Western Circuit Response
to the Ministry of Justice Consultation on Legal Aid Funding Reforms

1. This is the response of the Western Circuit to the Ministry of Justice consultation paper "Legal Aid Funding Reforms" closing 12 November 2009. The Western Circuit represents about 1000 practising barristers of whom about 50% are specialists in criminal work. Of these almost all undertake defence work and for many it is the mainstay of their practice.

2. The Western Circuit has established a Working Group to respond to the MoJ Consultation Document. Our response addresses national issues in general terms and then refers to issues local to the Western Circuit. This document represents the collective view of the group assigned to produce this paper. Whilst no poll has been taken, it will also represent the views of the large majority of criminal practitioners on the Circuit and their clerks/administrators.

3. This paper addresses only questions 4,5 and 6 of the consultation, that is to say the questions relating to the advocates graduated fees scheme.

4. Preliminary Point. We begin by observing that the consultation seeks to achieve something approaching parity with a revised CPS graduated fees scheme which we understand is planned. Neither we nor anyone else as far as we are aware has any idea how the new CPS scheme will look. It is very difficult to respond at all in those circumstances and our response must be provisional.

5. General Comments. The current RAGFS was established only some 2 years ago, following the Carter review. The current fees were deemed by Lord Carter to be appropriate for the valuable and demanding service the criminal Bar provides. It was a legitimate expectation that prosecution fees would be increased so as closely to match those of defence advocacy. It is deeply regrettable that this has not been honoured. It is worse – and we are sorry to suggest disingenuous - that a Department of Her Majesty's Government of the United Kingdom should now turn matters on their head and seek to reduce defence fees on the basis of a lack of parity.

6. Summary. The MoJ consults on the idea that as the CPS has no difficulty in finding barristers at the rates it pays, defence fees should be no higher. In short, this is a misleading conclusion given the following;

   6.1. Prosecution work for the independent Bar has declined dramatically in recent years through the growth in use of C.P.S. in-house advocates.

   6.2. The independent Bar continues to be subject to the ethos (if not the in publicly-funded work, the letter) of the cab rank rule. In practise, it will not refuse prosecution work as a matter of professional ethic.

   6.3. Barristers will undertake prosecution work at rates which are unacceptable because the provincial Bar is also based upon the principle of mixed practice.

7. A Regional Approach. We propose to look in a little more detail at how the proposals would affect our region, although we suggest our conclusions are equally relevant across all similar areas of the Country. We hope by this route to add constructive insight into the consultation exercise being undertaken. The Western Circuit is subtly different from some areas in that it has no conurbation large enough to produce substantial sets of chambers specialising entirely in criminal law (no set, even in Bristol, could be so described). Rather the Bar on this Circuit is spread across less focussed sets organised on more traditional lines, covering a number of practice areas. The same could be said for many provincial areas up and down the land.

8. Bristol is professional home to about 240 Barristers. Historically, the focus of the Bar in the city was criminal work. In recent years, however, a corps of civil and commercial practitioners has sprung up as the city thrives commercially and as new avenues in the law open up. Most sets of chambers have sought to tap this new market. One or two, notably St Johns, have as a matter of policy moved away from publicly-funded criminal work. However, for the present, all sets in Bristol continue to take on some publicly-funded crime.

9. The Hampshire (Winchester/Southampton) area is professional home to about 120 barristers. In addition, a number of sets in London, traditionally Circuit sets but now more diverse geographically and in practice area, continue to send many practitioners out to this area of the Circuit on a regular basis. Exeter has about 80 practising barristers. Other smaller centres are dotted around the Circuit.

10. Everywhere there is now a sharp division in incomes. Typically a civil practitioner will earn twice that of his colleague practising in crime. Even family practitioners earn more than criminal practitioners. The divisions increase with age and experience: they are sharper towards the senior end of the profession. It is necessary to bear in mind that on this Circuit all these practitioners work in very close proximity to one another in sets that have in the main diversified into a number of different practice areas.

11. <u>The Stance of the Western Circuit.</u> Our first point is that this is the least appropriate moment in the long history of the legal professions to make a comparison between prosecution and defence fees. Why is this?

12. Since June 2004 when the CPS decided to take large quantities of Crown Court advocacy in-house, prosecution work across the Western Circuit (where in Bristol and Hampshire there was initially a particularly aggressive approach to the new policy) is down about 70% in the numbers of instructions and more than 30% in terms of fee income. Thus there are many underemployed prosecutors around at present. The 'market' has been skewed, perhaps particularly so in those provincial areas, such as this Circuit, which are light on the high-end crime that is relatively unaffected by the new policy.

13. Moreover, following the last 'Carter round' and the increase in the rates paid for more junior defence work the entire profession understood that there was to be money made available to <u>increase</u> rates of prosecution pay to achieve parity with rates for defending. In other words prosecutors were prepared to carry on accepting instructions and not look elsewhere on the basis that the differentials in pay were a blip that would soon be corrected.

14. Our next point is that the current CPS policy and fee structure has a particular effect. The major differentials occur in the simpler shorter work done by the most

junior. It is this work that is in particularly short supply. However, more complex and better paid work is still, relatively, available as the prosecution barrister makes his or her way up the ladder. It is therefore particularly obvious that the junior prosecutor, anxious to get a foot on or take the next step up that ladder, will tolerate lower fees than he or she would be paid for defending in the same case.

15. Similarly CPS - despite the reduction in work - continues to offer the prospect of repeat business - far more than any defence solicitor can offer. By definition it has 50% of the market share and is therefore in a dominant position. Basic commercial sense means that anyone wishing to work would be prepared to countenance some price discount.

