CBA RESPONSE

To Ministry of Justice Consultation Paper entitled

"**Legal Aid: Funding Reforms**"

Dated 20th August 2009

Introduction

1. The Ministry of Justice issued its consultation *Legal Aid: Funding Reforms* on 20th August 2009. The consultation period ends on 11th November 2009.

2. The Paper makes five main proposals: -

- Bringing the rates paid to advocates for defence work more in line with the rates paid by the CPS.
- Removing the disparity in Police station fees
- Replacing the standard fee for committals for trial with a fixed fee
- Ending payment of criminal file reviews.
- Making changes to payments made to experts in both criminal and civil cases so that these payments are standardised and setting maximum rates.

3. Only the first of these proposals directly affects members of the Bar, although changes to solicitors' remuneration has the potential to impact upon the Bar, as demonstrated by the response to the Litigators' Graduated Fee Scheme that has seen a huge increase in the use of HRAs as solicitors seek

new revenue streams to compensate for the loss of income from litigation work.

4. The proposed changes include the recommendation that the RAGFS rates for advocacy in the Crown Court should be brought in line with CPS rates for prosecutors that are on average presently 23% lower.

5. The MoJ suggests that a significant difference in payment between prosecution and defence advocates cannot be justified, and that prosecution rates have been demonstrated to be acceptable as "*there has been no difficulty in finding advocates prepared to undertake prosecution work*" since the conclusion of the Carter process.

Executive Summary

6. The first three questions deal with 'rationalising' police station fees and replacing the current standard fee for committals for trial with a fixed fee?

7. Questions 4 to 6 ask whether it is reasonable in most cases for prosecuting and defending counsel to expect the same level of reward and if so, should harmonisation be achieved in more than one stage and how quickly. The bulk of this Response deals with the true thrust of the Paper, which is the attempt to justify the claim that defence fees should be cut by 23% to 'harmonise' with prosecution fees, which the paper suggests are both reasonable and attractive.

8. In making that claim the paper even goes so far as to misrepresent the views of the Chairman of the CBA by selectively misquoting from his evidence to the Justice Committee published in their Report on 15th July 2009.

9. This response sets out what we consider to be essential issues of context and history that have given rise to the current system of remuneration for publicly-funded work.

10. The Government has a statutory duty under the Access to Justice Act 1999 to maintain sufficient numbers of publicly funded practitioners to provide adequate representation to those defendants who require it.

11. In 1996 the Graduated Fee Scheme (GFS), designed by the Bar, came into effect and later the Very High Cost Criminal (VHCC) scheme. Between 1996 and 2006, the rates within the GFS were not increased to keep pace with inflation. In 2005, when VHCC payments were reduced there was a crisis in supply that threatened to disrupt the work of the courts. The Government had failed to maintain sufficient numbers of practitioners to provide adequate representation.

12. Lord Carter of Coles was appointed to lead an independent enquiry into the procurement of legal services and the leaders of the Bar all agreed to use their best endeavours to ensure that in the interim there was an adequate supply of advocates willing and able to undertake the work.

13. The Carter Review introduced the "Revised Advocates' Graduated Fee Scheme" – RAGFS) for the vast majority of cases tried in the Crown Courts. A fixed cost envelope was used to determine the future cost of the RAGFS. The envelope was determined by Government and improvement in rates within 1-10 day range of cases was, in effect, paid for by reductions in the rates available to more senior practitioners.

14. The Secretary of State for Constitutional Affairs and Lord Chancellor the outcome:

    "*offers the best guarantee of an affordable, good quality legal aid system that will protect the vulnerable and is fair to taxpayers, fair to defendants and fair to practitioners*".

15. Less than three years later the Government proposes to tear up this agreement without producing any costings of the current Scheme, any detail about how these cuts would be

achieved and, contrary to its lawful duty, no impact assessment.

