CRIMINAL BAR ASSOCIATION

Response

To

Ministry of Justice Consultation Paper

Dated August 2009

"Legal Aid: Funding Reforms"

Introduction

1. 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 the largest specialist bar association. The high international reputation enjoyed by our criminal 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; ensuring that those who are guilty are convicted and those who are not are acquitted.

2. The Ministry of Justice issued its consultation *Legal Aid: Funding Reforms* on 20th August 2009. The consultation period ends on 12th November 2009. The Paper invites responses to sixteen questions which arise from five main proposals: the proposals are to -

- Reduce by up to 23% the rates paid to defence advocates to align them more closely with the rates paid by the CPS.

- Remove the disparities in police station fees
- Replace the standard fee for committals for trial with a fixed fee
- Ending payment for criminal file reviews.
- Standardise and reduce the payments to experts in both criminal and civil cases and set maximum rates.

3. The Paper has already been the subject of much criticism for the absence of detail in relation to the proposal to reduce fees paid to defence advocates, the absence of any proper analysis of how these fees are, or are not, comparable to fees paid to prosecution advocates and the lack of crucial impact assessments.

4. It has been pointed out that at the time of the introduction of the RAGFS it was agreed that there would be a rise in fees paid to defence advocates of approximately 16.5%[1], which would be reflected in the different fees to be paid at that time to prosecution advocates, yet the Paper claimed that the discrepancy between fees paid to defence and prosecution advocates was 23%.

5. The Ministry of Justice has responded to this criticism and conceded that the figure of 23% was wrong, and the correct figure should be 18% - the figure we suggested was a more accurate one. This confirms the worrying impression that the paper had been hastily and, in some respects, carelessly produced.

6. The Ministry of Justice has also confirmed that further consultation will be necessary before any detailed proposals are advanced. Accordingly this

1 The original estimate by the Bar was 16.5% but as a result of minor variations in how cases have been categorised, together with what turned out to be an underestimate of the number of pre-trial hearings, two different models subsequently produced figures of 17.6% and 17.9%

response must, by definition, be general in its approach to some of the proposals.

Executive Summary of Answers

7. **Questions 1 and 2** deal with 'rationalising' police station fees.

- We do not accept that there are inefficiencies and are concerned that the proper representation of suspects at police stations will be undermined and costs incurred elsewhere.

8. **Question 3** proposes replacing the current standard fee for committals for trial with a fixed fee.

- We do not agree with this proposal.

9. **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%[2] to 'harmonise' with prosecution fees.

10. The Response's principal points are: -

- The current rates and level of fees were agreed by this Government only a matter of three years ago after a very extensive process of analysis and negotiation and were published with this statement to Parliament:

  "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"[3]

  To tear up that agreement is a serious breach of good faith.

[2] or 18%
[3] "Legal Aid Reform: The Way Ahead" Cm 6993 introduced in Parliament by the Lord Chancellor on 28th November 2006 : Hansard 28 Nov 2006 Column WS79

- Because the fees paid to advocates are based upon a fixed fee system, any increase in the cost of provision of this legal service is beyond the control of our members and the result of increased prosecution activity.

- Contrary to the claim in the paper that the rates payable to prosecution advocates are both fair and attractive, the experience of our members is the exact opposite.

- There is a serious risk of there being an inadequate supply of properly qualified prosecution advocates because of the inadequate rates of remuneration.

11. **Questions 7 to 13** deal with the proposals to standardise and reduce payments for experts.

- We consider that the setting of rates should focus on the task the expert is undertaking and should be at a level that is economic for the experts concerned. Their continued contribution to criminal trials is undoubtedly in the public interest.

12. **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."[4]

13. **Question 16** asks for alternative proposals to reduce criminal legal aid expenditure.

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QUESTIONS 1 and 2

Do you agree that reductions should be made only against areas that are both over-subscribed with above median fees?[5]

Do you agree that rationalising police station fees in these areas is the right approach to contain costs and discourage inefficiencies?[6]

Do you have any other suggestions that would tackle the fee inequalities and deliver the required savings?[7]

14. In principle, it is desirable to contain costs and discourage inefficiencies; however, two basic facts should be acknowledged.

