RESPONSE OF SOUTH EASTERN CIRCUIT

TO PROPOSALS FOR THE REFORM OF LEGAL AID

CONSULTATION PAPER CP12/10 NOVEMBER 2010 (III)

INTRODUCTION

This document constitutes the response of the South Eastern Circuit. The Circuit has approximately 2,500 members who undertake Civil, Criminal and Family work. We have dealt with those questions which we consider we are particularly well qualified to answer.

Question 1

*Do you agree with the proposals to **retain** the types of case and proceedings listed in paragraphs 4.37to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?*

Yes. These are important areas of law which often involve complex procedural or substantive law and where claimants are more likely to be vulnerable.

In particular, we agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.82 to 4.85. An immigration or asylum applicant who is in detention and liable to removal from the UK is in a particularly vulnerable position. He will to some extent be isolated from any friends or family he has in the UK and English may not

be his first language. He needs access to good quality legal advice in order to be able properly to challenge, if appropriate, the legality of his detention and his proposed removal.

Family

Family Practitioners who practise on the South Eastern Circuit have long been dedicated to the principle that all members of society should have access to justice and not simply those who have the means to employ a lawyer or the aptitude to represent themselves.

It is a significant concern amongst those that practise in this field that the proposals contained in the Green Paper will gravely undermine this principle.

There is therefore no objection to the types of cases that are proposed to remain in scope.

Question 2

Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party?

Family

The argument set out in the Green Paper that public funds expended in relation to ancillary relief proceedings should be redirected to more deserving cases appears to suggest that each ancillary relief case that is publicly funded is a net loss to the public purse. This is illusory. The government takes a charge out in respect of public money spent and secures it against assets recovered or preserved in the course of the

proceedings. Therefore, the majority of cases should be approaching (if not entirely) cost neutral.

No account has been taken of the legal aid charge in the Green Paper and the government should set out clearly the **actual** cost incurred in funding ancillary relief proceedings net of any charge.

In relation to the proposed provision of an interim lump sum order to meet legal costs, whilst there is a benefit in increasing the tools available to enable a less financially able litigant to meet her (or his) legal costs, it cannot and should not be seen as a replacement to the availability of public funds. This is an area which might be more properly considered in relation to eligibility. It is wrong to remove it from scope.

There will inevitably be cases where the more affluent party (probably the husband) has been able, innocently or mischievously, to place his assets in trust or legally beyond reach so that they are unavailable for a lump sum order. In this situation the lump sum order will fail to remedy the inequality between the parties. There must remain a residual fund to prevent a risk of injustice arising.

Question 3

*Do you agree with the proposals to **exclude** the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme?*

Clinical negligence – 4.163-4.169

No. Victims of clinical negligence range from those with relatively minor injuries to those who are unable to speak, mobilise or take care of their own personal

welfare. To remove clinical negligence proceedings from the scope of Legal Aid altogether, without reference to the sorts of persons often affected by the negligence of medical practitioners, creates the potential for gross unfairness. The vast majority of clinical negligence cases are brought against NHS bodies. We query whether removing the ability of victims of clinical negligence to bring claims is in fact a way of reducing damages payouts from the NHS. We further query whether enough research has been done into the restrictive effect that removing clinical negligence from the scope of Legal Aid will have on the number of claims brought against the NHS.

We note that one of the reasons why the Government feels that these types of proceedings should be removed from the scope of Legal Aid is because of the existence of alternative forms of funding, primarily by way of CFAs. Indeed, there seems to be a push towards greater reliance on CFAs in the Government's Consultation Paper. We further note that at the same time it is consulting on implementing the recommendations of Sir Rupert Jackson in his *Review of the Costs of Civil Litigation.* This recommends, among other things, the removal of the recoverability of success fees and ATE premiums from unsuccessful defendants. Instead, these sums will have to be funded by a successful claimant from the damages that he obtains. Greater reliance on CFAs, therefore, will not compensate once eligible claimants for the loss of public funding. Indeed, as Sir Rupert himself said in his Report:-

> "*Legal aid is still available for some key areas of litigation, in particular clinical negligence, housing cases and judicial review. It is vital that legal*

> *aid remains in these areas. However, the continued tightening of financial eligibility criteria, so as to exclude people who could not possibly afford to litigate, inhibits access to justice in those key areas. In my view any further tightening of the financial eligibility criteria would be unacceptable.*"

and

> "*I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas.*"

It is clear, therefore, that both sets of reforms had a sense of mutual exclusivity about them. To implement them in tandem has the potential to cause grave injustice to those who are unable to fund litigation themselves. We take the view that it is premature to consult on these Legal Aid reforms on the premise that the Jackson Reforms will be implemented, without knowing what the impact of the Jackson Reforms will be upon litigants.

Furthermore, over-reliance on CFAs of the type proposed by Sir Rupert (i.e. with irrecoverable ATE premiums and success fees) will have the following effects:-

1. There will be less incentive for Defendants to settle cases if there is no risk of an uplift on costs;
2. There will be less incentive for Claimants to accept discounted settlements if they have to pay the uplift on costs. Claimants will want to ensure that their uplift is covered by any damages awarded and

accepting a discounted settlement would run counter to this. (Another unfortunate consequence would be exaggerated claims to ensure that the uplift on fees is covered);

3. If the Jackson reforms are not implemented but the Legal Aid reforms are, then more claimants will be driven to CFAs. The consequence of this is that more public funds will be paid out by the NHSLA because the NHS will end up paying the uplift on costs in most cases. This money will be paid to the detriment of frontline health services.

Consumer and General Contract – 4.170-4.172

No. Whilst we accept that matters relating to contract are not, generally speaking, as important as matters relating to personal safety and liberty, they are nonetheless important to the persons involved and to the proper functioning of the economy. If litigants were unable to vindicate their contractual rights in the courts, there would be no point having contractual obligations in the first place.

We note that "*Consumer and General Contract*" includes professional negligence proceedings. These can be complex and difficult for litigants to understand without help from lawyers. Insofar as recourse to CFAs is recommended, we refer to our observations on CFAs above. Also, one should bear in mind that CFAs are generally not available for Small Claims Track cases (because generally, costs cannot be recovered from a losing defendant in such claims).

The Financial Services Ombudsman, referred to by the Government, deals with financial services, which is but one type of contractual case. The demand on the voluntary sector and on organisations such as Citizens' Advice Bureaux is already great. The proposal to remove Legal Aid from these claims will only place an even greater burden on such organisations.

Legal Help for Criminal Injuries Compensation Authority – 4.173-4.175

No. We bear in mind that the types of persons bringing claims to the CICA are persons who have been injured and may not be able to endure the stress of reliving their traumatic experiences when filling out claim forms. We disagree that the claim is primarily financial in nature. The claim is often the only way that victims of criminals feel that their status as victims has been adequately compensated and that such "rights" as they may have as victims have been vindicated. The claim is often worth more than money for many of these claimants.

We also note that the Consultation Paper recommends using voluntary organisations such as victims' organisations to assist with CICA claim forms. We therefore take this opportunity to set out our observations on the use of voluntary organisations as a substitute for Legal Help/Legal Aid.

In terms of expecting litigants to utilise help from charities and other non-profit organisations, whilst the work that charities do is no doubt valuable, it is unfair to

shift the burden of providing legal services for those who cannot afford it onto the voluntary sector. Whilst charities are regulated in terms of the work they carry out as charities, they are not regulated in terms of any legal help (or legal "services") that they may provide. As more and more impecunious litigants turn to charities for help, it is imperative that the advice and help that they receive from charities is to at least a minimum standard of competence. If charities supplying legal help with cases are not regulated in order to ensure that standards are being met, the risk that litigants take when utilising such help is obvious. We do not feel that this is a point which has been considered by the Government sufficiently, if at all.

Education – 4.180-4.187

No. The right to education is a fundamental right and successive governments have stated their commitment to ensuring that each child receives at least a minimum level of education. Ensuring that a child is receiving the appropriate level of education that he needs is necessary not only for the proper functioning of the state education system but for the proper functioning of society. Those who are excluded from school often go on to become offenders. Proper schooling would go some way to preventing this. Children also require a proper assessment of whether they require special needs provision. We would hope that this Government recognises the need for proper statementing to take place.

It ought to be obvious to those advising the Government that although the classes of persons bringing proceedings are usually parents, who may not be particularly vulnerable, this does not detract from the fundamental importance that such proceedings have to the present and future well-being of the child, who clearly is in a vulnerable position. Furthermore, it is often the case that the parents of the children themselves may be vulnerable, which would affect their ability to prepare and present cases before the First-Tier Tribunal.

We disagree that all that is required is a presentation of the facts to the Tribunal, leaving the judge to interpret the law. Litigants, represented or not, have the right to address the judge as to the law. Sometimes, the law is uncertain and requires contested argument. The law in the field of education is complex and will not be easy for parents, perhaps vulnerable themselves, to understand. Furthermore, we disagree that the Tribunals Service is accessible to individuals. The rules relating to Tribunals are so complex that they present a challenge even to competent lawyers. We deal with this point further below. Finally, the proceedings themselves may require parents to do things such as instruct experts in a variety of fields or arrange meetings between experts. Again, we take the view that this will be too difficult for parents to carry out themselves. The contention that parents will be able to carry out such tasks is simply untenable.

The removal of Legal Aid will significantly hamper the ability of parents to ensure that their children's rights to education are being vindicated. It is unfair to

expect them to rely on the help of charities. We repeat our observations, above, about the wisdom and fairness of passing on vast swathes of Legal Aid work to the voluntary sector.

Welfare Benefits/Upper Tribunal Appeals – 4.126-4.224/4.231-4.235

No. There is a degree of overlap between the answers in relation to these types of proceedings and so they are dealt with together.