16. Questions 7 to 13 deal with the proposals to harmonise and cut payments for experts.

17. There are no questions asked concerning the removal of payments for file reviews.

18. Questions 14 and 15 deal with the Impact Assessments. The Paper itself says: -

"No impact assessment has been undertaken on AGFS, file review or on expert fees at this stage. We will publish an impact assessment on changes to AGFS when we bring forward more detailed proposals."[1]

QUESTION 4

Is it reasonable in most cases for prosecuting and defending counsel to expect the same level of reward?

Introduction

19. In responding to this and other questions, it is important to provide a context and some history, expressed in very brief and outline terms.

20. The Criminal Bar Association represents the 3,600 or so employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is specialist, highly skilled and demanding work undertaken in the public interest. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts;

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ensuring that those who are guilty are convicted and those who are not are acquitted.

21. There can be few greater responsibilities in Government than to ensure public confidence in the criminal justice system, and to guarantee the effective working of the criminal courts. These are underpinned by the need to comply with Article 6 Convention rights to ensure fair trials prosecuted by competent and fair prosecutors, and the statutory duty under the Access to Justice Act 1999 to maintain sufficient numbers of publicly funded practitioners to provide adequate representation to those defendants who require it.

22. In satisfying those duties and responsibilities, Government has long been supported by the profession and this Association. Highly skilled and experienced members of the profession have always been available both to prosecute and defend, however onerous the responsibility, notwithstanding that payment for such work is at a fraction of commercial rates. It has been done responsibly in the public interest and by way of a contribution to the delivery of justice and the rule of law.

23. Moreover, the nature of the public duty is reflected in the long established 'cab-rank' rule by which work is accepted without exercise of preference so long as it is properly remunerated. This applies whether it is prosecution or defence work, whatever the nature of the case, and however disagreeable the allegation or the defendant. By this means, a pool of properly qualified and experienced advocates is made available in every part of the country as a resource to the Crown Prosecution Service and to defendants alike. By the same token, in most areas of the country practices are generally divided between prosecution and defence work. This increases the knowledge and skill base of practitioners and adds quality. It also ensures that the rigorous independence and ethical standards of practitioners are maintained in the public interest.

The Approach to Remuneration

24. Historically, the contribution of the legal profession was matched by the agreement of Government, reflected in statute, to ensure that "fair and reasonable remuneration" was made available by way of payment for legally aided cases. That settlement permitted the Bar to apply to the "cab-rank" rule a presumption that all legal aid cases were properly remunerated and to impose an obligation on counsel to undertake them. Over the years, prosecution fees were not subject to the same statutory requirements or tied to the same payment systems. However, it is fair to say that both the profession and the Law Officers sought to ensure that rates were broadly aligned so as to ensure that they remained fair and reasonable, and to avoid inequalities of supply or quality arising.

25. That broad settlement was changed by the provisions of the Access to Justice Act 1999 which brought into play a 'best value' requirement for procurement of publicly funded legal services, and heralded the market-based approach that has characterised the landscape over the last decade. The requirement to secure 'best value' is unqualified by concerns of fairness or what is 'reasonable'.

26. Against this background, it is necessary to consider the history of attempts to ensure that costs were controlled, and that payment mechanisms provided the budgetary control and predictability required by Government.

The Graduated Fees Scheme

27. Rising costs of criminal defence work, driven by increased length and complexity of trials, changes to the law and other factors, led in 1996 to the creation of the Graduated Fee Scheme (GFS), a fixed fee system for Crown Court work devised by the Bar. The fees available under this system were tied to case seriousness, complexity and trial length, with very limited scope for variable payments in relation to

additional time spent in preparation. Moreover, the rates within the scheme were designed to be cost neutral, and were based upon actual payments made in 1994-5. The GFS was initially confined to 1-10 day cases, although its success in providing budgetary stability led to extensions of the scheme in later years to cover cases up to 25 days, and ultimately cases lasting as long as 40 days.

