SOUNDING THE ALARM

Western Circuit Response to 'Next Steps' Consultation[1]

The Western Circuit envisages that if the Government proposals are not reconsidered, they will lead to:

1. A reduction in the quality of justice afforded to all who appear before our courts;
2. The extinction of the self-employed criminal Bar as a specialist referral profession of excellence founded on the chambers system;
3. A resultant increase in cost to the taxpayer for criminal justice in excess of the purported savings hoped for in these proposals;
4. A reduction in the quality of the judiciary, and the criminal justice system;
5. A serious decline in the regard in which our justice system is held overseas which in turn will lead to the decline of international commercial litigation and investment in this jurisdiction;

Our response is based on evidence.

[1] A draft of this response has been read by our members. So far, 124 of them have endorsed it and added comments of their own. On the response deadline we will provide a copy of that schedule which we will also place on our circuit website.

Introduction

1. The Government has rejected much of what was urged by respondents to the last consultation and has now asked nine narrow questions, which amount essentially to three:

    i. Do you agree with our method of procuring and funding Criminal Legal Aid contracts?

    ii. Which of two schemes should we use for the Crown Court Advocacy Fee?

    iii. Have we got our impact assessments right?

2. The answer of the Western Circuit is:

    i. No.

    ii. Neither. (The question is misplaced because it poses a false choice).

    iii. No.

3. There is a widespread concern that the responses we are providing are going to be ignored: that this consultation is effectively meaningless. The majority of issues raised in relation to criminal funding in response to the first consultation have not been properly addressed or even acknowledged. We note that in relation to proposals concerning civil and family legal aid there have been very few concessions made despite sound, reasoned and principled objection.

4. We can only work on the basis that the consultation is what it claims to be, and that there is a real prospect that the Government will listen to and understand the justifiable depth of opposition to what is proposed.

5. Accordingly we will explain why the proposals are very bad for our criminal justice system (in particular as it is currently delivered on the Western Circuit) and why the apparent objective of the proposals - saving money - will not be attained. This latter consideration requires the Government to look further forward than a year or two, because the inevitable diminution of quality should the proposals be implemented will lead to increased costs in the medium and long term.

6. We will return to some of the residual issues in areas concerning legal aid other than in crime at paragraphs 83 to 85 below.

The Western Circuit

7. The Crown Courts served by practitioners on Circuit are Winchester, Southampton, Salisbury, Portsmouth, Newport (Isle of Wight), Bournemouth, Dorchester, Taunton, Exeter, Barnstaple, Plymouth, Truro, Bristol, Gloucester, and Swindon.

8. Barristers on our Circuit practise in these courts, in the surrounding magistrates' courts, and in the Court of Appeal. They are generally based in chambers and chambers annexes in the towns and cities listed above. The exception is those based in London sets who come out on Circuit to practise.

9. Some Western Circuiteers will on occasion carry out work off-Circuit. Some have a mixed practice in that they work in areas other than crime. But the overwhelming majority work entirely on Circuit and have specialised in crime, to the exclusion of other fields of practice. In that sense the picture has changed over the last two decades. As the law has become more complex, a greater degree of specialisation has been encouraged and market driven. The result is that the degree of specialist knowledge of a criminal barrister nowadays is markedly higher than previously. Whereas it was once sufficient to know the substantive law and the core rules of procedure and how to conduct a trial and a plea, now the position is that a barrister practising in crime has to be able to deal in advance of trial with a host of ancillary applications such as: special measures for vulnerable witnesses, hearsay and bad character applications under CJA 2003, applications to cross-examine rape victims, CPIA disclosure applications, Public Interest Immunity applications, restraint of assets applications, etc. Furthermore the substantive law has become much more complex as has sentencing. Specialisation was called for, and has occurred to a marked extent.

Ethos

10. The quality of criminal advocacy delivered by the rank and file of the Bar on the Western Circuit is dependent upon not only the professional training, Continuing Professional Development etc., all of which may be taken for granted, but upon the ethos of each set of chambers, which may not.

11. Each individual set of chambers provides by far the most significant contribution to the overall quality of practitioners on our Circuit. First and most obviously this is through formal funded pupillages for 12 months within chambers. A pupil has the benefit of the wisdom and experience of others - not only his or her supervisors but of the whole of chambers. That is only the start. The contribution to quality continues throughout membership of chambers. This derives from the continual support and constructive criticism of colleagues, emulation of best practice, reputational incentive, competition within chambers,

access to learning, liaison and relationship each chambers has with the judiciary and the constant 'in-house' informal monitoring and training that all those with a interest in the reputation of each set of chambers will provide.

