

## RESPONSE THE MOJ CONSULTATION PAPER August 2009

FAO Annette Cowell  
Ministry of Justice

Miss Tracey Lloyd-Nesling,  
Chambers of James Tillyard Q.C.,  
30 Park Place,  
Cardiff  
CF10 3BS

14<sup>th</sup> October 2009

Dear Madam,

I write in response to the government's latest 'legal aid funding reforms' as set out in the latest Consultation Paper. I am appalled but, sadly, not surprised at the contents. I urge you to reconsider these ill-conceived proposals. They will be detrimental to the interests of justice. Furthermore, they will be particularly detrimental for those who come to the criminal Bar from the more diverse backgrounds that the Government claims to encourage.

To suggest that the current 23% imbalance between the Prosecution and Defence fees for advocates in the criminal courts justifies a reduction in Defence fees so that the fees are 'harmonised' is a blatantly dishonest attempt by the Government to go back on its word. Has it forgotten about Lord Carter's report? Does it think the Bar has?

I make the following observations;

1. The Graduated Fees agreed following that report were thought by Lord Carter to be the *minimum* necessary to ensure that the appropriate number of qualified advocates would be prepared to undertake defence advocacy. This was an independent report which followed a huge amount of consultation and analysis of data. To reduce those fees only 2 years down the line would lead to the decline of good advocates choosing to do crime and the reduction of

those currently practising in this area. Standards will decline. The criminal justice system will suffer.

2. There is no evidence to suggest that the criminal budget is spiralling out of control. Indeed, the GFS scheme has not increased with inflation since its inception. In real terms our fees have declined since 1996. The Carter Report attempted to redress some of that unfairness. We do not fully know the reasons behind the current proposals, although one suspects it is a misguided attempt to cut costs in a short term, knee-jerk reaction to the economic downturn. This will be shown to be false economy when standards decline in direct proportion to the increase in costs of running criminal cases (i.e. when efficiency is lost, trials are not prosecuted properly resulting in the guilty walking free and appeal convictions/sentences are more common because of a lack of good quality defence advocates). Bad and/or inexperienced advocates make a case last longer which increases Court costs. I am also very strongly of the opinion that a bad advocate can do a great deal of emotional damage to a victim/witness that a good advocate can avoid. Surely the Government would want e.g. a child victim of sexual abuse to be examined and cross-examined by the most skilled advocates who should, in all fairness, be paid a reasonable rate for doing so? The Government has frequently expressed concerns about cases involving child victims and witnesses, sexual offences and domestic violence cases. Female advocates appear far more often in these sensitive, difficult and often complex cases and we will be disadvantaged by the proposed cuts in fees. Lord Carter's review recognised that and the present scheme is much fairer to women advocates. Being self-employed, female advocates at the independent Bar do not have the advantages of female employees, e.g. maternity pay/leave. Although the Bar has done a great deal to promote female advocates at the

independent Bar, some disadvantages will always remain simply because we are self-employed. It is difficult enough to encourage young women to take up a long-term career at the criminal Bar without the huge financial disincentive that will be caused by the proposed cuts.

3. To say that 'the CPS have not found any difficulty in finding advocates to undertake Prosecution work' is to completely (and dishonestly) ignore the fact that;

- i) The CPS was involved in those lengthy and difficult discussions with Lord Carter but then withdrew from following its recommendations at a late stage. We have been negotiating with them for 2 years to redress that imbalance. It has never been accepted that the different level of fees paid by the CPS were in any way appropriate or fair. Despite that the Bar have continued to do Prosecution work in good faith and in the hope that some resolution could be reached. Many of us continue to do Prosecution work because we wish to maintain a balanced practice and because we do not want to see prosecutions being left to those who are too junior and/or incompetent to get defence briefs.
- ii) The Bar are not able to refuse to undertake Prosecution work because of the cab rank rule. By virtue of our own professional rules and codes of conduct we are not in a position to reject prosecution work on the basis that it is not remunerated as it should be. The government obviously forgets the threats it made to the Bar in 2006 when many individual practitioners did just that, due to the proposed cuts to the GFS.
- iii) An increasing proportion of the CPS work is now undertaken by in-house CPS advocates. Those individuals are therefore not paid the (23%) lower

fees, rather they receive good salaries with holiday pay, sickness pay, pension contributions, travelling expenses, and provision for flexi-time and maternity leave. It would be interesting to see whether the work they undertake *at the real cost* to the state makes this a cost-effective exercise as compared to paying the Bar fixed fees on a case by case basis. I suggest that you read the independent auditors report commissioned by the Bar Council recently which proves that the CPS claim to be saving money by the use of in-house advocates is not correct. In any event, the CPS is not having to rely wholly on the Bar to do the available work because they are doing some of it themselves. It is therefore no surprise they are not having difficulty getting the work covered despite paying lower fees.