15. Firstly, the Police and Criminal Evidence Act 1984 (PACE) was enacted to right a considerable number of wrongs that had resulted from the lack of any clear framework to provide and safeguard the proper rights of suspects in custody. This framework included the right to the presence of a properly trained legal adviser – not necessarily a solicitor – to advise and observe a suspect's detention and questioning.

16. Secondly, what is often overlooked is that this relatively modestly-funded framework has resulted in incalculable savings in public expense; because they are incalculable they are easily overlooked.

    a. Before the enactment of PACE criminal trials were often greatly protracted by the evidence and cross-examination of so-called confessions that were disputed by the defendant; this often constituted the major part of the trial. That element of criminal trials has completely vanished and is now

[5] This is the form of Question 1 at Page 11 of the Consultation and of Question 2 in the "List of questions for response"
[6] This is the form of Question 1 from the "List of questions for response"
[7] This is the form of Question 2 at Page 11 of the Consultation

only a memory. This saving in the costs of trial should not be ignored;

b. Subsequent appeals against the rulings of judges in admitting disputed confessions were not uncommon and were expensive and again sometimes protracted with the admission of fresh evidence. Of course the cost to the reputation of the criminal justice system was equally incalculable.

17. Accordingly, face to face advice from properly qualified advisers is actually a cost-saving exercise and if this is undermined any apparent savings in costs may be dwarfed by increasing costs in another part of the system – the trial process - by undermining the integrity of the detention and questioning of suspects.

18. We are concerned that the consultation has either not considered the historical background to recent changes in the scheme for paying police station fees or is happy to ignore it. The fixed fees that were introduced in October 2007 as a consequence of the Legal Services Commission's consultation paper were said to *"give providers greater scope to benefit through efficiency savings as the fixed fee will be paid regardless of the amount spent on a case"*. (Para 3.1 – February 2007) *and "while no two police station attendance cases will be exactly the same, the relatively narrow spread of average costs within police station duty solicitor schemes – with around 90% of cases costing no more than £400 – is an indicator that police station attendance cases are well suited to the introduction of fixed fees".*

19. The fixed fee scheme has produced stability in expenditure. We do not consider that it has been demonstrated that inefficiencies persist. We are concerned that the proposed cuts will render the provision of an important public service uneconomic. It follows that we do not accept the premises that "fee inequalities" require tackling or that Police Station

Advice is any longer an area that should be seen as a target for "required savings".

20. Representation in the police station was and is a demand led system; any increase in the cost is outside the control of the providers of the service.

21. We believe that this has led to fundamental misunderstandings about the scheme. For example equating Bexley with Heathrow as comparable police stations with comparable requirements reveals a disturbing lack of understanding of how the duty solicitor scheme works in practice.[8]

22. Creating an inadequately funded fixed fee system will result in lack of appropriate representation. What will be the consequences? The police are unable under PACE to question a suspect who has requested advice but not received it. There will be delays in questioning, creating inefficiencies in the investigative process. Unrepresented suspects will be interviewed creating disputes as to evidence in the trial. Inadequate advice from poorly trained and/or overworked advisers will result in further delays in trials as evidence is disputed.

23. We consider the use of the term "over-subscription" in the Consultation paper as misconceived. It appears to be based upon data obtained from practitioners in July 2008 when they were asked how many duty slots they would like.

24. The underlying data for the claimed oversubscription has not been provided. Insofar as duty solicitor work is demand driven it is not clear how the numbers of solicitors available to provide the service can build in any inefficiencies.

25. The proposal to reduce fees which are above the median level in "over-subscribed" areas seems designed to focus disproportionately upon work

[8] For a more detailed critique of the reasons why this comparison is inappropriate see the LCCSA's response

in urban conurbations and, in particular in, London. We consider that the historical average costs basis for the existing fixed fees went some way to properly reflecting the nature of the work carried out due to the characteristics of the areas in question. These characteristics included the nature of local populations, type of crime, the location and volume of work passing through the different areas' police stations.