16. Furthermore – and we respectfully suggest this point should not be underestimated - the Bar has been prepared to absorb unacceptable rates of pay for prosecution work precisely because of the Carter increases in defence fees: it is a case of swings and roundabouts. Had all work been paid at prosecution rates the drift away from crime which below we identify as happening on this Circuit would have been far more significant.

17. These effects are seen particularly on a circuit such as ours. The reasons are as follows. First, the tradition that the barrister both prosecutes and defends runs deep in the provinces, if we may say so particularly on the Western Circuit. We believe this tradition is valuable: it promotes independence of thought and action and therefore a more efficient system as pleas are properly accepted, weak cases withdrawn and so forth. Secondly, whilst the cab-rank rule was formally abandoned in respect of criminal work many years ago, this has had absolutely no effect on members of this Circuit who continue to adhere absolutely to its ethos. Thus a prosecuting brief has been, until now, invariably accepted when the barrister is available, in spite of universal misgivings over the rates of pay. Thirdly, the junior barrister on circuit is more likely to begin his or her career by practising to some extent in criminal law – it is almost universal. Again, we would suggest that this approach is valuable in itself to the profession as a whole and also to the system. It should not be jeopardised. It fosters oral advocacy skills in a way that no other ‘apprenticeship’ could.

18. What would be the effects of the cut proposed? We are aware that the present consultation round is now said to be limited to the principle of parity between prosecution and defence. However, we respectfully suggest there is a danger of mission creep. We therefore propose to look briefly at the likely effects of a cut of the size proposed. The advantage of taking a relatively closed world such as a Circuit like ours is that it is easier to identify the very serious ramifications and to test these against current trends.

19. On Circuit, chambers tend to be more diverse in terms of practice areas. It is thus easier for individual members faced with a threat to their practice to diversify. It is also easier at a chambers level for the organisation to cushion the effect of severe funding difficulties in one particular area. Thus the picture that might be expected if funding in crime had reached a critical level would look something like this. At a chambers level most chambers would be forced to quietly look to change the emphasis of their work away from public funding. Some would adopt a more radical approach. Some would do nothing. The number of pupillages available would reduce. Commercial pressure would push criminal work down the ladder. Overall, on a Circuit such as ours we suggest the picture may differ to some extent from the picture in the major conurbations in that (i) diversification away from crime at the junior Bar will be seen sooner and more radically (because the opportunity exists in our less specialised chambers); but also (ii) we are unlikely to see any sudden crash in, for example, the number of pupillages such as may be experienced in a specialist criminal set. There will overall however be a marked move away from crime.

20. Are these predictions borne out by the evidence?

21. As to pupillage numbers, the experience on Circuit is that numbers have drifted downwards over the last 5 years. The figures for chambers on circuit and major circuit chambers in London are: 2005: 30; 2006: 24; 2007: 26; 2008: 21; 2009: 20. We hold no figures for numbers of tenancies, but our experience is that the trend is the same, and indeed it could hardly be otherwise.

22. It must be remembered that the Bar is used to a career progression that sees low earnings on entry. However, as juniors look up the ladder they no longer see the

career opportunities as lying in criminal law. Increasingly, they and their chambers are looking to diversify away from criminal law. We look towards a time when, if the work is to be done by the Bar at all, it will done by junior practitioners as a means of cutting their teeth before moving on to other fields in an increasingly law and litigation conscious society. Very senior practitioners may continue to do heavyweight crime, but the real effects will be felt in the core business of middleweight Crown Court trials. A practice in criminal law may come to be seen not as an end in itself, but as an adjunct to another practice. It has been the publicly expressed message of the leader of this Circuit for the last two years that members should diversify away from publicly-funded work where they can.

23. Furthermore, the proposals will tend towards a decline in social mobility. The historic bane of the Bar was that it was only open to those with private funds. It was a socially elitist profession and not meritocratic. This was perhaps less true in the somewhat late-developing provincial bar. It is therefore depressing that there could be no more effective route to encouraging only those who could subsidise their own practices in the early days than by reducing criminal fees in the way proposed – and that this effect may well be felt even more keenly on a Circuit such as ours than elsewhere.

24. On our Circuit, geographic mobility is also likely to be affected. Travelling expenses are high (it is 311 miles between Truro in the far West and London), and no sufficient allowance is made for them in the fee scheme. Members' willingness to travel long distances would be much reduced by further cuts. Busy high-quality practitioners in the larger centres would be less likely to travel to the smaller centres, affecting quality there. A particular effect is likely to be that London practitioners will no longer travel to the Circuit. This Circuit tends to lack large quantities of high-end criminal cases, relying instead on precisely the categories of crime that will be least attractive to experienced practitioners following a cut of the kind proposed.

25. In Bristol, local solicitors have also been considering their response to the best value tendering pilot scheme for work in police stations and magistrates' courts. It is obviously impossible for them to tender without knowing the value of the work in the Crown Court that might be produced on the back of such work. We are aware that the pilot scheme has been deferred, but we observe that long-term uncertainty surrounding publicly-funded work in the Crown Court is bound to have an effect on the tenders, as it will on the strategic planning and commitment of all practitioners.

26. Conclusion. The proposals represent an unacceptable abandonment of the Carter settlement. The government is reneging on an agreement expected to last for many years. The government appears to misunderstand the profession, and devalues its contribution to the course of justice. This is particularly depressing given the engagement that the Bar offered in full with the Carter process. In the light of past co-operation we hope it will be understood that we must now be blunt. The Western Circuit expresses its outright opposition to the proposals.

Robin Tolson QC, Leader of the Western Circuit
Paul Cook, Circuit Junior. 11 November 2009.