REFORMING LEGAL AID CONSULTATION

INITIAL RESPONSE ON BEHALF OF THE CRIMINAL BAR ASSOCIATION

INTRODUCTION

1. *This initial response is provided at the request of the Bar Council Working Party, in order to assist in their compilation of a prospective response on behalf of the profession.*

2. *This document reflects individual contributions from the named authors only. Time has not permitted any review, either by the Criminal Bar Association ("CBA") Committee, or by the membership of the Association as a whole. It is important to note that this document is not a submission to government, for which the consultation concludes on 14th February 2011. The CBA expects that the proposed Bar Council response to government, no doubt including material taken from this document, will be circulated widely within the profession in advance of that date. The CBA expressly reserves to itself the right to make a separate, final submission to government at that time, if necessary.*

3. *This document expressly does not include, because time has not permitted, any contribution either as to:*

(1) statistical analysis, assisted by Professor Martin Chalkley instructed by the Bar Council, designed to interpret and comment upon the government-drafted Impact Assessments which accompany the consultation paper, or as to:

(2) proposed efficiency savings within the criminal justice system, assisted by the work of the Bar Council Efficiency Savings Group, chaired by Paul Keleher Q.C.

4. The CBA represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across 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 on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

5. The CBA acknowledge the government is dealing with a huge financial crisis. However the current proposals are a depressing reversion to the frequently targeted area of advocacy fees, broadly stagnant over the last 15 years and recently subject to heavy cuts described as "salami slicing" by the Lord Chancellor. The cuts and the absence of any proposals for considering other sources of funding will further depress hard working and diligent professionals praised by Lord Carter in his review of legal aid for their industry.

6. The possibility of fundamental structural reforms is merely foreshadowed and is not set out even in outline in the consultation paper. There are arguments of principle, which are yet to be heard and resolved, concerning whether it is necessary or appropriate to implement fundamental changes to the way in which legal services in criminal cases should be delivered in future. The government is, in any event, imposing on itself a dangerously ambitious timetable for implementation of complex reforms. The current proposal to proceed to phased implementation without the safeguard of a properly assessed pilot scheme is unacceptable.

7. There is a present danger of quality practitioners and entrants to the profession deserting criminal work. The process is already happening. In addition, there has been a dramatic fall in the number of pupillages available at the self employed bar (20% + fall over the last two years). LSC funding for training contracts for solicitors (available until recently) was never extended to assist pupillage at the Bar. The majority of the missing pupillages are in criminal sets while commercial sets are able to offer financially attractive prospects. The present approach in Chapter 6 of the consultation will further deter quality entrants to the profession from pursuing criminal work and accelerate the progress towards a two tier system with a gulf between the private and publicly funded sectors.

8. Looking at legal aid more widely, it is disappointing to see no reference in the proposals to research into alternative sources of funding. One obvious example is to permit the use of restrained assets (with appropriate capping) as a source of funding for the defence of

criminal proceedings. Consider the example of a defendant accused of a serious fraud who has £1 million on deposit in a bank account frozen under a restraint order. At the moment, legal aid has to fund his defence to the criminal charges. He is not allowed to use his own money. This type of case is a huge drain on scarce resources and it is a burden assumed by the government of its own volition. The argument that the sums restrained need to be preserved in the hope that, some time down the line after the expenditure of a great deal of legal costs, a confiscation order may be obtained to benefit other departments is no answer to the problems created for the hard pressed legal aid fund.

9. These latest proposals on defence fees come as the 13.5% cuts to advocacy fees made by the last government are being implemented. These proposals undermine professional confidence in the government's commitment to retaining quality advocacy in the system.

10. The detailed proposals on structural reform of legal aid funding are still awaited. The CBA wishes to sound a clear warning now. The introduction of a competitive market would for the first time formalise a system where there will be an incentive to instruct the cheapest qualified rather than the best available advocate. At present, we are focussing on any and all ways in which the Criminal Bar can make constructive proposals to enable the Ministry of Justice to deliver the savings demanded in the Comprehensive Spending Review. That present necessity is an entirely different matter from principled arguments about the system.

