LEGAL AID: REFORMING ADVOCATES GRADUATED FEES

JOINT RESPONSE

OF THE BAR COUNCIL

AND THE CRIMINAL BAR ASSOCIATION

INTRODUCTION

1. The Ministry of Justice (MoJ) stated in its Consultation Paper issued on 16 December 2009 that its aim is to cut its expenditure on the defence graduated fees advocacy budget in the higher criminal courts (Advocates Graduated Fees Scheme or AGFS) by £47-48 million[1]. It presented advocates with two stark choices:

   Option 1 involved immediate cuts to AGFS rates across the board of 17.9%.

   Option 2 involved phased cuts of 4.5% annually for 3 years, totalling 13.5%. However, its implementation was conditional upon removing trials of between 40-60 days from the definition of Very High Cost Cases (VHCCs) and including them within the

[1] Ministry of Justice: *Legal Aid: Reforming Advocates Graduated Fees*: Consultation Paper CP 54/09 (December 2009) [referred to hereafter as MoJ CP/54] Executive Summary, p. 4.

Graduated Fee Scheme as well as consulting very quickly with a view to implementing a 'One Case One Fee' (OCOF) scheme. [2]

2. As regards the latter option, the MoJ observed at paragraph 29 that as it "delivers less savings than option 1, we plan to consult early in the New Year on proposals to pilot a single graduated fee, as was originally recommended by Lord Carter. If we proceed to implement a single fee we anticipate that we might make some further savings that would help to make option 2 sustainable in the longer term."

3. That statement was repeated in the Consultation Paper in its Impact Assessment.[3]

4. The Bar Council and the Criminal Bar Association submitted a joint response to the Consultation Paper in February 2010.[4] In the Response one of our stated objections was that it was impossible objectively to elect between the two options where it was stated, directly or at least by implication, that the second option was unsustainable, without notice of what would be put in place to render Option 2 sustainable. We also gave notice that the Bar would continue to resist the imposition of OCOF.

5. By a letter dated 5 March 2010[5], written in response to the Bar Council's Pre Action Protocol letter before action of 17 February 2010[6], the MoJ extended the period of consultation to 1 April 2010. The reason given for doing so was to correct apparent ambiguities or lacunae which had arisen in the original Paper relating to paragraph 29, and the omission of data relating to impact assessment.

6. As regards paragraph 29, the MoJ stated in its letter that:

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2 MoJ CP: 54/09: para 29

3 *Impact Assessment of a reduction in fees for advocates under the AGFS*, 15 December 2009, § 3.12.

4 http://www.barcouncil.org.uk/consultations/pastresponsestoexternalconsultations/

5 http://www.justice.gov.uk/consultations/legal-aid-reforming-advocates-fees.htm

6 http://www.barcouncil.org.uk/news/latest/509.html

(i) It had been drawn to their attention that paragraph 29 "could be taken to mean that we would only consider consulting on a single fee if we decided, following this consultation, to implement option 2. We would like to clarify that this is not the case. In fact, this is a consultation exercise we are likely to undertake in any event, irrespective of the decisions I make in relation to Advocates Graduated Fees and Very High Cost Cases; and irrespective of whether option 1 or option 2 is chosen."

(ii) the paragraph was not "intended to suggest that the amount of any savings to be made as a result of any single fee would be linked to any shortfall (estimated at £2 million per year) in savings made by option 2 compared to option 1."

(iii) "consultees should not assume that the savings will be limited to making up the shortfall, or that the policy options under consideration are limited to the single fee."

7. The letter went on to state:

> "We expect to have to face some tough choices in the months ahead; and all options will continue to be examined. Consultees will appreciate that in the current financial climate it is likely that further savings will have to be found whichever option is proceeded with, and should not assume that policy in this area will remain static."

8. As regards the OCOF proposal, the MoJ stated:

> "At this time there are no worked up proposals for consulting on a single fee, or on any other measures. When and if such proposals are ready, they will be set out in full in any future consultation paper."

The issues now raised

9. It appears to us that the Bar is now being asked to consider the following Options:

Option 1 immediate cuts to AGFS rates across the board of 17.9%; with no guarantee of fee stability, together with the likelihood of further cuts in this area through OCOF or other unspecified proposals;

Option 2 phased cuts of 4.5% annually for 3 years, totalling 13.5%; removing trials of between 40-60 days from the definition of Very High Cost Cases (VHCCs) and including them within the AGFS scheme; further cuts to make Option 2 "sustainable"; no guarantee of fee stability, together with the likelihood of further cuts in this area through OCOF or other unspecified proposals.

10. **This Response replaces our previous Response[7] of 23 February, which is hereby withdrawn.** This Response deals with the matters now defined. Before dealing with them two preliminary issues need addressing.

The Consultation Process

11. On 16 December 2009 the MoJ planned "to consult early in the New Year on proposals to pilot a single graduated fee". It is no longer early in the New Year. Moreover, in its letter of 5th March 2010, the MoJ said "there are no worked up proposals for consulting on a single fee", and that, as one would expect, when such proposals are available, "they will

[7] http://www.barcouncil.org.uk/consultations/pastresponsestoexternalconsultations/

be set out in full in any future consultation paper." On 22 March 2010 the MoJ reiterated that "at this time there are no worked up proposals for consulting on a single fee."[8]

12. If there are no worked up proposals now, there were no worked up proposals on 19 December 2009. It seems incredible that the MoJ was in a position to announce on that date that it planned to consult early in the New Year on such matters. Any objective observer would be forced to conclude that the original statement was either disingenuous (because it was the product of wishful thinking); or that there had been an incompetent execution of a genuine intent; or that other more pressing and urgent matters or policies had intervened or priorities had shifted. Whatever the reason, the consultees laboured for weeks under the misapprehension (a) that an OCOF proposal was imminent and (b) that such a proposal would, if implemented be likely to involve further cuts, one of the incidental effects of which would render Option 2 "sustainable".

13. This is not an idle complaint to be viewed in isolation. The Bar Council and the Criminal Bar Association have administrative and support staff whose efficiency, dedication and loyalty command the respect, admiration and thanks of all who work with them. However, responses to Consultation papers are not considered and prepared by them, but by members of the Bar in consultation with their colleagues. Advocates have to find the time to weigh, discuss, consult, research, draft papers and deal with these issues, while at the same time advising clients, preparing for and conducting trials, complying with deadlines imposed by judges, even sitting as part time judges, and dealing with all the other exigencies and administrative burdens of practice, let alone finding time for family life. Cutting short periods of consultation, or hurried and careless drafting compounds the problem, particularly when, as now, the Bar Council is dealing with and

[8] Ministry of Justice: *Restructuring the delivery of criminal defence services*: 22 March 2010, para 18. http://www.justice.gov.uk/publications/restructuring-delivery-criminal-defence-services.htm

considering responses to a plethora of consultations[9] and issues raised by central Government or its agencies.[10]

14. We note that this Consultation, like all Consultations, purports to adhere to the *Code of Practice on Consultation*[11] which includes the statement that Consultation Documents should be clear about "... what is being proposed, and the scope to influence; that it is essential if consultations are to be effective that the burden of consultation should be kept to a minimum; and that consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible."

15. *At least 12 weeks* might be adequate for one consultation, but 12 weeks appears to have become the norm, and 4 weeks is not uncommon. When an avalanche of consultations is directed at the justice system, orchestrating considered responses from busy practitioners becomes enormously burdensome; tends to promote inefficiency and error; and creates among those potentially affected not only the impression that they are sometimes an exercise done by rote, with little attention paid to the result, but that overwhelming the profession with such consultations is a strategic goal in itself.

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9 Between 1st January 2010 and 28 February 2010, the Bar Council responded to 14 consultation papers.

