RESPONSE OF THE

CRIMINAL BAR ASSOCIATION

TO THE CONSULTATION PAPER CP12/10

PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES

1. 1293 members of the CBA emailed to indicate their specific support for this paper within 5 days of the draft response being sent to them. The names are set our in the attached spreadsheet.

2. The Criminal Bar Association 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. Their 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.

3. The CBA acknowledges that the Government is dealing with a huge financial crisis. However the current proposals are a 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 threaten the viability of the legally aided Bar, hard working and diligent professionals praised by Lord Carter in his review of legal aid for their industry. These proposals undermine professional confidence in the government's commitment to retaining quality advocacy in the publicly-funded justice system.

4. There is a present danger of experienced practitioners and newly qualified practitioners choosing not to undertake publicly funded 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 (a fall in excess of 20% 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.

5. 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. This will have a direct effect on equality and diversity: there is a significant risk that only those with access to other income, such as assistance from parents, will be able to afford to enter the legally aided Bar, especially as the changes to tuition fees will increase the level of student debt accumulated before entering the profession. This will impact in turn the diversity of the judiciary, undermining the recent work under Lord Neuberger into entry to the profession.

6. We note with particular concern the words within paragraph 2.10 of the Consultation document '*[previous] attempts at reform have been*

piecemeal'. This is unnecessarily dismissive of previous reform, in particular Lord Carter's review of Legal Aid procurement, which reported in July 2006 and led to the introduction in April 2007 of the revised Advocacy Graduated Fee scheme, which was a fundamental review and reappraisal of the funding of criminal cases. It cannot be dismissed as 'piecemeal' reform so as to justify some of the current proposals which depart radically from Lord Carter's scheme.

7. The detailed proposals on structural reform of criminal legal aid 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 advocates rather than those with suitable experience. At present, we are focusing 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.

8. Advocates who undertake publicly funded work do so not in the expectation of great financial reward but having chosen to pursue what is often described as a vocational career - practitioners committed to doing publicly funded work - similar to the publicly-funded medical profession. Almost all criminal cases are publicly funded and for the vast majority of practitioners there is not the option of taking on private work to supplement income. Practitioners do so because they believe in the

importance of having a strong Criminal Justice system in which the individual is protected by the State and from the State; where the accused is properly and fairly tried; and in which the actions of the State are rigorously scrutinized and where necessary, challenged. The publicly funded criminal practitioner is bound by a strict code of conduct and ethics. He or she may be instructed by either side, for the State or the individual, or by other interested parties. This means that the Government and the individual are able to seek proper advice and have their case argued fully before the Courts. The government and the individual both instruct the criminal practitioner for his experience and the quality of his advice and advocacy. Experience and quality therefore matter.

9. It must be remembered that access to justice affects both the State and the individual not only in criminal trials in the Magistrates' and Crown Courts and Courts Martial, but also in the High Court, the Court of Appeal, the Supreme Court, the Judicial Committee of the Privy Council and the European Court of Human Rights. Some cases may be relatively straightforward but there is rightly the expectation from Government, the individual and the Judiciary that all cases are prepared and presented to a high standard. The Government and the individual daily need access to advice and advocacy from practitioners experienced across a wide range of specialist fields. This may range from advice to Government Law Officers to prosecuting a complicated terrorist or fraud trial on one side, to challenging control orders (or their successors) by judicial review or defending those accused of child abuse or murder on the other; and any

case may ultimately include appellate work. The need for experienced practitioners is therefore obvious when assessing access to Justice; and the need to recruit to the Judiciary from the profession, and the equality and diversity issues associated with that important task, is self-evident.

10. We recognise that the proposals in this consultation would not have the effect in crime of removing access to publicly funded legal representation for swathes of the population. However, we make the fundamental observation that criminal advocacy must be fit for purpose, or it is of no use to those in need, however expensive or economic it may be. In respect of many of the proposals, junior barristers will be the worst affected since solicitors will seek to pass on the potentially unprofitable cases to the junior Bar at cut prices. 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 and ongoing cuts, this will only drive more talent away from the publicly funded part of the profession. But these proposals threaten to remove, through underfunding, quality advocacy at all levels in the criminal justice system.