ANSWERS TO CONSULTATION QUESTIONS IN CHAPTER 6

Question 24: Do you agree with the proposals to:

1. pay a single fixed fee of £565 for a guilty plea in an either way case which the magistrates' court has determined is suitable for summary trial; **NO**

2. enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; **NO**

3. remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee? **NO**

Please give reasons.

These proposals seem to be promulgated on the premise that the election of Crown Court trial is a decision wholly within the gift of the lawyer and that the decision is driven by a desire to extract a higher fee from the legal aid purse for providing the same service. The premise is misconceived and is based on prejudice and not evidence.

It is clearly right that a guilty person should plead guilty as soon as is possible, but the vast majority will only do so if so advised and that advice can only be properly tendered in full knowledge of the evidence that will be called at trial.

Before it is said that the solution to this problem lies in full disclosure of the prosecution case in the Magistrates Court, experienced criminal practitioners know that further evidence is generated

in all but the simplest cases between committal and trial. Plea and Case Management Hearings are in large part dedicated to timetabling the service of further evidence. *A fortiori* the defendant at trial will face evidence which may be substantially expanded beyond that of which he was on notice at the date of committal.

It should be remembered that, in such cases, pleas of guilty at or after the PCMH are likely to be as a result of advice provided by a barrister, following a conference. A basis of plea may have been drafted, or in the alternative a defence statement may have been drafted, and negotiation may have taken place with the prosecution. The resulting guilty plea saves both court time and precious resources and it is only right that the advocate is remunerated properly for his work.

The CBA is very concerned that a single fee for this type of work will lead to pressure being placed on very junior advocates to act in such cases for a very small part of the fixed fee. Cases of this nature will not be attractive to more senior advocates. Given the pressure already placed on the younger members of the criminal bar as a result of recent cuts, this will only drive more talent away from the publicly funded part of the profession.

We also observe that these proposals may inhibit the giving of impartial advice as to the appropriate venue for trial, in either way cases, because of a concern that election to the Crown Court, when followed by a guilty plea or cracked trial, may have a significant adverse financial impact on both litigator and advocate.

Whilst there remains a <u>right</u> to elect Crown Court trial in either way offences the legal profession should not be penalised if an accused exercise this statutory right. It is, we suggest, only a small

minority of cracked trials which result from any fault on the part of the legal profession. Yet these proposals import a significant financial penalty in large numbers of no-fault cases.

Fees for guilty pleas and cracked trials in indictable only and either way cases where magistrates have declined jurisdiction

Question 25: Do you agree with the proposal to harmonise the fee for a cracked trial in indictable only cases, and either way cases committed by magistrates and in particular that:

1. the proposal to enhance the fees for a guilty plea in the Litigators' Graduated Fees Scheme and the Advocates' Graduated Fees Scheme by 25% provides reasonable remuneration when averaged across the full range of cases; **NO**

2. access to special preparation provides reasonable enhancement for the most complex cases? **NO**

Please give reasons.

These proposals are advanced on a premise which is wholly misconceived: that the cause of cracked trials is a failure on the part of the defence litigator/advocate to offer appropriate and timely advice as to the strength of the prosecution case and the appropriateness of a guilty plea.

Those with any real-world experience of criminal practice know that the issue of cracked trials is far more complex.

Cases crack for a number of reasons. There is no recognition within the consultation paper that a case often cracks because the prosecution shift their position. They may offer no evidence, they may accept a plea which was previously unacceptable. Additionally, a case may crack because

the defence barrister has undertaken a substantial amount of work, for example on the unused material for which he is not currently remunerated, and/or is able to persuade the judge to stay the case as an abuse of process. Even in those cases where the defendant pleads to the indictment as a whole, this may be because of the late service of compelling evidence. Furthermore, a barrister has no control over a defendant who wants to wait and see if prosecution witnesses attend his trial. The appropriate sanction for the latter conduct may lie in the calculation of credit for plea, but should never be a financial penalty imposed upon the advocate.

