DRAFT RESPONSE OF THE CRIME TEAM AT GARDEN COURT

TO PROPOSALS FOR THE REFORM OF LEGAL AID (CRIMINAL FEES)

CONSULTATION PAPER CP12/10 NOVEMBER 2010 (III)

INTRODUCTION

LEGAL AID REMUNERATION: CRIMINAL FEES

Introduction

1. As a team of criminal practitioners, our response to the Green Paper: "Proposals for the reform of legal aid in England and Wales", will necessarily focus on Chapter 6 and questions 24 to 31, which relate to criminal fees.

2. The proposals relating to questions 24, 25 and 26 will result in the largest cuts: £72 million by the Government's own estimate[1]. It is clear that the Bar will be most adversely affected by the proposed changes.

3. The preamble to the consultation paper advises respondents 'to have the overall fiscal context firmly in mind'. It is clear that savings must be made in the legal aid budget, however, the reform of fees should be proportionate, fair and based on a sound rational approach. Our response focuses on questions 24, 25 and 26, because these proposals are disproportionate, unfair and irrational.

[1] 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.

4. The proposals that questions 27 to 31 relate to are more rational and, therefore, less objectionable. In recognition of the need for some reasonable reforms, we would not object to these proposals.

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:-

5.

(a) The decision as to choice of venue in an 'either way' matter is a defendant's choice, subject to their representative's advice. This advice will differ from case to case, but will certainly involve advice to enter an early plea in the Magistrates' Court, where the defendant provides instructions consistent with guilt. This is particularly the case given the discount in sentence and possible restriction in the sentencing powers available in the Magistrates' Court. Therefore, the proposed changes would have no impact on such cases. Those who intend to plead not guilty have a right to trial by jury in either way cases, which is established by law. The suggestion that a representative

can be incentivised to tailor their advice in furtherance of their own commercial interests is illogical and unpalatable. If, indeed, lawyers were to advise on the basis of such commercial self interest, this would be contrary to their duty to the lay client and would be an unwelcome step away from the 'best practice' currently observed by lawyers.

(b) The reduction in fees will have a disproportionate effect on the junior Bar and will lead to a reduction in candidates entering the profession with a view to undertaking criminal legal aid work. Inevitably, this will lead to a serious lowering of standards, which will impact on the criminal justice in both the short and long term. The vast majority of members of the judiciary in the criminal courts started their professional lives practising criminal law. There will eventually be a dearth of good quality candidates to both prosecute and defend in the most serious cases and a lack of experienced criminal practitioners to take up judicial appointments in the criminal court.

(c) The reasoning is inconsistent with the reasoning behind the proposal at Question 26. If less serious criminal cases are deserving of a different approach and, in particular, a lower fee, the same should logically follow in relation to rape as compared to murder allegations;

(d) There is no evidence that the volume of cracked trials/late guilty pleas will be reduced as a result of the reforms. Those of our team who deal with junior Crown Court work, both sitting as Recorders and/or as Counsel, are able to give an indication of the prevalent reasons for the

trials cracking and guilty pleas being tendered at a late stage. For the most part, they result from the following:

a. Late service of evidence by the Prosecution;

b. A belated willingness of the Prosecution to accept a plea to a lesser offence/s. There can be a tendency to overcharge and/or overload the indictment in the Magistrates' Court. This is often only addressed once the case is before an experienced Crown Court judge and/or prosecuted by a more senior advocate.

c. Late changes of mind by Defendants – often arising from the above.

d. Witness difficulties on the part of the Crown, particularly in cases with a domestic background, which may result in either offering no evidence or acceptance of a lesser plea.

6. None of the above is likely to be affected by the Government's proposed reforms. Whilst our experience is anecdotal, it is based on the widespread experience of a large team of practitioners in our Chambers – both sitting and practising in the Crown Court.

7. Work properly done in the best interests of the lay client according to the law, and in pursuance of best professional practice, far from being discouraged, should be properly remunerated. It is inappropriate for the Ministry of Justice to seek to promote unprofessional behaviour by setting lawyers against their

clients. The underlying intention of the MoJ that advice should and could be influenced by the commercial self-interest of lawyers is deeply alarming.

8. If there is a concern that cases are unnecessarily [as the MoJ would see it] being committed up to the Crown Court, the real reasons for this happening need to be identified and addressed. In light of our experience, as set out in the preceding paragraph, the most obvious changes that could address the problem are

(i) Providing the Defendant with a proper incentive to plead in the lower court (or improving the incentive to do so) and

(ii) improving the efficiency of the CPS – leading to earlier service of relevant and probative evidence.