We note that the Government believes that it is acceptable for litigants to represent themselves in Tribunals because of their "*user friendly*" nature. We take the view that there is an absence of reality about this proposition. Whilst the Government may think that Tribunals are user-friendly, those whose practice actually involves proceedings in Tribunals know that the reality is that Tribunal-related work has some of the most complicated substantive and adjectival law in the English legal system. The law relating to Tribunals is complicated even for competent lawyers. It is almost laughable to suggest that litigants will be able to represent themselves before the Tribunals Service. We question where the Government has got the idea that the Tribunals are user-friendly from.

In relation to social welfare in particular, the persons likely to need to resort to tribunals to adjudicate upon their welfare are often the very persons that Legal Aid was designed for. Further, it is somewhat illogical to allow funding for judicial review applications in respect of social welfare cases (paragraph 4.224)

but not in respect of first instance and appeal decisions. We consider that it would be more efficient to give assistance to claimants at first instance in order to ensure that cases are heard after proper and competent preparation, which would ensure better quality decision making and less judicial review applications.

Debt matters (home not immediately at risk) – 4.176-4.179

No. Whilst falling into debt is clearly not as serious as having one's life or liberty imperilled, it is nonetheless a serious issue for a debtor to have to face in his life. We note that the Government's line of thinking is that often, what is required is not legal advice but advice on debt management. We take the view that not only does this overlook the number of instances where debts are not caused by, for instance, arrears on utilities bills, but also risks patronising the person concerned. In any event, it is unlikely that the debtor will be able to pay for such advice.

We repeat our observations set out above about the reliance on voluntary organisations. Very often, a claim for a debt can be defeated, which at once relieves a debtor of the financial burden that he has. Debt management advice probably will not indicate to a debtor that this possibility is open to him or how he can go about challenging the debt. We also take the view that this approach is short sighted. Individuals who are impecunious because they have debts will often be a greater drain on the public purse because of the benefits that they enjoy. Giving them advice on how the debt claim against them could be defeated goes some way towards eliminating that situation.

Employment – 4.188-4.192

No. There is very little legal aid for Employment Tribunals at the moment but to say that monetary damages are not sufficient to justify its continuation is surprising given that discrimination claims may involve monetary remedies but also deal with the right not to be discriminated against (which the Government recognises at paragraph 4.133). It cannot be right to say that those bringing claims are not likely to be 'vulnerable'. They invariably are and by definition those who are disabled will cover a wide range of disabilities. Cases involving litigants in person tend to take longer as (i) the procedure (ii) the law must be explained. They rarely grasp concepts of relevance in relation to issues and evidence to be adduced and attested and there would be a saving in Tribunal time if they did have legal assistance/representation.

To rely upon trade union representation is somewhat ironic given the decline in union membership over the last 20 years.

CFAs in employment cases are still rare and only cost effective in mass claims as otherwise it is far too risky and in many cases damages are capped so that a disproportionate portion of damages is taken by the lawyers. Household insurance has increasingly been used to back claims.

Other housing matters – 4.193-4.197

No. The Government recognises the need to provide Legal Aid in cases of homelessness and disrepair which threaten health. However, actions for wrongful breach of quiet enjoyment or trespass are often brought *because* the tenant has been evicted unlawfully from their premises. They bring these actions because they are homeless. We therefore seek the Government's assurance that such cases remain in scope.

The Government acknowledges the fact that individuals bringing these proceedings are more likely to be ill or disabled but then simply goes on to repeat its justification for removing those proceedings from the scope of Legal Aid. Mere acknowledgment does not compensate ill or disabled people for their inability to bring proceedings to vindicate their rights due to the lack of help via Legal Aid.

We note that again, the Government places reliance on the availability of CFAs. We repeat our observations, above, about the dangers of relying on CFAs given the Government's proposed implementations of the Jackson reforms. We also register our concern that the fact that many of these claims are removed from scope may result in tenants taking matters into their own hands, possibly resulting in more repossessions which will bring more cases within the scope of Legal Aid.

Immigration where the individual is not detained/asylum support – 4.198-4.204/4.221-4.224

No. We do not agree with the proposals to exclude the types of cases and proceedings listed in paragraphs 4.198 to 4.204 and 4.221 to 4.224. Non-asylum immigration cases can raise issues of profound importance to the individual and to society as a whole. Many of the leading House of Lords/ Supreme Court cases in the immigration context in the last few years have involved non-asylum matters such as family reunion and the question of the balance to be struck between the right to respect for family life and the interests of immigration control. Immigration law has also become a complex mix of case law, statutes, statutory instruments and the Immigration Rules, and litigants need access to experienced immigration lawyers in order to ensure an even playing field. Further, it is essential that assistance should continue to be provided for asylum applicants making applications for asylum support. The fact that clear guidance notes accompany application forms will not assist an asylum applicant who cannot read English, and the provision of advice by voluntary sector organisations will be insufficient to replace the advice currently provided by solicitors.

Public interest cases – 4.236-4.238

No. Public interest cases, by their very definition, are those that have a special element to them that make them of wider importance than to just the parties alone. The fact that one of the parties is impecunious should not deprive the public from the benefit of the bringing of cases which will benefit them in the long run.

Tort and general other claims – 4.239-4.243

Whilst the Government has outlined the types of cases that fall under this area of law, the Government has failed to identify the types of persons that bring tort cases. Whilst it is right to say that many tort cases are primarily financially motivated, the Government overlooks the fact that many claimants may also be vulnerable or injured. Take, for example, a road traffic accident claim which has left a pedestrian paralysed, unable to communicate effectively and who cannot afford legal representation – it would be grossly unfair to deny legal aid to this sort of individual. The rather inflexible way in which the Government has approached tort claims creates scope for injustice.

Family

The primary objection is to the proposed restrictions on access to public funds arising from a series of presumptions concerning domestic violence that seriously endanger certain members of the public.

It is the view of the Family Bar that the Green Paper appears to place grave overreliance on the belief that victims of domestic abuse routinely seek and obtain injunctive relief. It is a corollary of this that those parties to family proceedings who either do not seek an injunction or fail to secure an injunction are equally matched and capable of conducting the proceedings in person.

At paragraph 4.67, the Green Paper refers to those facing an "ongoing risk of physical harm" as requiring access to public funds to be represented in ancillary

relief or private law children proceedings. It is concerning that this excludes those who fall victim to any of the more insidious forms of abuse.

According to Women's Aid, a charity supporting the victims of domestic violence, ***domestic violence is physical, sexual, psychological or financial violence that takes place within an intimate or family-type relationship and that forms a pattern of coercive and controlling behaviour***[1].

Even the Government's own definition acknowledges that domestic abuse is multi-dimensional:

> *"Domestic violence does not just mean that your partner is hitting you. The abuse can be psychological, physical, sexual or emotional.*
>
> *Domestic violence can also include many things, such as the constant breaking of trust, psychological games, harassment and financial control. It is rarely a one-off incident and is usually a pattern of abuse and controlling behaviour.*
>
> *It can affect adults in all types of relationships and can also involve violence between parents and children".*[2]

The Green Paper's focus on actual violence is unhelpful. It jeopardises the safety of a significant number of victims of domestic abuse for whom a domestic violence injunction is unobtainable. For example, a person who has suffered years of belittling and controlling behaviour at the hands of their spouse or partner, but no actual or threat of physical violence, is far less likely to consider an application for a non molestation injunction due to the controlling and coercive nature of this

[1] http://www.womensaid.org.uk
[2] http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/VictimsOfCrime/DG_4003136

type of abuse. A victim of an assault by their partner, possibly presenting with obvious facial injuries, is more likely to encounter the police and/or receive advice and guidance on obtaining suitable relief.

It is the experience of the publicly funded family bar that parties to family proceedings, often but not exclusively women, are no less disempowered by a chronically oppressive relationship, rather than a physically violent one. Paradoxically, these women are less likely to telephone a helpline or walk in to an advice centre to obtain an injunction.

It has long been known that a high proportion of abuse goes unreported. According to the domestic violence statistics, the police receive over 570,000 calls each year in relation to domestic violence[3]. Furthermore, only a minority of domestically abusive incidents are reported to the police: between 23%[4] and 35%[5].

According to research commissioned by the Home Office in 2004[6], the following was recorded in relation to non-reported domestic abuse:

> ***Seeking help***
>
> *Thirty-one per cent of female victims and 63 per cent of male victims had not told anyone other than the survey about the worst incident of domestic violence that they had suffered during the last year.*
>
> *Forty per cent of women told no one about their worst experience of rape suffered since the age of 16.*
>
> *Twenty-five per cent of those women that were raped in their worst incident (since age 16) and classified it as such, told no one about this incident.*

[3] Stanko (2000)
[4] Walby and Allen, 2004
[5] Home Office, British Crime Survey 2002
[6] http://rds.homeoffice.gov.uk/rds/pdfs04/hors276.pdf

Among victims of stalking last year, nine per cent of women and 17 per cent of men had told no one.

In less than one in four (23% women; 8% men) of the worst cases of domestic violence in the last year did the police come to know.

In cases of sexual assault the police came to know in less than one in seven of the worst cases (15% completed rape; 12% any serious sexual assault; 13% less serious sexual assault).

Stalking was the most likely to be reported of these forms of inter- p e r s o n a l violence, but even for this, in only one in three (31% women last year; 30% men) cases did the police come to know.

Asked why they did not report the worst incident of domestic violence in the last year, 41 per cent of women and 68 per cent of men replied they thought that it was too trivial, 38 per cent of women and 39 per cent of men that it was a private family matter, seven per cent of women and five per cent of men that they did not want any more humiliation, and 13 per cent of women, but no discernible percentage of men, that they feared more violence or that the situation would get worse as a result of police involvement.

