RESPONSE OF THE CRIMINAL BAR ASSOCIATION TO THE LEGAL SERVICES COMMISSION' S CONSULTATION ON THE FUTURE OF VERY HIGH COST CASES ["VHCCs"]

Introduction

1. VHCCs are the most complex criminal cases. It is critical that they are undertaken by the most able advocates and litigators. The Criminal Bar Association (CBA) is keen to ensure that any VHCC scheme (a) attracts advocates of sufficient quality (b) encourages efficiency (c) keeps the level of bureaucracy to a minimum and (d) ensures fair remuneration

2. It is a reflection of the importance of the Consultation that the Chairman and the Secretary of the CBA have led this working group. They have been assisted by another QC and three junior practitioners with significant knowledge and expertise in these cases and a Senior Clerk from a set of Chambers that undertakes a large volume of such work. In order to gauge the mood of the Criminal Bar we have held a public meeting and we have received and considered a large number of responses from individuals and from various Chambers.

The Proposals – General Remarks

3. Before turning to the specific questions we make some general observations. We welcome two important structural changes in the proposed new scheme. First the use of a contract on a case by case basis and second the removal of the panel of advocates.

4. Subject to a more precise definition, the CBA cautiously welcomes the concept of core tasks as long as the level of bureaucracy for undertaking core tasks will be minimal. We understand that an *"appropriate deliverable"*, as referred to at page 30 of the Consultation Paper, is not a worklog and is simply written confirmation that the work has been undertaken with no need to state precisely when or how long it took. Such minimal bureaucracy would be welcomed and would ensure that efficient barristers are not penalised. Our view on this subject would be different if we are wrong as to the nature of an *"appropriate deliverable"*.

5. However, having welcomed these features we are firmly of the view that otherwise the proposed scheme is very unlikely to be acceptable to most barristers. This is because there is a widely held concern that the payments proposed under the new scheme will be appreciably lower than current levels. Whilst we believe that this was not the intention of the proposal we feel that the reliability and quality of the data relied upon to calculate the unit rate is questionable. Most of the profession would prefer an extension of the Graduated Fee Scheme. If some VHCCs

are so big that they are not amenable to such a scheme we invite consideration of whether the current Graduated Fee Scheme could be extended to cover cases up to say 60 days and there be a hybrid scheme to deal with the most serious cases.

6. The data relating to the 88 cases, upon which the unit rate was calculated, was only disclosed on 6th February 2009. Analysis so far undertaken of that data raises as many questions as it answers. A number of other responses to the Consultation Paper that we have seen have dealt with specific anomalies in the data. Those need to be carefully considered. We do not feel that it is necessary to descend in this Response to that level of detail. But the 88 cases plainly include those which did not proceed to trial and may well include cases which were returned shortly before trial. It is our opinion that the first task should have been to consider from the 88 cases all of those that went to trial and to have produced unit rates based on those cases. That could have been compared to the 'ready reckoner' commonly used in our experience, of 2 minutes a page for witness statements, 1 minute a page for no comment interviews, 2 minutes a page for comment interviews, 2 minutes a page for transcripts of probe material, 1 minute a page for documentary exhibits and 30 seconds a page for photographic exhibits. Once that analysis had been undertaken the cases which did not proceed to trial should have been considered to see if it would be possible to apportion a relevant discount to the unit rate depending on when guilty pleas were entered. This might have involved undertaking more work to find out precisely why and at what stage those cases did not proceed to trial.

7. We would ask that this detailed analysis is commenced on the data. It is hoped that there may be additional cases which have concluded since the Consultation Paper was produced which may provide additional assistance.

8. We are sufficiently concerned by the quality and reliability of the data that we would prefer to see a short deferral of the introduction of a new scheme rather than again to suffer a scheme that will not work. We would welcome the opportunity to assist the LSC to improve the current proposals.

9. It is also our opinion that the budget for the VHCC scheme **must** be that as at November 2008 when modest (overall budget neutral) changes were made. We can see no good reason for not doing so bearing in mind the savings that are being made in respect of a reduction in the number of cases in which two advocates are instructed. It should be noted that the January 2008 rates were widely rejected by the Bar as being inadequate for this type of work.