12. Paramount among the above is the inheritance and understanding through careful teaching, of the ethics of the profession. Every criminal barrister of any calibre will acknowledge their ethical understanding of practice derived from the collegiate structure of chambers. The importance of fairness and justice over 'winning' is at the heart of this culture.

13. The head of each chambers plays a central authoritative and fundamental role in the development and protection of the ethos of each chambers. The willingness of senior members to give freely of their time to junior members of chambers, and to members of chambers who are not so junior but who are in need, is the distinctive hallmark of the chambers system.

14. These considerations - collectively described as the chambers 'ethos' - cannot be replicated if the chambers system breaks down. Once lost, these high standards will not be recovered. It is what has historically given the criminal Bar its justifiably high reputation. However good some individual employed Higher Court Advocates may be, they do not have the support and training which comes from being in a set of chambers.

15. The loss of this ethos, and the accompanying high standards, cannot be measured in immediate arithmetic or economic terms. Because the Consultation does not recognise this, it is flawed and should be reconsidered. The effect of it will not merely be nostalgic. It will in the end cause a very significant lowering of standards. This will reduce trust and in the criminal justice system generally. The length of many trials conducted by barristers on our Circuit at the moment is significantly reduced because members of chambers trust their opponents in court. They often share chambers, or know of the high standards and ethos of other sets. They know that reputation matters. Whereas of course these things matter in any office or workplace, the fact is that the environment of a set of chambers, where self-employed people nurture and help each other in accordance with the way they in turn were nurtured and helped, and where excellence is fostered, is unique. Losing this ethos would cause a significant diminution in quality. Moreover, poor quality lawyers will cost the criminal justice system much more in financial terms, through misunderstanding, inefficiency and lack of thoroughness, delay, miscarriages of justice and through an undue inclination to please the client, at whatever expense. The professional liaison between judges and lawyers will suffer, with the loss of the benefit of efficiency and best practice born of mutual respect. A long term consequence

will be a loss of the quality of the judiciary: most of our Crown Court judges were schooled as advocates at the criminal Bar.

16. In other parts of the country and in some parts of some cities, the chambers system is breaking down. On our Circuit it survives, though in a more precarious position than it has been for many years.

Our current state - recent trends

17. As we demonstrate below, the existence of chambers which contain criminal barristers is already threatened, even before the materialisation of these proposals.

18. In response to the proposals we have looked at what has happened to the number of practitioners in crime on our Circuit, and, critically, to the numbers of pupils that have been recruited to practise in crime.

19. Dividing the Circuit into three groups (1) Bristol (2) Hampshire (3) Somerset, Devon & Cornwall: there has been a decrease in the number of barristers practising in crime on Circuit, of (1) 26% (2) 20% and (3) 22% since 2005. For a breakdown of these figures please see **Annex A.**

20. This decrease reflects (a) the demise of two principally criminal sets of chambers and one set which lost its crime team, (b) the loss of members from sets who were not replaced, (c) the migration of many of the more able practitioners into other fields of practice, (d) the lack of recruitment to chambers of pupils intending to practise in crime.

21. No symptom is more telling, in terms of a lack of confidence in the future, than the decision made year after year in almost every set on Circuit not to recruit pupils to practise in crime.

22. Our research from sets of chambers and annexes based within the geographical boundary of our Circuit, shows that since 2008 out of 107 pupillages offered – only 5 have been in exclusively or predominantly criminal pupillages – an average of one a year.

23. Of course there are sets in London with Western Circuit members. But even there, the number of criminal pupillages has been very sharply reduced in recent years. Very few criminal practitioners under 6 years call, based in London, practise on our Circuit.

24. Previously most chambers recruited at least 1 pupil to practise in crime every 2 years. The result was an annual influx of about 8 new junior criminal tenants a year on Circuit.

25. Given that there are currently about 300 barristers practising in crime on our Circuit, and all but a handful of them are more than 6 years' call, it is clear that unless the Government takes meaningful initiatives to change the clear perception that there is no future for barristers at the criminal Bar, this trend will continue. There will be no junior criminal Bar and, shortly, no senior criminal Bar. The implications of this should be a major factor in reconsidering the wisdom of the proposals.

