Response of the South Eastern Circuit
to the Legal Services Board document entitled
"Referral fees, referral arrangements and fee sharing"
insofar as these relate to Criminal Advocacy.

1. The South Eastern Circuit (SEC) has formed a sub committee to consider the proper response to the LSB paper dated September 2010 entitled *"Referral fees, referral arrangements and fee sharing"* insofar as the paper considers these matters in relation to fees payable for criminal advocacy.

2. We have not considered responding to the questions posed in relation to conveyancing or personal injury but have borne in mind the materials and considerations that the LSB has raised in respect of those aspects of the legal matrix.

3. The 3 questions posed by the LSB are in the following terms:

   a) Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?
   b) Do you have additional evidence about the operation of referral fees of fee sharing arrangements that should be considered by the LSB?
   c) In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?

The short answers to the 3 questions are as follows:

   a) No
   b) Yes
   c) Yes

4. These short answers plainly do not provide a sufficient response to the posed questions and so we shall set out the matters that give rise to those answers in more detail. We are of the opinion there are strong public policy reasons why the payment or receipt of referral fees should be

resisted. They are neither in the interests of the lay client nor in the interests of criminal justice generally.

5. We begin by quoting from the Chief Executive's introduction to the LSB paper, with which we agree:

> *"The question for regulation now, is how best to put incentives in place to reinforce ethical behaviour that maintains public confidence …"*

6. The LSB paper concludes that insofar as the matters considered affect conveyancing or personal injury litigation, then there should be improved transparency as follows:

> *The legal provider should disclose to their clients the key facts about referral fees:*
>
> - *whom the referral fee is paid to and for what services*
> - *the value of the referral fee in pounds*
> - *the consumer's right to shop around for an alternative provider.*
> - *All agreements for referral arrangements should be in writing.*

7. Whilst we make plain our total opposition to the permission of referral fees in criminal advocacy, we see no reason in principle why such conclusions should not apply if the contemplated arrangements are permitted. Our view is that there is no proper basis for permitting fee sharing for criminal advocacy beyond the model represented by the Bar Protocol. Such fee sharing is not and should not become a back door to referral fees.

8. The LSB paper describes the concept of referral fees in the following terms (para 2.16):

Referral fees can be described as a cost in the market. They are recognition of the need to connect consumers with legal services.

9. We are of the opinion that this definition may be apt in the context of conveyancing and/or personal injury work. It may also be appropriate for other areas of privately funded legal work, or work in which financial claims arising from negligent conduct can provide appropriate damages or recompense. We consider that it has no place in the realm of publicly funded criminal advocacy.

10. To describe the provision of criminal advocacy as a "market place" is wholly misleading. Subject to recent changes in relation to "direct access work", Barristers are dependent upon Solicitors to provide them with lay clients and are not in a position to compete directly for clients. This places Barristers at an obvious professional disadvantage in the so-called "market place" for criminal advocacy services, the more so if these are to be governed in any way by the effect of referral fees or fee-sharing arrangements.

11. There is no true "cost in the market place" for the referral by a Solicitor of advocacy services to a Barrister – the advocacy services are not paid for by the Solicitor, either directly or indirectly, but are funded directly by the public purse (with or without a level of contribution from the lay client).

12. The only sense in which there is a cost to the Solicitor, is the "opportunity cost" to the Solicitor who is unable to perform the advocacy work (for whatever reason) and is thereby prevented from being paid for that which s/he has not done. This is not a real cost, but is a loss of potential income/profit such as would befall any person who was unable to perform work for whatever reason and thereby passed that work to a colleague.

13. The LSB recognizes (para 2.19) that the Bar Standards Board (BSB) does not permit the payment or receipt of referral fees, albeit that such matters are prevalent amongst some Solicitors. Also paragraph 307 (e) of the Code of Conduct explicitly bans *"any payment … to any person for the purpose of procuring professional instructions"*. We are of the opinion that there are good reasons for these professional obligations and responsibilities to remain in place.

14. Criminal Barristers are self-employed; a monopoly provider (the Government) governs the terms and conditions for the payment of public funds for criminal advocacy {the Advocates Graduated fee Scheme (AGFS)} – these cannot be negotiated; the terms are formulaic (depending on such matters as pages of paper and length of trial) and are blind to almost all issues of quality control; the fee structure has been subjected to vigorous negotiations in recent years and has recently been reduced without any reference to the quality of advocacy; the only element of "quality control" is therefore exercised by the lay client (occasionally), by the instructing Solicitor alone or in combination with Barrister's Clerks.