26. The proposal to introduce cuts in the manner proposed, by reference to the median level, removes any link to the nature of the likely work and locality. It is a retrograde step that we envisage will have an adverse impact on supplier base for the provision of police station advice. The long-term impact on the economic viability of this type of work for suppliers, including those from BME backgrounds, does not appear to have been properly assessed. This lack of assessment causes us grave concerns that the short-term savings produced may result in real issues of access to justice for members of the public.

27. Finally, we fail to understand the argument that over-subscription is an indicator of demand outstripping supply and thus the work is overpaid. Queues at soup kitchens are not usually seen as an indicator that the 'customers' are overfed but greedy.

28. We should acknowledge that these proposals do not impact on the self-employed Bar directly under the present arrangements for the distribution of work between the two branches of the legal profession. However, adverse and unjustified impacts upon solicitors who are a source of referral work for the self-employed Bar and of employment for many members of the employed bar have been shown to lead to "knock-on" effects that are of not only of real concern to our members but also to the Criminal Justice System as a whole.

QUESTION 3

Do you agree with the proposal to replace the current standard fee with a Committal for trial fixed fee?

29. No. The work undertaken by a solicitor to prepare for a committal hearing is different from the work carried out by a litigator to prepare for a Plea and Case Management Hearing.

30. The Consultation states the Ministry of Justice view as being:

"We believe that this allows for an element of duplication of funding within the current arrangements as some of the work done for the committal hearing is also work that is paid for under the graduated fee scheme"

31. Preparation for the committal hearing essentially requires an analysis of what can be proved on the basis of the material served for the purposes of committal. The threshold for committal is whether the evidence discloses a prima facie case. There is no need to take instructions from the defendant in order to determine that question. Preparation for a PCMH is entirely different and although there may be some re-reading of the same material, it is in an entirely different context:

- It will be with a view to taking detailed instructions from the client on each witness statement so as to enable proper trial preparation;

- It is likely to require consideration of the necessity of making or resisting hearsay, bad character or special measures applications;

- It will be with a view to considering the instruction of experts;

32. We consider that, even if it is the same solicitor who is performing the two tasks (which is far from certain), the proper performance of each task is distinct and will require the "element" of duplication so as to ensure that each is done properly. We would consider it unprofessional for anyone to prepare for a PCMH relying upon just their recollection of the papers from an earlier perusal for the purposes of preparing a committal.

33. One final observation we would make with regard to this proposal is that it appears to be correct that the increase in costs is in large part due to the following factors: -

- An increase in the number of committals to the Crown Court
- Inefficiencies on the part of the CPS in properly preparing committal proceedings

34. If this is correct then far greater savings could be made by ensuring committal proceedings take place on the date set and not repeatedly adjourned.

QUESTION 4

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

Introduction

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

36. 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.

37. 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.

38. 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

39. 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.

40. 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'.

41. 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

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. The Government accepted all of these recommendations, <u>including the precise figures contained within the RAGFS.</u>

52. 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:

" *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".

53. 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.

54. 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.

55. 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.

56. 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

57. 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. <u>It should also be noted that the Defence payment structure resulted from an independent review conducted by Lord Carter of Coloton."</u>

58. 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.

59. 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

60. 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.

61. 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.

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

63. 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.

64. 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.

65. 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

66. 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

67. In 2007 to 2008 the Legal Services Commission in conjunction with the Bar Council conducted a self completion survey among barristers to assist the LSC develop its proposed pilot impact assessment of the QAA scheme and to supplement the range of diversity and other information that the Bar Council held on its barristers. There were 4161 responses.

68. Significant findings were as follows: -

- 37% practiced in crime but the figure for those from BME backgrounds was 44.7%

- A third of those practising in crime received over 91% of their income from it .

- A fifth of barristers who responded to a survey had been called to the bar before 1980. Reflecting the changing age profile , only 6% of the women had been called before 1980 and only 22% before 1990 .The figures for men were 26% and 51% respectively.

- Over half of the female barristers had been called to the bar in the last 12 years

- 53% of BME respondents had been called since 1995
- 23% of graduates of Oxford and Cambridge practised in crime compared to 52% of graduates from former polytechnics
- Respondents were asked to estimate the proportion of their work coming from firms with a significant BME membership, defined as firms with at least one third of partners/directors who were BME .
- While overall 15% estimated that more than a quarter of their work came from BME firms this increased to 32% amongst BME respondents .