How prevalent is the abuse? The same research provides the following shocking figures:

*"There were an estimated **12.9 million** incidents of domestic violence acts (nonsexual threats or force) against women and 2.5 million against men in England and Wales in the year prior to interview."*

Women's Aid report the following:

"During 2006-7, the National Helpline answered an average of 387 calls per day: 500 a day on weekdays, 250 on Saturdays and 200 on Sundays.

The Freephone 24-Hour National Domestic Violence Helpline (run in partnership between Women's Aid and Refuge) received just over a quarter of million calls during its first 12 months."[7]

According to the Ministry of Justice court statistics[8] published from 2008, the number of applications for non molestation and occupation order injunctions issued in the County Court between 2004 and 2008 was as follows:

Year	**Total Applications**
2004	27,813
2005	27,374
2006	26,269
2007	24,222
2008	24,879

Thus, only a fraction of the 15.4 million incidents are reported to the police, a smaller number to refuges and women's aid and even fewer still become the subject of an application for an injunction.

There can be absolutely no doubt, therefore, that domestic violence injunctions are a crude and lamentably unreliable method of identifying victims of domestic abuse.

[7] www.womensaid.org.uk
[8] http://www.justice.gov.uk/about/docs/judicial-court-statistics-2008-05-chapt5.pdf

Is there evidence that these victims of largely unreported events become involved in family proceedings? The British Crime Survey 2001 reports the following:

> *"Of the female victims of domestic violence who had seen the perpetrator since they had split up because of their child/ren, 29 per cent had been threatened, 13 percent had been abused in some way, two per cent had had their children threatened, and in one per cent of cases the perpetrator had hurt the children."*

Taking account of only private Children Act proceedings, one can infer from these figures that a huge number of people experience their ex partners as violent or frightening individuals and yet have not obtained an injunction or even reported the incidents as a crime.

Although domestic abuse can occur in any domestic environment irrespective of class, sexuality or ethnicity it is wrong to assume that the problem is evenly distributed. It is already obvious from the statistics quoted above that a far greater proportion of women fall victim to domestic violence than men, but crucially, those women on a low income are at a significantly greater risk of abuse than their more affluent contemporaries.

> *"During the last year women in households with an income of less than £10,000 were three and a half times more likely to suffer domestic violence than those living in households with an income of over £20,000, while men were one and a half times more likely. The nature of the links between poverty and risk of interpersonal violence is unclear. It may be that poverty is associated with the onset of domestic violence, or it may be that in fleeing domestic violence women are reduced to poverty."*[9]

[9] http://rds.homeoffice.gov.uk/rds/pdfs04/hors276.pdf

Therefore, those that are most likely to be affected by the Green Paper proposals (and left unrepresented in court) will be women on a low income who have been abused and bullied by the very partners against whom they will have to appear in court.

Domestic abuse is not the only characteristic that will influence and hinder an individual's capacity to conduct family proceedings unrepresented. For those parties with mental health problems, addictions, learning difficulty (or some other cognitive or communication impairment) or those who have little or no use of English as a written or spoken language, the court system will be virtually incomprehensible.

These features are, once again, far more likely to prevail in households with a low income and are often encountered by professionals in combinations of difficulties, i.e. learning disability and domestic violence; mental health problems and domestic violence; mental health problems and addiction etc.

Apart from the few cases in which one party has attended court and obtained an injunction, none of these characteristics will trigger public funding. Therefore, cases involving allegations of violence, mental health difficulties, drug or alcohol abuse (which are tragically commonplace in the family courts) will inevitably have one or both parties representing themselves. Where the allegations are denied, it will be necessary to conduct a fact finding hearing to establish the veracity of the allegations. These cases will become an absolute ordeal to the litigants as well as an administrative minefield for the judge and the court service.

The last few years has seen a dramatic increase in the administrative burden on advocates. This (largely unremunerated) work consists of preparation of case summaries, chronologies, schedules of findings sought by each party and drafting orders. In order for the court system to keep abreast of the workload, cases must be conducted as expeditiously as possible whilst striving to balance a party's right to a fair hearing. To meet these needs, the case must be sufficiently pleaded to enable each party to know the case against them; as much of the evidence as possible should be reduced into written statements and exchanged with the other parties; the cross examination should be conducted thoroughly but succinctly with advocates advancing their case robustly but respectfully. Litigants in person will find many of these tasks extremely challenging to accomplish and, for many, the experience of being cross examined by the alleged abuser is likely to have a re-traumatising effect.

Faced with these significant difficulties, many litigants may turn away from the family courts as a source of redress and either suffer in silence or, worse, adopt more risky methods for resolving their difficulties.

In essence, certain family proceedings in which the court must determine the truth of an allegation will inevitably be conducted in an adversarial style, rather than the inquisitorial style highlighted by the Green Paper, and conducting those cases can be complex and demanding. In order for each party to have a fair trial it is necessary for the state to provide representation at public expense and only doing so where a party has obtained a non molestation injunction fails to provide justice to many.

A distinction is drawn between the gravity of public law cases and private law/ancillary relief cases in the Green Paper. There can be no doubt that proceedings that have the potential permanently to separate children from their parents are very grave indeed. However, the distinction is likely to be meaningless to a child in private law proceedings who is being prevented from exercising contact with the non-custodial parent or to a child who is made homeless as a result of the unequal distribution of assets after separation. These latter cases can lead a child to suffer significant harm and the Green Paper's categorisation of them as uniformly less serious is ill judged and potentially harmful.

Question 4

Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scheme, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases?

No, for the reasons set out in our answer, above, in relation to the removal of funding from cases which have a significant wider public interest. We take the view that limiting funding for non-scope cases for which, effectively, the failure to provide funding would constitute of breach of human rights, is too narrow. As we have pointed out, the very concept of cases which have a wider public interest

denotes that the bringing of those proceedings is of benefit to society as a whole. Very often, that benefit cannot be quantified in monetary terms. Not every such case will be of the type where the failure to provide funding would be a breach of the Government's domestic and international legal obligations. We therefore propose to keep the funding criteria the same as currently.

Question 5

Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative source of funding, such as a Conditional Fee Arrangement?

No.

Presently, the only alternative source of funding that the Government has identified in its Consultation Paper is CFAs. We have already made observations above in relation to the unfairness of insisting on the implementation of the Legal Aid Reforms *and* the Jackson Reforms on Civil Costs in tandem. Those observations are repeated here.

Question 6

We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

We take the view that removing so many types of proceedings from the scope of Legal Aid, reducing Legal Aid fees to the extent that many practitioners will

simply not supply Legal Aid services, and the reforms to CFAs (the availability of which the Government places much reliance on) will result in a significant increase in the numbers of litigants conducting their cases in person. The impact on the efficiency of the court system is obvious.

Litigants in person will, for good reason, require greater time to comply with directions and court orders. There will often be slippages in compliance with directions due to the litigant's inability to carry out what was required of them. This is because of their lack of expertise, rather than because of an intention not to comply with the order. Further hearings will be required in order for the litigant's case to be in order before trial. Then, trials will be lengthened because of the amount of time that litigants take to establish their case – litigants in person will invariably require more time than qualified lawyers in this respect.

The result of all this will inevitably be inordinate delays in the civil justice system. Claims will be subject to lengthy delays, which frustrates the objective of speedy and efficient access to justice. The other consequence of driving litigants to conduct cases themselves is that the quality of justice will suffer. People who do not have the lengthy and demanding training required for a career in the law will undoubtedly find it difficult to deal with cases that affect them directly and personally.

How, for example, are litigants expected to understand complex reports from medical experts, let alone know where to obtain such things from? A variety of claims require compliance with Pre-Action Protocols. Compliance with these can be quite onerous without legal knowledge. The failure to comply with these can result in costs sanctions. We doubt if litigants in person even know what a Pre-Action Protocol is.

Litigants will not have access to legal websites, up to date authorities or the White Book which costs currently £465 + VAT. Court staff will be inundated with inquiries from Litigants in Person for advice further impacting upon the efficient running of our Courts, adding to delays and increasing costs. Well advised Defendants will have a huge advantage and will win cases on procedural points that they should lose. When it was introduced in 1974, the whole idea of Legal Aid was to prevent a situation whereby the party with the deepest pockets won regardless of the merits. These reforms will return us to those unjust times.

The potential for miscarriages of justice, where legal representation may have made a material difference to the conduct of proceedings and their outcome, is great.

Family

We refer to the answer given in respect of Question 3. We make the following additional comment. In response to a Parliamentary question, Jonathan Djanogly has estimated that..."*removing from the scope of legal aid most private family law cases, except for those involving domestic violence, forced marriage and*

international child abduction, would reduce the number of people receiving advice under the legal aid scheme by about 211,000 annually and of those represented in court by just under 54,000 annually". Bearing in mind that those who receive advice currently pursuant to the scheme will now simply consider issuing proceedings in person, the figure of 54,000 must be looked upon as a conservative estimate of the number of litigants in person who will be conducting their own cases. This figure does not account for the increase in litigants in person undertaking their own divorce and ancillary relief cases (94,431 cases in 2008)[10]. According to the Ministry of Justice figures, there were 113,590 applications issued in 2008 for private law orders in all tiers of the family justice system[11]. Therefore, 54,000 represents around half of all cases dealt with in a year. That alone represents a significant increase in the burden on the court system and on the representatives of any party who is represented. It is unthinkable that legislation might be enacted that imposes this degree of change to the family justice system (already working at capacity) without assessing thoroughly the impact of the change.