10 During the same period, advocates representing the Bar Council had been involved in discussions with Government agencies concerning, for example: the imposition of security standards on barristers working practices; CPS graduated fees and Manual of Guidance; electronic evidence; transfer of processing of AGFS fees from the HMCS to the LSC; review of the Litigators' Graduated Fee Scheme; 2010 Standard Criminal Contract tenders; 2010 Standard Civil Contract Tenders for Immigration, Social Welfare Law, Family and Mental Health; LSC and MoJ proposed Family Advocacy Scheme; Legal Services Board study into referral fees; Civil Justice Council review of protocols; LSC Special Cases Unit including civil VHCC process and MoJ refocusing on priority cases.

11 *Code of Practice on Consultation* (3rd edition July 2008): http://www.berr.gov.uk/files/file47158.pdf

Morale

16. The proposals involve cutting the average defence advocate's taxable income by between one quarter and one third. Cuts to public services are mooted of 20% or more, but we are assured that these will not be achieved by cuts in salaries of those who provide frontline services. The Prime Minister recently announced that senior public sector workers, Army officers, NHS managers, judges, and dentists are to suffer pay freezes, while junior doctors and MPS are to receive pay increases of 1% and 1.5% respectively. It seems that advocates in the criminal justice system, unlike police and judges, are not regarded by the Government as providing a frontline service. The proposals provoke despair. Moreover, they have to be seen in the context of sustained erosion in the real value of AGFS earnings from their inception in 1996 because of inflation and the extra unpaid tasks added to the scheme. The inflationary erosion alone was corrected under the Carter proposals in 2007. That correction is now to be removed.

17. The average criminal barrister is not a fat cat, despite the annual efforts of Parliamentary questioners and the press to suggest that the fees of a handful of outliers are the norm. They are not the norm. Most criminal defence advocates living on publicly funded work are, apart from those involved in immigration work, the least well remunerated at the Bar. They start with significant debts. Many average 50 hours per week to discharge their professional obligations: on occasions many have to work longer hours. Fees have been in a state of flux for the last 10 years, and, save for Carter, the general individual trend has been downwards. The average criminal barrister earns roughly one half of what an average self-employed GP earns.[12] Anecdotal evidence increasingly suggests

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[12] The average income for GMS contractor GPs before tax in the UK in 2007/8 was £100,234 and £116,059 for those working under a Primary Medical Services contract. The average taxable earnings varied from £96,189 for non-dispensing GMS GPs, to £ 132,222 for PMS dispensing GPs: Technical Steering Committee of the NHS: *GP Earning and Expenses: 2007/2008 Provisional Report:* September 2009: p. 5.
Criminal Barristers have on average lower billing than family barristers (2007 Quality Assurance for Advocates survey). Family Barristers earn a median of £66,000 a year "The Work of the

that universities and training schools are advising students to avoid publicly funded work.

18. The proposed changes not only would take the Bar back 10 years, but beyond. Criminal legal aid for defence advocates did not receive the rises which were common in all other areas of supplying services during the boom years and therefore it cannot be said that these proposals are merely designed to cut inflated rates. Fees may revert to what they were 10 years ago: the 10 year rise in expenses, inflation, the pace of procedural and statutory changes, and the increased work load will not reverse. On top of that more cuts are threatened.

19. We accept that all public expenditure must be subject to review. We accept that the taxpayer requires value for money. However, we cannot accept cuts that are savage, unfair, and disproportionate. There appears to be no rational coherent policy: reasoned argument has been abandoned in favour of 'slash and burn'. Over many years of negotiation it has been recognised that properly balanced remuneration schemes are essential for the effective delivery of advocacy services. The current consultation makes proposals that place the entire system in jeopardy. It is little wonder that the average criminal advocate feels increasingly like a tethered scapegoat, to be bled at will and whim.

Executive Summary

20. We unequivocally reject both options for the following reasons:

- The proposed cuts ignore the years of consultation and reform which culminated in this Government's adoption of Lord Carter's proposals in 2007

Family Bar: Report of the Week-At-A-Glance Survey 2008", King's Institute for the Study of Public Policy, Feb 2009, p.107.
http://www.flba.co.uk/public_notices/public_notices/the_work_of_the_family_bar

to achieve a fair, efficient and sustainable means of remuneration for advocates.

- Option 1 is objectionable in principle. Cuts of this order of magnitude are unprecedented and thus untried in any area of public service, and are likely to risk the stability of the criminal justice system.

- Option 2 is on analysis so opaque that it cannot properly be assessed, and/or appears to be based upon a false premise.

- Insufficient information has been presented to allow an informed choice to be made between the so-called options.

21. We further note the issues raised by Bindmans LLP in their letters dated 17 February 2010 and 25 March 2010 to the Secretary of State of the MoJ and to the Chief Executive of the LSC in respect of the issues raised.[13] We adopt the matters raised therein insofar as they have not been expressly set out in this response.

Background

22. The background to AGFS and the Carter Report has been set out in detail elsewhere.[14] In summary, in 2005 Lord Carter proposed, and the Government later accepted a reform of AGFS to correct the fact that "elements of the graduated fee scheme had been held flat, with no indexation for inflation, in some instances for up to 10 years"[15]. The value of

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13 Both letters appear on the on the CBA website and the Bar Council's website at http://www.barcouncil.org.uk/news/latest/509.html

14 *Legal Aid: Funding Reforms: The Bar Council's response:* 12 November 2009. http://www.barcouncil.org.uk/consultations/pastresponsestoexternalconsultations/ResponsesToConsultationPapers2009/

15 Lord Carter of Coles, *Legal Aid, a market based approach to reform*, July 2006: chapter 5, page 107 at paragraph 70.

all graduated fees cases had "decreased in real terms by between 5% to 30%"[16]. Fees for 1-10 day cases, mainly undertaken by the junior Bar, had not been increased for nearly 10 years. As the Government accepted, the new scheme rebalanced the system, essentially by an agreed redistribution from higher earners to more junior, lower earners, so that "shorter cases are fairly rewarded"[17].

23. Carter stressed that further reforms should only be contemplated once the market had reached a steady state in 2010-2011.[18] To date, there has been no appraisal of Carter's reforms.

Steady State

24. Carter's emphasis on steady state is pertinent. There are currently three payment systems in operation:

- AGFS which now covers the bulk of Crown Court defence work. At its core it is a fixed fee system which has expanded to cover more and more cases since 1997. Most AGFS fees are paid within a month of the submission of the fee note after the conclusion of the case.

- VHCC covers complex and lengthy cases estimated to take more than 40 days in court. There is a graduated scale of rates which include hourly rates for pre-agreed preparation. Fees are paid during the preparation of and at the end of the case.

16 Ibid.
17 *Legal Aid Reform: The Way Ahead* Cm 6993, at page 10, paragraph 21.
18 *Legal Aid: A Market Based Approach to Reform*: Chapter 3 para 2.

- EPF (*ex post facto*) fees used to comprise the bulk of defence advocates fees. A reasonable fee for work actually and reasonably done is paid after the conclusion of the case following taxation (assessment) of the work done. Only a few EPF cases are before the courts: what remains is effectively aged debt.

25. The three systems provide different speeds of payment. A good proportion of VHCC work is paid for during preparation. Nearly all AGFS work is paid for reasonably swiftly once a case has been concluded. EPF work is largely paid after the event, and those remaining in the system represent cases which may have started many years ago. All future cases will be, and all cases taken on within the last 2 years, are likely to be either AGFS or VHCC cases.