69. Research conducted by the LSC itself in considering the impact of Best Value Tendering (BVT) found[9] that firms owned and controlled by BME solicitors tended to have *smaller* contracts compared to those firms with white majority ownership. The effect on smaller BME firms would be that they would not be able to cross-subsidise their costs to the extent that the larger firms would and thus would be driven from the market place. The assessment concluded that there would be a discriminatory effect on the ability of BME firms to tender due to their relatively small size and volume compared to larger white multi partner controlled firms. The same was true of any increase in the use of fixed fees in contracts.

70. These figures confirm anecdotal and impressionistic evidence. The Bar has succeeded in becoming more diverse in the last ten years or so; however the route into the law for the more disadvantaged has overwhelmingly been to undertake publicly funded work, and in the case of BME lawyers, publicly funded criminal work. Furthermore, as well as BME practitioners being statistically over-represented in publicly funded work in general and crime in particular, solicitors firms which were owned or controlled by BME practitioners tended to be smaller and thus more susceptible to pressures created by fixed fees.

[9] Para 11.18 of the Annex to the Consultation

71. We believe that the impact upon 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.[10] The Criminal Bar Association is deeply concerned about this prospect. We are 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.

Summary

72. 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.

73. 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.

1. [10] 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.

QUESTIONS 5 and 6 :Harmonisation of Prosecution & Defence

74. "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.

QUESTIONS 7 TO 13: Experts' Fees

75. The proposals relate to the payment of experts' fees in both civil and criminal work. We limit our views to experts in criminal proceedings.

76. Our principal concern is that difficulties encountered in instructing expert witnesses in criminal trials should not be exacerbated. These difficulties are real. If, as we suspect, many experts "cross-subsidise" their work in criminal matters from other areas of work that are likely to include acting in publicly-funded civil work we would be concerned at steps that might lead them to withdraw from the provision of expert witness services all together, due to such work becoming uneconomic.

77. We consider that the setting of rates should focus on the task the expert is undertaking and should be at a level that is economic for the experts concerned. Their continued contribution to criminal trials is undoubtedly in the public interest.

78. The Consultation notes that neither the Ministry of Justice nor the LSC have a direct relationship with experts. The situation is the same for the Bar when it comes to the instruction of experts and the payment of their fees. We recognise, putting the role of the CPS in criminal work to one

side, that in both criminal and civil work it is solicitors who are primarily involved with experts.

79. The vast majority of experts in criminal cases are paid by the state, whether appearing for the prosecution or the defence. The state has thus been in a position to limit costs by simply refusing to pay higher fees. This has resulted in certain supply problems; for example there is a chronic lack of properly qualified pathologists in London who are able or prepared to accept instructions in murder cases.

Question 14

Do you agree with the initial Impact Assessment? Do you have any evidence of impacts we have not considered?

Question 15

Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals will have a disproportionate adverse impact on any group? How could nay impact be mitigated?

80. Given that 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."[11]

The only comment we would make with respect to the impact assessments is to observe that, as the paper says,

"The LSC does not hold data on payments to individual barristers that would enable us to assess the diversity impact of proposal 3."

[11] Page 21

81. However, as 42.1% of BME barristers practised in crime compared with 36.8% of white barristers any proposal that would reduce the fees payable to barristers in criminal cases will disproportionately impact upon BME barristers. The question that clearly needs to be addressed is why the number of BME barristers practicing in crime is disproportionate to the number of white barristers. We would venture to suggest that one reason is that the problems of racism in the professions – institutional as well as personal – have been addressed more successfully in the criminal justice system than in other areas of the provision of legal services. The reasons for this relative success are many and varied, but this greater equality of opportunity will be damaged by measures that will make it harder to make a living at the criminal bar than hitherto. With the level of debt amongst trainee barristers higher than ever before as a result of the rising costs of training and the loss of grants to students in higher education – another reform carried through by this government – reduced incomes will serve to discourage young people from seeking to enter the legal profession as criminal practitioners.

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11th November 2009