lawyer it pays. The policy approach is wrong-headed. Of course, there should be no lawyer/client conflict of interest that serves to delay guilty pleas; and there is not today.
- 4.10 The other reason why this is important is that the guilty plea aspect of these schemes will impact disproportionately on the criminal Bar. The experience of the Bar has been that other providers prefer to do the easier, relatively better paid work if they can. HCAs, whether deployed by defence solicitors or the Crown Prosecution Service, have done far more uncontested work than they have done trials or other litigious hearings. This work is harder, very much more time-consuming and requires skill and experience.
- 4.11 But, those same providers brief the Bar. It is they who decide whether to keep the work or to instruct the Bar. It is entirely foreseeable and predictable that if a fee structure is significantly loaded for guilty pleas and depressed for trials and cracks:
- (1) the criminal Bar will lose more of the plea work; and
 - (2) the appearance of a conflict of interest between lawyer and client is introduced.

¹⁵ Section 144 of the Criminal Justice Act 2003; sentencing guideline "Reduction in Sentence for a Guilty Plea", applicable by statute; and see section 48 of the Criminal Justice and Public Order Act 1994

Each is an inherently obvious consequence of the scheme.

- 4.12 Both results are highly undesirable from the point of view of the public interest. The second additionally ignores the statutory framework.
- 4.13 In any event, these are not true increases: they are paid for by proposed *reductions* in cracked trial fees and ‘harmonisation’. This is of no help to the Bar. Cracks often occur where barristers assess evidence lately served by the Crown and give additional, robust advice to their lay clients, which those defendants are driven to accept. These proposals considerably reduce the reward for that professional and responsible stance.

Tapering

- 4.14 Option 1 employs the device of tapering. For the reasons we have set out, fee reduction on this scale and at this time is damaging of the public interest. Tapering brings additional problems. Criminal procedure means that a defender presents his case last, makes his speech last and addresses the court in mitigation last, if required. This proposal means that for that part of his work, he gets paid the least.
- 4.15 It lacks any justification and does not make sense, unless you first propose that advocates deliberately extend criminal trials as routine, in breach of their professional duties, and succeed in outwitting the judge to do so, and then conclude that they must be penalised in order to stop them.
- 4.16 If you do not make that assumption, which is unwarranted and without evidence, this proposal is baseless and has the vice that public confidence in representation will not be sustained or improved: what is the rational observer to think when considering that an advocate advises his client whether or not to give evidence or to call experts or witnesses of fact? When he advises not, should the fact that the advocate is being paid less by the day, by the State, be ignored?
- 4.17 This does nothing to improve public confidence and it should not be implemented. It leaves room for the suspicion that the State-funded lawyer is motivated otherwise than in his client’s best interest. It dramatically worsens an existing fee structure in this respect.

Option 2

- 4.18 We note that the Ministry has taken the Bar Council’s proposal based on the CPS Scheme C and simply depressed the numbers. For the reasons given above, this is not in the public interest.

4.19 We can add this: we operate under this framework already. We know that the standard and enhanced rates are very significantly different. We also know that the page count numbers have been arrived at by very careful actuarial work by the Crown Prosecution Service. These proposals increase those numbers making it even less likely that any case will be paid at an enhanced rate. The fact is that very, very few cases exceed these thresholds in practice. It is therefore very important indeed that the focus is on the standard rate and not on the enhanced rate.

4.20 Unless the standard rate represents fair and reasonable remuneration, service suppliers will not seek to undertake it, whatever the enhanced rate might be. A wait for the Service to deliver page 5001 in a murder prosecution is a long one. Also, the decision to accept the instructions is always made when the page numbers are less, since they are usually served in instalments.

Conclusion

4.21 Neither Option 1 nor Option 2 provides sufficient remuneration to secure the public interest.

4.22 Neither should be implemented; one mechanism is no better than the other and each has vices.

MULTIPLE COUNSEL

5.1 We agree the principle that the need for two or more counsel is capable of assessment by the judges, provided that they are fully and properly informed to carry out the task when it needs to be addressed.