26. The concurrent operation of the three different systems means that as AGFS payments have expanded, EPF work has diminished. However, the speed of processing fixed fees is obviously much greater than the speed of taxing or assessing older EPF cases. As a result the LSC and advocates have experienced a concertina effect in spend and income because payment of the backlog of old cases often coincides with payments which are received for work done more recently. The precise current effect of this is unknown: no statistics have been provided. Those which have now been provided are based upon data which is over two years old and include prosecution, EPF, VHCC and RCPO fees, as well as AGFS fees. It seems likely that EPF payments have dropped by two thirds over the last four years, and are likely to tail away to nothing over the next 2 years. Moreover, that diminution of EPF expenditure will not be replaced by an increase in work in the other categories. In effect, it represents the repayment of outstanding aged debt rather than an ongoing disbursement stream. Moreover, the fees rates for VHCC work has diminished with the introduction of different fee structures.[19]

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[19] VHCC receipts two years ago were based upon fee structures which were higher than they are now. For example, in January 2008, a Junior alone undertaking a category 3 VHCC defence case billed £80 per hour preparation rate, today it is £74 per hour.

27. The impact of legal aid reforms to the Government monopoly supplier of criminal legal aid is fairly obvious, namely a move towards clearer budgetary controls, and simpler (and cheaper) administration. However, the financial effect of any specific reform, and these projected cuts is less clear, because the spend and the effect on individuals' incomes or Chambers' incomes as a whole has been and continues to be obscured by the concertina payment effect. As Lord Carter predicted, that lack of clarity is likely to continue for the next 12 to 24 months.

28. That factor alone renders impact assessment and evaluation of the nature of the current and future spends difficult. The task becomes virtually impossible when basic statistics based upon a steady state evaluation are not provided. Moreover, two further factors, unforeseen by Lord Carter, have been introduced. First, with the recent merger of the Revenue and Customs Prosecution Office (RCPO) with the CPS, the rates paid to RCPO prosecutors have been superseded by CPS rates for new cases. Second, means assessment of Crown Court defendants has been reintroduced, with an estimated annual saving of £50m[20]. The impact of these changes is discussed below, but they are only just starting to work through the system and will inevitably diminish further the income of criminal advocates. The only steady state currently enjoyed by the criminal Bar is one of uncertainty.

Criticisms

29. Our complaint about the lack of statistics should not come as a surprise. The National Audit Office (NAO) in its November 2009 report on the procurement of criminal legal aid[21], after noting that "the division of responsibilities [between the MoJ and the LSC] has sometimes led to confusion and duplication in the oversight of criminal legal aid,"[22]

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20 MoJ: *Crown Court means testing: Interim Impact Assessment*: 8 June 2009: p.1

21 National Audit Office: *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission*: 27 November 2009 (The NAO Procurement Report).

22 NAO Procurement Report: *Summary*, para 4

stated, "(t)he Commission does not currently hold enough information centrally about its suppliers to be an intelligent commissioner. The Commission should collate and analyse the information it already holds locally, supplemented as necessary by further research so that it is better informed about its supplier base."[23]

"Each year significant numbers of firms withdraw from criminal legal aid contracts, although new firms also tender for contracts. Commission data shows that 12 per cent of firms withdrew between February 2008 and July 2008, and seven per cent between August 2008 and March 2009. From our survey, 28 per cent of firms reported it unlikely they would be conducting criminal legal aid work in five years' time. Reasons included lack of profitability, the prospect of tendering, and retirement. Firms which had withdrawn from criminal legal aid contracts told us the main reason was that remuneration by the Commission paid unfavourably in comparison to other types of legal work."[24]

30. Further robust criticism appeared in February 2010 in the Public Accounts Committee Report on *The Procurement of Legal Aid in England and Wales by the Legal Services Commission*.[25] The Committee described the LSC as "an organisation with poor financial management and internal controls and deficient management information. These weaknesses resulted in the Commission having its annual accounts qualified for 2008-09 and an assessment that its procurement and administration of criminal legal aid posed risks to value for money."[26] Furthermore, it found that the LSC "does not know enough about the costs and profitability of firms to know if it has set its fees at an appropriate level."[27]

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23 NAO Procurement report *Recommendation* 18c, p. 9

24 NAO Procurement Report: Page 16 para 1.14

25 Public Accounts Committee of the House of Commons: *The Procurement of Legal Aid in England and Wales by the Legal Services Commission*, 9th report of the 2009/2010 session: (HC332) (2 February 2010): [The PAC Procurement Report].

26 PAC Procurement Report : Summary, p 3.

27 PAC Procurement Report, Summary, p 3.

31. Despite the fact that the MoJ itself spends over £2 million a year on legal aid policy matters and overseeing the LSC, the Committee found "confusion and uncertainty about the respective roles of the two organisations which had led to duplication of effort on some issues and a lack of clarity about who should be responsible for others."[28]

32. The Committee found that the LSC considered the introduction of Best Value Tendering would remove the imperative for it to know the market.[29] The Bar Council and CBA deprecate the LSC approach which seems an abdication of responsibility and epitomises the failure of the LSC and MoJ properly to engage with providers of legal services to date.

33. The Committee also noted that the Commission has been responsible for the implementation of significant reform to legal aid. "However, constant changes in staff at senior level – which have been costly and disruptive – and poor planning of the changes has meant that reforms have often been delayed, have not always kept to their timetable and have not been properly evaluated to assess their impact"[30].

34. The Committee concluded that the LSC lacks a clear strategic direction, reflected in its poor management of the changes to legal aid detailed by Lord Carter. It recommended that the MoJ and the LSC adopt a more coherent approach to introducing change; that all future reforms should have a clear timetable, be fully piloted and evaluated, and that any evaluations should be timely and consider the impact of reforms on suppliers, as well as identifying any financial impacts of the change.[31]

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28 PAC Procurement Report, Summary, p 3.
29 PAC Procurement Report, Summary, p 3.
30 PAC Procurement Report, Summary, p 4.
31 PAC Procurement Report, Recommendation 9, p 6.

35. Finally, the Committee voiced its concern that the increasing use of solicitors to conduct work in the Crown Court is threatening the long term future of the junior criminal bar and may be affecting the quality of advocacy being provided in the Crown Court. The view of the Bar Council and CBA is that both this MoJ paper and the LSC consultation on VHCCs will serve only to further damage the junior criminal bar and the quality of advocacy.

36. The recent Report by Sir Ian Magee[32] is also instructive. The Report criticised the LSC. Immediately following its release, the MoJ adopted one of the options recommended, and announced its decision to incorporate the LSC as an executive agency within its own Ministry. In the report, Sir Ian had raised concerns about the "significant volatility in forecasts at scheme level and below which raises questions over the efficacy of the forecasting process." He went on to say:[33]

> "The current approach to legal aid fund forecasting is extremely complex, detailed and time consuming. It involves extracting vast quantities of data from LSC systems and using very many, complex models to produce forecasts for the future which take account of past performance/trends and future policy changes (where known). Forecasting models do not adequately take account of changes in the macro environment such as the economy and demographics. Also in spite of the legal aid impact assessment process, those involved in policymaking in MoJ and in other government departments do not always understand that the changes they are making will impact on the legal aid fund. This means that those involved in forecasting, are not always aware and able to take account of all the policy changes that will impact on their forecast and the legal aid fund. The current forecasting models, while providing reasonably accurate overall forecasts in the last few years, do not represent good practice for the future."

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32 Sir Ian Magee: *Review of Legal Aid and Governance:* 3 March 2010: available at http://www.justice.gov.uk/publications/docs/legal-aid-delivery.pdf

33 Ibid: §202-203.

37. The report further stated:[34]

> "The nature of the forecasting process means that it is not transparent and scenario planning is very difficult and time consuming. There appears to be a lack of understanding of the limitations of the forecasting process within MoJ and the contribution that MoJ policy makers and others need to make to enable a more effective forecasting process. This, together with the lack of transparency in the process and the importance of legal aid fund forecasting (given the size of the legal aid fund compared to the overall MoJ budget), appears to have added to the lack of trust in the LSC and MoJ relationship."