26. There are other reasons to be alarmed by the emerging picture. 40 members of Circuit under 7 years' call responded to a survey conducted as part of this response. 24 of them had either intended to practise in crime when they were called, or undertook some (however little) criminal work during pupillage: they are now all doing something entirely different. 17 of the 24 explained this by reference to the financial disincentives. The survey adds to the evidence that contrary to the protestations by the Government that its strategy is to try to protect the junior Bar, chambers are not recruiting and the junior Bar is discouraged from criminal practice.

27. Part of the reason, is that as with others making early choices, having embarked on a profession, junior barristers must have regard to the long term. They realise specialisation is required and worry that once committed to one practice area, it is hard to change. Talented and motivated students are justifiably increasingly disinclined to take the risk of embarking upon a career at the criminal Bar. Increasingly they have to pay off large debts incurred in studying law and for the Bar exams. The justifiable perception of students and the junior Bar is that practising in crime does not pay.

28. Further challenges to the junior Bar include the fact that CPS in-house advocates now carry out virtually all the low-end Crown Court work. Although the Ministry of Justice is not immediately concerned about the conduct of the CPS, (the CPS being part of another Government department) an understanding of the true impact of these proposals requires consideration of all of the prevailing conditions for the junior criminal Bar. Similarly solicitor Higher Court Advocates conduct a greater share of routine defence work. Furthermore, it is our experience that there has recently been a substantial diminution in the number of cases reaching the Crown Court. No doubt this is in part owing to a reduction in flow caused by previous cuts to the budgets of the police and CPS. Aside from the fact that this considerable lowering of throughput is likely to result in

significant savings without the implementation of the fee cuts proposed, the effect of the cuts, if implemented, will thereby be exacerbated.

29. Of course, all that has been said so far deals with the situation as it is today, on the Western Circuit, i.e. prior to what is proposed. In short, we have already been put in a precarious position.

The future?

30. This response is based on the fact that the trends described above are a direct consequence of the fact that criminal fees for Crown Court advocates have already shrunk very considerably in the last six years, coupled with the connected growth in numbers of in-house solicitor HCAs. Nothing else could account for what has happened.

31. The question is: W**hat will the effect of the Government proposal be on what is left?**

32. We have looked closely at the figures for the proposed rates to be paid to barristers defending in the Crown Court, contained in the Consultation paper at Annex H. These rates relate to the vast majority of cases on our Circuit – i.e. Graduated Fee cases rather than VHCC. Whereas it has been asserted by the Government that the new rates are reduced in some cases by 'only' 6 or 7 %, the true reductions are much higher than this in some cases, particularly for trials.

33. The proposed changes 'incentivise' guilty pleas, by paying more for them. There are obvious moral and ethical objections to loading the structure in this way. It is a cynical attempt to sell the scheme. We are not falling for it. In any event guilty pleas will largely be kept in-house by solicitors, especially if loaded in this way.

34. It is wrong to look at these proposed cuts in isolation from the recent past. The fact is that the most recent round of cuts has not yet fully 'bedded in'. The consequences of those cuts are only now beginning to be felt. This new proposed significant range of cuts needs to be seen in the context of what has happened in recent years.

35. We have carried out our own calculations as to what has happened to the rates paid to advocates in Crown Court trials **since 2007.** These are set out in **Annex B**.

36. This reveals just how dramatic the position is. Anyone who has not studied the figures needs to absorb them. Advocates will routinely have to suffer reductions of up to 40%-50% of the 2007 payments for identical cases.

37. The junior Bar are far from immune. Quite the opposite. A typical Crown Court trial of two days concerning the alleged handling of stolen goods (classic fare of a very junior barrister) will incur cuts of between 24%-45%.

38. The Consultation poses a false question as to fee cuts. The 'choice' which lies behind it is in each case unacceptable. The question should not involve a selection of one choice from two, but whether either solution is in the public interest and, if not, what should be done. The fact that the Consultation question only asks which of two options we prefer betrays a complete lack of comprehension by the Government of the fact that both schemes involve cuts the effect of which, upon an already fragile criminal Bar, will be to 'topple over' many sets of chambers whose existence is already precarious because they are mainly or wholly criminal sets. For mixed sets, either scheme will operate as a slow bleed to many crime teams. Practice in crime within the current structure will become unsustainable. There can be no expressed 'preference' as between two mechanisms which will have that effect.