11. These proposals will also damage the achievements made in increasing the diversity of the profession. Fewer people from lower socio-economic backgrounds will be able to afford to come to the criminal Bar. Student debt is already high and set to rise further. Pupillage awards are low (few criminal chambers pay more than the minimum £12,000) and the risk of being unable to establish a regular income or being able to repay debts will

inevitably deter new entrants. This is a fact that has not been acknowledged in any of the Impact Assessments.

12. These proposals will also impact significantly on the retention of women at the Bar. Criminal work, by its nature, requires being in court, unlike more paperwork based areas of law. The cuts will simply make it uneconomic for many women faced with childcare costs. Contrary to the findings at 1.16 of the EIA, the recent survey carried out by the Bar Council, into Barristers Changing Practice Status 2001-2008 (December 2009) showed that women barristers were disproportionately represented in the family and criminal practice. They are also 2 to 3 times more likely than men to have probationary, squatter or pupil status, making them the most financial vulnerable and therefore those who will be most affected by the cuts.

13. Use of restrained assets in criminal cases: One obvious example of alternative sources of funding would be 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.

14. A strong Criminal Justice system lies at the heart of a free society, in which criminal legislation is lawfully implemented and the individual is afforded proper protection. The Government must be mindful of the potential long-term harm that ill-directed cuts may have. Experience and quality are important to both the State and the individual. It is against this background that this response to the Government's Green Paper is provided. Whilst further cuts, beyond the 13.5% announced last year, may be necessary, we submit that the Government should pause to consider whether the proposals of the Green Paper are in fact the appropriate course to take; and we invite the Government not only to consider this principled response but also to consult with practitioners on alternative methods to cut costs.

15. We take exception to the apparent attempt to introduce One Case One Fee (see consultation question 24, the intention to pay a single fixed fee for guilty pleas in either way cases which the magistrates' court has determined suitable for summary trial), before this fundamental structural change to the provision of legal services has been debated at a level of principle. Ring-fenced advocacy fees, provided for under the current GFS and VHCC models, have a multitude of benefits including (a)

transparency, (b) government control over expenditure, (c) protection of defendants from representation of insufficient qualification or experience, (d) a guarantee that government money is spent on that for which it is intended ie the provision of advocacy services in the criminal courts, (e) preservation of the defendant's right to representation by advocates based upon merit rather than the financial interests of litigators, and (f) the identification of an advocate with duties to the court as well as to the lay client. We agree with the South Eastern Circuit, who put it thus: 'We cannot stress strongly enough that, in our view, there is a compelling public interest in the setting of a standard fee for courtroom advocacy in cases which the Government has decided should be publicly funded. For many years the Government has accepted responsibility for determining the level of remuneration for courtroom advocacy in criminal cases. The alternative is that standards will fall in a race to the bottom in the interests of profit, rather than the interests of justice. The most able practitioners will move out of publicly-funded work and the pool of talent from which judges with experience of criminal work are chosen will dry up. For these reasons, any proposal involving 'One Case One Fee' should be rejected'.

16. The existing Graduated Fee scheme, with all its imperfections, is based on a swings and roundabout approach without which the scheme would not work. Some cases are plainly inadequately remunerated – those involving many hours of study of video-recorded interviews or relevant unused material for example. Other cases may sometimes be more appropriately remunerated. In any fixed fee scheme it is vital always to have regard to

the overall picture, as well as individual elements. To identify and remove those adequately remunerated aspects of the advocates' graduated fee, without considering those areas which are inadequately paid, destabilises a system which has, on the whole, been very effective in achieving financial control for the Government.

Answers to Consultation Questions on Criminal Remuneration

Question 24: Do you agree with the proposals to:

- 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;
- enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and
- remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee?

Please give reasons.