38. The above criticisms are reinforced by the absence of a steady state, and that fact that suppliers are continuing to adjust and react to recent changes in the marketplace by withdrawing from legal aid work. Many firms have only been able to continue to undertake criminal legal aid contracts by employing advocates and using the fees earned from advocacy to cross-subsidise their litigation, but cuts in fees for advocacy will make that impossible and it would seem to be a matter of simple common sense that further cuts in the level of remuneration will accelerate this process. Despite this flight from criminal legal aid contracts, the current condition of the market has not been properly investigated by the LSC and, therefore, the MoJ is in an ill-informed position to judge both the effect of further cuts and the likely reaction of legal services suppliers, in particular advocates, to the proposals. That is confirmed by Sir Ian Magee's recent report, which was accepted by the MoJ.

39. In any event these proposals indicate a deliberate policy to let criminal defence advocates shoulder a wholly disproportionate burden of proposed cuts. A recent NAO

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[34] *Ibid.* § 205

report[35] on the performance of the MoJ identifies the delivery strategy for £1 billion savings which the MoJ proposes to achieve by 2010-2011. Of that sum £61 million (6.1%) is to flow from Legal Aid Reform as a whole.[36] The current paper seeks savings of an additional £360 million,[37] of which £47-48 million (13.3%) is to come from legal aid criminal defence advocacy fees alone.

40. Nor should it be forgotten that criminal defence expenditure is demand driven. The numbers of crimes committed and cases prosecuted; the introduction of new offences and procedures; and the increasing complexity of matters investigated, are all factors outwith the control of defence advocates. There are no doubt other ways to save money, but these require careful investigation, discussion and implementation. Effective and competent defence advocacy is a key component of an efficient criminal justice system, which in turn forms an essential part of the body politic. Using a scalpel like an axe produces corpses, not better health.

The CPS comparison

41. The cuts are based upon the premise AGFS pays defence advocates 17.9% more than monies paid to advocates instructed by the Crown Prosecution Service (CPS) for similar work. The cuts are intended to achieve parity and follow the assertion that the CPS has reported no problems over the past 2 years in paying fees which are broadly in line with the proposed (Option 1) AGFS rates.

42. That comparison is flawed for seven reasons.

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35 National Audit Office: *Performance of the Ministry of Justice: 2008-2009:* October 2009 (the NAO Performance Report)

36 NAO Performance Report: *Appendix 1*, p. 30.

37 MoJ CP: 54/09*: Foreword*, p. 3.

43. First, as a matter of principle it is inherently unsound to compare a prosecution scheme managed and run by a monopoly supplier which also employs amongst its staff Higher Courts advocates (HCAs) who are briefed in direct competition with the self-employed Bar. The AGFS scheme is based upon a swings and roundabouts principle: counsel cannot cherry-pick the type of cases they wish to undertake and have to take the good with the bad, the easy with the complex and the well remunerated with the poorly remunerated. In-house HCAs employed by the CPS operate under different criteria with different targets.

44. Second, there has been a substantial and continuing reduction in the volume of work undertaken by the self-employed Bar on behalf of the CPS which now, it is believed, undertakes 50% by volume and 25% by value of its cases by in house advocates[38] – and probably at significantly greater cost to the public purse.[39] It seems that the more recent increases in CPS trial work have taken place in the smaller contested cases.

45. Third, the profile of the current CPS scheme does not fit that of the AGFS. The CPS scheme pays prosecution counsel more for complex cases, but significantly less for smaller cases, and for certain classes of case, such as rape. Although the CPS is seeking to amend its scheme to fit the AGFS profile, that would merely have the effect of enhancing the CPS's own budget as it would increase the proportion of fees paid in those small cases which form the diet of salaried and pensionable in-house HCAs employed by the CPS at the expense of the junior Bar.

46. Fourth, the profile difference has another significant effect. The data upon which the AGFS/CPS comparison was drawn is at least 2 years old. However, since that date, the CPS has undertaken more Crown Court trial work in the smaller cases. An analysis and comparison of such profiles is of little value for the purposes of impact assessment

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38 HM Chief Inspector's Annual Report 2008 -2009 at page 53 (although this report only refers to 25% of the work being conducted by HCAs.)

39 *Crown Prosecution Service: the choice between in-house and self-employed advocates A critique of the CPS' analysis.* Europe Economics, 20 July 2009.

where the profiles of the two schemes differ so markedly and the CPS has increased the amount of work it undertakes at the lower end of its scheme. In terms of overall spend, the current figures must have altered and the suggested difference of 17.9% is simply too high. How far that percentage has now diminished is impossible to establish without the provision of statistics. Moreover, the CPS itself had earlier argued that a direct application of AGFS would be inappropriate for the advocacy work that it undertakes. On that basis alone, direct comparison, let alone any inference that defence advocacy work could be undertaken at rates currently paid by CPS, is at best questionable.

47. Fifth, there has always been an element of cross-subsidisation of work. Prosecution advocates may undertake work for different prosecution authorities. In that context there has been a recent significant and continuing reduction in the income of prosecution advocates who were formerly instructed by HM Revenue and Customs. The amalgamation of that body with the CPS has led to the introduction of the CPS fee structure on future "Customs" cases with consequent significant reduction in expenditure and concomitant loss of income for those advocates. Again, precise figures are not available and have not been provided. However anecdotal evidence suggests that in some cases, fees might be reduced by 30%, assuming that experienced Counsel whose quality is demonstrated by their inclusion on the Attorney General's (AG's) list will be willing to continue to conduct such work at these rates. Again, to say that the CPS has had no difficulty in finding barristers to prosecute their work is disingenuous when much of the complex work has, up till now, fallen outside their remit. It should be noted that even when the current AG's rates were announced a couple of years ago, and were a reduction on the previous figures, many chose to reduce the amount of RCPO work they carried out and move into other (regulatory) areas. These reductions are more stringent; their effect is recent, developing, and unknown; they represent savings which do not appear to have been costed publicly, and are having and will have an inevitable and growing effect on the incomes of individuals and Chambers.

48. Sixth, none of the figures produced or considered during this consultation takes account of the recent introduction of means testing in the Crown Court. The effect of this change to the availability of legal aid will be twofold. First it will reduce the overall cost of legal aid in the Crown Court as many defendants will now fall outside the scheme, thus already producing savings in the budget which have not been accounted for. Second, it may reduce the amount of work available to defence advocates as many of the defendants who find themselves ineligible for legal aid may chose to represent themselves. Again this is most likely to affect BME and young barristers as they are those whose financial burden is higher (due to repayment of student loans etc) but also because they are those most likely to be conducting those smaller cases where litigants in person who are ineligible for legal aid might try to "have a go".

49. Finally, the difference between AGFS and the CPS scheme was known to all parties throughout the Carter discussion and subsequent negotiations. In the 2½ years since Carter was implemented, the Bar has been negotiating for a recalibration of CPS fees to achieve some degree of parity with AGFS. Indeed, the Bar believed that the Carter AGFS spend envelope was reduced by about £9 million, late in the day, in order to contribute towards this. The Bar has operated under the expectation that the CPS would move towards a fairer system of remuneration and were prepared accept the current fees structure as an interim measure. Plainly, such expectation has not been and will not be fulfilled and the Bar's goodwill in this regard will evaporate.

The Options - Option 1

50. Option 1 superficially appears straightforward. Savings of £47-48 million are to be achieved by a simple one-off reduction of 17.9% in AGFS fees, assuming the AGFS spend is £262.5 - £268 million. However, no statistics are provided as to the spend on AGFS or other criminal defence expenditure: it is not clear whether this figure is an estimate of future expenditure or based on current or indeed historical statistics. No overall statistics have been provided. It is one thing to set a target figure of savings: it is quite another to translate that into a percentage reduction of rates without a clear statement of:-

(i) what is in fact the current and future estimated expenditure on AGFS and on higher court criminal defence advocacy in total (including VHCCs and EPFs) and

(ii) the volume of work to which it is said to relate.