However, the figure of 54,000 requires clarification. We know that 24,800 applications were issued in 2008 for non-molestation or occupation orders (in the County Court) and 24,466 were granted. This means that on the Green Paper proposal, approximately 89,124 applications were made in 2008 in excess of the number of cases in which an injunction was obtained (i.e. entitling the party to legal aid). This figure might be reduced by the figure for injunctions obtained in

[10] http://www.justice.gov.uk/about/docs/judicial-court-statistics-2008-05-chapt5.pdf table 5.6
[11] http://www.justice.gov.uk/about/docs/judicial-court-statistics-2008-05-chapt5.pdf table 5.3

the FPC and the High Court, although this is likely to be an insubstantial figure. 89,124 will include those cases that are currently privately paid, but it would be surprising if privately funded case constituted 40 % of the private law cases undertaken in the County Court. It requires further data to reassure the South Eastern Circuit that 54,000 is not a serious underestimate.

Question 7

Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice?

Family

In family law, parties to proceedings must confront some of the most traumatic and painful events in their life. It is difficult enough for litigants to discuss these matters with their solicitor and barrister, even though these professionals might become familiar over time. It is fundamental to presenting a client's case properly that a rapport develops that enables the client to speak candidly about their life. It will be quite beyond the majority of them to develop this sort of professional relationship over the telephone.

Many clients struggle to read letters and documents that they receive, whilst others must be seen to understand fully their history. A "single gateway" would fail a sizeable proportion of those seeking professional and sympathetic assistance.

Question 8

Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel?

Family

The Family Bar does not agree that family law issues should be dealt with by a telephone or online gateway. The solution to advice deserts is not to remove the last remaining oasis of good legal advice but to fund an adequate environment providing legal help.

Question 9

What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

Family

In Family Law there should be a presumption that a face to face meeting is required unless there is no cause of action. Child Protection issues and domestic abuse are often invisible and the method of eliciting a candid account from a client can be time consuming and taxing. The subtlety of this would be lost if no face to face contact occurred and the safety of the clients and often their children would be placed in jeopardy.

Question 10

Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

Family

A telephone operator would need to be able to refer a client to Cafcass, social services, mental health services and the police. However, the only person who could and should offer an opinion on whether a client has a cause of action is a qualified solicitor or barrister and placing a "gateway" between a client and adequate advice simply creates a dangerous barrier.

Question 11

Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?

Family

No. It is highly questionable that the client's best interests would be served by a system in which "paid advice services" pay an inducement to the "gateway" operator to buy the referral. Client choice is effectively removed at the point of entry and the market will inevitably be distorted.

LEGAL AID REMUNERATION: CRIMINAL FEES

Introduction

1. In the Green Paper: "Proposals for the reform of legal aid in England and Wales" (the "GP"), Questions 24 to 31 relate to criminal fees. Of these, the proposals relating to Questions 24, 25 and 26 will result in the largest cuts: £72 million by the Government's own estimate. That estimate is derived from the Criminal Fees Impact Assessment (the "IA") on pp 2 – 4, where the net legal aid reductions for the proposals relating to questions 24, 25 and 26 are estimated at £23 million, £32 million and £17 million respectively.

2. It is apparent that this legal aid reduction will be shouldered mainly by the Bar. The Response of the South Eastern Circuit focuses principally on the proposals relating to Questions 24, 25 and 26 because they are the most irrational, and demonstrably so.

3. With a nod to pragmatism, the remaining proposals relating to Questions 27 to 31, could broadly be supported because they are less objectionable and would have a lesser impact on an already struggling and demoralised Bar, who have faced swingeing cuts in fees before the current proposals (*recognised at Chapter 6.6 of the Green Paper*).

4. In our view, the maintenance of a strong, independent Bar committed to publicly-funded work is emphatically in the public interest.

5. The Government should be aware that the morale of those currently practising in this area is at the lowest of ebbs. Some of the proposals (for example those relating to question 26) will, if introduced in addition to existing disproportionately savage cuts to fees, have the effect of totally demoralising the existing criminal bar and discouraging the more able from joining.

6. We urge the Government to take heed that further proposed cuts will not simply result in temporary discomfort for those currently in publicly funded practice. They run the risk of destroying the criminal bar. The Government is in danger of completely re-moulding and de-stabilising a once excellent criminal justice system, admired by other nations for its standards.

7. The Circuit supports the proposals in relation to Questions 40 to 44, which relate to securing interest from client money held by solicitors and recovering a proportion of damages in successful claims by legally aided claimants for the benefit of the legal aid fund. These sources of funds could mitigate the need for cuts which are bound to damage the public interest.

Documents

8. Reference will be made in this Response to the following documents :

(a) Green Paper: "Proposals for the reform of legal aid in England and Wales";

(b) Criminal Fees Impact Assessment;

(c) Criminal Fees Equality Impact Assessment;

(d) The Criminal Defence Service (Funding) Order 2007;

(e) The Graduated Fee Payment Protocol;

(f) "The Advocates' Graduated Fee Scheme 2007 (AGFS)" by Andrew Hall QC in Archbold News 2007 at pp 7 – 9;

(g) Green Paper: "Breaking the Cycle";

(h) Paragraph 6 of Part 1 of Schedule 3 to the Criminal Justice Act 2003;

(i) The Carter Review; and

(j) Statistics on sentencing in the Crown Court from the website www.banksr.com in the spread sheet "2008 sentencing statistics.xls".

Question 24

Do you agree with the proposals to:

(i) 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;

(ii) Enhance the lower standard fee paid for cracked trials and guilty pleas under the magistrates' courts scheme in either way cases; and

(iii) Remove the separate fee for committal hearings under the Litigators' Graduated Fees Scheme to pay for the enhanced guilty plea fee ?

We disagree for the following reasons:-

1. While the rationale for the proposals may appear attractive to the ill-informed at first blush, it does not withstand logical scrutiny. It is objectionable for 5 major reasons:-

   (a) The MOJ's duty in this regard, like that of the Bar Council, the CBA and the South Eastern Circuit, should be to help lawyers to achieve and promote best practice. Best practice involves timely and accurate advice based on the present state of the law and procedure. If the law presently allows a Defendant to procrastinate in a way which is costly to the public purse but not to him, then the remedy is to change the law rather than to penalise the lawyer.

   (b) The election decision is a defendant's choice, not a lawyer's choice. A right to trial by jury in either way cases is established by law. And if the Government's view is that this law is no longer constitutionally sound (*viz* the right to elect Crown Court trial in less serious either way cases) or that, although sound, it can no longer be afforded, then the Government should have the courage to say so, rather than hiding behind the introduction of a base commercial incentive designed to encourage lawyers to substitute their private commercial best interests for the best advice to and the best interests of their lay clients.

   (c) The reasoning is inconsistent and illogical when compared with that underpinning the reasoning behind the proposal at Question 26.

   (d) It extends payment of fees directly to solicitors, placing the Bar at a disadvantage. The impact of fee reduction will be passed on by

solicitors to the junior Bar. Yet further reduction of potential earnings at the lower end of the profession will discourage applications for pupillage from the best candidates who might otherwise have undertaken criminal legal aid work, leading to a very real drop in standards.

(e) The 'perverse incentive' rationale is a thinly veiled and erroneous suggestion that the majority of junior advocates fashion their legal advice to defendants on selfish financial considerations. It is far more likely (although the Government have provided no data in this regard) that late pleas / cracked trials arise as a result of different considerations, eg. late service of evidence by the Prosecution and late changes of mind by Defendants.

2. We propose to elaborate on the summary at 1 above.

3. The Government appears to give two main justifications for this proposal:

(a) At para 6.10: "Too many criminal cases that could adequately be dealt with in the magistrates' court are going to the Crown Court." At para 6.19: "we do not believe that there is **any reason** why we should pay significantly more for a guilty plea based on the venue in which the proceedings took place" for "those cases in the Crown Court that could, in the opinion of the magistrates' court, realistically have been dealt with in the magistrates' court". This will be referred to as the "seriousness" point.

(b) At para 6.16: "We wish to reform the fee structure so that it does not inadvertently lead to delay or potentially discourage the defence team from giving consideration to plea with the defendant early in proceedings and before questions of venue have been determined." This will be referred to as the "perverse incentive" point.

4. Put shortly, the **reason** at para 6.19 is that work properly done in the best interests of the lay client according to the law and in pursuance of best professional practice should be paid for, certainly it should not positively be discouraged. It is not acceptable for the Ministry of Justice to seek to promote unprofessional behaviour by setting lawyers against their clients. The Ministry should be promoting Justice, not bringing it into disrepute.

5. Neither of the Government's justifications is accepted. We shall deal with them in turn.

The "seriousness" point

6. There are two parts to this "seriousness" point. First, that less serious either way cases should be dealt with in the Magistrates' Court rather than the Crown Court. Secondly, that the guilty pleas in the Crown Court for these cases should be paid at the same rate as in the Magistrates' Court. In essence, the first point is justification for the second.

7. It is essential to understand how a Magistrates' Court is supposed to approach the decision as to venue. The overriding question, in practice, is whether the Magistrates' Court feels its sentencing powers would be sufficient upon conviction. In other words, for either way offences which are not serious enough to require the sentencing powers of the Crown Court, the Government does not feel that it should pay significantly more for a guilty plea in the Crown Court as opposed to the Magistrates' Court.

8. However, the Government is not consistent in its application of such logic. For example, the Government also proposes to reduce the Advocates' Graduated Fee for murder, and other category A cases, to the fee attracted by category J cases which relate to rape and serious sexual offences.

9. There can be no doubt that murder is more serious than rape, not least in terms of sentencing. Society, rightly, puts a uniquely high value on human life. Whether attempted murder or manslaughter is more serious than rape is a separate issue, which will be dealt with in relation to Question 26.

10. But if the seriousness of murder does not justify higher fees, then why should the less serious nature of some either way offences justify lower fees? The logic behind the Government's proposal to reduce guilty plea fees for less serious either way offences is at odds with the logic behind the proposal to reduce murder and other Category A fees.