The proposal that special preparation payments be relied upon where extra work is done has some merit, but only if the parameters of such payments are extended dramatically. Under the current regime, the 'special preparation rate' would only be available in cases where there are more than 10,000 pages of prosecution evidence. Advocates should be able to claim upon the basis of a case summary or a written advice and where this has properly been done after the PCMH and plea of not guilty, this should be remunerated. The same should apply to skeleton arguments and other trial preparation documents which lead to a cracked trial following a successful (or unsuccessful) legal argument. Indeed, we would go further. If it is to be said that special preparation 'provides reasonable enhancement', we submit such payments should follow wherever and whenever work is reasonably done in advance of trial.

Adjustments to Some Graduated Fees Categories

Murder and/or manslaughter

Question 26: Do you agree with the Government's proposal to align fees paid for cases of murder and manslaughter with those paid for cases of rape and other serious sexual offences?
NO

Please give reasons.

We do not accept the argument that since both rape and murder carry life they are comparably serious offences. Very few convicted rapists are sentenced to life with a minimum of 30 years to serve. Murder has always been (and should always remain) the most serious offence in the criminal calendar. Justice demands that murder trials are afforded special treatment. The exceptional burden placed on advocates (particularly the lead advocate) must be appropriately recognized in the fee structure.

The graduated fee for murder trials was substantially reduced when the RGFS was introduced. Despite the attempts in the consultation paper to draw comparisons with sexual offences, the vast majority of the public regard murder and manslaughter as the most serious of all offences. Under these proposals, there would be no incentive for experienced counsel to become involved in murder trials, whether as leading or junior counsel.

Those whose practice includes prosecuting and defending in murders readily appreciate the very special challenges and burdens which these cases place on the advocates involved.

Offences of dishonesty (Abolishing Category G cases)

Question 27: Do you agree with the Government's proposal to remove the distinction between cases of dishonesty based on the value of the dishonest act(s) below £100,000? **YES, WITH RESERVATIONS**

Please give reasons.

This issue is not limited to complexity, but is also concerned with seriousness. Generally, more serious offences should attract a higher base fee. We accept that the £30,000 figure, in place since 1997, is a somewhat arbitrary gauge of seriousness and complexity in dishonesty cases. However, it remains the current best indicator of complexity within the graduated fee scheme. Cases of dishonesty and fraud involving higher sums continue to attract higher penalties upon conviction, and should therefore continue to attract more senior advocates. We propose that greater attention be given to amending the £30,000 figure, perhaps to £50,000, rather than to removing it altogether.

Aligning magistrates' court fees in London with other major urban areas and reducing Advocates' Graduated Fees – 'bolt ons'

Question 28: Do you agree with the Government's proposal to

a) remove the premium paid for magistrates' courts cases in London; **NO**

b) reduce most 'bolt on' fees by 50%? Please give reasons. **NO**

Removal of the premium is likely to have a marked effect upon the earnings of young barristers in particular. The lower standard fee for a guilty plea would be reduced from £284.35 to £221.59, and the higher standard fee from £1005.49 to £792.71. This loss to solicitors, we fear, would be passed on to young barristers who currently struggle to make a viable living as self-employed advocates. The problem is particularly acute in London as opposed to other cities because of the high degree of competition among advocates. As a result of this competition there is in place a

Magistrates' Court Protocol which is designed to reflect the minimum fee deemed appropriate for a hearing in the Magistrates' Court (£50 for a hearing, £75 for a half-day trial and £150 for a full day, excluding travel or waiting). If the standard fee were to be reduced in the Magistrates' Courts, we fear that solicitors may place chambers under significant pressure to reduce the rates paid to their pupils and junior tenants.