Fair remuneration for work undertaken in the Crown Court

9. A more detailed analysis of what work is required of the defence in even the least serious either way cases should be undertaken before the fees are reformed. Even where the charge is not serious, one expects an advocate instructed at the Plea and Case Management Hearing (PCMH) to undertake a substantial amount of work, whether or not a defendant eventually pleads guilty in the Crown Court. 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.

10. Initial disclosure is usually served at the committal stage and, thereafter, the

defence team needs to take full instructions and prepare a defence statement. Typically, the defence statement will be prepared by a barrister of significant experience. It is an extremely important document and requires a significant amount of work[2], even in what may be a less serious either way case at PCMH. In light of changes to the Criminal Procedure Rules, some judges have indicated an unwillingness to deal with substantive issues at the PCMH, without first having a defence statement.

11. 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. There are time limits for responding to bad character and hearsay applications and for serving notices in relation to the same and these must be complied with before the trial. This may require detailed consideration of factual material, the statutory provisions and a large body of case law. Just as in relation to 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 the PCMH. The proposal relating to question 24, in removing the distinction between cracked trial fees and guilty plea fees, for less serious either way offences, is equally unfair.

[2] The defendant is required to set out the general nature of defence, matters in issue with the prosecution case, facts relied on in the defence, legal issues and details of witnesses

12. The potential unfairness created by these reforms cannot be ameliorated by the proposed 25% increase in the Magistrates' Courts fees for cracked trials and guilty pleas in either way cases.

13. The net reduction in fees proposed by the Government will result in a lack of remuneration for a huge amount of work undertaken in less serious either way cases, where there is a guilty plea in the Crown Court.

14. 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.

15. The 2007 Order enhanced the fee payable at PCMH. The rationale behind the enhanced PCMH was made clear in the protocol: "This will ensure that the advocate who conducts the PCMH is properly remunerated for the necessary preparation and attendance at court." It was made clear, at the time of the changes, that this was "a strategy designed to encourage early preparation and the possibility of more early guilty pleas".

16. It is irrational 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 a real difference can

be made.

Payment of fees directly to the solicitors

17. There is a genuine 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 solicitors retain the balance of power by having direct access to lay clients, particularly, at the police station. To afford the Bar direct access cannot possibly redress this imbalance.

18. 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. As stated at paragraph 5(b) above, the most able practitioners will move out of publicly-funded criminal work and this will have short and long term deleterious consequences for the criminal justice system. For these reasons, any proposal involving ‘One Case One Fee’ should be rejected.

19. 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.

Solutions to the Problem

20. The Government identifies a significant problem: many defendants elect trial on indictment, but then plead guilty in the Crown Court which is financially costly. The Government sets out data in the GP to show the extent of the problem.

21. Para 6.11 indicates that in recent years the proportion of Crown Court cases resulting in guilty pleas has risen significantly. On the other hand the number of defendants proceeded against in the Magistrates' Courts has fallen. There is no analysis as to whether any perverse financial incentive has increased in line with those figures over the same period. The data does not show that the Government's proposal can reasonably be expected to improve the situation.

22. It is not accepted that defendants are being advised to elect trial on indictment rather than indicate a guilty plea in the Magistrates' Court so as to secure a greater legal aid fee. But supposing that were the position, it cannot be right to address that problem in the way proposed by the Government. As set out above, this would create an incentive to take more cases to fully contested trials.

23. 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. Yet it is noteworthy that even in cases where the Magistrates have properly declined jurisdiction, the Crown Court often imposes a sentence which the Magistrates could have imposed. The reason for this is that in making the decision as to jurisdiction, 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. Accordingly, the fact that the Crown Court has imposed a sentence available to the Magistrates does not mean that the case should not have been committed to the Crown Court.

24. The underlying problem is this. The election decision is a defendant's choice, not a lawyer's. To address this problem the government should assess the factors upon which that choice depends.

25. As it stands 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. In addition, 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.

26. 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 are to make.

27. This could be done in three ways.

28. First, the Government may conclude that there is scope for changing the law to reduce access to the Crown Court. The Government could, for example, look to restrict 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. 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.

29. Secondly, 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).

30. Thirdly, Defendants who elect trial on indictment may be required to take out a loan provided by the Government to contribute towards 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 show the defendant the true cost of their election.

31. The Government needs to create a system where the external costs associated with an election decision are understood better by the defendant making that decision.

32. Defendants elect trial on indictment because the Crown Court is quite simply a fairer venue than the Magistrates' Court because of the protection offered by a judge and jury. With that in mind and the lack of obvious costs associated with the choice, a defendant might elect trial on indictment even if they were likely to plead guilty, just so their best interests would be protected if they did want a trial.