11. It appears that the Government are happy to turn a blind eye to seriousness of the offence when it suits their proposal for a reduction in fees for Category A offences, but yet the Government insist on focusing on seriousness when it suits their proposal for a reduction in fees for less serious either way offences to which guilty pleas are entered in the Crown Court. This is sophistry.

12. If there are to be reductions in remuneration they should be justified by proper reasoning which is not demonstrably inconsistent.

13. The key is to analyse the problem clearly. One must identify what the true problem is. One must carefully distinguish it from other things that look and sound a bit like it and which also cost money, but which are not the problem. The data for cracked trials and late guilty pleas is available. The Criminal Procedure Rules Committee sees the statistics every quarter. They are informative. They alone should inform any positive change. The most obvious changes are (i) incentivisation of the Defendant and (ii) improving the efficiency of the CPS.

14. If these less serious either way cases are costing a lot in the Crown Court, the solution, if the Government believes there is a need for one, is surely not to cut fees under legal aid, but to change the law so as to limit access to the Crown Court. On the other hand, if the Government believes in the importance of allowing defendants to elect trial on indictment in less serious either way cases, then the Government must be prepared to shoulder the corresponding costs. To

suggest otherwise would be irrational. For our part, a right to trial by jury in either way cases should remain in all but the least serious of cases. But if the Government believes that this constitutional right can no longer be afforded, then it should say so and should be prepared to argue its case against those, including the vast majority of qualified lawyers and jurists, who believe otherwise.

15. The Government should undertake a more detailed analysis of what work is required of the defence in even the less serious either way cases. This is because, even where the charge is not grave, one expects an advocate instructed at PCMH to undertake a substantial amount of work, whether or not a defendant eventually pleads guilty in the Crown Court. Ex hypothesi, if there has not been an indication of a guilty plea in the Magistrates' Court, the expectation is of a plea of not guilty in the Crown Court.

16. Assuming that initial disclosure is served at the committal stage, the defence team needs to take full instructions and then prepare a Defence Statement. The Defence Statement is often prepared by the trial advocate, frequently a barrister of significant experience. It is usually the single most important document after charge that will be prepared on behalf of a defendant. This represents a significant amount of expected work, even in what may be a less serious either way case at PCMH.

17. The amount of work the defence are expected to have done by the day of trial, as opposed to PCMH, is of a greater order of magnitude: i.e. full trial preparation. This is expected to be very significant even in the less serious cases. Just as for the proposal relating to Question 25, we would argue that there is a good reason for maintaining a higher cracked trial fee than guilty plea fee. That is simply because by the day of trial, one would reasonably expect the defence to have undertaken significantly more work than by PCMH. The proposal relating to Question 24, by removing the distinction between cracked trial fees and guilty plea fees, for less serious either way offences, is subject to the same criticism.

18. The proposed 25% increase in the Magistrates' Courts fees for cracked trials and guilty pleas in either way cases will not even come close to addressing this deficiency. This is plain from the size of the net expected reduction in legal aid expenditure of £23 million (IA p 2).

19. The net reduction in fees proposed by the Government will leave such guilty pleas inadequately remunerated.

20. Finally, if the Government wish to address this apparent disproportion between seriousness and remuneration for these less serious either way cases, the proposal relating to Question 24 is the wrong way to go about it, for the reasons given below.

The "perverse incentive" point

21. The suggestion, although very cautiously put, is that as things stand, there is a perverse financial incentive for defence lawyers to persuade legally aided defendants who might otherwise plead guilty in the Magistrates' Court, to elect trial on indictment in order to achieve a greater legal aid fee. We do not believe that this happens.

22. If this perverse incentive notionally exists, there is also a notional perverse incentive which pulls in an opposite direction. It would arise from the fact that a greater legal aid fee can be achieved by representing a legally aided defendant at trial as opposed to on a plea of guilty.

23. The Government recognises this opposing perverse incentive in the Criminal Fees Impact Assessment (the "IA") and Criminal Fees Equality Impact Assessment (the "EIA"). In the IA, the Government identifies this as a "key risk", and describes the risk in this way (*ibid* at para 50 on p 20): "Another possibility ... is that cases which previously were cracked cases or early guilty pleas at the Crown Court move to being full trials at the Crown Court or full trials at the Magistrates' Court, or attract a non-standard fee at the Magistrates' Court." The Government echoes this in the EIA at para 1.27 on p 10.

24. The Government suggests that this risk "is more hypothetical" (IA at para 50 on p.20) than the response which the Government implicitly hopes for, which is that

"cases where the defendant elects to go to the Crown Court but does not proceed to trial become cases where the defendant enters an early guilty plea at the Magistrates' Court" (IA at para 48 on p 19). The Government gives no reason in support of this claim (that the risk is more hypothetical). It is irrational.

25. The perverse incentive argument is predicated on the (false) assumption that legal aid lawyers do allow perverse financial incentives to influence the legal advice they give. That is not the reality. Even if it were right, a lawyer who is influenced by the perverse incentive to advise legally aided clients to elect trial on indictment in order to achieve a greater fee, is also going to be influenced by the perverse incentive to advise those same clients to proceed to trial on indictment as opposed to pleading guilty, again in order to achieve a greater fee. Moreover, if the Government's proposal does come into force, the latter incentive to proceed to trial would be even greater.

26. As an example of better reasoning, we would urge the Government to heed its predecessor. The current AGFS had its last major revision in 2007, by way of The Criminal Defence Service (Funding) Order 2007 (the "2007 Order"). The Bar Council, with the support of the then Department of Constitutional Affairs, produced a Graduated Fee Payment Protocol (the "Protocol") following consultation.

27. In particular the 2007 Order enhanced the fee payable at PCMH. At paragraph to 42 of the Protocol, the rationale behind the enhanced PCMH is made clear: "This will ensure that the advocate who conducts the PCMH is properly remunerated for the necessary preparation and attendance at court." As Andrew Hall QC notes in his article "The Advocates' Graduated Fee Scheme 2007 (AGFS)" in Archbold News 2007 at p 7, this is "a strategy designed to encourage early preparation and the possibility of more early guilty pleas".

28. This is why, in our opinion, it is especially perverse to expect an increase in guilty pleas by reducing remuneration in the way the Government has proposed. It is only with extra work, not only from the defence, but also by the prosecution and the Court, that real progress can be made in this area.

Payment of fees directly to the solicitors

29. There is very real concern at the Bar that payment of guilty plea fees in these minor either way cases directly to solicitors will put the Bar at a great disadvantage. The impact of the fee reduction will be passed on by the solicitors, as far as possible, to the barristers, precisely because the solicitors will receive the fees and therefore be in the better negotiating position. This cannot be fair on the Bar, especially when the balance of power is already skewed towards solicitors.

30. 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. Properly policed and regulated ring-fenced advocates' fees have a number of advantages. The advocate has specific tasks to perform. If the litigator duplicates that work, he should not be paid for it. This does not prevent a litigator who is entitled to work as an advocate from claiming the fee as an advocate, but he cannot claim a fee for what he has not done or is not regulated to do. A ring-fenced advocacy fee gives the Government control over the level of the fee and the work performed is transparent. Public money does not go to some secret profit. The defendant is protected from unqualified or poor quality representation. The defendant's right to choose his advocate on merit is preserved, as opposed to the choice being made according to the financial interests of the litigator.

31. Specifically with regard to Question 24, the proposals will give rise to a situation where work is so poorly remunerated that junior members of the Bar may be forced out of publicly-funded criminal cases.

The problem, its possible causes and solutions

32. Although the Government's justifications for its proposal are, in our view, irrational, the Government does identify a significant problem which is this: many defendants are electing trial on indictment, but then pleading guilty in the Crown Court at great cost to the public purse. The Government sets out certain data in the GP to demonstrate the depth of the problem.

33. At para 6.11, the data cited indicates that in recent years the proportion of Crown Court cases which have resulted in a plea of guilty has risen significantly whereas the number of defendants proceeded against in the Magistrates' Courts has fallen. However there is no analysis as to whether any perverse financial incentive has increased concomitantly over the same period. So, the data does not demonstrate that the Government's proposal can reasonably be expected to improve the situation.

34. In any event, we do not agree that defendants are being advised to elect trial on indictment where they might otherwise indicate a guilty plea in the Magistrates' Court in order to achieve a greater legal aid fee. But even if that were the case, it cannot be rational to address that problem in the way proposed by the Government. As discussed above, this would create an opposing perverse incentive to take more cases to fully contested trials.

35. At para 6.12 the Government states that almost 60% of defendants in either way cases sentenced in the Crown Court received a sentence on conviction that a Magistrates' Court could have imposed. However, it is apt to note that even in cases where the Magistrates have properly declined jurisdiction, it is not unusual for the Crown Court to impose a sentence which the Magistrates could have imposed. This is because in making the decision as to jurisdiction, the Magistrates do not take into account any reduction from a potential guilty plea, do not hear mitigation, and are bound to take the prosecution case at its highest. So, just because the Crown Court has imposed a sentence available to the Magistrates does not imply that the case should not have been committed to the Crown Court.

36. However, one does not have to look at data to understand and react to the underlying problem. The election decision is a defendant's choice, not a lawyer's choice. If the Government wants to address this problem, it should address the factors upon which that choice depends.

37. At present, in reality, there is very little reason for a defendant in an either way matter presented with a choice as to mode of trial not to elect trial on indictment. The Crown Court is unlikely to pass a higher sentence than the Magistrates' Court and is likely to give maximum credit for a guilty plea at PCMH. The Crown Court is unlikely to order substantially greater costs against the defendant than the Magistrates' Court. Most defendants are on bail and are not concerned by the delay of going to the Crown Court.

38. If the Government wishes to encourage defendants to consent to summary trial, the appropriate response is not to cut guilty plea fees in the Crown Court, but directly to address the choice which these defendants have to make.