28. Between 1996 and 2006, the rates within the GFS were not increased to keep pace with inflation. At the time of the Carter Review of Legal Aid in 2007, it was calculated that the value of fees had been reduced by a very significant amount to a fraction of payments available in 1995. At the same time, longer and more complex cases that had provided a cross-subsidy for this work were made subject to contractual arrangements with the Commission under the Very High Cost Cases Scheme (VHCC). Moreover, there was an uneven distribution of value within the scheme that was to the significant disadvantage of more junior practitioners, who were under the greatest pressure.

29. The devaluation of the scheme, and its perceived unfairness, was the cause of considerable concern to the Bar. It seriously inhibited the ability to recruit and retain new practitioners, and threatened the maintenance of quality and supply of advocates.

30. Devaluation of the scheme led to the Bar voting in 2003 with great regret to abandon the rule deeming that legal aid amounted to "reasonable remuneration" for the purposes of the 'cab rank' rule. Thereafter, counsel were entitled to choose whether to accept an individual publicly-funded case or not, depending on the remuneration available. In 2005, when the Commission further imposed significantly reduced VHCC payments, the majority of individual practitioners declined new contractual work at the cut rates offered. It generated a crisis in supply that threatened to disrupt the work of the courts, and led to urgent meetings with the Lord Chancellor in an attempt to repair the situation.

31. The outcome of those events was firstly the extension of the GFS to cases up to 40 days so as to bring the numerical majority of contract cases within a fixed fee scheme on a basis calculated to be cost neutral. Secondly, it was agreed that Lord Carter of Coles would be appointed to lead an independent enquiry into the procurement of legal services, and would produce recommendations as to criminal fees within a year. Thirdly, the Bar Council, Criminal Bar Association and Circuit Leaders all agreed to use their best endeavours to ensure that in the interim there was an adequate supply of advocates willing and able to undertake the work.

The Carter Review.

32. The independent review conducted by Lord Carter was lengthy, detailed, painstaking and inevitably costly. The contents of his detailed report are well known and need not be repeated here. His "market based" approach to fixing prices for legal services anticipated that in the long term competitive tendering mechanisms might be appropriate for certain categories of work. But that would require the legal services market to re-structure over a significant time frame in order to be viable. In the interim, suffice to say that he recommended that the GFS scheme should be retained in a revised and improved form (the "Revised Advocates' Graduated Fee Scheme" – RAGFS) as the central mechanism for calculating advocacy fees in the vast majority of cases tried in the Crown Courts. Indeed, he recommended that a litigators' graduated fee scheme should be devised to deliver equivalent cost control on the litigation side.

33. In coming to these conclusions, Lord Carter accepted the value of the scheme as an effective mechanism, and that it had indeed delivered predictability and price control over 10 years. Whilst adopting a market-based approach to procurement in the long term, it was Lord Carter's intention that the RAGFS would provide an enduring mechanism for

payment over a significant period of years. It would accordingly provide stability and certainty for all concerned. To ensure the continued smooth functioning of the scheme, he recommended that a review body be created, comprising all relevant partners, to monitor the operation in future years.

34. The future cost of the RAGFS was the subject of detailed negotiation between all parties. A fixed cost envelope was used to determine the prices within the scheme, and no new money was provided. The envelope was determined by Government and calculated in accordance with its stated requirement to control costs within criminal legal aid overall. It permitted the RAGFS envelope to be re-valued by including within the calculation the cost of high cost cases not previously subject to a fixed fee regime. Thus, although the overall cost of provision was not increased, an agreement was reached to re-assign value within the overall payment system so as to secure an improved arrangement for the most junior practitioners. In particular, the enhanced improvement in rates within 1-10 day range of cases was, in effect, paid for by reductions in the rates available to more senior practitioners.

35. The final feature of the Carter process was for the review group to assess whether the necessary supply of specialist advocates, and the desired quality of work, could in fact be secured by the new rates offered. That was a judgement influenced by calculating whether the incomes that could be obtained by those engaged in such work were adequate for that purpose, whilst at the same time securing 'best value' for the Government. It perhaps goes without saying that the rates considered to provide adequacy and best value in 2006 have not been increased since they were implemented in 2007.

