SOUTH EASTERN CIRCUIT RESPONSE TO MOJ: CRIMINAL LEGAL AID: PROPOSALS FOR ADVOCATES' GRADUATED FEE SCHEME REFORM CONSULTATION.

1. This is a response on behalf of the South Eastern Circuit ("SEC") to the Ministry of Justice consultation on Criminal Legal Aid and the proposals for AGFS scheme.

2. The South Eastern Circuit is the largest of the six geographical Circuits that make up the Bar of England and Wales and represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice. The South Eastern Circuit stretches from Canterbury and Lewes in the South to Norwich in the North and from Ipswich in the East to Reading and Oxford in the West. The Circuit is a representative, educational and social organisation. Members of the Circuit include those who are in employed practice, but the majority of Circuit members are self-employed barristers.

3. We are disappointed and concerned that the underspend from the previous fee increase 2022/23 is being deducted from the £34m (inclusive of VAT) announced by the former Lord Chancellor in December 2025. There is no justifiable explanation for the 6 month delay before consulting upon the allocation of those funds. The underspend should be in addition to, not taken from the announced sum. Real meaningful investment in the Criminal Bar is overdue and essential.

4. Investment must apply to those cases currently in the system not solely new cases entering the system. This is entirely achievable, as has previously been done, by setting an implementation date and applying the new fees to any case with the main hearing after that date. Limiting investment to new cases simply postpones much-needed support for the Bar; many counsel will not see any benefit for years due to the backlog, by which time the value of the limited extra funding will have diminished further.

5. Not to apply the fee increases to the current cases is to undermine entirely the assertion by the government that they seek to invest in the Bar. The appearance created is one of delaying investment, when the outstanding case load and how quick cases work through the system is beyond the control of the Bar. The Bar proposed lifting the cap on sitting days at an early stage, yet a considerable duration elapsed before the Government sanctioned unlimited sitting days.

6. We also note that whilst this consultation is for AGFS reform it also incorporates additional questions concerning VHCC and IFFO, alluding to a further consultation. These cases are

complex and would require more detailed analysis and consideration than this consultation allows for. There is no legitimate basis for the inclusion of these questions and the impression created is that the MOJ is to seek to cut theses fees.

7. If any proposals are not specifically accepted by the SEC in this response, then they are opposed.

SPECIFIC QUESTIONS

Question 1

"Do you agree with the proposal to increase AGFS fees by 6%, excluding Daily Attendance Fees? Please state yes/no/maybe/do not know and provide reasons."

No. Any increase should include Daily Attendance Fees (DAF). There is no justification not to increase the DAF, this is the work undertaken by barristers the majority of the time in trials. A simple increase on the brief fee does not reflect the impact that inflation has had on the fee. The DAF is no different to any other fee in this regard. No justification has been provided for treating it in a special category.

Question 2

"What do you consider to be the equalities impacts on individuals with particular protected characteristics of the proposal to increase AGFS fees by 6%, excluding Daily Attendance Fees? Are there any mitigations the government should consider? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views."

There will be a disproportionate impact upon those with caring responsibilities particularly women barristers. The costs directly linked to caring, including childcare that is required for a barrister to undertake trial work have risen and will continue to rise significantly. Women comprise a higher proportion of those who undertake RASSO (Rape and Serious Sexual Offences) trials, which are more likely to be effective as the defendant is less likely to plead guilty or offer acceptable pleas to less serious alternative offences. Accordingly, the DAF becomes very important in these cases. Without an increase to DAF, those undertaking this work will suffer, yet again, benefitting comparatively less than others. The remedy is straightforward: increase the DAF by 6% in addition to the other fees.

Question 3

"Do you agree with the targeted investment proposals listed in this chapter? Please state yes/no/maybe/do not know and provide reasons."

We agree with the targeted measures identified within the consultation, save for the proposed increase to guilty plea fees. The proposal to raise the guilty-plea-to-trial ratio from 50:100 to 65:100, in addition to the 6% overall uplift, is unsupported by any evidence or modelling demonstrating that such an increase would influence guilty plea rates.

The terminology used in the consultation is, with respect, a matter of concern, as it appears to suggest that higher remuneration for guilty pleas might encourage barristers to persuade clients to plead guilty, or that inadequate fees are causing insufficient preparation. The implication is that barristers may not be acting in accordance with their professional obligations. The Circuit is unaware of any evidence that counsel withhold appropriate guilty plea advice for reasons connected to remuneration. We take the view that such conduct would likely amount to professional misconduct. The Circuit rejects the premise that terms of publicly funded remuneration should be used to incentivise the nature, content or timing of professional legal advice.

For clarity we remind the MOJ that barristers act upon instructions and therefore the lay client is the person who dictates whether there is a guilty plea entered or not at PTPH not the advocates.

The Circuit supports the proposed increase to sentencing fees, particularly the recognition that Judges routinely direct the preparation of sentencing notes often requiring significant preparation time. These written notes are important pieces of work that are likely to be scrutinised by the Court of Appeal in the event of an appeal against sentence by either party. We do not accept that that the proposed increase should apply only to sentence after trial and see no justification for this distinction. Where the case is adjourned for sentence after a guilty plea, or cracked trial, the professional burden on the barrister is identical, if not in fact more onerous. The uplift should apply to all sentencing hearings irrespective of whether there has been an effective trial.