39. The position is equally stark in relation to the 30% cut upon VHCC (Very High Cost Cases: very large frauds, terrorism etc.) which the Government has decided is not part of this second consultation: this has already been decided upon and is to be implemented shortly. But the effects of the VHCC cut will be (a) to reduce further the incentive for the talented to join or remain with the criminal Bar (b) to increase those in chambers who (now that they will not accept any VHCCs) will be reliant on Graduated Fee work.

40. Following years of no increase for inflation, there have now been several years of cuts, each of which is unparalleled in any other publicly-funded sector. **The central message of this response is that the current system - whereby chambers-based barristers prosecute and defend Crown Court cases on Legal Aid - will not survive further cuts. This would be completely contrary to the public interest.**

41. The figures discussed so far relate to defence advocacy trial fees. It has been an inevitable feature of the system that as one side of the equation (prosecution or defence) cuts its fees, so the other follows suit. This is not always immediate, and not always precise, but the pattern is undeniable. The last three years has seen a 25% reduction in prosecution fees. So it is reasonable to conclude that the proposed cut in fees will become cuts across the board in terms of the public funding of the criminal Bar.

42. The average rate of chambers overheads on our Circuit in terms of the percentage of fees received by members, that have to be paid to chambers, is 20-22%. For most sets of chambers this cannot sensibly be driven down any

further than it has been, following a numbers of years of downturn in chambers' income. A set of chambers is in general a very efficient business model. It is a classic small business, lauded as an integral part of the economy. It employs relatively few staff. It shares facilities. It is ultra-competitive. Most chambers are wholly IT based in their method of working. More and more cases are being conducted digitally. Such savings as that brings have already been absorbed. But if chambers are to be retained some overheads – rent and wage bills – have to be paid. As solicitors and the CPS are themselves unable (through cuts) to provide elementary services, sets of chambers have shouldered much of the administrative burden that should not be their responsibility. It is no exaggeration to say that some courts on our Circuit would not be able to function if this was lost. Chambers require minimum facilities to provide this service. In short there is no fat on the bone left to cut.

43. So the maths is such that for our Circuit, based on the trends over the past few years, practice at the criminal Bar, save perhaps for the highest earners, will become rapidly unsustainable. We already lack the most junior members following years of reduced recruitment. We will soon be losing many others at all ages of seniority (because seniority does not necessarily reflect income) as rates fall.

44. In the medium to long term the trend shows that, if there are any further significant cuts, those that have qualified or practised as barristers will not be able to work from a set of chambers as criminal practitioners. Life as a criminal barrister working from chambers will cease to be viable. They will either leave crime and seek to retrain in other specialist fields, or seek work from firms of solicitors either as in-house employees or 'agented' HCAs, operating in effect from home and the boot of a car. We discuss this further below. We know that the Government imagines that this growth in the number of in-house HCAs will not happen because of the cost of employing staff. We disagree.

45. It is obviously necessary in this response, for the Circuit to consider the impact of the proposals on firms of solicitors working in the field and on the effect of those proposals on the relationship between the Bar and solicitors. Therefore we turn below to consider some of the ramifications of the Chapter 3 proposals.

The Chapter 3 proposals: Solicitors

46. We have, in the last month, interviewed solicitors from across our Circuit. We have tried to discover what they foresee as the impact of the proposed changes on their own firms, and, if they survive in some shape or form, on the question of future instruction of counsel. For obvious reasons of commercial confidentiality, we cannot identify the individuals (nor their firms) we have spoken to. We have

spoken to firms that practise in Bristol, Gloucester, Taunton, Exeter, Plymouth, Truro, Yeovil, Dorchester, Winchester, Southampton, Bournemouth, and the Isle of Wight.

47. It is acknowledged that the Government has rethought its ill-conceived proposed procurement areas. By itself this concession is meaningless in the light of what is now proposed.

Winning a contract

48. Most firms that we spoke to considered that they would not survive for very long if they had to rely on 'Own Client' work alone – i.e. if they did not secure a contract for Duty Scheme work. The percentage currently of Own Client work against Duty Scheme work significantly varies between firms. The strong majority view was that however healthy the current level of a firm's Own Client work is, if they as a firm did not obtain Duty Scheme work then their work would inevitably shrink over time. There was a prediction that there would be a return to a time when there was much more aggressive/hostile poaching of work between firms struggling for survival.