- iv) Moreover, whether the CPS is 'getting the work covered' is not the real point. It is no use to the Criminal Justice System if the advocates doing the work are doing it to a poor standard and inefficiently. Due to the difference in the level of fees there is a currently a clear preference by the most able barristers to do defence work. That cannot be in the interests of justice. Also, there is governmental pressure on the CPS to cover the work in-house with the use of HCA'S. Whilst not all HCA'S in the CPS are of poor quality, it is certainly my experience that most are mediocre, a few are very poor, and almost all do not have a great deal of practical experience in conducting Crown Court trials. The CPS's own HCA's are not expected to meet the standards they set for the Bar in terms of being at the accredited level in order to prosecute certain types of case. That is mainly because a number of years' experience and proved ability is demanded for levels 2, 3 and 4. The HCA's do not and cannot have

that experience. Yet it is acceptable for them to prosecute rape cases without being a level 4 prosecutor, or be led in a murder case. Reducing the fees as currently proposed will inevitably lead to less and less able advocates doing prosecution (and defence) work and more and more reliance on the inexperienced and under-resourced CPS HCA's who do not have the incentives to attain such standards as those driven by a competitive market.

4. If my income is to reduce by 23% then I will be in a position where I have to seriously reconsider whether I continue to practice at the Criminal Bar. I fear there may be many like me who will be in the same boat. Given the amount of time and private and public money spent on the years of training that the Bar has collectively accrued, the loss of a great number of good quality, experienced advocates will be wasteful and detrimental to the Criminal Justice system overall. The proposed cuts cannot justify that.
5. Should my chambers have to bear the brunt of a 23% reduction in income from all criminal practitioners then it could seriously undermine its very existence. Although we are a multi-disciplinary set, criminal work brings in 50% of the income of chambers. With cuts also proposed in family and other legally aided work the effect of the reduction in criminal fees will be acutely felt. Again, the dissolution of experienced barristers' chambers will be detrimental to the Bar, the future judiciary and the proper administration of justice.
6. Some female practitioners choose to do crime because they believe there is a fairer access to work in the public sector as opposed to the private sector. This may in part be because it is simply left to market forces to dictate what advocates are favoured, and this can mean prejudices

against females can continue since there is no monitoring of the proportion of work sent to females and ethnic minorities (as there is in the CPS, for example). Females may well be dissuaded from entering the profession if they feel that publicly funded work is poorly paid and that the private sector is heavily biased towards men. Indeed, men and women will be put off joining the Bar as a whole due to the proposed cuts. We are already finding these past few years that junior barristers are choosing to do civil and privately paying work because they simply cannot afford to practice in crime. Soon the only barristers gaining the years of experience in practising crime will be those who have not specifically chosen to do crime but are doing it because they are not good enough to practice in other better remunerated areas of the law. The only other persons who will be able to practice crime will be those whose families are wealthy enough to support them financially. I have been in practice now for 21 years and I have seen the efforts made by the Bar to become more diverse. Those efforts have been successful and I welcome them. When I began to practise at the Bar, I was unusual as I was educated at a comprehensive school in the South Wales Valleys but for those beginning to practice now, that is not an unusual background. In my opinion, these proposals will go a long way to undoing all that good work and the criminal Bar will become less diverse as a result. Surely that can not be the Government's intention? It is certainly not the intention of the independent criminal Bar.

I urge the Government to move away from making brash statements that they think will win votes and impress the public, and instead to look at the true reality of the current Criminal Justice System and the inadequate fee structure which currently exists. It is a wonder that there is still an abundance of hard-working, talented advocates at the Bar who

are prepared to undertake Prosecution and Defence work and do so, at short notice, during evenings and weekends, and do it to such a high standard. We are already pushed to the limit. The reduction in fees proposed is short-sighted and has disastrous consequences. Moreover, it is a breaking of the government's own promises 2 years ago. Purely as a matter of principle the proposals must be rejected. Instead the prosecution fees should be increased and 'harmonised' with the Defence fees, and then the government may find that they get better value for money, greater efficiency and a criminal justice system of the highest quality. In recent years, the Government has had to tackle the unintended and detrimental consequences of ill-thought out criminal justice legislation (e.g. IPPs) passed in the face of considered and justified opposition from those of us who work at the Courtface. I urge you to ensure that you do not find yourself in that position as a result of these proposals which will cause considerable damage to the criminal justice system.

Yours faithfully,

Tracey Lloyd-Nesling.

cc. Julie Morgan M.P.