5.2 We would deprecate any change in criteria that significantly reduces the current level of instruction. Our experience is that complex trials are much better prepared, much better presented and much less likely to experience costly delay where two advocates are instructed. The reason is that a complex trial is not a set piece: it is dynamic and requires great attention, action and reaction by every party involved. In large or serious cases, doing that work effectively and timeously is beyond one individual, especially where the advocate is not attended by a representative of the instructing firm or agency in court – as is the real position in every current criminal case on both sides.

5.3 The assessment of this should be made alongside that of the rate being paid. The more work you require of the individual, the less the value of a given rate, especially if it is fixed. You cannot both elevate the one and depress the other and expect there to be no effect.

5.3 These observations only remain true for so long as it is the case that the junior is properly qualified. There is a risk that the role is undertaken by the inexperienced and insufficiently qualified. That risk is heightened when the junior advocate is employed by, or has a direct financial relationship with, the firm instructing him or her. We are confident that the Presiding Judges are aware of this potential problem; our concern is the limit of their capacity to address it.

EXPERT WITNESS RATES

6.1 We note the reductions in rates proposed.

6.2 These reductions, which again have no other policy objective, will exacerbate an existing problem. It is becoming increasingly difficult to find good, sound, robust and fair expertise in criminal cases. Experts who fall into that category are in high demand. They are able to command a higher rate for their work elsewhere.

6.3 Some of these are people who operate in a very demanding environment. For example, the current state of the law on expertise in infant death cases and on DNA comparison, especially low template testing and on mixed profile DNA testing, renders these highly complex and specialised areas¹⁶. This kind of evidence is frequently deployed in serious cases where the importance of the evidence can be very great indeed. The trend is to allow evidence of expert opinion even where statistical evaluation by reference to an established database cannot be achieved, placing a high premium on the expert's view. The science is advancing and the evidence is often being given near to the leading edge of research. To reach a just result, the court must have the best scientific help – that is often not the most readily available witness at existing legal aid rates.

6.4 As these appeals show, getting it right first time is worth the investment. There are other similar cases in each general area of expert witness specialty, to indicate that the issue needs to be focussed upon and properly addressed across the board. It has not been and these proposals make an existing problem dramatically worse.

6.5 We would strongly counsel against reducing rates that are already low by the extent proposed.

ANSWERS TO CONSULTATION QUESTIONS

7.1 As to questions 1. to 5. we adopt the answers to these given by the Bar Council.

¹⁶ See for example R. v. Dlugosz and other appeals [2013] 1 Cr. App. R. 125 on DNA evidence and in infant death cases R. v. Henderson and other appeals [2010] 2 Cr. App. R. 185

7.2 We give these answers to the remaining questions, for the reasons given above:

Chapter 4: Advocacy fee reforms

Q6. Do you prefer the approach in:

Option 1 (revised harmonisation and tapering proposal); or,

Option 2 (the modified CPS advocacy fee scheme model)

Please give reasons.

Neither, for the stated reasons. Each will damage the public interest.

Chapter 5: Impact Assessments

Q7. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Please give reasons

No, for the stated reasons. In particular, the steady state assumptions are wrong and the ‘unquantifiable’ consequences are identifiable, foreseeable and undesirable.

Q8. Do you agree that we have correctly identified the extent of impacts under these proposals?

Please give reasons.

No, for the stated reasons. The extent will be considerable.

Q9. Are there forms of mitigation in relation to impacts that we have not considered?

Yes. Reduce or eliminate the further fee reduction, or, at the very least:

- (i) Delay further consideration until the previous reductions have been given effect and can be quantified; and**
- (ii) Then, first consider the outcome of the proposed procedural reviews.**

By this route, the prospects of decision-making that most promotes the public interest and has least undesirable impact are maximised. We cannot afford to do less.