The CBA answer to these three questions is NO

1. The CBA believe this proposal to be wrong in principle as it seems 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 to elect may be

driven by a desire to extract a higher fee from the legal aid purse for providing the same service. This is simply not the experience of practitioners in the Magistrates' Courts and would be rightly considered by them as an affront. We are unaware of any evidence that this is a problem, and we do not believe that it is. We draw support for that view from Lord Carter's own words, taken from the introductory paragraph of his final Report in 2006: *"I have been impressed by the deep dedication and integrity of the professionals involved in legal aid work, and their real commitment to the principles of legal aid. They should be proud of their hard work on behalf of their clients, and acknowledged rightly as a credit to the legal profession."*

2. When the court decides that the case is suitable for summary trial, the right of election for trial by jury is the defendant's. It is a fundamental principle of the Criminal Justice system. The defendant's decision may be influenced by a number of factors, including, but not limited to, a belief that he will receive a fairer trial in front of a jury, or that he has a greater chance of acquittal in a jury trial. Whilst there remains a right to elect Crown Court trial in either way offences, the legal profession should not be penalised in fees if an accused exercises this statutory right.

3. It is clearly right in principle that a guilty person should plead guilty as soon as is possible, but experience has shown that there are many reasons why a defendant may not wish to admit guilt at that early stage, examples include: the evidence at that stage may be weak or incomplete, the defendant may wish to remain on bail for as long as possible, the defendant may believe that the

witnesses will not turn up to give evidence, or he has witnesses, or simply because the defendant does not want to admit his guilt. The majority will only plead guilty if so advised and that advice can usually only be properly given in full knowledge of the evidence that will be called at trial. It must also be noted that cases do not only conclude by the defendant pleading guilty or there being a trial. The paper makes no acknowledgement that trials also crack due to the Crown offering no evidence.

4. At present, Defendants are asked to indicate their plea at the first appearance. It is then that mode of trial is dealt with. Usually there is very little evidence before the court at this stage. The case is then prepared for committal, often with the papers being handed to the defence on the day of the committal hearing. At no point is the defendant asked to confirm his decision to plead not guilty nor his decision to elect. The Bar believes that by altering the committal hearing to include such questions would significantly reduce the number of cases going to the Crown Court, in particular if additional credit was provided when sentencing. This would make substantial savings and properly puts the consequences of the decision in the hands of the defendant not the advocate. Such credit should not be lost however if the Crown serve further evidence between Committal and PCMH.

5. Experienced criminal practitioners know that further evidence is generated in all but the simplest cases after committal for 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.

6. 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 the advocate, following a review of the evidence now served, discussions with the prosecution and a conference with the client. A plea to an alternative and/or lesser offence may now be acceptable to the Prosecution. A basis of plea and/or defence statement may have been drafted, and negotiation may have taken place with the prosecution leading to an acceptable resolution. 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.

7. The CBA is very concerned that a single fee for this type of work will lead to considerable 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 publicly funded work.

8. As to the individual components of Question 24, we say:

24.1. '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';

24.1.1 The introduction of "One Case One Fee" through this proposal, before there has been principled argument on the matter, is wrong. It will impact unfairly upon members of the Bar, in particular the junior members who undertake a higher proportion of this level of work.

24.1.2 There would be every incentive for a litigator to deal with relatively straight forward cases in-house, and only send the potential "loss leaders" to Chambers.

24.1.3 It introduces the invidious new concept of ex post facto negotiation between advocate and litigator, depending on the outcome of the case.

24.1.4 "Guilty plea or cracked trial" under RAGFS includes cases in which the prosecution offers no evidence, accepts a plea to a lesser offence or part guilty pleas – even including cases in which the prosecution accepts at the Crown Court pleas which were offered but rejected in the Magistrates' Court. Comment in relation to this aspect is set out further in the response to question 25 below.