51. The effect of a 17.9% reduction on barristers' taxable incomes has also been ignored. Lord Carter, the MoJ and the LSC work on the reasonable assumption that 35% of advocates' receipts are lost in overheads, excluding tax and any pension contributions.[40] Those expenses will at best remain broadly the same: more probably they will increase. The consequences are set out below:

[40] CP 54/09 § 15. "Overheads are assumed at 35% based on a sample study in 2005 of 28 barristers across all years of call. Overheads include chambers rent and personal work related expenses and do not include any allowance for pension contributions or tax." Chapter 5, p. 108 at §72 Lord Carter Review.

The Effect of the Cuts on advocates' Taxable Income

	Receipts per £100	VAT*	Costs	Taxable Income	% taxable	Cut in Income
2008/9	£100.00	£ 13.04	£ 35.00	£51.96	51.96%	0%
Option 1	£ 82.10	£ 12.23	£ 35.00	£34.87	34.87%	32.88%
Option 2	£ 86.50	£ 12.88	£ 35.00	£38.62	38.62%	25.67%

* Figures for 2009 include VAT at 15%. The rise of VAT to 17.5% in 2010 has been factored into the above table.

52. In other words, the proposed cut of 17.9% represents cuts in individual incomes before tax and pension contributions (if any) of one third. In Option 2, individual incomes would be cut by one quarter (25.67%), before rising to "sustainable" Option 1 levels. Even if Lord Carter's 35% is based upon receipts after VAT,[41] the proposed cuts remain significantly above the MoJ figure of 17.9%: for Option 1 the figure would be 30.2%; for Option 2, 23.6% again before rising to "sustainable" Option 1 levels.

53. The MoJ does not appear to understand that the fee incomes of members of the Bar do not equate to a salary. Out of those fee incomes come all the expenses of not only running barristers' Chambers but a significant proportion devoted to other expenses. For example, Chambers meets the cost of training all pupil barristers. One effect of declining incomes is the reduction in pupillages available at the criminal bar. Further declines in overall income are likely to lead to further reduction in pupillages. It seems that the MoJ has ignored the wider effect which its proposed cuts are likely to have on the future of Bar.

[41] i.e. £30.43 per £100 of gross (VAT inclusive) receipts.

54. We reiterate[42] that, as far as we are aware, there is no other public sector in which employees have had their pay cut by up to 25% to 30%. Other public sector workers, having seen incomes rise over the past 10 years, are now threatened with pay freezes or marginal increases. Advocates, having recovered from inflationary erosion on fixed fee levels for 10 years, are threatened with significant cuts.

55. The fact that no other avenue for cuts to the legal aid budget appears to have been investigated, together with the failure of the MoJ and LSC to properly assess the state of the market and the effect of the reduction of former Customs prosecution fees, exposes the cavalier attitude of the MoJ towards criminal defence. The Bar Council and CBA have no hesitation in denouncing Option 1 as unfair, excessive, unprincipled and wholly unjustified.

Option 2

56. Lord Bach states that the additional VHCC savings envisaged in Option 2 would allow him to make a lesser reduction to graduated fees which would be to the apparent advantage of the vast majority of Crown Court advocates.[43] This Option is at first blush more attractive than Option 1. A transitional phasing in of cuts is clearly preferable: floating straws are always grasped. However, the devil lies in the detail or rather the lack of it.

57. First, MoJ figures (where provided) are unclear. The MoJ estimate that one third of all VHCC cases exceed 60 days and account for about 50% of the VHCC spend in 2008/2009

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42 As the Bar Council pointed out in its response to the consultation paper *Legal Aid: Funding Reforms* in November 2009.

43 MoJ CP: 54/09: Foreword, p 3.

of £112m.[44] That appears to, but cannot mean that £56m is expended upon 40-60 day cases. Elsewhere, in the same paper, the figure of £51m on VHCC advocacy is given.[45]

58. More precise figures are provided by the MoJ Impact Assessment which states that 40-60 day cases would yield steady state savings of £1.22m on 4.92% cuts by 2014/5.[46] That translates as a total figure of £24.8m, on which a 30% saving would yield £7.44m. However, the Impact Assessment also asserts that Option 2 would achieve steady state savings of £10.75m from the removal of 40 – 60 day VHCC cases into AGFS by 2015/16.[47] This appears to be calculated on the basis that the move would reduce the spend from £24.8 million by 30% (i.e. to £17.9 million) which would in turn be reduced by a further 13.5% under Option 2 (i.e. to £14.69). The total saving would therefore be something over £10m. To achieve £10.75m would require the Option 1 cut of 18%. The figures do not appear to tally. Moreover, no account is set out for the savings to be made in expenditure on administration. Apart from avoiding transparency by failing to provide basic statistical information, it would be less disingenuous to state that the cuts mean an overall reduction of 43% in fees paid for these complex cases.

59. Second, in one consultation paper the MoJ has calculated that its 30% saving would reduce individual fees in such cases by certain percentage amounts. It appears to have failed to publish the effect of the further percentage reduction of 13.5% or 17.9%.

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44 *Very High Cost (Crime) Cases 2010: A Consultation Paper*: December 2009): Annexe 3 p. 71 §3.27

45 V*ery High Cost (Crime) Cases 2010: A Consultation Paper*: December 2009 Annexe 3 p 66 § 3.4and p. 71 at § 3.27

46 MoJ CP54/09, Annexe 3, table 1 at page 6.

47 *Ibid*, Annexe 3, Table 2 at page 8.

Fee cuts for 40 – 60 day cases: LSC consultation cut plus MoJ consultation cut.			
	LSC consultation VHCC Cases 2010[48]	MoJ consultation Option 2: 13.5%	MoJ consultation Option 1: 17.9%
QC	15-38%	26%-46%	30%-49%
Leading Junior	18 – 30%	29% - 39%	32% – 42%
Led Junior	48%-58%	55%-63%	57% – 65%

60. Third, the removal of 40 - 60 day VHCC cases into AGFS was considered and rejected during earlier discussions by all stakeholders on the VHCC Steering Group, including the LSC and the MoJ. It was agreed by both the LSC and MoJ that it would be impossible to implement such a change for a variety of reasons yet the current proposal fails to explain why an idea that was recently considered impracticable and unworkable has suddenly become not only feasible but positively desirable. It is this kind of irrational volte face that causes us to seriously question the thinking behind the current proposals.

61. Graduated fees evolved from the simple premise that a formulaic approach to the calculation of fees in smaller cases would not be unfair to any individual whose reasonably poor remuneration in one case would be balanced by reasonably good remuneration in another: over 12 months, an individual's income would be likely to stay cost neutral. That *swings and roundabouts* principle has found its way into the vocabulary of Costs Judges' reports.[49]

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48 *Very High Cost (Crime) Cases 2010: A Consultation Paper*: December 2009, Annexe 3 p 72 Table 7: estimated direct financial impact of extending AGFS per advocate role.

49 *R. v. Chubb* [2002] Costs L.R. 333

62. The same reasoning does not apply to 40 to 60 day cases. Such cases are limited. They take time. Most counsel who undertake a VHCC undertake but one a year. An advocate who is inadequately remunerated under a formulaic system is unlikely to have that inadequacy corrected by another case. Conversely the payment of excessive remuneration is invidious. A formulaic extended AGFS is likely to achieve both results. Swings and roundabouts simply cannot apply to 40 to 60 days cases: an AGFS system for such cases for would be more like snakes and ladders, and the proposed reform removes the ladders.