36. The Government accepted all of these recommendations, including the precise figures contained within the RAGFS.

37. In announcing the publication of "Legal Aid Reform: The Way Ahead" (Cm6993), the Secretary of State for Constitutional Affairs and Lord Chancellor (Lord Falconer of Thoroton) said that the paper:

38. " *sets out how the (DCA and LSC) will deliver a new system of legal aid procurement. The reforms will set legal aid on a sustainable footing for the future and will ensure that the most vulnerable people in our society receive the help that they need…In summary, we are proceeding with Lord Carter's proposals and we are delivering on our commitment to rebalance the funding between civil and criminal legal aid. The approach set out in the (paper) offers the best guarantee of an affordable, good quality legal aid system that will protect the vulnerable and is fair to taxpayers, fair to defendants and fair to practitioners*".

39. It is a matter of astonishment that, less than three years on, and in the absence of any economic case or other rational justification, that which was accepted to be:

- affordable is no longer so;
- necessary to protect quality and protect the vulnerable can be abandoned;
- fair both to taxpayers and practitioners is no longer fair.

40. It is a crude "smash and grab" cut, made with little thought, and in the absence of any impact assessment whatsoever.

The engagement of the CPS with the Carter process.

41. Throughout the whole period of Lord Carter's review, representatives of the Crown Prosecution Service were intimately involved with the process, represented at every meeting, and worked closely with both the Ministry officials and the Legal Services Commission in co-ordinating their evidence and strategies. Although the review was of legal

aid procurement, the CPS (and other prosecution agencies) had a strong interest in securing a settlement that enabled them in the future to maintain broad parity with defence fees. It was the explicit and oft-stated rationale of interventions by their representatives.

42. It follows that there was an entirely legitimate inference that the intention of the CPS, so far as possible and as soon as possible, was broadly to match the value if not the precise form of the new defence RAGFS. To do otherwise would be to defeat the perennial concern of prosecution fees falling behind those available to the defence, and the inequality of arms this might give rise to.

The Reasonable Expectation of Increased Prosecution Fees

43. Following the conclusion of Carter, negotiations began with representatives of the CPS as to when and how prosecution fees might be aligned with those available within the RAGFS. The failure of the negotiations to achieve this result over a two year period led to the comment of the then Chairman of the Association to the Justice Select Committee that is quoted selectively and out of context at page 14 of the paper. The full quotation is as follows:-

"One very considerable issue which must be addressed by the CPS, as a priority, in relation to the prosecution of rape cases is the wide discrepancy between the payment for the advocates who prosecute and who defend. Following the introduction of the Revised Advocacy Graduated Fee Scheme in April 2007 the payment for Defence advocates and Prosecution advocates has differed. This is most apparent for rape cases where, for example, in trials lasting between five and 10 days (which is most rape trials) the Defence advocate is likely to be paid nearly double that of the Prosecution advocate. The inevitable effect of this discrepancy is that many advocates will wish to defend

rather than prosecute those cases. Such inequality of payment cannot be justified for these types of cases that must be prosecuted by the most able and experienced advocates. It should also be noted that the Defence payment structure resulted from an independent review conducted by Lord Carter of Coloton."

44. We are surprised that the Government considers it proper to effectively misquote the evidence from our own Chairman as justification for proposing the opposite of what he was suggesting.

45. The suggestion that defence fees should be reduced to the level of devalued prosecution fees has accordingly been greeted by the profession with astonishment and disbelief. That is comes while the Bar is in the middle of negotiations with the CPS about fee levels, and by implication seeks to pre-empt them, is an extraordinary intervention. It is inconceivable that it was done in consultation with the CPS. They are negotiating in good faith with the Bar in an attempt to change and improve payments on the prosecution side.