39. This might be done in three ways.

40. First, the Government may take the view that there is scope for changing the law to reduce access to the Crown Court. Is the Government prepared to tackle the real problem and look, for example, at restricting the right to trial by jury for low level offences of dishonesty where the value involved is less than £100? Such a limit is already in operation in respect of cases of criminal damage - a summary only offence unless the sum involved exceeds £5000. This is not a suggestion made by the Circuit. It is a political decision. It may be a constitutionally unpopular one for the Government to make. But to conceal the nature of a perceived problem by penalising lawyers and promoting unprofessional practice instead is no answer.

41. In the second place, Crown Court judges could be required to withhold a certain amount of credit from defendants who have elected trial on indictment. The Government has already stated in another Green Paper, entitled "Breaking the Cycle" that they are considering "introducing a maximum discount of up to 50 per cent that would be reserved for those who plead guilty at the earliest stage" (*ibid*

at para 216 on p 63). An additional discount for a plea of guilty in the Magistrates' Court to an either way offence is an obvious possibility.

42. A third possibility might involve requiring Defendants who elect trial on indictment to take out a loan provided by the Government to pay for some if not all of the costs of providing them with representation - (for example, Germany has a loan model for legal aid). By providing a loan, rather than full legal aid, the Government would bring home to the defendant, to a greater extent, the true cost of their election.

43. As an economist might put it: the Government needs to create a system where the external costs associated with an election decision are internalised better by the defendant making that decision.

44. The main reason why defendants elect trial on indictment is because the Crown Court is quite simply a fairer venue than the Magistrates' Court because of the protection offered by a judge and jury. Faced with that reality, and the lack of obvious costs associated with the choice, a reasonable legally aided defendant might elect trial on indictment even if they believed they might yet plead guilty, just so their best interests would be protected if they did proceed to trial.

45. A quite separate problem which arises is that the CPS do not always, or even regularly, disclose sufficient evidence at the plea before venue stage to allow a

defence lawyer properly to advise their client as to the likely strength of the evidence at trial.

46. It would, of course, be unrealistic to suggest that the CPS could be expected to improve this situation significantly without the re-direction of resources not only to the CPS but to the police. However, should the Government want to persuade more guilty defendants to plead guilty at an earlier stage, it needs to re-direct some of the available resources.

An administrative solution from Kent

47. We set out an example from the Kent Magistrates' Courts. A new initiative has been rolled out by one District Judge 'K' whereby certain cases which had been fixed for summary trial were listed for what we shall call a "K hearing". The purpose of the hearing is to see whether some sensible negotiation, in Court, could see the case resolved without a trial. The listing might come at the request of the defence, the prosecution or the Court.

48. Recently DJ 'K' sat for a week doing this exercise almost exclusively. He dealt with roughly 100 cases in that week and roughly half of those were resolved immediately. The net saving to the public purse, even without detailed data, is obvious.

49. Some of the cases were resolved by DJ 'K' giving Goodyear style indications and perhaps an indication that the prosecution evidence appeared to him to be strong. We note that the law does not yet recognise Goodyear indications in the Magistrates' Court. The pending amendment to Section 20(3) of the Magistrates Courts Act 1980, by Paragraph 6 of Part 1 of Schedule 3 to the Criminal Justice Act 2003, would allow for an indication of whether a custodial or non-custodial sentence would be imposed on a plea of guilty. If this provision does come into force it would go some way to encouraging early guilty pleas before the Magistrates' Courts.

50. Other cases were resolved at 'K' hearings by an indication from the Court that the prosecution evidence appeared to be weak, causing the prosecution to accept a plea to a lesser charge or offer no evidence altogether.

51. However, to suggest that these 'K' hearings are successful only because of helpful indications from the Court would be wrong. They are successful because the parties respect each other and are prepared to work together to achieve a just outcome, even at the cost of an additional hearing which otherwise would not have occurred. If all the defence cared about was cost, these hearings would be viewed as a waste.

52. It is fair to say that these 'K' hearings are currently aimed at dealing with cases listed for summary trial. Could cases listed for committal benefit as well?

53. Plainly there would be little benefit in the most complex either way cases where the evidence is mostly served at or after the committal stage, by which time the Magistrates' Court is *functus officio*. In order for a 'K' hearing to be effective, the defence have to be served with adequate disclosure in order to allow the representative properly to advise the defendant as to the prospects of success at trial.

54. However, the Government is focusing, in relation to Question 24, on less serious either way cases which are deemed suitable for summary trial, where the defendant goes on to plead guilty at the Crown Court. Assuming that the CPS have served sufficient evidence by way of advance disclosure at the first hearing to allow the defence representative properly to advise the defendant as to the prospects of success at trial, these are potentially cases which could benefit from a 'K' hearing at or before committal. Obviously, if the CPS have not served sufficient evidence by way of advanced disclosure then it is not realistic to expect the defendant to indicate a guilty plea at the first hearing in any event. That is why we have suggested that re-directing resources towards prosecution disclosure may be a cost effective way of reducing legal aid expenditure.

55. So what benefits might flow from listing either way cases where the defendant has elected trial on indictment for a 'K' hearing? Some defendants might indicate guilty pleas if given a Goodyear indication and an indication from the Court that

the prosecution evidence appears to be strong. Where the Court indicates that the prosecution evidence is weak, the prosecution might accept pleas to lesser (or even summary) charges or even discontinue the case.

56. What are the limitations? It would require a more targeted deployment of District Judges - but it seems to work in Kent. Another precondition is that the parties respect each other enough to cooperate and compromise, and care more about justice than money. The risk is that the Government will price out those defence representatives who do care more about justice than money by enacting proposals like those which relate to Question 24.

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 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 ; and*
- *Access to special preparation provides reasonable enhancement for the most complex cases?*

We strongly disagree for the following reasons:

1. It is said at para 6.25, that "the approach would have the benefit of promoting efficiency by removing any potential discouragement in the fee scheme for the defence team to give consideration to the plea early in the proceedings".

2. There are few if any litigators who wish to waste their time preparing a case for trial which they envisage will end in a plea, and most if not all litigators will consider the options for a plea very early on in proceedings. This approach fails to recognise why late pleas arise. They arise in almost all circumstances because the case is properly prepared for trial and then one of the following gives rise to the plea:

    a) The defendant fails initially to recognise the strength of the case against him and enters a plea once that is fully understood.
    b) The prosecution have failed to recognise that a case has been overcharged and after negotiation offer a plea to a lesser offence.
    c) The prosecution have problems with calling a witness or witnesses and offer a plea to a lesser offence.
    d) A ruling by the trial judge excludes a piece of prosecution evidence, opening the way for the prosecution to accept a plea to a lesser offence.

3. In all of these above examples, which comprise the vast majority of late pleas, the case has been fully prepared for trial. A 25% uplift in the litigators fee will in no sense compensate for this preparation.

4. If this proposal is accepted it will result in far fewer pleas of guilty, because what is proposed discourages the litigator from preparing the trial until late in the day and in consequence the opportunity for an acceptable plea either being forthcoming from the prosecution or the defendant is lost.

5. All of the matters raised in response to question 24 (under the 'perverse incentive' point) are repeated here. Practitioners on the Circuit take the view that the Government labour under an over-cynical misconception of what motivates the advocate.

The "work done" point

6. At Paragraph 6.24, it is said *"In many cases, the cracked trial fee is more than twice the fee paid for a guilty plea entered before the case is listed for trial, whether or not any additional work has been undertaken"*.

7. The Government must realise that the AGFS is a fee structure that is not determined by work actually done but by what work one would reasonably expect to be done in an average case of a certain type. This is what distinguishes the AGFS from the now defunct ex post facto scheme where barristers billed for work actually carried out.

8. So the Government should not be asking itself whether more work is actually done by the defence in any given cracked trial case, but rather whether one would reasonably expect more work to be done in an average cracked trial case.

9. It is obvious that by the day of trial, one would reasonably expect the defence to have undertaken significantly more work than by the PCMH stage. Clearly, the further one goes back from the day of trial, the less work one would reasonably expect to have undertaken.

10. The Government's logic in relation to the "work done" point is at odds with the very logic of the AGFS itself. If there are to be reductions in remuneration they should be justified by proper reasoning which is not demonstrably inconsistent.

11. Returning, then, to the core logic of the AFGS, so long as one reasonably expects more work to be done on a cracked trial than on a guilty plea, a higher fee should be paid. On this basis, the Government's proposal that there also be a 25% uplift in guilty plea fees does not make sense. That would simply be paying more for the same amount of expected work. Nor would that uplift constitute adequate remuneration across the board, given the expected net reduction in legal aid expenditure associated with this proposal: £32 million (IA p 3).

12. If the Government does not agree that in an average cracked trial one would reasonably expect the defence to have undertaken more work than an average

guilty plea at PCMH, the Government should explain why. Otherwise the Government should recognise that their proposal will tend to reduce the rate of pay for barristers below that which is reasonable.

Special Preparation

13. The Government's suggestion that access to special preparation be continued is of no relevance as it is available now and is an instrument with a very different target. A claim for 'special preparation' is available in an extremely limited number of cases involving:

    - Preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue, or
    - The number of pages exceeds 10,000 and the appropriate officer considers it reasonable to make a payment in excess of the graduated fee.

    As such this provision is largely irrelevant in that it goes no way towards addressing the changes which would be brought about by the Government's proposals. In short, if the special preparation fee did not apply to the case before the proposal, it will not apply afterwards.

14. Special preparation is aimed at allowing the most complex cases adequately to be remunerated, rather than at ensuring work conducted by the defence at different stages of the case is adequately remunerated. That latter target is currently achieved by maintaining a differential between cracked trial and guilty plea fees.