24.1.5 Para 6.22 envisages that there will be only one extra appearance in the Crown Court. This is unlikely to be the case. Where the case is listed for trial, there could be 3, 4 or more

hearings if reports were not available or if the prosecution was not willing to negotiate a reasonable outcome early in the life of the case. The practical effect of this proposal could be that a case might be fully prepared for trial, be listed on several occasions, and end up as a "late guilty plea" because of matters beyond the control of the defendant and/or the Advocate who would then be dependent upon the goodwill of the litigator.

24.1.6 In any event, the fees suggested will be grossly inadequate and will lead to wholly undesirable and unhealthy negotiations between litigator and advocate. In reality, it is likely to lead to a similar situation to that which has developed with unassigned counsel in Magistrates Court cases, where Chambers are unwilling to undertake this work in order to try to protect young (and financially vulnerable) members of the Bar from abuse since many litigators will not agree a reasonable fee for the work (partially, no doubt, if not wholly because of the inadequacy of the scale fees) and, even if they do, junior counsel in particular frequently find it very difficult to collect the fee agreed.

24.2 'enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases;'

No. Whilst this proposal may provide some element of compensation for the litigator, by the enhancement of other fees in the Magistrates Court, there is no such compensatory element for the Crown Court Advocate, who will be deprived, in all probability, of any fee for work reasonably and properly done in the Crown Court.

24.3 'remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee'

No. Since the object of the previous proposal is to encourage more either-way cases to be dealt with in the Magistrates Court, the proposal should pay for itself. It would be wrong to penalise Litigators of further fees since they will be losing the LGFS fee from the Crown Court on such cases as it is.

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:

- the proposal to enhance 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; and

- access to special preparation provides reasonable enhancement for the most complex cases?

Please give reasons.

The CBA is clear that the answer to these questions is NO

1. We are of the view that this proposal in wrong in principle in that it is 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.

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

3. 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. He may have successfully argued the exclusion of certain crucial evidence, leaving the Crown no choice but to offer no evidence. Such an argument

generally takes a good deal of preparation, legal research and obligatory preparation of skeleton arguments. 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 it is wrong in principle for it to be a financial penalty imposed upon the advocate.

4. The recent changes to CPS internal ownership of cases, namely placing cases in a "pool" rather than allocating them to a specific lawyer has made it increasingly difficult to obtain a binding decision from the Crown, often until a case is listed and at court for trial. A recent example by a barrister practising in London was a case where there were 6 hearings, each time with the defence asking the CPS to review the case, but it was not until it was listed for legal argument prior to trial that the case was dropped. This also affects acceptance of pleas and other matters which influence when cases crack.

5. 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 a very small minority of cases where there are more than 10,000 pages of prosecution evidence, or where it can be demonstrated that the case includes unusual or novel points of

law or fact, or in the case of electronic 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.

6. The CBA believes that the effect of this proposal is particularly damaging to the self-employed Bar which undertakes most of the more complex and demanding cases, which therefore require the most preparation. An increasing number of solicitors tend to keep in-house those cases which are less complex or burdensome and are likely to plead guilty at an early stage

7. Increasingly the self-employed Bar is instructed in the more difficult, challenging cases, which require, for example, detailed attention to hearsay or bad character applications, or lengthy consideration of video-recorded interviews or lengthy preparation for any other reason. This is not a complaint. The self-employed Bar exists to undertake the more demanding work in which expertise and commitment is essential.

8. The present proposal will benefit most those who undertake the more routine work while hitting hard those who tackle the more difficult and demanding work. The claim that an increase in the guilty plea fee will "on average" provide "a reasonable level of overall remuneration" (para 6.27) is simply not justified, ignores the reality of the briefing practice of many solicitors and it will not provide reasonable remuneration.

9. For the reasons set out above, the concept of swings and roundabouts which is fundamental to the RAGFS would become completely unfair and unbalanced since the likelihood is that counsel, who tend to be instructed in the larger and/or more complicated cases, will suffer all the "swings" with little to opportunity gain on the supposedly compensatory "roundabouts".

10. It is not agreed that the provisions for Special Preparation would provide a reasonable enhancement for the most complex cases. The reference to "special preparation" is illusory in all but a tiny number of cases. The rules for Special Preparation" are most unfairly and unacceptably confined and in any event this proposal would involve a reversion back to hourly rates – which have previously been agreed to be undesirable.