15. We are of the opinion that if the fees payable to an advocate are to be reduced further by the intervention of an intermediary (whether Barrister or Solicitor) this can only have a potentially detrimental effect upon the quality of the advocates likely to be prepared to perform advocacy services. We can see no potential benefit to the public (since the total sum payable remains fixed) or to the lay client (who has little chance to properly assess the quality of advocacy being provided). The only benefit that can be foreseen is one that accrues to the intermediary.

16. Unlike other forms of litigation, there is no adequate recompense/damages for a lay client in the event of inadequate advocacy services in criminal litigation – either a person is convicted or acquitted

and the result often changes the life of the all those concerned in the litigation. This cannot be "undone" by suing an incompetent advocate.

17. The LSB concludes (para 6.10) that, *"there is no evidence that lawyers are consistently putting financial interests ahead of their duties to their clients."* This is either a naïve assertion or one which, at the very least, places too much reliance upon the appearance within it of the word "consistently" . In the absence of any independently assessable system of quality control for advocacy services, it is not possible to provide "evidence" of the effect of referral fees on the quality of advocacy in the manner contended for by the LSB. However there is other evidence-based information that does reflect upon this issue and should be considered powerful in its implications. None of it supports the stated conclusion of the LSB.

18. Charles River Associates (CRA) produced a Report (dated May 2010) for the Legal Services Board, which provided some analysis of the impact of the changes in the litigator fee and the advocacy fee in criminal cases. The Report bears close and complete reading.

19. The reduction of the "litigators fee" has reduced the payments that are made to Solicitors conducting criminal work. The number of Solicitor advocates has risen substantially (and is expected to rise further) consequent upon the reduction of the litigator's fee, as Solicitors attempt to secure payment of all or part of the criminal advocacy fee (CRA paras 3.2.1, 3.4.2).

20. It is plain that this has not been driven by a desire to improve upon the quality of advocacy but is driven entirely by financial considerations. During the same time, there has been a reduction in the number of

criminal Barristers (CRA para 3.2.2). This is also reflected in the percentage of Solicitors who reported an increase in the instruction of Solicitor advocates (12%) and those who reported a reduction in the instruction of Barristers (21%). To argue that there is no financial imperative at play and that the quality of advocacy will remain unaltered is simply not tenable. The standards of the Bar have not altered, but the financial interests of instructing Solicitors have.

21. It is plain that the referral of work to other Solicitors or Barristers on the basis of who is prepared to undertake the advocacy work for a reduced payment will be driven by similar considerations.

22. Our Committee has seen many examples of Solicitors being instructed as advocates consequent upon a fee sharing/referral fee arrangement. It has been apparent that in no case has the quality of advocacy been a consideration in the mind of the referring lawyer. We consider that it would be naïve to believe that any referring lawyer would tell a reviewing body that they have done anything other than place the interests of their client at the front of their considerations. The LSB should approach such assertions with the greatest caution.

23. On the topic of quality control and its relationship to market forces, we make further reference to the findings of CRA, which reported, inter alia, as follows:

"Concerns about quality in criminal advocacy were identified in the Carter Review in 2006. It was noted that introducing price competition in criminal legal aid would bring a significant risk to quality, as high quality efficient suppliers could be undermined by low quality, unsustainable suppliers. For this reason the Carter Review stated that:

*"A swift move towards a proactive quality assurance process for advocates is required as a **precondition** of the new advocacy procurement system." [Emphasis added]"*

It is clear from this that the intention of the Carter Review was that a quality assurance scheme would be in place before any movement towards a more market based pricing system. In practice this has not arisen and the QAA scheme remains under development at the time of writing.

Finally, we note that consumers are thought to be in a weak position to assess the quality of advocacy services that they receive, indicating that the role of the consumer in selecting the advocate or switching advocates is likely to be very limited in ensuring that quality standards are maintained."

24. Given these findings of a Government led review of criminal advocacy fees almost 5 years ago, it is surprising to find the LSB placing so little emphasis upon the lack of an existing quality control mechanism whilst simultaneously purporting to consider that there is little impact upon the quality of advocacy resulting from fee sharing or referral arrangements.