15. Each target requires a separate instrument if you are to aim at all targets effectively and at the same time. By cutting the cracked trial fee, the Government is losing sight of a very important target.

16. In any event, applications for an additional fee for special preparation are very rarely successful under the current regulations. It is well-known that such applications, while welcomed by advocates in practice, are routinely disallowed in deserving cases, leading to disillusionment amongst advocates who are left working without adequate payment for the hours they have put in.

17. Is the Government prepared to review and extend the payment of 'special preparation'?

Alternative Proposals

18. Although the Government's justifications for its proposal are, in our view, misconceived, the Government does identify a significant problem: many defendants in the Crown Court do plead guilty on the day of trial, who might under other circumstances have pleaded guilty at PCMH. The data to which the Government refers is set out at para 6.11 of the GP.

19. In particular, at para 6.11, the Government states that "Legal aid data indicate that average overall expenditure on ... cracked trials within the Advocates' Graduated

Fee Scheme (AGFS) has increased by ... 67% ... since 2007, taking into account changes in the volume of cases." . However there is no analysis as to whether any perverse financial incentive has increased concomitantly over the same period. So, the data does not demonstrate that the Government's proposal can reasonably be expected to improve the situation.

20. In any event, we do not agree that defendants are being advised to maintain a not guilty plea in order to obtain a cracked trial fee later on rather than a guilty plea fee at PCMH. But even if that were the case, it cannot be rational to address that problem in the way proposed by the Government, as this would create an opposing perverse incentive to take more cases to fully contested trials, as discussed in the response to question 24 above.

21. Although statistics can give some insight, in this case, as to the scale of the problem, it is much harder statistically to analyse its causes.

22. At least one significant cause of this problem is late service of material by the CPS, especially in the more serious cases where investigation is an ongoing process right up to the day of trial, if not beyond. It is our opinion that the Government ought to re-direct resources to encourage the CPS and police to effect earlier and more comprehensive service of essential evidence.

23. Another cause might be the instruction of an advocate at PCMH who is not the trial advocate. One of the key innovations of The Criminal Defence Service

(Funding) Order 2007 ("the 2007 Order") is the concept of the "instructed advocate" as recommended by by Lord Carter in his Review of Legal Aid Procurement (see Recommendation 4.14 on p 78).

24. As Andrew Hall QC notes in his article "The Advocates' Graduated Fee Scheme 2007 (AGFS)" in Archbold News 2007 at p 9, this is "an attempt to encourage 'case ownership' in order to ensure early and effective preparation." If a trial advocate is instructed well in advance of the PCMH, that advocate will be able, from a very early stage, properly to prepare the case. This will usually include the drafting of a Defence Statement from a proof of evidence taken by the solicitor. That process of preparation will allow the advocate thoroughly to advise the defendant as to plea at PCMH, or if appropriate, in conference prior to PCMH.

25. It is our opinion that the Government would do better to encourage solicitors to instruct a trial advocate at an early stage for PCMH.

26. The Government should realise though that other features of the Crown Court system do tend to make it difficult to ensure that a trial advocate is instructed at PCMH to represent the defendant at trial in every case. The fact that trials are mostly listed in warned lists, without a guarantee that a trial will necessarily be heard during the period of a particular warned list, means that inevitably a reasonably busy advocate will not be able to satisfy all their trial commitments.

27. The Government should be aware that no amount of cost-cutting or cynicism about the cracked trial issue will resolve a fundamental issue, namely that a defendant will often stall – and stall vehemently – until the eleventh hour despite advice to the contrary. To hit the advocate's pocket for work which he genuinely and properly had to do on behalf of a vacillating defendant, is inequitable and demoralising. It is just wrong.

28. In the final analysis, it seems to us that proposals for saving money within the criminal justice system need to go back to first principles, rather than prune indiscriminately with the risk of unintended consequences. It is, after all, Parliament which decides when a defendant has the right to elect trial in the Crown Court and for which offences.

29. In the second place, we think that the judiciary need uniformly to be much more interventionist in positively seeking out at the earliest stage those cases in the Crown Court which, for whatever reason, will not or do not need to go to trial. The fact is that the inclination or the ability to do this comes more readily to some judges than others.

30. Finally, the Government has the option of reconsidering the justification for short sentences of imprisonment for 6 months or less, save in the case of offenders who have breached a sentence which did not initially result in their immediate imprisonment.

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?

We disagree for the following reasons:-

1. The Government seeks to justify a reduction in fees for murder/manslaughter cases on two bases:-

    a. At para 6.30: "Although cases of murder and manslaughter have a much higher public profile, they do not necessarily raise more complex matters of law or fact than other very serious offences, such as rape and serious sexual offences … While cases of murder and manslaughter often involve high volumes of prosecution evidence, such as witness statements, forensic and psychiatric reports, this is separately recognised through the enhancements available for pages of prosecution evidence." (The "complexity" point.)

    b. At para 6.30: "Although murder carries a mandatory life sentence, many other serious offences also carry a maximum sentence of life imprisonment, including rape and some other serious sexual offences." (The "seriousness" point.)

2. Those two purported justifications reveal a serious misunderstanding of the true position in the criminal courts. Those who practise in the criminal courts know full well that a murder / manslaughter case is invariably significantly more serious and more complex than other 'serious' cases. They carry more responsibility. It is right that the most able and experienced advocates undertake them and that they are properly remunerated for doing so. It seems to us that the special position of homicide offences is explicitly acknowledged by the fact that the Judges who try them need to be specifically authorised to do so. Separate authorisations are required for a Judge to be able to try cases of rape, murder and attempted murder.

The Complexity Point

3. The higher rates paid for murders under the ex post facto arrangement were not put in place merely because of either the profile of murder cases or indeed the mandatory life sentence. Rape and other serious sexual offences are rarely comparable with murder allegations. Rape cases by their nature are very often 'one witness' cases – they are almost always committed in private - with some scientific evidence in the form of DNA. There are of course rare exceptions to this generality, where there are multiple allegations of historic rape involving numerous victims. Murders on the other hand are more often than not hugely complex by way of comparison, involving issues of identification; cell site analysis; video evidence; scientific evidence including the comparison of fingerprints, facial mapping and DNA samples, blood detection and distribution; the causation of death and a wide range of defences, both full and partial. Under

the "ex post facto" arrangements the exceptional multiple rape case would attract a greater fee that a simple murder in recognition of the difficulty of the case. When the graduated fee system was introduced the Bar recognised the need to reduce the cost of fee administration and therefore accepted a graduated fee system which by its nature could only make generalised distinctions between cases.

4. It is suggested that the greater volume of work generated by almost all murders is separately recognised through the enhancements available for pages of prosecution evidence. That is simply not the case. The enhancement for murder cases under the present scheme is paid on the basic fee and the enhanced daily rate. At present the rate per page as between a rape and a murder is exactly the same. In consequence, the only difference between a rape and a murder would be the number of pages at £1.89 a page. This distinction would be derisory and wholly unfair. Take, for example, a rape case with a single complainant, where the defence is consent and the pages of prosecution evidence amount to 200. Compare a murder of an infant in the care of a parent where the issue is cause of death - inflicted injury vs unknown cause (sudden infant death syndrome " Sids"). The cases would be paid the same, the work entailed by the two cases a world apart. Whilst the rape allegation would consist of victim statements and interviews and perhaps some corroboration by way of recent complaint or witness testimony as to the behaviour of either party before or after the alleged rape, the alleged child murder would consist of a vast array of expert evidence as to the cause of death ranging from neuropathology, paediatric pathology and

ophthalmology. In a recent such case, the Crown instructed 17 such experts. In choosing this example we are not comparing extremes, the murder that does not contain a vast range of scientific and factual issue is vanishingly rare. The 20 % differential even at present between the two categories of cases, does not reflect the difference between them.

5. If the Government does not agree that in an average case of murder or manslaughter, one would reasonably expect the defence to have undertaken more work than in an average case of rape, the Government should explain why. Otherwise the Government should recognise that their proposal will reduce the rate of pay for barristers below that which is reasonable.

The Seriousness Point

6. It is disingenuous to suggest that *'Although murder carries a mandatory life sentence, many other serious offences also carry a maximum sentence of life imprisonment, including rape and some other serious sexual offences.'* We note that the Government does not produce data revealing how many other serious offences including rape and other serious sexual offences have in practice resulted in sentences of life imprisonment. That is because in the overwhelming majority of cases they do not.

7. We have analysed statistics available from the website www.banksr.com where Crown Court sentencing data are displayed in spreadsheet format. In 2008, for

defendants aged at least 21, the average custodial sentence for:

a. rape of a female was 97 months;

b. rape of a male was 100 months;

c. attempted murder was 172 months;

d. manslaughter was 61 months.

8. The above average sentences are highlighted in the relevant spreadsheet named "2008 sentencing statistics.xls". There are no data available on the relevant spreadsheet as to average sentence length for murder. But no data are required to realise that a mandatory life sentence is going to be much longer on average than the average sentence of 97 – 100 months for rape. Sentences for murder where the offender is over 18 years currently provide guideline minimum terms beginning at 15, 25 and 30 years in those cases where a 'whole life order' is not imposed.

9. It should be noted that the data presented in the relevant spreadsheet in relation to the average sentences in cases of conspiracy to murder are conflated with data for sentences for threat to kill, a very much less serious offence which would not be paid, in any event, at Category A rates.

10. For attempted murder too the average sentences are substantially higher than for rape. For manslaughter, the average sentence is lower than the average sentence for rape. However, it should be acknowledged that a significant proportion of those cases which fall to be sentenced as manslaughter start out as murder. They

become 'manslaughter' for the purpose of statistical data either as a result of an alternative verdict being delivered by a jury or because a satisfactory plea has been entered. Moreover, those manslaughter (or indeed murder) cases which are regarded as other than 'exceptional' by virtue of complexity are already subject to provisions under the Criminal Defence Service (General) (No.2) Regulations 2001 (Regulation 14) which is strictly interpreted by the judiciary and which severely limits the extension of legal aid to permit of instruction of leading counsel with the concomitant additional expense.