33. Whether or not there is a perverse financial incentive for lawyers to advise legally aided clients to elect trial on indictment is irrelevant in practice, to whether the defendant is advised to elect. This is because a lawyer who is merely protecting his client’s best interests is very likely to advise his client to elect trial on indictment in any event. Except, of course, where the evidence is so strong at the plea before venue stage that the lawyer should be advising their client to indicate a plea of guilty.

34. There is a further problem. The CPS often do not 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.

35. It's 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.

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. Para 6.25 says 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. Most, if not all litigators, will consider the options for a plea very early on in proceedings. So why do late pleas arise? The answer in almost all circumstances is because the case is properly prepared for trial which 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's 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. These examples, which encompass the vast majority of late pleas, arise after the case has been fully prepared for trial. A 25% uplift in the litigators fee will not compensate for this preparation.

4. If this proposal is accepted it will result in far fewer pleas of guilty, as it discourages the litigator from preparing the trial until late in the day. Consequently the opportunity for an acceptable plea is lost.

5. The matters raised in response to question 24 (under the 'perverse incentive' point) apply here. In our opinion the Government is misconceived as to what motivates the advocate.

<u>The "work done" point</u>

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 should understand 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 old ex post facto scheme where barristers billed for work actually carried out.

8. So the real question is not 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. Obviously by the first 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. It seems the Government's logic in relation to the "work done" point is at odds with the very logic of the AGFS itself. Any reductions in remuneration should be justified by proper reasoning which is not palpably inconsistent.

11. 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. Accordingly, the Government's proposal that there also be a 25% uplift in guilty plea fees does not make sense. That would mean 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, with respect, explain why. Otherwise the Government should understand that their proposal will reduce the rate of pay for barristers below that which one would reasonably consider to be adequate.

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, (in practice a head of case that is virtually impossible to attain) 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.

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. 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. 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. The Government identifies 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 are set out at para 6.11 of the GP.

19. A 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." . There is no analysis as to whether any perverse financial incentive has similarly increased over the same period. The data does not show that the Government's proposal can reasonably be expected to improve the situation.

20. Defendants are not 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 right 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. Statistics may give some insight as to the scale of the problem yet it is much harder statistically to analyse its causes. The best approach is to analyse the problem with care.

22. 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 view that the Government should re-direct resources to encourage the CPS and police to provide earlier and more comprehensive service of essential evidence.

23. Another cause might be the instruction of an advocate at PCMH other than 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. On the other hand, an advocate instructed the night before the PCMH who does not go through that process of preparation, is unlikely to be in a position to give thorough advice.

26. Furthermore, a barrister instructed on behalf of a defendant at PCMH is likely to be more cautious when advising the defendant to plead guilty when the barrister knows that other counsel is instructed as trial advocate, despite any perceived financial incentive to the barrister at PCMH to secure a guilty plea and the associated guilty plea fee. The reason for this caution by the barrister at PCMH who is not the instructed trial advocate is that his knowledge of the case is very limited and his advice is less weighty than that of the trial advocate.

27. We feel that the Government would do better to encourage solicitors to instruct a trial advocate at an early stage for PCMH.

28. The Government must appreciate that other features of the Crown Court system 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 barrister will not be able to satisfy all their trial commitments.

29. In addition no amount of cost-cutting or cynicism about the cracked trial issue will resolve a fundamental issue, namely that a defendant will often wait until the door of the court 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 unfair and demoralising. It is just wrong.

30. Ultimately, 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. Only Parliament decides when a defendant has the right to elect trial in the Crown Court and for which offences.

31. Secondly, in our opinion the judiciary need 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. Judges vary. The inclination or the ability to do this comes more readily to some judges than others.

32. 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 very strongly 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. In our view, those two purported justifications reveal a serious misunderstanding of the true position in the criminal courts. Those who practise in the criminal courts know that a murder/manslaughter case is invariably significantly more serious and more complex than other 'serious' cases. They carry more responsibility not least in the mandatory sentences that result on conviction. It is right that the most able and experienced advocates undertake them and that they are properly remunerated for doing so.

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 are more often than not hugely complex by way of comparison, involving complex issues of identification, DNA evidence, cell cite analysis, video identification and scientific evidence ranging from the comparison of fingerprints, facial mapping and DNA samples, blood detection and distribution to 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 than 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. Consequently, 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 150. 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 issues 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 an in an average case of rape, the Government should explain how that conclusion is reached. The Government must recognise that their proposal will tend to reduce the rate of pay for barristers below that which one would reasonably consider to be adequate.

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.'* The Government fails to provide data showing how many other serious offences

including rape and other serious sexual offences have 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" attached to this response. 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 post trial, 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. It is apparent 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 at and we have commented on them.

14. There is 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 must 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 cutting of fees to date, moving 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 must understand that the 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.

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.

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.

On behalf of the Crime Team at Garden Court Chambers

6th February 2011