49. The cut rates proposed – said by the Government to amount to 17.5% over 2 years, but said by solicitors to be a higher figure – by themselves will imperil or extinguish many firms on our Circuit. Many solicitors have been working very hard for a number of years, trying to keep their firms afloat and paying the staff wage bills whilst nonetheless losing money at current rates. The strong feeling is that these proposals, if implemented, will trigger the exit for many experienced and respected practitioners from amongst their number.

50. There is a universal disgust reported at the fact that the payment for most trials in the magistrates' court will be fixed at the same sum as a guilty plea in the same case. The potential for unjustifiable commercial pressure – exerted by the employer on the advocate, to encourage or ensure that matters are not contested – is obvious.

51. There was a general complaint of lack of detail as to what the new Duty Provider contract might require. There is an assumption that some form of merger would be a necessity before any bid for a contract stood a chance of success. There is a fear that large cut-price national providers will win contracts and squeeze others out.

52. There was a conviction amongst many that these proposals spell the end for all small firms. Firms that consist of only one, two or three solicitors will not win

contracts. Many parts of our Circuit (and not only the rural areas) are served by small firms.

53. Despite Government assertions to the contrary, the view is that many small firms will not in reality have the option of merging. The business model of a large firm is likely to be such that maintaining a number of offices in local communities will be prohibitively expensive. Many practitioners consider that it is the relationship they have with their locality which provides what they have to offer. This is a circle which cannot be easily squared and accordingly is likely to lead to a number of highly experienced lawyers being excluded from Legal Aid practice. We discuss an example of this (disproportionate) impact on the BME lawyers in Bristol, below.

HCAs

54. What about the impact on the current rate of use of HCAs? Over the last few years, an increasing amount of Crown Court advocacy has been undertaken by in-house solicitor HCAs, at the expense of the Bar. The national figures show that HCAs now undertake 32% of Crown Court work.[2] A crucial question: will the new proposals operate to increase or decrease this percentage?

55. The answer to this question from solicitors we spoke to, was mixed. But the majority were clear that they would try to bring more and more work in-house to generate more 'income streams', notwithstanding the cost of employing someone. The view is that the market will allow them to employ at relatively low rates. There is an alarmingly candid acceptance that quality will not be a priority, and in many cases not a consideration at all.

56. Others pointed to the fact that they will possibly seek to enter relationships with individual HCAs or Bar 'Agents'. Upon probing this idea, it became clear that they would in turn require a 'commitment' of some sort. Some seem unaware or unconcerned about legality of fee-sharing arrangements. The view is that a way will have to be found.

57. One of the consequences of any chambers being involved in any such arrangement, should a lawful model be found, is the impact (in terms of conflict of interest) with the relationship of the same chambers with the CPS. This is a fundamental issue relating to conflict of interest.

58. Noticeably, and inconsistent with the Government's predictions, none of the solicitors spoken to thought that the proposals would lead them to make existing

[2] Statistics release by Legal Aid Agency 09.09.13

in-house HCAs redundant and brief the Bar. No doubt there are a variety of reasons for this, not all of them commercial.

59. One vision of the future from an in-house barrister now employed by a firm of solicitors in London was that the future *'typical firm'* would need a minimum staff of 20 *'so they will hire cheap paralegals and have a limited number of experienced lawyers. They won't use the Bar. They will brief –out at last second if no guilty plea or if unable to cover in court.'* In our view this has the depressing ring of truth.

60. Although our survey cannot be construed as a scientific one (the restricted response time, though extended, prevents that), nonetheless the overall implication was that the proportion of work to be carried out by HCAs rather than the Bar, will increase if these proposals are implemented.

61. The impact of that will of course be to exacerbate the effect of the cuts upon the Bar as set out above. There will be less work at lower fees.

Impact assessments

62. Questions 7, 8 and 9 of the Consultation ask if we agree the range and extent of impacts identified in the paper, and whether we think there are forms of mitigation so far not considered.

63. Although the section of the Consultation paper dealing with impact assessments is large (see especially Annex F), with all respect to those that are responsible for the contents, we are concerned that only lip-service has been paid to real impact.