25. There is already some provisional evidence that does not reflect well upon the quality of Solicitor advocates in the Crown Court. This has been obtained from the pilot QAA scheme and has been reported by CRA (para 3.5.2). This is further evidence that financial considerations are acting so as to blind those who are in a position to determine whether to instruct independent advocates:

Pilot QAA scheme

There is tentative evidence from the pilot scheme of the QAA, which finds that for Level 2 (reflecting straightforward Crown Court cases), solicitors had a higher failure rate (42%) than barristers (25%). This is based on a voluntary pilot scheme and the LSC notes that individuals may have sought to test themselves at a higher level than that at which they commonly operated. However, the LSB notes that,

"there is no evidence to show that merely having the right to appear and conduct trials in the Crown Court means that an advocate can exercise their skills at the requisite entry level for that court".

26. It is apparent from the above quote that the LSB is already in possession of this information and we regard it as very surprising that such material has not appeared in the LSB consultation paper to which we are making this response.

27. We do not regard QAA as holding all the answers in any event. It will merely provide a form of "minimum requirement threshold" but will say little or nothing about the real ability of criminal advocates. Most importantly, it will say nothing about their independence.

28. This LSB Consultation appears to us not to have grasped the essential concept of the need for independence in criminal advocacy – criminal advocacy is seldom driven by consideration of the mere financial outcome for a lay client, one is usually dealing with the liberty of the client – at its highest, one is dealing with the life-long liberty of the client. If the public was aware that this was being traded for a share of the advocate's fee to the lowest bidder then we venture to suggest that any right-minded member of the public would wonder at the competence of those who permitted such an arrangement to be contemplated. The high standards of the criminal Bar are recognized the world over – we would urge that it is

the duty of the regulating body to ensure that these are maintained and not subjected to inappropriate and avoidable economic pressures.

29. We recognize that the Bar has had to acknowledge a limited scope for fee sharing arrangements as a result of the current AGFS notionally including a number of Court appearances in the overall fee. However, in order to ensure that there is no unfairness to advocates, a Bar Protocol has been prepared to govern such arrangements. Whilst this is not mandatory, none of the members of the sub-committee is aware of Barristers refusing to comply with the Protocol. It is important to note that when cases are subject to such arrangements, the Protocol avoids decisions as to which advocate should undertake the case being determined by considerations of financial advantage in the mind of the 'returning" advocate. The Protocol operates upon the presumption that cross-payments will be made for work actually done, rather than made to obtain the opportunity to earn an advocacy fee (albeit in a diminished form). This provides a real and tangible difference between acting under the Protocol and acting under a "market forces" fee sharing or referral fee arrangement. They are not to be confused.

30. Under AGFS, Advocacy fees are meant to be payments for advocacy. They are not to be used by one branch of the profession as a method of increasing the perceived inadequacy of fees for other services. If Solicitor advocates are permitted to conduct the PCMH and thereafter to instruct only those who will conduct the trial for 80% (or some other Solicitor determined percentage) of the proper fee, then every firm conducting criminal litigation will employ a Solicitor advocate and increase its profits by this simple device. Its corrupting influence is too obvious to state further. It has nothing to do with the quality of advocacy or justice.

31. Equally, if Barristers are permitted to conduct a PCMH and thereafter to demand that any subsequent advocate should receive only a percentage of the trial fee (not being governed by the Protocol), then the potential for undue influence is obvious.

32. We have also considered the potential effects of the Bribery Act 2010 upon such payments. Section 1 criminalises those who improperly offer, promise or give financial advantages to others whilst Section 2 criminalises the procurers or recipients of such payments. We consider that there is scope for the Legal Services Commission to examine any payments by way of referral fees or fee sharing arrangements where there is no objective advantage that will accrue to the lay client, or when there is no accepted and public Protocol delineating the proper nature of such payments – in such circumstances it is would be interesting to hear the justification for such a payment. At present, those who engage in such practices do not even have to declare the fact of such an arrangement – this appears to be extraordinary in the current climate of the encouragement of greater transparency. We encourage greater openness and more effective regulation of Solicitors who engage in fee sharing arrangements and/or the payment/receipt of referral fees.

33. In the event that fees are driven down by such "market forces", the advocates who remain within the system of criminal justice will soon be limited to the young, the inexperienced, the incompetent or all three. Those who lose loved ones to murderers will find inexperienced advocates are prosecuting the killers; those who find themselves wrongly accused of committing such crimes will find themselves represented by advocates unable to deal with the rigours of such litigation. This special form of cost-neutrality and supposed "equality of arms" is neither to be applauded nor contemplated.

34. It should be a part of the function of all concerned with the provision of legal services relating to criminal advocacy to ensure that the public is aware of the real risks of gross miscarriages of Justice becoming commonplace if the quality of criminal advocates declines. We urge that no regulating body should be prepared to countenance a step, which carries an identified risk of promoting and/or accelerating such an outcome.

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23/12/2010