



BIRMINGHAM LAW SOCIETY

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**REFORMING THE ADVOCATES' GRADUATED
FEE SCHEME CONSULTATION**

Ministry of Justice
January – March 2017

February 2017

Introduction

The Birmingham Law Society is the largest provincial local law society with a membership of some 5,000 representing solicitors, barristers and paralegals working in the West Midlands area.

This is The Society's response to the questions posed in the MoJ's consultation, Reforming the Advocates' Graduated Fee Scheme.

Contributions to this response have been received from small, medium and large firms. Some of those firms conduct most of their advocacy in-house. Others brief most of their advocacy to counsel. Contributions have also been made by counsel members of The Society. [Hopefully this will be correct]

We note that the working group agreed to a set of guiding principles, including that the new scheme should be cost neutral, using 2014-15 as the baseline. In our view that principle is wrong. The costs at 2014-15, as now, are inadequate and follow many years of directly imposed and 'real terms' cuts, the latter brought about by the fact that there has not been an increase in costs payable to reflect the change in the value of money in two decades.

As is noted in the foreword to the consultation, the rule of law is underpinned by expert advocates. A continued refusal to pay those expert advocates a reasonable rate will reduce still further the number of solicitors and barristers prepared to accept criminal defence instructions at legal aid rates. In turn, the expertise available and the strength of the rule of law will be reduced. In both branches of the profession there are already very few trainees, pupils, and newly qualified advocates prepared to undertake legal aid work. Not for the first time, we are moved to wonder where the advocates, partners, Queens Counsel and judges of the future are to come from.

We note that most junior advocates (and their firms if they are employed) accept that fees work out on a 'win some lose some' basis. In some cases an advocate will make a very small profit, and in others a larger one, so that the average profit per case just about makes the work worthwhile. The proposed changes would see a considerable fee increase for Queen's Counsel, which must necessarily be at the expense of juniors since the scheme is designed to be cost neutral. It follows that junior advocates will 'lose' in more cases than under the existing scheme. This will contribute to the brain drain referred to above.

We note that it is rarely difficult to instruct a silk. Conversely, it is often extremely difficult to instruct a junior, because of the shortage of advocates prepared to undertake the work. Paying silks more, and juniors less, will compound this problem.

We welcome the intention to simplify the current system. We agree that it has become over complicated, and that it has developed some obvious iniquities. Although there is much that we disagree with in the proposed scheme, we appreciate the spirit in which the proposals are made, and would welcome the opportunity to contribute to any future discussions of the proposed changes.

Q1: Do you agree with the proposed contents of the bundle? Please state yes/no and give reasons.

No

- a. The current 'swings and roundabouts' approach to graduated fees results in payments that are adequate in straight-forward cases, and wholly inadequate in more complex cases. It can also result in surprisingly low (more often) and high (rarely) payments. We accept the need for some change.
- b. We can see some sense in reducing the reliance on PPE calculations. However, we believe this proposal goes too far. Much court time is saved through careful preparation by trial advocates. If advocates are rewarded for days in court rather than PPE, there will be a perverse incentive to carry out this preparation much later, or during trials. Insufficient retention of the PPE calculation is proposed.
- c. We agree that the witness uplift should be removed. The number of prosecution witnesses alone rarely relates to the complexity of a case.
- d. We support the removal of the first four standard appearances being removed from the bundle. However, it seems to us to be sensible to include one standard appearance in the bundle, since every case that leads to trial will have had a PTPH. We suggest that this standard appearance be included, and the relevant fee be increased commensurately.
- e. We note that the proposals here are – in part – predicated on concern about the current Bar fee sharing protocol. This protocol is badly in need of updating, and we reject the premise that these proposals should be informed by the Bar protocol, or any other private fee sharing arrangement.
- f. We note that there is concern about fees paid to junior advocates. This is a concern predominately for those who are self-employed at the Bar. This can and should be addressed by the Bar, as at (e).
- g. Paying for work on the basis of the work done is costly to administer. It also gives rise to uncertainty as the result of different assessors making different assessments of what should appropriately be paid. It gives rise to the perverse incentive for unscrupulous or incompetent advocates to take longer than is necessary to prepare the case. This replaces one difficulty with another. Under the PPE system there is regrettably a perverse incentive for unscrupulous advocates to undertake less work than is necessary, to turn their attention to the case at the latest possible stage and not to undertake all work necessary to meet the justice of the case.

Q2: Do you agree that the first six standard appearances should be paid separately? Please state yes/no and give reasons.

No.

We suggest that the first appearance should be included in the bundle, with any subsequent standard appearance remunerated separately.

Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle? Please state yes/no and give reasons.

No.

Although cases in which there are more than six standard appearances are rare, they tend to be those which are more complicated. As such any further appearance would require lengthy preparation, which should be properly remunerated.

Q4: Do you agree that the second day of trial advocacy should be paid for separately? Please state yes/no and give reasons.

Yes.

If (as is proposed) advocates are to be paid for the work they actually do, it follows that they should be paid for the second day of the trial. It would also help avoid cracked trials.

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed? Please state yes/no and give reasons.

No.

The proposed scheme would replace one over-complicated and unwieldy system with another.

It is difficult to see how the proposed categories and bandings have been arrived at. We note that the work appears to be based upon relative complexity as suggested by the Bar Council, but we have not seen this work, and question the conclusions. By way of example, dangerous dog cases appear to fall into the same category as child cruelty and attempted murder. Since dangerous dog cases are routinely tried summarily, this does not appear to us to reflect reality, and leads us to question the other suggestions made by the Bar Council.