10. The current VHCC categorisation regime of four categories is widely regarded as being unfair. However, there is no uniform view at the Bar as to what to do about this unfairness. Some favour abolition of all categories. Others would keep them despite the unfairness. It is likely that any scheme which has Categories would create some iniquities. We suggest a scheme which has just two categories. Category 1 would involve some (but not all) terrorist prosecutions, SFO frauds and the most high profile and complex murders. All other cases would be in Category

2. It is our opinion that some of the current terrorist cases do not merit being in Category 1. For example, defendants charged with offences contrary to sections 57 or 58 of the Terrorism Act 2000 face a maximum sentence of 15 or 10 or years respectively. It is noteworthy and anomalous that such cases are remunerated at Grade B within the Graduated Fee Scheme. There are some high-profile murder cases which attract national and international press attention, where defendants face spending the rest of their lives in custody if found guilty, which are routinely placed into Category 3. Those cases are difficult and burdensome. They should be categorised alongside the most complex fraud cases and the biggest terrorist prosecutions. Most such murders do in fact fit within the Graduated Fee Scheme. But for those that do not they should be Category 1 as opposed to Category 2 or 3.

11. The Unit rate for a new Category 1 would need to be higher than for Category 2 to indicate the increased weight of responsibility. There must not be a disincentive to taking the more challenging cases. However, we would ask that the differential is not marked so as to decrease the Unit rate for new Category 2 cases. Category 2 should be the proper standard and Category 1 should contain an enhancement above that standard.

12. The views of the profession in relation to 'core' and 'non-core' tasks also varies. However, most members of the profession wish to limit both the extent of negotiation with contract managers and the associated bureaucracy. In order to do so they would wish to include more work in core tasks. In this context the terminology used in the

paper is of the greatest importance. By way of example the definition of 'perusing' at page 44 of the Consultation Paper has caused real concern. We understand that the Legal Services Commission ["LSC"] has recently indicated that this definition merely relates to the initial reading and that re-considering for the purposes of detailed preparation, for cross-examination in particular, would be a non-core task as presently envisaged. If that is correct then it is likely that there would be more support for this aspect of the scheme. In our view that support would grow if the scope of the core tasks is extended and a payment mechanism is devised which accurately reflects the amount of work in the core tasks.

13. One of the most unsatisfactory elements of the previous and existing VHCC schemes has been the level of refresher fees (both full day and half day rates) and the difficulties that arise during a trial of negotiating for extra and necessary hours. The January 2008 refresher rates were unacceptably low and are not consistent with the hourly rates of pay which are paid for preparation for these types of cases. VHCCs are demanding cases to appear in and we wish, as far as possible, to reduce the need for negotiation during trials. We assume that if extra evidence was served during the trial that this would be remunerated as a core task. If that is right then we would prefer the enhanced refresher fees (Option 2). However, the rates proposed under Option 2 do not appear consistent with those set out in tables 5 and 8 of the Consultation Paper. When the analysis that we have suggested at paragraphs 6 and 7 above is undertaken we would ask that a comparison is made with the refresher rates (inclusive of additional hours

given for work during the trial) and those that are proposed for Option 2. In addition the half day rule should either be abolished or at the very least replaced with a need for two and a half hours to be spent in Court, as opposed to three and a half hours, in order to qualify for a full day rate. It is particularly iniquitous that frequently barristers are at Court for the whole day but through no fault of their own they are only paid for half a day. This does not happen in Graduated Fee cases and there is no good reason for it to happen in VHCCs.

14. The Consultation Paper is silent on three very important issues. The first is the timing of payments. There must be staged/interim payments in VHCCs. This may require some thought but it is critical that payments under the new scheme are no less frequent than under the existing scheme. The second is the question of payment for re-trials. The third is the question of cases which have to be returned to another advocate. Bearing in mind we are recommending structural changes it is difficult for us to provide any detailed suggestions in relation to re-trials and returns but we would be happy to work with the LSC to ensure that any Scheme deals with these situations fairly.

15. As we have set out above we are troubled by a number of the essential aspects of the proposed scheme, but we consider that these aspects are remediable and are willing and eager to assist the LSC in order to achieve this. If a variant of the proposed new scheme is introduced we suggest that a system is put in place which allows sufficient data to be captured so as to ensure that if any

fundamental problems arise they can be remedied as soon as possible.

16. With these observations in mind, we answer the questions as set out in the Consultation Paper.

Question 1

"**What are your views about moving to a system based on units?"**

Our view is that there will be benefit in the unit system if it ensures that the level of bureaucracy is reduced and as long as an "appropriate deliverable" is no more than certification that work has been undertaken (see paragraph 4 above). In our view it is essential that the unit price must be based on the same budget as is being used for the existing interim scheme (November 2008).

Question 2

"**To what extent do you agree with the working group's proposal to remove case categorisation?"**

There is consensus that the current system of case categorisation is not fair but, as indicated above, there is a lack of consensus in the profession as to the appropriate remedy. We would ask that consideration be given to retaining categorisation but limiting it to just two categories (see paragraph 10 above).