Parity of Payment

46. It will be apparent from the brief recitation of history above that broad equality of payments is essential, and has always been considered so by the Criminal Bar. This is to ensure equality of arms in terms of quality and supply, and to reinforce operation of the cab-rank rule so as to secure skilled prosecutors who are rigorous, independent and even-handed in their approach.

47. We, of course, acknowledge that there are differences in the burdens applying to defence and prosecution counsel. Some are innate and predictable. Others depend upon the nature of the case and precise circumstances, many of which are difficult to predict. Any sensible scheme will provide the flexibility to accommodate such differences. But the grafting of such a scheme onto the RAGFS is a complex enterprise.

It requires the sort of detailed consideration that is not appropriate here, and direct negotiation between Advocates' organisations and the Prosecution agencies.

48. Precisely that form of detailed discussion has been underway for the last two years.

49. Whether it is "reasonable" in most cases for prosecuting counsel and defence counsel to expect the same level of award is not the real question that should be posed. In a 'best value" or "market" context it is a meaningless question.

50. But since the context is a proposal to reduce RAGFS payments to match the grossly undervalued rates available to prosecutors, the simple answer is that it is wholly unreasonable and irrational to achieve parity by such means.

51. In such a context the real questions are, firstly whether a failure to increase rates to broadly the same as the RAGFS will result in poor quality prosecutors, or no prosecutors. Secondly, what is the rationale and likely impact of reducing rates on the defence side?

Abandonment of Carter

52. The proposed reductions are wholly unreasonable and irrational for the following reasons:

(a) They amount to the abandonment of the Carter settlement, whose terms were accepted by Government only two years ago, when the common intention of the review, was to:

- address the serious impact of 10 years of inflation on the value of payments within the GFS;
- create a robust and enduring fees structure to last for a decade or more;

- achieve a settlement with the Bar to avoid the churn of annual negotiations and disputes;
- re-balance the new RAGFS, with money from longer and more expensive cases going to the 1-10 day cases undertaken by the junior Bar;
- within an agreed envelope of overall spending, to produce what Carter and the independent consultants agreed were reasonable levels of remuneration for practitioners at each level of seniority, to protect quality and ensure supply.

(b) The proposals renege on the agreement reached with the legal profession at the conclusion of the Carter process despite it being accepted that:

- the driver for reductions is expressly <u>not</u> current budgetary constraints on the Ministry of Justice;
- advocacy costs have been brought under control in the Crown Court;
- the RAGFS provides the budgetary control and predictability sought by Government;
- nothing has changed since Carter to require further drastic changes and reductions in payments.

This is precisely the sort of blinkered short-termism that the Carter process intended to consign to history. It also defeats the reasonable expectations of publicly funded advocates that defence rates were secure and would be increased in line with inflation and affordability, rather than reduced with the passage of time, and that prosecution rates were to be raised to broad equivalence.

(c) The premise that defence fees have somehow grown out of proportion to prosecution fees to cause an imbalance

is an entirely false representation of the history of events. It turns the facts on their head.

(d) On the contrary, since the conclusion of the Carter process, prosecution fees have remained (on Carter's own terms) wholly inadequate. The Bar spent two years in negotiations with the CPS in the reasonable and justified expectation that prosecution fees would be raised and brought into line with the RAGFS.

(e) The suggestion that prosecution fees are adequate and acceptable, because the Bar has continued to do prosecution work, is based on several wholly false premises; in particular the suggestion that practitioners bound by the cab rank rule are free to pick and choose work on price in an open market place.

- The majority of practitioners (especially out of London) have mixed practices. The nature of their work makes it impracticable to decline prosecution work, even if they were not inhibited by the cab rank rule from doing so.

- The last time practitioners refused to accept cases (during the VHCC dispute) the Criminal Bar was accused by Government of the most grave irresponsibility and unprofessionalism. It is scandalous, and wholly dishonest, now to suggest that it would have been acceptable to Government for the profession to refuse to prosecute rapists and murderers and terrorists because of lower fees.