Further, we note that a number of bandings are left unspecified. We foresee just as many applications for redetermination, and costs appeals, under the proposed system as under the current system.

We agree that a new category system is preferable, but believe that the proposal simply replaces one problem with another.

Q6: Do you agree that this is the best way to capture complexity? Please state yes/no and give reasons.

No.

The PPE scheme is an attempt to equate volume with complexity and distil complexity into monetary value. The proposed scheme is simply another method of doing this. We agree that (subject to our other observations) the proposed scheme is capable of capturing complexity better than a PPE calculation. However, we are not convinced that in its current format the proposal does so.

Q7: Do you agree that a category of standard cases should be introduced? Please state yes/no and give reasons.

Yes.

We agree that it is sensible to do this, subject to the caveat that these standard cases should not be paid any more poorly on average than they currently are.

Q8: Do you agree with the categories proposed? Please state yes/no and give reasons.

No.

For the reasons set out at Q5.

Q9: Do you agree with the bandings proposed? Please state yes/no and give reasons.

No.

For the reasons set out at Q5.

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4? Please state yes/no and give reasons.

No.

For the reasons set out at Q5.

Q11: Do you agree with the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

No.

Although we recognise that efforts have been made to ensure that this table is as fair as possible, this cannot be achieved for the reasons set out elsewhere. It follows that we cannot agree with the table.

Q12: Do you agree with the relativities between the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

No.

We note that the relativities applied began with the starting point that the most complex cases would be remunerated at twenty times the fee payable for the least complicated, and that this appears to have been reduced to a ratio of 15:1 on the basis of consultation with experts. It is impossible to consider this approach without understanding –

- a. The basis on which 20:1 and then 15:1 ratios were arrived at. It appears arbitrary.
- b. Some indication of who the experts are, whether they have any self interest in the proposals, and what data they analysed to arrive at their suggestions.
- c. The justification for reducing (overall) fees for junior advocates in favour of fees for silks.

Q13: Do you agree with the relativities proposed to decide fees between types of advocate? Please state yes/no and give reasons.

No.

The proposal increases payments to silks at the expense of junior advocates. This is unacceptable at a time when many juniors at the independent bar and in firms struggle to

make an acceptable living. Fees should be increased across the whole range of cases, and not in favour of one group at the expense of the rest.

Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases? Please state yes/no and give reasons.

Yes.

We agree with the basis set out in the proposal. Further, it seem to us the retaining PPE in relation to other categories of offences would deal with some of the difficulties set out at Q5, above.

However, the consultation appears to overlook the ongoing costs of litigation in relation to electronically served PPE. This is a golden opportunity to set out a position, and ought not to be missed.

Q15: Do you agree that the relative fees for guilty pleas, cracks and full trials are correct? Please state yes/no and give reasons.

Yes.

While it would doubtless be possible to point to potential scenarios in which the proposal would create iniquities, it seems to us that the ratios are, broadly speaking, acceptable.

Q16: Do you agree that the point at which the defence files a certificate of trial readiness should trigger the payment of the cracked trial fee? Please state yes/no and give reasons.

No.

We are aware that the current system builds in a perverse incentive to advise defendants to plead not guilty, and subsequently crack the case. We are well aware that some advocates routinely do this, to the inconvenience of other parties, victims and the courts, and the detriment of their own clients. We support the aim of removing this incentive.

However, we do foresee the following problems with this proposal -

- a. Not all courts insist upon certificates of readiness. These documents rarely focus minds in the manner intended, or prove to be of any practical benefit. To insist upon certificates being filed in areas where it has previously been deemed unnecessary (in our view sensibly) would add an additional administrative burden to all parties and the courts.
- b. We note that one of the stated aims of those putting forward the proposals is to remove what are described as 'perverse incentives'. In our view this proposal may replace one with another. There will be little to stop those who wish to manipulate the system simply lodging a certificate of readiness before notifying the court of a defendant's intention to plead guilty. In this way, the vast majority of the profession who act honourably would lose out, and the dishonourable few would continue to claim large fees for very little work.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document? Please state yes/no and give reasons.

Yes.

We agree with the argument set out in the consultation document.

Q18: Do you agree that the wasted preparation provisions should remain unchanged? Please state yes/no and give reasons.

Yes.

We agree with the argument set out in the consultation document.

Q19: Do you agree with the proposed approach on ineffective trials? Please state yes/no and give reasons.

Yes.

We agree with the argument set out in the consultation document, and also note that this would go a little way to mitigate the loss to junior advocates if this scheme is implemented.

Q20: Do you agree with the proposed approach on sentencing hearings? Please state yes/no and give reasons.

Yes.

We agree with the argument set out in the consultation document.

Q21: Do you agree with the proposed approach on Section 28 proceedings? Please state yes/no and give reasons.

Yes.

We agree with the argument set out in the consultation document.

Q22: Do you agree with the design as set out in Annex 1 (proposed scheme design)? Please state yes/no and give reasons.

No.

Please see all answers above.

Q23: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

No.

Please see all answers above.

Q24: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

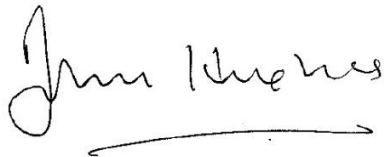
No.

Please see all answers above.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

We have no response to this question.

27 February 2017

A handwritten signature in black ink, appearing to read "John Thomas". The signature is written in a cursive style with a long horizontal stroke underneath.

President
Birmingham Law Society