11. Accordingly, the "seriousness" point does not justify a reduction in fees for homicide, where the average sentences are significantly longer than for Category J offences. The loss of a human life renders an offence one of unique gravity.

Key Risks

12. In relation to Question 24 and 25 the Government has sought to identify a particular problem that should be addressed. In relation to Question 26 that is not the case.

13. We do note that the Government has failed, in the Criminal Fees Impact Assessment (the "IA") and Criminal Fees Equality Impact Assessment (the "EIA"), to identify key risks which may arise if the proposal relating to Question 26 is enacted. In relation to the proposals relating to Questions 24 and 25, key risks were identified in the IA and EIA and we have commented on them.

14. There is, however, a very substantial risk if the proposal relating to Question 26 is enacted. This is because the additional burden of responsibility on an advocate in a murder case, even in those (rare) cases where the hours worked may be the same as on a less serious case, should be a proper justification for a higher fee under AGFS. There must be recognition within the AGFS that in general the seriousness of the sentence the defendant is likely to receive on conviction needs to be reflected in fees payable. The Category system was created, it would appear, to satisfy this purpose.

15. In cases of homicide the public interest is best served by attracting the most talented and experienced advocates to deal with what are the two most serious offences in the criminal calendar. Under the Government's proposal there would no doubt continue to be advocates prepared to represent legally aided defendants in cases of murder. But who would they be?

16. If the Government's proposals are implemented with regard to Question 26, the effect will be further to reduce the fees of Queen's Counsel who are instructed to defend in the most serious cases of murder and manslaughter such that they are paid on an equal level as junior members of the Bar. That will have three effects:-

    a. It will remove the incentive on those who have been adjudged 'excellent' advocates to undertake publicly funded criminal cases at all, leading to a lowering of standards in the most serious cases;

b. The Government will find that a reduction in fees for murder / manslaughter will lead to those without the skill or experience more readily undertaking these most serious of cases, with the corresponding risks of miscarriage of justice and an increase in cases going before the appeal courts;

c. It will have the effect of blurring the distinction between those who have attained the rank of QC and those who have not – a substantial inroad into the justification for QCs, which has already been considered in detail and affirmed.

d. It runs the risk of doing away with the Silk system at the criminal Bar by stealth. What point would there be in making an application for Silk if the vast majority of a QC's criminal practice is now to be paid at the same rate as that of a junior barrister?

17. The Government should be aware that in the criminal courts currently, legal aid is invariably only extended to permit of instruction of Queen's Counsel in murder / manslaughter cases. It is those cases which, for very good reason, require the skill, experience and expertise of those at the very top of the profession. Accordingly, the practice of those lead counsel prepared to undertake publicly funded work at all is currently almost entirely dependent upon such cases. Those highly skilled advocates are already aware that their income is very substantially less at the publicly funded criminal Bar than in other branches of the law. They undertake such cases, despite the relatively poor fees, because it is vitally

important work. The proposal, if implemented, will lead to those of the highest calibre, already disillusioned by the 'salami-slicing' of fees to date, diversifying away from publicly funded criminal work. Moreover, it will result in fresh new talent refusing to undertake that sort of work at all. The fee will simply not adequately remunerate them for the hours of work and the responsibility that such cases involve. The Government would do well to heed the warning that the consequent lowering of standards and the mistakes that will inevitably follow will have an impact upon criminal justice in the most serious, important and well-publicised 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.

We disagree for the following reason:

The enhancement at present between the bands F and G is reflected in the basic rate and the enhanced refresher. The page rate is paid at the same rate. To leave the distinction between the two categories to the vagaries of the number of pages is neither fair nor logical. In the overwhelming majority of cases, the higher the sum involved, the more complex the case.

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.

We disagree.

As to a) the self-employed bar practising in London must endure higher living and travel expenses. The principle of 'London Weighting' is long-established, applies elsewhere in the public sector and exists for good reason - to counter those increased costs.

As to b), the proposed reduction of 'bolt-on' fees will again principally affect junior members of the bar. We know of no other public service whose fees are subject to the reductions already faced by the criminal bar. Bolt-on fees represent real work undertaken. To reduce them by 50% is unfair and arbitrary.

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?

We agree. For reasons of consistency.

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.*

We take the view that this may be of assistance, although we question whether, given the limited number of cases now falling within the VHCC scheme, it would offer value for money. Previous experience as a judge or advocate would be essential. The assessor could deal with cases of particular complexity and assist in other cases of dispute. Of course, the Graduated Fee "Plus" Scheme was worked up with a view to taking over from the VHCC scheme so as to provide greater budgetary certainty and reduce the cost of administration. Unfortunately, the scheme was not taken forward.

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?

We do not disagree, although it would be as well to bear in mind that often significant amounts of additional evidence are served very late in the day. Paradoxically, it is frequently encountered in very serious cases where expert evidence is not made available until the eleventh hour – long after decisions as to proper representation have been made. In an appropriate case, where further

evidence is expected, there should exist a discretion to grant an extension of legal aid to permit of two counsel in advance of trial.

Question 32

Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

Family

The SEC considers that the majority of family fees have been pared down to the minimum by several years of reductions by successive fee consultations as well as real term decreases as a result of inflation. The Green Paper offers no analysis to support the value to the fund or the impact of a 10% cut in fees. It is an arbitrary figure at best and has the appearance of a punitive recoupment at a time when the landscape of the family justice system is being fundamentally altered.

The removal of scope (in relation to private family and AR) is estimated to save the fund £178 million, so it is debatable whether the government has any data at all to place a value on a further 10% cut. Without an idea of what the figure of 10% means in real terms it is impossible to provide a meaningful response. However, it is questionable whether this approach represents good financial management.

On a case by case basis, it is difficult to see how any cut can be justified. An advocate representing a child by a rule 9.5 Guardian against two or more litigants in person has an exceptional burden of responsibility to undertake to assist the

court. It is quite impossible to justify, in the face of the removal from scope the representation of each other party, the reduction for the one remaining lawyer in the case, who will be expected to do much more work.

Question 34

Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5, subject to a further 10% reduction? Please give reasons.

Question 35

Do you agree with the proposals:

- *To apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and*
- *To apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?*

Please give reasons

Question 36

The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraphs 7.22 and 7.23) for which the application of 'risk rates' would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.

No. The answers to these questions have a significant degree of overlap and so it is convenient to deal with all in the same place.

The rates currently paid to barristers are modest. A reduction by 10%, together with insisting upon risk rates in every case, is swingeing. This is particularly so when coupled with the removal of vast swathes of proceedings from the scope of Legal Aid. This will result in barristers who currently act for litigants that have to resort to Legal Aid (because they are impecunious) switching to better paid private work. The fact that they have not already done so is testament to their sense of public duty and their genuine commitment to access to justice. As a result of barristers refusing to do Legal Aid work, the pool of those who offer Legal Aid services will be diminished and litigants will either have to represent themselves or wait in line for a barrister who continues to provide Legal Aid services to become available.

Question 38

Do you agree with the proposals to restrict the use of Queen's Counsel in family cases to cases where provisions similar to those in criminal cases apply?

Family

The primary driver for these proposals is cost control. The requirement for government bodies to exercise a keener degree of financial husbandry has seen many new initiatives being considered. The provision of public funds for representation by Queen's Counsel in family proceedings is already the subject of careful scrutiny and ongoing review.

The SEC does not consider that any further changes are necessary to the provision of funds for QC without detailed data being provided of the current cost of the provision.

Question 39

Do you agree that:

- *There should be a clear structure for the fees to be paid to experts from legal aid;*
- *In the short term, the current benchmark hourly rates, reduced by 10%, should be codified;*
- *In the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;*
- *The categorisations of fixed and graduated fees shown in annex J are appropriate; and*
- *The proposed provisions for exceptional cases set out at paragraph 8.16 are reasonable and practicable?*

Family

The SEC agrees that there should be greater control over experts' fees and a clearer structure would assist with this. The current benchmark hourly rates require closer analysis and do not reflect the availability of certain experts. The Government will need to bear in mind that low availability of certain experts, particularly in the fields of child and adolescent psychology and psychiatry and paediatrics can lead to significant delay and proceedings. Over-zealous cuts will probably reduce the pool further. The unintended consequence may be further delays in proceedings which would be extremely unhelpful at a time when the number of litigants in person is swiftly rising.

Question 49

Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons

We agree that the Government has identified the range of impacts correctly. However, we are dismayed at the way that the potential impacts described have been dealt with.

We note that in the Equalities Impact Assessment for the proposed scope changes, potential disproportionate impacts have been identified in respect of clients and providers, and in respect of women, the ill/disabled and/or those from BAME backgrounds, in the following paragraphs:-

1.35, 2.34, 3.36, 4.35, 5.36, 6.36, 7.36, 8.37, 9.35, 10.35, 11.36, 12.37, 14.42 and 14.101 (the last two in respect of implementing all options)

Further, in the Equalities Impact Assessment for the fee reduction/restructuring proposals for civil and family cases, potential disproportionate impacts were identified in the following paragraphs:-

1.42, 1.43, 2.27, 2.33, 3.15, 3.34, 3.38

On each occasion, the Government has been unable to find ways of mitigating the impacts identified. It is regrettable that the Government feels it is permissible to drive through its reforms notwithstanding the negative and disproportionate impact they will have on the most disadvantaged members of our society. We query whether the Government has on its agenda the protection of the rights of minorities, given this attitude to its own analysis.

On Behalf of The South Eastern Circuit **14th February 2011**