64. Specifically, we consider that the impact on BME lawyers has not really been dealt with. Whereas it is acknowledged[3] that *'to the extent that BME majority managed firms are more likely to be small, the proposal may have had a disproportionate impact on them'*, it is then claimed that the Chapter 3 proposals *'minimise the reduction in contract numbers and offers the unlimited number of providers delivering Own Client work. This we believe would mitigate the potentially adverse impact on smaller organisations delivering criminal legal aid and therefore any disproportionate impact on BME majority managed firms.'*

65. Frankly this is nonsense. If, which is the case, small firms are going to be in trouble, BME firms tend to be small, and you cannot survive on Own Client work, the government should not pretend that these proposals do not have a disproportionate impact on BME firms. Our findings in Bristol are very specific in

[3] Annex F 7.3.8

that regard. The effect of these proposals will be to squeeze out those BME lawyers who have over recent years made significant inroads into a profession which is predominantly white.

66. It is disappointing then to read the words which follow on from the passage quoted above: *'We also consider this proposal will help in advancing equality of opportunity through the removal of any disadvantage for BME majority managed firms.'*[4] This is 'doublespeak'. Putting small BME firms out of business does not advance equality of opportunity. There is a perception amongst BME lawyers in Bristol who we have spoken to, that they have got where they are despite rather than because of help from other lawyers. The suggestion that the proposals 'help' them in any way, by reconfiguring the market is provocative and offensive. They will not find it as easy as others might to merge or enter some other formal association with non-BME firms. There are insufficient numbers of BME lawyers for them to unite in order to form a big enough group to bid. Neither they nor their clients want them to lose their identity as firms where the majority of personnel, and people at the helm, are BME. The Government should have the courage to admit this consequence of its proposals.

67. We accept that in other parts of the country there may be more BME lawyers able to merge with each other, or otherwise combine to win Duty Provider contracts: however the fact is that there are parts of the country – including the South West – where that is not the case. These areas require the promotion of BME lawyer initiatives as opposed to the hindrance now proposed.

68. The Circuit acknowledges that its research in Bristol has been limited in scope. But it is research – and appears to be far more than the Government has undertaken to inform its own impact assessment. We challenge the Government to research this issue candidly, properly and fully and to demonstrate, if it be the case, that its proposals will not have the effect we describe. It will help if, as we have done, the topic is discussed directly and openly with those concerned.

69. One member of the Circuit has put together a paper on the emergence of BME lawyers in Bristol. It is attached at **Annex C.** We agree with it. The fact is that these proposals will turn the tide on what had been a slow but ultimately encouraging development of the role of Black and Minority Ethnic solicitors in the largest city on our Circuit.

70. The knock-on effect for the BME Bar is real.

[4]Annex F 7.3.8

The financial cost to the Government of the loss of the criminal Bar on the Western Circuit

71. We represent those who appear regularly in Western Circuit courts. We believe the submissions below apply equally to other parts of the country. If the view is taken that we are overstating the position we invite liaison with the judiciary, who are informed and independent.

72. The trends we have described above will be sharply accelerated if the proposals are implemented. The result will be that within a few years the majority of all Crown Court advocacy will not be conducted by the independent criminal Bar. The constitutional and economic implications of this remarkable change have to be weighed in the scale.

73. For the reasons set out above there will be a consequential diminution in quality, caused principally by:
    a. the loss of ethos inherent in a chambers system;
    b. the loss of independence of the advocate;
    c. the loss of the considerable incentive to hard work that comes from being self-employed.

74. No quality assurance scheme can protect against these losses. Ministry officials when challenged on this topic[5] reply simply that they do not worry about quality because the Bar is overpopulated with barristers who want to practise in crime, and they do not believe quality will suffer because (implicitly) there will always be enough barristers competing for the work.

75. This attitude ignores the trends and the three consequences identified above. None of the three consequences is mitigated by there being an excessive number of qualified barristers.