63. Fourth, Option 2 is said not to be sustainable: the shortfall would have to be made up, as the MoJ makes clear.[50] However, the means whereby the shortfall is to be made up is wholly unclear. The MoJ said in the paper it proposed to consult soon about proposals to pilot OCOF. We are now told in the letter from the MoJ of 5 March that this consultation is months away and in any event will apply to Option One as well. There have been past suggestions that OCOF would cease to ring fence advocates' fees and would simply pay a single fee to litigators. Any such proposal would be disastrous for, and vigorously opposed by advocates. As a result any version of OCOF would almost certainly involve actual reductions in fees that would end up being greater than those proposed in Option 1.

64. In any event, the MoJ make it clear that further options will be considered. Given their lack of current data, the criticisms of their forecasting models, and the difficulty in determining the actual state of the current fee regime in the light of the numerous past changes still operating upon it, the blithe assumption that individual criminal advocates will survive such cuts is cavalier at best.

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[50] MoJ CP: 54/09 p. 10, para 29.

Responses to Questions

65. **Question 1:** ***Given the current financial pressures, and the need to make savings, which of the two options above do you prefer?***

66. **Answer.** Neither.

67. It is impossible to make any rational or sensible assessment of the proposed options where no coherent statistics are provided; there is no explanation as to what base figures are being used; and there is no meaningful explanation as to how figures have been calculated; where figures which are provided appear to be at worst inconsistent and at best ill-explained. Moreover, the MoJ spend is gross and includes the payment of VAT: no indication has been given as to whether and how far VAT increases have been included in the computation.

68. What is clear is that both proposals would have an enormous and disproportionate effect on income, which does not appear to have been considered. The MoJ may consider cuts of 13.5% or 17.9% with equanimity, but appears to be wholly unaware of the fact that these will translate into cuts to real income before tax and pension provision of between approximately one third and one quarter.

69. ***Question 2: Are there alternative proposals you would suggest that would achieve the same level of savings in the same timeframe?***

70. There are undoubtedly alternative proposals which could achieve savings within the given time frame. The Bar has produced a carefully considered replacement scheme for VHCCs – GFS Plus - which has broad support of all stakeholders including the LSC and

should deliver significant savings without providing advocates with shortfalls or windfalls. However, it requires cost analysis and that cannot be achieved overnight. Details of the scheme are set out fully elsewhere.[51]

71. The MoJ appear to have rejected consideration of this scheme, despite its widespread support, because it has not been costed. If, as we suggest, it is a valid and sensible substitute for the crude and potentially unfair transfer of 40 – 60 day VHCC cases into the Graduated Fee Scheme, which is to attend a 3 year roll-out of Option 2, followed by further savings in defence fees, there is more than adequate time to review, cost and roll out GSF Plus. The LSC undertook to collect data on current VHCCs as they closed to test GFS Plus. We have been told that this data collection exercise started at the beginning of December 2009, so that there should now be nearly four months' worth of such data. This data should be published immediately, with a view to assessing whether Option 2 is sustainable, and is therefore at least the less objectionable of the two Options proposed.

72. In any event, it is impossible to identify and formulate cost saving proposals when the relevant statistical information has not been made available and/or collated. Savings and cuts should not be achieved at the expense of the viability of the self-employed Bar and the continued delivery of an efficient Criminal Justice service. Significant changes require cogent consideration. We are told that there will be no increased funding in the future. We will co-operate with rational, measured and carefully formulated proposals to reduce the criminal justice budget that have been properly impact assessed and can deliver clearly stated and justifiable objectives; however, we have yet to be presented with such proposals.

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51 Ver*y High Cost (Crime) Cases 2010: A Consultation Paper*: December 2009, at Annexe 1

73. A holistic approach to cost saving should also be undertaken. The Bar would be more than willing to play its part. However, to suggest that any sensible proposals can be produced and costed within a matter of weeks is facile.

When a reduced expenditure envelope is proposed, the first task should be to determine, following proper consultation, the fair and proportionate level of savings to be made from the criminal justice budget as a whole. The current proposals have not undertaken this task and have simply demanded a quantum based upon a misconceived premise relating to prosecution fee scales and the alleged availability of supply. The second task should then be for the suppliers (who are best placed to do so) to propose the most appropriate means by which to generate such savings from within the various areas of expenditure in the interests of the profession as a whole.

74. By way of example, over the past few years, private funding of defence costs has been blocked by legislation which enables the prosecution to restrain a defendant from using his own monies to fund his own defence. However, once convicted, those funds are usually seized and used, amongst other things, to augment the budgets of the prosecution authority and the Court Service. The removal and/or regulation of that imbalance, or the removal of the ban on "topping up" provisions[52] would introduce private funds into the criminal defence scheme and reduce the MoJ spend, but both require careful analysis and debate.

75. ***Question 3: Do you agree with the initial Impact Assessment? Do you have any evidence of impacts we have not considered?***

76. If one definition of a cynic is someone who knows the price of everything but the value of nothing, then the Initial Impact Assessment is a cynical document.

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[52] *Access to Justice Act* 1999, Chapter 22, section 22(2)

77. Having suggested that the proposed fee decrease might be so great that the new level would not provide adequate remuneration and would result in advocates leaving the market, the Assessment rejects this possibility by asserting that the CPS have reported no problems with paying fees which are broadly in line with the new proposed AGFS rates.

78. That assessment wholly fails to take into account the significant reduction in fees paid to former Customs prosecutors, which are yet to work their way through the system; the invalidity of comparison between CPS and AGFS schemes, both in terms of profile, and the changing dynamics of CPS work; and the altering balance of work between the instruction of in-house advocates and the self-employed Bar.

79. The effect upon the incomes of criminal advocates will be such that the viability of many chambers, specialist criminal sets in particular, will be put in jeopardy.

80. The Criminal Bar is rightly proud of its record in attracting more women and black and minority ethnic law graduates into this area of practice. Even the inadequate data collected by the LSC [see below] indicates that BME barristers are disproportionately represented at the criminal bar compared to the Bar in general. These cuts would adversely impact upon the diversity of the criminal bar as fewer candidates with high debts and those from economically disadvantaged backgrounds would be able to afford to enter the profession. In the longer term, the profession and the judiciary, which is principally drawn from the self-employed Bar, would cease to be representative of the public it serves, with damaging consequences for the credibility of the criminal justice system.

81. The Impact Assessment wholly fails to address the potential damage to the value of a criminal justice system that is already creaking under the strain on advocates of a hugely increased workload which has not been met by any increase in the level of fees paid to

prosecution advocates. In many areas it only continues to function because of the goodwill of the profession; if the MoJ require confirmation of this they simply need to ask the judiciary.

Question 4: Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals will have a disproportionate adverse impact on any group? How could any impact be mitigated?

82. Following our original response, the MoJ stated, in its letter of 5 March 2010, that it had not considered "that it was in a position to be able to assess how the proposals would impact on women, people from ethnic minority backgrounds or people with disabilities." The MoJ thanked us for drawing its attention to the data gathered by the Bar Council and the LSC as part of the work on Quality Assurance for Advocates (QAA), and further stated that while it was aware in broad terms of the work, it was "not aware of the more detailed data related to earnings that had been gathered as part of the QAA project."[53]

83. Rejecting our earlier submissions, the MoJ asserts that examination of that data "shows that, generally, there were few statistically significant differences by race, gender, age or disability as between the proportions of crime income being publicly funded or as between the aggregate impact of either proposed option on income."[54] We agree, largely because the answer is disingenuous. The distinction between Option 1 cuts and Option 2 cuts is minimal when the unknown "sustainable" elements of Option 2 are brought into being to achieve the same level of overall cuts. The issue is not whether removing £47m from the defence advocate budget over one or three years will make a statistically significant difference *by race, gender, age or disability, but whether the cuts, whether by way of Option 1 or Option 2, will have that effect.* We believe that they will have that effect, and

53 MoJ letter 5 March 2010, page 2. http://www.justice.gov.uk/consultations/legal-aid-reforming-advocates-fees.htm

54 Ibid

accordingly, remain firmly of the view that the LSC has failed to carry out an adequate Equality Impact Assessment (EIA) in relation to the proposed cuts. Compliance with positive statutory equality duties by the MOJ is not to be treated as "rearguard action following a concluded decision but as an essential preliminary to such decision, inattention to which is both unlawful and bad government."[55]

84. The original EIA stated

> "The LSC does not hold data on payments to individual barristers that would enable us to assess fully the diversity impact of the proposal on different groups of people. While the Bar Council publishes data on the ethnic background and gender balance of the Bar that data cannot be linked directly to information about payments."