- On the contrary, notwithstanding the failure in relation to the re-structuring of prosecution fees, the Bar has continued patiently to negotiate for two years. During that time it has honoured its professional obligations, and its public duty, and behaved entirely properly.

- In the light of Lord Bach's comments about free choices in the market place, and the implicit rejection of any prospect of proper fees for prosecution work, we can no longer guarantee that the Bar will not approach the offer of instructions on anything other than a commercial footing. We were in a position to encourage prosecutors to be patient whilst negotiations continued and there was a prospect of improvement. That moment passed with the publication of this Consultation.

- In any event, the tide may already have turned. The evidence suggests that many prosecution sets, and increasing numbers of individual practitioners, are seeking defence work in preference to prosecution work. That is hardly surprising in the current economic climate.

- In our judgement, a failure to improve prosecution fees in line with the Bar's reasonable expectations following Carter, creates a genuine danger of a crisis in the availability of experienced and quality advocates prepared to undertake this work, even in the short term. The CPS simply does not have the resources or capacity to substitute for this loss of supply.

(f) Cuts of this magnitude will have an enormous and critical impact on the future availability of experienced and quality advocates to prosecute and defend the most serious criminal cases. The criminal justice system will face a crisis sooner or later as a result, and the Government will not be forgiven for this.

- Quality of representation will suffer almost immediately, with the consequent risks of the innocent being convicted and the guilty going free.

- Short term savings in fees will be balanced by significantly increased systemic costs due to delays, longer trials, more appeals.

- Sets of chambers will be unable to survive the gross reduction in fee income necessary to sustain chambers, including the recruitment and training of new practitioners. For criminal sets, a reduction of 23% in the RAGFS is a reduction of 23% in chambers' income. This simply cannot be sustained. This will be the case, in particular, in more distant court centres on the Circuits. Representation deserts will be the result in the short term.

- In the longer term, the supply of advocates of reasonable quality, in appropriate numbers, will be at risk. This would put Government in breach of its residual statutory and Convention responsibilities so far as defendants are concerned. Since those who defend also prosecute, a loss of supply will impact further on the availability of those able and willing to work for the prosecution.

- The impact on diversity within the profession in the medium to long term will be profound. BME practitioners are heavily represented in the area of publicly funded criminal work. For many it is the most accessible route into the profession, and the ability of the criminal bar to provide the necessary training opportunities will be severely restricted by these deep cuts. The effects will be long-lasting, and profoundly damaging to any hopes of a more representative judiciary in future years.[2] The Criminal Bar Association is deeply concerned about this prospect. We are

[2] At Page 64 the Paper notes that a workforce survey of barristers showed that 38.6% (1,752) of those responding practised in crime. Of these 92.7% barristers responding reported doing legal aid work. 42.1% of BME barristers practised in crime compared with 36.8% of white barristers. These proposals will thus have a disproportionate impact upon BME practitioners.

committed to maintaining a diverse profession and it was our belief that Government shared this commitment. It is a dreadful indictment of this proposal to cut fees at the defence Bar that not a shred of work has been undertaken by the Ministry of Justice on the diversity implications this will bring.

QUESTIONS 5 and 6

53. "Harmonisation", in the terms identified, should be abandoned, whatever the timescale. The suggestion that *"there is no reason to believe that advocates would not accept instructions for the defence at rates closer to those paid by the CPS"* is wholly misconceived. It mis-states history, ignores the serious problems giving rise to the Carter Review, and risks serious consequences for the delivery of justice through the criminal courts.

Summary

54. The CBA has long recognised there needs to be budgeting predictability for publicly-funded criminal defence services in the Crown Court. That predictability is currently provided by the RAGFS, which, we believe, is cost-effective and relatively cheap to administer.

55. Cuts of this magnitude will have an enormous and critical impact on the future availability of experienced and quality advocates to prosecute and defend the most serious criminal cases and on the diversity of people prepared and able to undertake publicly funded criminal cases. The criminal justice system will face a crisis sooner or later as a result, and the Government will not be forgiven for this.