The Circuit supports the increase in fees in the Court of Appeal however the uplift proposed is insufficient for this demanding and responsible professional obligation. It is unclear how any uplift would be applied. There are no fixed hourly preparation rates for Court of Appeal work, in addition the distinction between half day and full day appearances is arbitrary. The length of time for Court of Appeal fees to be assessed is currently unacceptable the fees are often then subjected to redetermination, taking many months longer and finally the Cost Court which often find the fees are inadequate that have been allowed.

A barrister's criminal appellate work makes an essential contribution to the efficient running of this very busy court. Furthermore, competent appellate representation plays an essential and integral role in safeguarding against miscarriages of justice. The Circuit remains concerned that appellate work in the Court of Appeal (Criminal Division) is under-remunerated for the delivery of written and oral advocacy before the senior judiciary. Accordingly greater provision is required to remunerate the settling of ground of appeal against conviction and/or sentence. Thereafter, public funds are always protected by the judicial decision whether to grant a representation order. Such orders only arise where the court deems the appeal to be properly arguable, and accordingly the barrister's work is justified and properly incurred in accordance with their duty to their lay client.

We welcome the proposed extension of categories 1.1 and 1.2 to include defendants and victims aged 17 years. This extension should apply to all homicide offence categories without distinction for the reasons advanced in the consultation document.

The Circuit remains concerned about some of the "blunt instrument" differentiations in some of the categories, leading to striking disparities in the fee payable where one case falls marginally one side of the line, and another on the other side. The mere fact of a murder being committed by firearm, 1.2, renders the fee 67% higher than a murder committed by, for example stabbing, no matter the complexity and other difficulties involved. We struggle to see any justification other than one predicated on fiscal envelopes.

The same applies to Fraud cases, where we note with concern that the Consultation does not consider any specific uplift to be appropriate. Specifically, the "blunt instrument" differentiation is perhaps even more stark at the inflection point between 6.2 and 6.3 bands – 167%, approaching three times higher. That could apply exactly in the same way to a case of 9,999 pages or a value of £999,999 as it does to a case of 100 pages with a value of £100,001. That appears arbitrary and unjustifiable.

Question 4

"What do you consider to be the equalities impacts on individuals with particular protected characteristics of the targeted proposals? Are there any mitigations the government should consider? Please include which groups/individuals and explain your reasons. We would welcome examples,

See response to Question 2.

Question 5 & 6

"Are there aspects of the current VHCC model that you think lead to inappropriate levels of remuneration? Please state yes/no/maybe/do not know and provide reasons.

"Do you agree that we should change the way VHCC cases are currently remunerated? Please state yes/no/maybe.do not know and provide reasons?

The phrasing of the consultation and the structure of the questions give the impression that the MOJ considers current VHCC remuneration to be excessive and intends to revise the scheme accordingly. This overlooks both the complexity of VHCC cases and the history of how the present IFFO scheme was established, with rates fixed since 2014.

There are particular categories of offences, generally sexual offences that the VHCC model leads to inappropriately low levels of remuneration. We do not agree that the VHCC model leads to inappropriately high levels of remuneration.

In 2013 the Bar ceased to accept VHCC instructions, and the IFFO scheme was introduced in 2014 following negotiation with the Bar. The IFFO scheme continues to operate at present and has not previously been identified as problematic prior to this consultation on AGFS.

VHCC cases comprise a very small proportion of Crown Court cases. By their very nature they are among the most complex of cases before the Courts. The IFFO scheme reflects the reality that counsel who undertake these cases must devote substantial time to preparation often over years, during which they are not in court and therefore not receiving AGFS fees. The IFFO scheme ensures that counsel are remunerated whilst the preparation is ongoing.

In short, we do not agree that VHCC remuneration should be changed if the intention is to reduce fees. The current rates are already too low and have remained static since the inception 12 years ago and we would support an increase in VHCC fees but not any restructuring that undermines the viability of undertaking this essential and highly complex work.

Question 7
"From the descriptions provided, do you prefer adjustments to the IFFO model, or a move towards more of a graduated fee structure model? Please provide reasons"

We would oppose any move towards a graduated fee structure for VHCC cases. Whilst adjustments to the IFFO model could be considered, these would require detailed analysis and proper consultation with the Bar Council and CBA. One constructive example would be reforming the appeal process for pre-contract disputes. However, we would strongly oppose proposal such as allocating a fixed block of hours for specific categories of material.

Any significant alteration to VHCC fees or the underlying scheme – particularly changes designed to reduce remuneration- risks creating the circumstance of 2013, when the Bar refused to accept VHCC instructions. The history of the IFFO scheme demonstrates that VHCC work must be remunerated in a way that reflects its exceptional complexity, duration, and the substantial periods of preparation during which counsel are unable to undertake AGFS work. Undermining that structure would jeopardise the viability of undertaking VHCC cases at all, leading, inevitably to a rerun of the 2013 boycott of the previous VHCC scheme.

South Eastern Circuit

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