85. We pointed out that is no excuse for the failure to carry out a proper impact assessment that the LSC does not hold data on payments to barristers. If that is the position, it is incumbent on the LSC or the MoJ to secure such data in order to enable it to formulate its policy lawfully. Such a failure is particularly concerning in light of the criticism made by the NAO in its November 2009 report that the LSC did "not currently hold enough information centrally about its suppliers to be an intelligent commissioner and accordingly recommended that the LSC should collate and analyse the information it already holds and supplement it by further research so that it is better informed about its supplier base."[56]

86. With its letter of 5 March 2010, the MoJ issued its analysis based on data drawn from their Barrister Workforce profile.[57] The MoJ assert that 84% of the BAME barristers surveyed see 50% or more of their crime income coming from public funding, compared

55 *R (BAPIO Action Ltd) v SSHD* [2007] EWCA 113

56 NAO Procurement report *Recommendation* 18c, p. 9

57 MoJ: *Self employed barristers - ethnicity, gender, age and disability impacts.*

with 90% of white barristers.[58] It concludes from its analysis that neither gender, race, age nor disability appear to play a significant part in determining the proportion of income derived from publicly funded work. On the contrary, it is asserted that "the impact of both options 1 and 2 on white barristers as a group will be slightly greater than on BAME barristers as a group."[59]

87. That observation is startling. It is contrary the evidence presented in our earlier submissions which are set out below.

The original Response

88. The original EIA referred to evidence provided to it by the Bar Council based on research by the Legal Services Research Centre entitled *Barrister Workforce Profile* from February 2008. Those data show that 44.7% of BME practitioners practised in crime compared to 36.8% of white self-employed practitioners; and that nearly all criminal practitioners in the survey (99.7%) reported doing legally aided work. It is self evident that any reduction in defence fee rates will have a harsher effect on those groups whose practices are wholly or significantly reliant on public funding. Since BME practitioners are disproportionately represented in this group, it is self evident that these proposals will impact disproportionately on BME self employed barristers.

89. In fact the following tables demonstrate the disproportionate reliance by criminal practitioners on publicly funded work; and the differential diversity impact in relation to that reliance. The tables bear out the Bar Council's response of 12 November 2009 to the "Legal Aid: Funding Reforms" consultation document.

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58 *Ibid:* part 1

59 *Ibid:* Summary

Table 1: Percentage of civil work that is publicly funded; all those doing any civil work

% of total civil work publicly funded	Frequency	Valid Percent
None, do not do Legal Aid work	1114	37.5
Less than 50% publicly funded	1278	43.1
More than 50% publicly funded	576	19.4
Total	2968	100%

Source: QAA Survey

Table 2: Percentage of family work that is publicly funded: all those doing any family work

% of total family work publicly funded	Frequency	Valid Percent
Less than 50%	306	35.9
More than 50%	547	64.1
Total	853	100%

Source: QAA Survey

Table 3: Percentage of criminal work that is publicly funded; all those doing any criminal work

% of total criminal work publicly funded	Frequency	Valid Percent
Less than 50%	164	10.7
More than 50%	1366	89.3

Total	1530	100%

Source: QAA Survey

90. The table below draws out diversity differences in the proportion of work that is publicly funded. Overall 39% of the self-employed bar has more than half of their work through legal aid, but this varies substantially by gender and ethnicity.

Table 4: Proportion of work that is publicly funded, according to gender and ethnicity, self-employed bar

	White male	BME male	White female	BME female	Total
Less than 10%	47.5%	33.7%	24.9%	16.4%	38.4%
Between 11-30%	14.9%	11.6%	6.9%	9.6%	12.1%
Between 31-50%	8.9%	9.5%	15.2%	11.0%	10.8%
Between 51-70%	10.2%	12.6%	21.8%	9.6%	13.6%
Between 71-90%	9.3%	16.8%	18.0%	21.9%	13.0%
More than 91%	9.2%	15.8%	13.3%	31.5%	12.1%
Total	100.0%	100.0%	100.0%	100.0%	100.0%
N= p<0.001	764	95	362	73	1294

Source: QAA Survey

91. It is no answer to this disparate adverse impact to say as the MoJ does that, "The Bar itself needs to address issues of diversity to ensure that women and BME practitioners have the opportunity to develop their careers in the same way as their white male counterparts and eventually undertake better paid cases, that they are suitably qualified

to undertake." Indeed, we suggest that the Bar has been extremely successful in doing so. The MoJ and the LSC each have statutory duties to eliminate discrimination and promote equality of opportunity between persons of different racial groups. Where these proposals will have a discriminatory impact on BME barristers, those duties are not discharged by seeking to shift responsibility to the Bar.

92. Nor can we understand why the original EIA made repeated reference to the fact that the proposed cuts would mean that junior members of the Bar would continue to be no worse off than they were prior to the implementation of the Carter changes. In November 2006 the Government accepted that the Carter rates represented principled and fair remuneration for criminal defence work. There was a clear acceptance that the pre-Carter rates were inadequate. In the circumstances, we still fail to see the relevance of repeated references in the original EIA to the pre-Carter rates; and cannot understand how this can be relied on to justify the proposed cuts

93. As regards the data provided by the MoJ in the revised Equalities Impact Assessment of 5 March 2010, it narrowly focuses on any difference in the proportion of crime income received from public funds and points in the tables to no significant difference in the proportion of crime income from public funds by gender or race. However, the data show white barristers have higher earnings than non white, and male barristers have higher earnings than female barristers. Figure 3 highlights the lower earnings of women, particularly BME women, among those who rely mainly on publicly funded crime and of BME males compared to white male barristers. Figure 4 draws attention to the lower earnings of those most recently called to the Bar. Those on low earnings will clearly be less able to withstand the proposed large reductions in criminal legal aid and this adverse impact on women and BME barristers appears at best not been considered by the MOJ, and at worst ignored.

94. The Bar's first response to the AGFS consultation, commenting on the EIA, refers to the evidence that 44.7% of BME practitioners practised in crime compared to 36.8% of white practitioners. This is not disputed by the MOJ. As self-employed barristers, BME practitioners will be more adversely affected than white self-employed barristers by cuts to the legal aid budget. This disproportionate impact is likely to lead to a smaller pool of BME self-employed barristers in the pool for judicial appointment. Again this has not been addressed in the MOJ's response.

MoJ Data

95. The MoJ data provided by the letter of 5 March are wholly inadequate for the purposes of this consultation for two principal reasons.

96. First, it seems that the data set upon which the MoJ have relied is that held by the LSC and the Bar Council from the QAA survey. That data set has not been made generally available. Consequently anyone else interested in the consultation is labouring under a significant handicap in attempting to deal with the issues raised.

97. Second, the data set is fundamentally flawed for the purposes of this consultation.

(a) The QAA questionnaire was never designed for the purpose of gathering information about fees. It was designed to study the diversity of the profession.