Question 3

"To what extent do you agree with the split of core and non-core tasks explained in Chapter 2?"

Our preference would be to expand the core task definition to include more tasks than appear to be covered as presently defined. This is because we wish to reduce the amount of bureaucracy inherent in the current system. As indicated at paragraph 11 above there has been much disquiet about the definition of "perusing". We would ask whether the reading of served unused material and unused material schedules could be included as a core task at a set rate per page.

Question 4

"To what extent do you agree with the Working Group's view that to have two separate payment mechanisms is the correct approach for the future of VHCCs?"

We agree with separate payment mechanisms because of the very different work undertaken by advocates and litigators.

Question 5

"To what extent do you agree with the working group's suggested approach to dealing with non-core tasks?"

We would prefer to include more work in the core tasks.

Question 6

"**Which of the two options set out for trial work remuneration do you prefer?"**

We prefer Option 2 for the reasons given at paragraph 13 above. However, more analysis needs to be undertaken to ensure that the Option 2 rates are fair.

Question 7

"**To what extent do you agree with the assessment of impact outlined in Annex 5?"**

We agree with the six broad policy objectives that are set out in Initial Impact Assessment. However, as we have stressed in paragraph 1 of this response, it is vital that this work is attractive to good advocates; by returning to the tendered hourly rates it is extremely unlikely that a sufficient number of quality advocates will wish to undertake this work.

Question 8

"**Do you have any evidence of impacts that we have not yet considered?"**

We have raised our concerns in relation to the proposed new scheme and the associated impacts in paragraphs 5 – 14 above. We reiterate our concerns about attracting quality advocates, if they are not there is a significant risk that trials will be conducted less efficiently which will impact adversely on other budgets in the criminal justice system.

Question 9

"**Which of the two payment mechanisms set out in Chapter 1 do you prefer, i.e. the new scheme or the current mechanism?"**

At present we could only answer this question with one word – "neither". We are though of the opinion that the new scheme could be made to work and would be preferable to the existing scheme given time to ensure that the unit price does not ensure a reduction in remuneration.

Question 10

"Which of the following three options would be your preferred choice, a closed panel, an open panel or a closed panel but with access points?"

We are of the opinion that an open panel which allowed only those litigators firms with sufficient quality and experience is the most preferable option.

Question 11

If your choice is option 3: closed panel but with access point(s); if the panel tem was three years, at what point would you allow other firms to apply for membership?

As our answer to question 10 was not a closed panel then we are not able to answer this question.

Question 12

"**Do you accept the LSC's proposal that the minimum Peer Review entry criterion for VHCCs ought to be PR3?"**

Peer Review and PR3 are not subjects upon which we can provide any real assistance.

Question 13

"**What appropriate measures of experience do you feel we ought to consider when assessing the quality of litigator firms?"**

As with question 12 this is not a question which we feel we can answer. However, we should point out that a number of firms of solicitors who have undertaken VHCC type work for a number of years are no longer doing so on the basis that it is not financially viable. This is deeply regrettable as those firms contain the type of quality litigators that are needed.

Question 14

"**To what extent do you agree with the LSC proposal to assess an Advocate's quality through a self-assessment mechanism with endorsements?"**

The Consultation Paper rightly distinguishes between self-employed advocates and in-house advocates. We are of the opinion that the quality of advocacy in VHCCs is paramount. We are of the opinion that the endorsements which the Consultation Paper requires for in-

house advocates are insufficient and we raise the question of whether there should be judicial endorsement. We are also concerned that a conflict of interest could arise for a self-employed barrister to have to provide a reference for an in-house advocate who in reality is his/her instructing solicitor.

Question 15

"**To what extent do you agree with the proposed function and remit of the Post-Case Review Committee?"**

We have no objection in principle to the Post-Case Review Committee. However, the proposal is lacking in detail and accordingly we can make no other observations.

Question 16

"**To what extent do you agree with the proposed method of procurement for advocacy services?"**

We agree with the proposal that the advocate would not be required to sign a contact until instructed. Therefore they would only need to sign a contract on a case by case basis. Payment for the advocacy must be made direct to the advocate.

Question 17

"**To what extent do you agree with the proposed contracting approach for advocate work on VHCCs?"**

We have already answered this when addressing Question 16.

Peter Lodder QC (Chairman of the CBA)

Tom Little (Secretary of the CBA)

Martin Hicks QC

Simon Csoka

Tim Moloney

Alison Pople

Michael Eves