Bolt-ons were an important and recognized aspect of the Carter settlement. Thereafter, the last government imposed a 13.5% cut to advocacy fees which is still being implemented. We cannot accept that the principled need for bolt-ons under Carter has halved, in addition to the ongoing 13.5% cut, resulting in standard appearance fees making insufficient provision for increase in complex cases. We submit there should be further consideration of the scale of this proposed reduction, if indeed it is appropriate at all.

Payments in Very High Cost Criminal Cases

Question 29: Do you agree with the proposal to align the criteria for Very High Cost Criminal Cases for litigators so that they are consistent with those now currently in place for advocates?
YES

Please give reasons.

Litigators in this area should be paid in the same way as advocates so as to promote consistency.

The VHCC scheme is cumbersome and awkward to administer and operate.

The Graduated Fee Plus scheme should be implemented to provide certainty and promote efficiency.

Barristers are not litigators and therefore not best placed to assess this question, but we cannot identify any compelling argument to suggest that the currently anomaly should not be rectified.

Independent assessor for VHCCCs

Question 30: Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? **NO**

It would be helpful to have your views on:

1. the proposed role of the assessor;
2. the skills and experience that would be required for the post; and
3. whether it would offer value for money.

Please give reasons.

Employing independent assessors will only add to the overall cost of a case, so in principle, this appears to be counter-productive.

We cannot identify any need for such appointments. The proposed role of the assessor "to review and challenge the defence representative's assessment of a case" makes it clear that this proposal represents the introduction of a further and unnecessary layer of bureaucracy with which barristers will have to struggle in trying to reach agreement on sensible hours for work that reasonably needs to be done to properly represent their lay clients.

Moreover, we are concerned that assessors would not enjoy true independence. The consultation paper suggests the assessor would "support decision making by contract managers and lawyers within the LSC's Complex Crime Unit (CCU), taking a pro-active role in challenging assessments of work by representatives."

If, contrary to our submissions, assessors were to be appointed they would have to possess extensive experience of running VHCCC cases as a litigator or advocate. Only individuals with such experience would have the necessary insight to perform the role properly and be able to engage the trust of the professions. Therefore, without prejudice to our principled objection to this proposal, any assessor appointed should be drawn from a suitably qualified and experienced cadre of professionals. This would include experienced judges with a history of dealing with cases of serious fraud, and lawyers whose professional practice has been centred on managing serious fraud cases in a team-leading capacity.

Limiting the use of leading counsel, and/or multiple advocates

Question 31: Do you agree with the proposal to amend one of the criteria for the appointment of two junior counsel by increasing the number of pages of prosecution evidence from 1,000 to 1,500 pages?

YES WITH CONDITIONS

Please give reasons.

It is not clear why it is felt that it is necessary to introduce this amendment to the existing criteria. We are not aware of any evidence to suggest that two-counsel certificates are being

granted inappropriately simply because the page count limit is too low. No evidence is cited in the consultation paper to suggest that this is the case

We are inclined to the view that in the light of the primary condition which must in any event be satisfied i.e. that the case *"involves substantial, novel or complex issues of law or fact which could not be adequately presented by a single advocate"* , and that all such applications are considered by the senior resident judge at each court centre, this proposal is unnecessary and impractical if its objective is to guard against the possibility that a judge may feel compelled to grant an otherwise unmeritorious application because the existing page count criteria is too low.

If the proposed amendment was nevertheless made we are firmly of the view that any page count must include electronically served evidence as well as paper copy material.

17th December 2010.

MAX HILL Q.C.

SIMON MAYO Q.C.

TIM MOLONEY Q.C.

SIMON CSOKA (Northern Circuit)

NICHOLA HIGGINS (YBC Vice-Chair)

KATE LUMSDON (Western Circuit)

ELEANOR MAWREY

EDMUND VICKERS