(b) The QAA questionnaire was certainly not designed for the purpose of gathering data on criminal defence fees in the Crown Court. It does not distinguish between types of defence fees (AGFS, VHCC, and EPF) or in any real detail between prosecution and defence fees; or at all between publicly funded and private fees or between Crown Court and magistrates court fees.

(c) The MoJ figures present a "mean gross total fee income" for barristers. Figures are given to the nearest pound (e.g. £42,941). To an impartial observer that must suggest that an average gross fee income has been achieved by adding together the incomes of a group of barristers and dividing the total by the number of barristers. That reasonable assumption is simply wrong. The QAA data set is based upon broad bands of annual income e.g. less than £20,000; £20,001 - £40,0000; £40,001 - £60,0000.[60] Of course it is mathematically possible to create such precise figures for mean gross fee income from bandings if certain assumptions are made. However, whatever assumptions were made remain unstated. The accuracy of any such figures is clearly dubious. We reiterate: the data was not gathered for and cannot be used to provide meaningful averages for incomes for criminal defence advocacy.

(d) Insofar as the QAA does provide information about incomes, albeit in a broad banding format, that information is over two years old and has been superseded by events. Over that period and subsequently, EPF expenditure has reduced; CPS HCAs have undertaken a greater proportion of the work hitherto done by the junior Bar; fees for work hitherto provided by HM Customs and Excise have begun to diminish as CPS rates are substituted; the impact of Crown Court means testing has yet to be determined; VHCC rates have diminished; and expenses have increased.

98. However the QAA data set is useful, as the MoJ acknowledge, for the purpose for which it was created, namely as a study of diversity at the Bar. It is noted that the MoJ omits to mention data in the survey which also shows

- A significantly higher proportion (44.7%) of BME barristers than white barristers (36.8%) practise in crime;

[60] Legal Services Research Centre: *Barrister Workforce Profile*: February 2008: Annex 1

- The percentage of female and BME barristers is increasing among the more recently called to the Bar
- 15% of BME barristers are 1-10 years' call and 14% are 11-20 years' call;
- 48% of women are 1-10 years' call and 35% 11-20 years' call;
- The income progression of male and white barristers is significantly faster than that of BME and female barristers.
- 31.7% of men practising only in crime earn under £80,000 against 57% of women;
- 27.4% of white self-employed barristers earn under £80,000 against 44.6% of BME barristers

99. The omission of that information becomes of greater relevance when compared with a recent exit survey of barristers changing practice status, including those leaving the self-employed Bar between 2001 and 2008. [61] Its relevant findings in this context were that:

- Women, and black and ethnic minority groups are disproportionately likely to leave the Bar.
- 25% of those who leave are between 4 and 7 years of call, a group which represents only 15% of practitioners.[62]
- Half of those who left the Bar had been influenced by uncertainty over future levels of income, and 44% by their current levels of income. These financial factors were particularly important to practitioners from ethnic minorities.[63]
- Those doing criminal work or a mixture of criminal and civil work, and those working in publicly funded areas of work were most likely to cite financial factors: they had more uncertainty than others over future levels of income and current levels of income.[64]

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61 Electoral Reform Society: *Survey of Barristers Changing Practice Status 2001-2008:* December 2009: http://www.barcouncil.org.uk/assets/documents/Final%20GCB%20ExitSurvey2009.pdf

62 *Op cit, para.* 2.1.1

63 *Op cit, para.* 2.1.1; 5.5

64 *Op cit, para.* 2.1.1; 5.5

- Over the past two years there has been an increase in the importance of financial factors.[65]
- Those who left the self-employed Bar had been influenced largely by financial factors: those who left the employed Bar were influenced by considerably more diverse factors.[66]
- Of those who left, half did mainly criminal work and 10% did a mixture of civil and crime; 59% practised mainly in publicly funded areas of work.[67]

100. The data on overall representation of BME barristers and the exit survey (and possibly recent falls in pupillage diversity) are enough to raise serious concern that the proposed large reductions in criminal legal aid will lead to a significant drop in the diversity of the profession and, in due course, of the judiciary. The recent Neuberger Panel's Report on *Judicial Diversity* acknowledged the Bar Council and FLBA survey which indicated that dependency on legal aid varies according to gender and ethnicity. [68] It also stated that, although the efficacy of planned reforms to legal aid was not within the Panel's remit, "any disproportionate impact on women and BAME professionals would be a cause for concern, as it would impact upon the eligible pool for judicial office. This needs to be closely monitored." [69]

101. The MoJ's public equality duties require that it takes into account the diversity impacts of its policies as they are formulated and that it sets out steps to mitigate adverse impact by race, sex or disability. The MoJ has inadequate information to do this. The Barrister Workforce Profile data is over two years old. It does not take account of recent changes in funding and operational practice by the LSC, CPS and others. The reliability of the findings on barrister gross billing income which it seeks to extrapolate from the QAA data set is untested and uncertain. However, the conclusions that can be drawn suggest

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65 *Op cit, para.* 2.1.4; 5.5

66 *Op cit, para.* 2.2.4

67 *Op cit, para.* 5.3.3

68 *The Report of the Advisory panel on Judicial Diversity* 2010, para.68.

69 Ibid. para 69

strongly that BME and female practitioners will be less able to withstand large across the board cuts to legal aid. The MoJ should not move forward with their proposed funding changes until they have more reliable data on the possible impacts of such cuts on those minority groups.

102. In its letter of 5 March 2010, the MoJ states that it does not accept that either Option 1 or Option 2 engages the indirect provisions of the *Sex Discrimination Act* 1975 (SDA) or the *Race Relations Act* 1976 (RRA). It asserts that:

"The proposals are for across-the-board reductions applicable to all advocates and providers. They do not impose restrictions on which advocates and providers can qualify to do legally aided criminal work or set prerequisites for doing such work. Nor do they oblige advocates and providers who do criminal work to perform services in a certain way. The proposals do not, therefore, impose a requirement or condition on advocates or providers, or impose or constitute a provision, criterion or practice, within the meaning of the relevant legislation."

103. We consider that this approach is wrong and involves a misunderstanding of the new definition of indirect discrimination. The argument might have been legitimate under the old definition of indirect discrimination in the SDA and the RRA, but fails to recognise the effect of the amendment to (and consequent widening of) this definition. Under the current definition, it is sufficient if there is shown to exist a provision or practice which, although applied to all of a relevant group, puts or would put some members of the group (defined by reference to race or gender) at a particular disadvantage when compared with other persons not of that race or gender. In short, the MoJ has failed to adopt the broader approach to interpretation required by the Directive and the legislation that implements it.

104. There is little doubt that the impact of these proposed cuts upon recruitment will be severe, and that the consequences will inevitably have diversity implications. With substantially reduced incomes in prospect, the best candidates will be dissuaded from practising in crime and only those with other means of support or income will be able to afford to set out in self-employed practice - particularly in view of the very substantial student debt (c £50-60,000) with which they start.

105. The same is true in relation to the impact on retention of able barristers from diverse ethnic and socio-economic backgrounds and female practitioners. The progress that has been made towards a more diverse Bar will be undermined by these proposed cuts, as continued practice at the Bar becomes an increasingly unsustainable proposition with substantial cuts in income. These results are at odds with and undermine Government's commitment to widening access to the professions and increasing diversity in the judiciary. This cannot have been an intended consequence; but the impacts have not been adequately or rationally considered.

106. The loss of high quality practitioners will lead to a lowering of standards of case preparation and advocacy. This will diminish the overall fairness and efficiency of our criminal justice system. Indeed, the MoJ's own research confirms that substantial costs are associated with a poorly incentivised criminal defence service; and these proposed cuts are more likely to lead to higher rather than lower costs in future.

The Bar Council

Criminal Bar Association

1 April 2010