

THE RESPONSE OF THE WESTERN CIRCUIT
TO THE MINISTRY OF JUSTICE CONSULTATION:
“LEGAL AID: REFORMING ADVOCATES’ GRADUATED FEES”
(CP 54/09)

(Closing Date: 1st April 2010)

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

The question is phrased so as to point the consultee towards the inevitability of cuts. We observe first that in all other areas of the economy the present government (i) has expressly declined to specify what the extent of any cuts imposed by economic conditions may be and where they may fall; and, (ii) has not imposed any cuts because of the fear that to do so will prolong and/or deepen the economic downturn. As originally specified, advocates were the exception to this rule only because of the disparity between prosecution and defence fees and the desire to reduce the latter to the former.

We respectfully suggest that no case has been made out either (i) for the rationale of the cut as originally proposed; or, (ii) to treat advocates differently from other sections of the working population. There is no case for treating advocates differently: advocates had not had a pay rise for inflation or for any other reason for more than 10 years until the Carter reforms. Even the Carter reforms, whilst they were of badly needed assistance to junior advocates, were not overall a pay rise: they cut total expenditure in terms of the spend on advocacy.

This brings us to our next point. The MoJ now talks about considering an OCOF scheme in the future whatever cut may be imposed in the meantime. Whilst we understand the need for the MoJ to make this point and are grateful for the clarification, please forgive us if we observe that what we now have is an equal division of uncertainty. Within the past month the MoJ has in a statement indicated an intention to change the basis on which advocates are funded in the next few months, in ways that are at present unclear, but may involve the block contracting arrangements that are just coming into being. We respectfully suggest that the present stance of the MoJ indicates the difficulty. It is saying ‘which option do you prefer now? It is also saying ‘which different options will you prefer a few months from now?’ without being able to identify those options. We are on the cusp of an election. The public finances will be reconsidered following it, whichever party (or even if none) is in an overall majority. Most sensible commentators predict, if we may put it this way, that it will be a different ball game come the Summer. Surely, we respectfully suggest, it makes more sense to do nothing until the Summer and the next promised round of consultation on advocacy funding. This Circuit remains as ready as ever to consider creative options – however novel they may appear at first sight to a membership used only to practise as a self-employed individual receiving an individual fee for a single case. Much better to be creative than to cut – or to be creative and cut less.

Moreover, if change and flexible thinking were to be required then the more goodwill there is now from the Bar, the easier it will be to impose change. We hope the MoJ can understand the mood of the Bar at present. The simple reality is that for 20 years successive administrations have perceived it to have been right to impose successive criminal justice statutes, lengthening and complicating sentences and sentencing, introducing new and complicated legislation in the areas of confiscation, bad character, sexual offences and so on: tough on crime; tough on the causes of crime. This is fine, but the MoJ must realise that this increases the strain on all within the system. Within that time space the Bar has seen its income cut, not increased to reflect the new responsibilities and strains. More work for less pay. It has also seen a significant loss of market share to in-house advocates from the CPS. We are not frightened of competition and many CPS advocates are fellow barristers. However, the self-employed bar suggests that CPS is running before it can walk and there has been a serious reduction in the quality of prosecution work. The MoJ will understand that this increases the resistance to further change. This Circuit is aware of the public finance crisis, it is not naïve about future funding. But it does respectfully ask for sensible planning and not off the cuff or on the hoof cuts. Moreover, the energy going into consultation after consultation is very draining.

What we suggest is now needed to plan sensibly for the future is a pause to the Summer and then, if there must be change, one consultation that results in one set of proposals to put the funding of advocacy on a sensible, stable and reasonably funded long term basis.

Option 1 (a 17.9% cut) would be disastrous. It would obviously be disastrous for the individual advocates affected. A 17.9% cut in gross fees has a significantly greater effect on the 'bottom line' of an advocates' income since expenditure – which must come out of the gross fee - barely changes. However, our point is that such a cut would be bad for the public. It would drive good advocates away from criminal law. It would badly hit recruitment. It would force work down to more junior advocates as those with the experience to tackle the work looked elsewhere. The effects would be more immediate on a Circuit such as ours because in mixed sets such as predominate here it is easier to change the direction of an individual's practice.

Option 2 is equally unacceptable but harder to assess in terms of its effect. Obviously, members of this Circuit would prefer not to have an immediate 17.9% cut.

Any OCOF scheme would probably mean that most criminal work, even in the Crown Courts, would remain in-house with firms of solicitors. We suggest that this would not be in the public interest because of the effect on quality. However, no details of the OCOF scheme proposed are given.

In truth, both options therefore now ask advocates, in effect, whether they would rather stay here and not make a living or move to a different land without being told what conditions apply there. We find it very difficult to make a sensible comment by way of response. How can we state a preference without knowing what OCOF scheme might be place? How can we state a preference without knowing whether the Bar will be in a position to challenge for OCOF contracts (in other words whether it might hold the purse strings)? Surely the question of the overall level of fees and the question of OCOF (if it is to be raised at all) belong together?

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

Yes. The Bar Council and the Criminal Bar Association have been proposing them for some time. We would particularly commend the increasing use of the private funds of defendants to fund their defence. We also suggest that with proper funding of POCA applications, much more could be done generally to increase the return to the public from the proceeds of crime. This would assist to fund criminal advocates, but would see an overall gain to the public purse.

The fault in the present consultation, we respectfully suggest, is that its genesis was the very narrow proposition that defence fees should be reduced to the level of prosecution fees. Starting from the wrong position it remains flawed. Rather more distance might lend perspective to the view. There is a pressing need to bring more funds into the criminal justice system. As it appears these cannot be public funds, then the government should look elsewhere before (or at least at the same time as) cutting the budget.

As set out above, we suggest one consultation on advocacy funding in the Summer.

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

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?

We do not agree with the impact assessments. We do have evidence of other impacts. We set these out in our response to the earlier consultation paper. We pointed to the effects on a circuit such as ours. We stand by our comments to the effect that cuts will have a more immediate effect on the quality and experience of those doing the work. We stand by our comments about the effect on recruitment that is already being felt and which would deepen significantly with further cuts. We will not repeat our detailed observations here.

Robin Tolson QC
Leader, Western Circuit.

Exeter, 1st April 2010.