76. The fact that there will be added cost flowing from the diminution of quality of advocates is beyond dispute. A list of all such situations would be very long. Common examples are:

    a. Unnecessary hearings because orders have not been complied with;

    b. Longer trials because of unmeritorious legal arguments;

    c. Longer trials because of unnecessary evidence being called when it is not contentious and ought to have been agreed, flowing from a failure by the

[5] At a meeting with Circuit Leaders, Petty France, 17.09.13

parties to do the preparatory work/discuss the case sufficiently in advance of trial, or flowing from a lack of trust;

d. Longer trials because of unnecessarily lengthy cross examination; there is only so much a judge can do to curtail excessive questioning;

e. Longer trials because of increased judicial intervention, trying to understand the defence case, and trying to ensure it is put to witnesses;

f. Trials not starting on time because legal arguments which should have been anticipated and dealt with before the trial have to be dealt with first;

g. Trials not starting on time because of very late requests for amendments which take time, such as editing of video interviews of vulnerable witnesses;

h. Trials not starting on time because advocate is unprepared, or hasn't spent enough time with the client;

i. Trials being aborted after witness evidence because of incompetent questioner adducing inadmissible evidence;

j. Failures in the disclosure process coming to light during a trial because there has been a failure to identify the real issues prior to trial, resulting in adjournments or abandonment of proceedings;

k. Failures to appreciate the significance of unused material because it has not been read or analysed, resulting in witnesses having to be recalled or trials becoming derailed;

l. Failures to ask for disclosure of unused material that plainly exists if trouble is taken to read the papers sufficiently thoroughly, resulting in applications to discharge the jury, or appeals where no ground would otherwise exist;

m. Failure to make appropriate third party disclosure applications well in advance of trial;

n. Failure in advance of trial to hold the prosecution to account for omissions on its part, which had they been identified earlier would not have resulted in inevitable adjournment.

77. The cost of delay (adjournments/derailed trials/longer trials) occasioned by the above – upon (1) the Court Service (2) the Legal Aid fund (3) the CPS – would, we contend, easily outweigh the sum to be 'saved' by the proposed cuts to the Graduated Fee rates.

78. In the written answers provided by the Ministry of Justice to Circuit Leaders September 2013, we were told that the Legal Aid spend on the Graduated Fee scheme has reduced since 2009/10 from £284m to £242m in 2012/13. The proposed Graduated Fee cuts will reduce the spend by a further £15m per year.

79. What annual price does the Government currently pay for the problems encountered above? No figure is available. We have repeatedly asked what analysis of this has been done, and upon the critical question of whether such problems have escalated. We believe strongly that they have. We are told that there is no analysis and no 'evidence' to support or refute the suggestion we make.

80. If it is suggested that our belief that decreasing standards means increasing delay/cost is not based on an impartial assessment of what happens at court, we have a simple answer: ask the judiciary.

81. In short, and putting aside the other adverse consequences of unwarranted delay on victims, witnesses, etc., the idea that these 'savings' are savings for the tax payer as opposed to merely hoped-for saving to the Legal Aid spend, is flawed. The thinking is not joined-up. It is deeply regrettable that proposals that will cause irreparable damage have been advanced without the necessary research.

82. **We expressly invite the Government, at the very least, to postpone the implementation of all of the proposals discussed above until after the Jeffrey Review, which is considering the provision of criminal advocacy across the Criminal Justice System**. The Jeffrey Review should be a review of advocacy with the criminal Bar as it is, in a precarious position. The Government would be better informed after the Review and better able to evaluate the Circuit's proposition that the cuts proposed in this consultation would be the death knell of specialist, excellent, ethical criminal advocacy. The Review is due to be completed in less than six months. It is difficult to see, given what is at stake, why the Government will not wait for that period of time before deciding whether and to what extent to implement these proposals.

Response to other proposals not relating to Criminal Legal Aid

83. We register disappointment that many principled objections to the first consultation (in particular in relation to Judicial Review) have been disregarded without sufficient weight being given to the powerful reasoning advanced in opposition.

84. None of the nine consultation questions ask for a response to what is proposed in relation to the Government's decision to implement change, notwithstanding that in significant respects the nature of what is to be implemented is different from that set out in the first consultation paper.

85. We limit ourselves to five topics:

a. The new Residence Test

Without knowing the Government's proposed definition of 'residence', it is difficult to know which type of case is likely to fall outside the perameter. We accept that the Government has moved some way to recognise our concerns, but this proposal will impact on the most vulnerable members of society, and in particular children. We still feel that there are areas where the ability of children to bring matters before the court is likely to be affected - for example, in relation to challenging Local Authority age assessments. In cases where there is a dispute as to a Local Authority's duty towards that individual, a blanket exception for under-18s from the denial of Legal Aid to 'non-residents' would be a less damaging proposal.

b. Judicial Review

We disagree with the suggestion that the introduction of a 'discretion' to permit Legal Aid payments in certain cases where proceedings are concluded prior to a permission decision adequately deals with the problems previously identified. There are obvious problems in a system where if JR is brought against Government, Government decides whether to settle and Government then decides whether the lawyers who brought the JR are to be paid. In fact the discretionary system will result in perverse incentives not to settle.

c. 10% reduction in solicitors' fees for public law cases

The effect ultimately of this cut will be to drive experienced and quality-driven providers from the market to be replaced either by litigants in person or large profit-driven organisations with low grade employees mandated to undertake the minimum amount of work necessary to secure the fee. Many of the cost consequences of such an approach echo that which is said above in relation to other costs to the criminal justice system; again the tax payer will receive no ultimate benefit.