11. In a system that was designed to create certainty and predictability (by the use of page counts and proxies) to both the Government, as the paying party, and the person undertaking the work, this reintroduces an area of uncertainty and "judgment" which has been inconsistent and not uniformly

applied. Few people have the necessary experience and expertise to assess the relevant claims (which will inevitably be ex-post-facto – a system which the Department have spent much time and effort trying to eradicate).

12. The Impact Assessment acknowledges that there is a possibility that this proposal may in fact encourage more cases to proceed to trial. This would significantly outweigh any savings achieved as a result of this proposal. It is suggested that it would be more appropriate, and more likely to increase savings, to increase the credit available for a guilty plea. At the very least, this will not run the risk of increasing pressure on the legal aid budget.

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? Please give reasons.

The answer to this question is NO

1. We do not accept the argument that since both rape and murder carry a maximum sentence of life imprisonment 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.

2. 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 general 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.

3. 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.

4. This proposal plainly fails to understand the burden of such cases. To quote one of the oldest Taxing Master's Decisions: "even with the abolition of the death penalty, Murder remains a special case" in terms of the burden of responsibility involved and the importance of the matter to the general public let alone the client.

5. The suggestion that cases of Murder/Manslaughter are no more demanding than other serious cases could not be made by anyone who has had the responsibility for conducting such cases. The truth is that there is something uniquely important and demanding about homicide cases.

6. This is reflected in the sentencing regime for murder (and for some types of Manslaughter, such as many cases of Diminished Responsibility). Life sentences with minimum terms of 15, 25 and 35 years are commonplace. This equates to fixed term sentences or 30, 50 70 years - far beyond sentences imposed in other types of serious and complex work (contrary to the suggestion in Paragraph 6.30).

7. The volume of unused material is often very high in homicide cases - particularly in "whodunit" killings in which there are often other suspects/lines of enquiry, where the relevant unused material may exceed the volume of served material and may required, 20, 40, 80 hours work, for which there is no remuneration.

8. Plainly, there can be complexity in any type of case (not only "very serious" ones) but the fee scales should reflect the generality of the burden and responsibilities of the different types of offences.

9. In view of the general approach and tenor of these proposals, there is a real concern that behind this particular proposal lies an intent to reduce substantially the number of homicide cases in which the instruction of Queen's Counsel is authorised. As will be apparent from the matters set out in this response, such an intent would be wholly undesirable and wrong.

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? Please give reasons.

The CBA answer to this question is NO – WITH RESERVATIONS

1. This issue is not limited to complexity, but is also concerned with seriousness. Generally, more serious offences should attract a higher base fee, to reflect the greater responsibility borne by counsel. 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.

2. We request that complete data should be disclosed in relation to the existing 3 categories (F, G and K) so that a proper analysis could be undertaken in order to seek to establish where the proper thresholds should be.

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

a) remove the premium paid for magistrates' courts cases in London; and

b) reduce most 'bolt on' fees by 50%?

Please give reasons.

The answer to these questions is NO

28 a) 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.

28 b) 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.

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? Please give reasons.

The answer to this question is YES

1. We cannot identify any compelling argument to suggest that the currently anomaly should not be rectified.

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

3. 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.

Question 30: Do you agree with the proposal to appoint an independent assessor for Very High Cost Criminal Cases? It would be helpful to have your views on:

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

Please give reasons.

The answer to this question is NO

1. Employing independent assessor/s (it is not entirely clear whether the proposal is to appoint one assessor nationally, or more) will only add to the overall cost of a case, so in principle, this appears to be counter-productive.

2. We cannot identify any need for such appointment/s. 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.

3. Moreover, we are concerned that the assessor/s 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."

4. If, contrary to our submissions, assessor/s 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.

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

The CBA answer is YES – WITH CONDITIONS

1. 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.

2. 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.

3. 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.

FEBRUARY 2011.

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