The suggestion that the modernisation program will reduce the need for input from solicitors is not evidence-based, and we believe this rationale is flawed.

d. ‘Harmonisation’ of civil (non-family) fees

The proposed cut represents between 36.5% and 53.3% of the fee, replacing a system of fixed fees with a system involving enhancements. This will be administratively much more expensive to operate. The pool of counsel willing to undertake such work (in addition to work that is better remunerated and less complicated in terms of fees) will shrink even further. That represents a loss to clients and the courts of valuable expertise.

e. 20% cuts in expert fees

The greatest impact on this will fall on public law family proceedings. The Government (in rejecting or ignoring previous submissions on this topic) seems consistently to fail to grasp the difference between experts instructed to advise upon welfare issues (psychiatrists, psychologists, ISWs, etc) and experts instructed to advise on alleged physical and sexual abuse cases. The requirements for the former may reduce as a result of modernisation reforms but not the latter.

The fixed fees already introduced in this area have had a significant impact on the availability of suitably qualified and experienced experts able to undertake work in a timely manner in difficult areas such as alleged non-accidental injury. Reducing the fees payable even further will lead to many existing providers leaving the marketplace. It is already very difficult to find neurologists, neuroradiologists, paediatricians, neonatologists, radiologists etc., to work at even the existing rates.

It is likely that the fees to be paid will be lower than locum rates, once the expenses of secretarial staff etc. are deducted, and there will be little incentive for experts to offer their services in the more complex work of child protection when they could earn extra income in other ways.

There is no evidence to support the assertion that ‘the market has adjusted’ to the new fixed rates. Moreover, there is no assessment of the likely impact of a 20% cut to those rates. Inevitably a cut to the payable rates of this magnitude will lead to the experienced and well regarded experts leaving the market to be replaced (if at all) by more junior colleagues. Experience built up over many years of court work will be lost. This again is not a problem which can be solved by broad brush ‘quality assurance’: it is almost impossible to measure experience and expertise in a particular field or the knowledge of the significant body of research material that is often required to advise in these areas.

In family work, a reduction in the supply of experts will have an adverse effect on the success of the modernisation programme currently underway. It is unlikely that a 26 week deadline can be met if experts are not available to report on issues, for example, of alleged non-accidental injury, within a tight timescale. The welfare of the children involved in such proceedings and the gravity of the decisions to be made demands that the best quality evidence should always be available and, to ensure their availability, experts will need to be remunerated at a fair rate.

Experience shows how poorly the LAA's discretion to pay higher rates operates in practice. Any application is usually met with a long waiting period and is almost inevitably refused. Such disputes routinely place hearing dates at risk and we can have no confidence that applications will be handled any more speedily or with any greater success rate than at present.

Conclusions

86. If the Government has little or no interest in the current chambers-based independent criminal Bar as the mainstay provider of Crown Court advocacy, then the proposals are easier to understand. Our complaint is that the Government believes – based upon years of witnessing the Bar continuing to work for lower and lower remuneration – that the Bar will take anything thrown at it and carry on. Undoubtedly some individual barristers will continue to work, one way or another, for whatever rates prevail, from home, or out of the boot of a car. But the loss of ethos, trust, peer support, learning and ethics that will flow from the demise of the chambers-based system will mean that others with a stake in the criminal justice system - the public at large; everybody involved with the system with an interest in the administration of justice, including the tax payer - will suffer in the long run.

87. There is a commercial value to the country in having a criminal justice system that is respected internationally. Commercial lawyers speak of the commercial value of that reputation to international litigation attracted to our jurisdiction.

88. It would be a great mistake to underestimate the depth and breadth of opposition, on the ground, to the implementation of these proposals. The Government should pull back from the brink.

THE WESTERN CIRCUIT
28 October 2013