Litigators' Graduated Fee Scheme and Court Appointees Consultation

Ministry of Justice
February – March 2017

March 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 Ministry of Justice's consultation, Litigator's Graduated Fee Scheme and Court Appointees

Contributions to this response have been received from small, medium and large firms.

Questions

1. Do you agree with the proposed reduction of the threshold of PPE to 6,000? Please give reasons.

No.

The consultation paper contains a fundamental misunderstanding of the way in which litigators prepare cases for trial. The assumption, particularly in relation to electronic evidence, is that prosecution evidence is relevant only to the purpose of proving the prosecution case. In reality electronic evidence, such as CCTV footage, telephone records, cell site analysis and financial records can prove equally as helpful to presentation of the defence. For example, a large digital file containing telephone records may hold a small number of lines of data pertinent to the matter the prosecution seek to prove but may similarly demonstrate the absence of contact between alleged conspirators and other significant witnesses (for the prosecution and defence).

The preparation work involved in considering such information is undertaken for the prosecution by and large by police officers or civilian staff employed by the police specifically qualified in that task. It is undertaken very often before decisions on charge are made and during a period when the prosecution/police enjoy long periods of investigation afforded when defendants are bailed and re-bailed to return to the police station. The defence are not funded at that stage nor entitled to disclosure. Once charged that material is commonly only served once the defendant has been arraigned at which point the defence are under significant pressures of time. Due to ongoing difficulties with the disclosure process it is common for material of this nature to be served after receipt of the defence statement, not with the first tranche of material served.

In an ongoing multi-defendant trial at Birmingham Crown Court the raw data alleged to support prosecution schedules of analysis of a dozen bank accounts was served on the defence two working days before the commencement of the trial. Defence analysis of that material to ensure the prosecution opening accurately summarises the evidence and to perform analysis of material pertinent to the defence, is a time

consuming and commonly expedited task. It is a far cry from a quick search for pertinent phone numbers within a vast array of material.

A second misunderstanding arises from the clichéd assumption that the defence engage in a fishing expedition when perusing served material. Fishermen catch fish. Defence representatives similarly establish lines of defence and further enquiries arising when challenging assumptions, often incorrectly presented or adopted by the prosecuting team. We are duty bound to ensure that the evidence supports the assertions made, to challenge that evidence and to establish a defence. The search function afforded by Adobe Acrobat (.pdf format) or similar software, is no substitute for the analysis afforded by a properly briefed litigator seized of the prosecution and defence case. The process only begins with the search function. As with presentation of the prosecution case it commonly requires scheduling for use by the advocate and presentation to the jury.

The vast majority of material served electronically is nothing more than the service of individual documents scanned and held by the prosecution in digital format instead of as printed material. That material is often no more readily digested in digital than printed form.

Reducing the threshold will exacerbate the difficulties presented by a payment method using pages of prosecution evidence as a proxy. It will increase uncertainty for litigators. It will increase the number of claims in which the litigator must enter into a process of negotiation with the Legal Aid Agency after the work of presenting the case is complete. Practitioners can ill afford to increase the number of instances in which having completed the case there follows a process of persuading the Legal Aid Agency to pay the costs incurred. That time is not remunerated and is a costly resource for the litigator/firm. The proposals will not reduce bureaucracy, to the contrary they will increase the burden on litigators who will find an increase in correspondence required to ensure they are paid for work already undertaken.

The proposal may disincentivise firms from undertaking necessary defence work, through concern that they will not be paid for their efforts at the close of the case. Paragraph 8 of the consultation appears to bear this point out. There has been on the one hand an increase in the number of cases with evidence served above the 10,000 page cap yet not a proportionate increase in the successful claim for payment for the work undertaken. We are not convinced that the material presented in the consultation paper can properly be interpreted as an indication of work not having been undertaken. It does evidence the uncertainty that litigators are subject to in their work not being appropriately remunerated.

Please provide the analysis and evidence which supports the contentions contained in paragraph six as to the work undertaken by litigators. This appears unsupported by appropriate research and based on anecdotal rather than empirical findings. We submit this is no basis upon which to suggest a fundamental change to the means of paying litigators across the sector.

The proposal does not complement the new criminal justice system, ensure fair payment for work done, provide certainty for all litigators or significantly reduce bureaucracy.

2. If not do you propose a different threshold or other method of addressing the issue? Please give reasons.

We are not persuaded that the issue raised by the consultation requires addressing. We perceive the consultation to be founded solely on the desire to make savings by a means other than an overall reduction in payments by a fixed cut. The consultation reads as a means to overturn the reasonable conclusions reached in the case of R v Napper, which were based on sound principle and an understanding of the work undertaken by litigators. The appropriate venue in which to have challenged the outcome of the case was on appeal where those involved in defending the case were afforded the opportunity to make representations before the court. A decision was taken by the Ministry of Justice and Legal Aid Agency not to challenge the outcome of the case. It appears to us disingenuous to now do so in this forum.

The proposals follow hard on the heels of proposal to re-shape payment of the AGFS which will impact on firms undertaking advocacy in the Crown Court and the junior Bar alike.

We do not accept that further cuts are necessary. The Ministry of Justice is invited to consider the conclusions of the further report of Oxford Economics commissioned by The Law Society. The report demonstrates that without making further cuts the Ministry of Justice is on target to achieve the savings earlier indicated as being necessary. That achievement arises from the multiple cuts and re-organisation of public funding for criminal defence work over a period in excess of a decade. At each stage this Society and The Law Society has warned of the detrimental effects those cuts would have. They are being experienced, as predicted, in difficulties in recruitment and the ageing demographic of defence practitioners. Firms already work at barely sustainable profit margins, which further cuts threaten.

It is very difficult to understand the suggestion that the proposals seek to provide certainty when they are timed shortly after a round of the award of a new general criminal contract. Firms were encouraged to apply for criminal contracts on the basis of the terms then published, not as now proposed. We repeat our concern that these measures will result in the closure of the firms best able to provide a quality service to defendants and see the survival of the lowest common denominators in the sector.

The proposals evidence on the part of the Ministry of Justice an understanding of the cost but not of the value of providing a criminal justice system which entitles the citizen to mount a robust defence.

We echo the view expressed by The Law Society that is it not appropriate to implement further cuts and to make an existing scheme less attractive still at a time when there is ongoing discussion as to a replacement for proxies based on page count. We invite the Ministry of Justice to suspend any such change pending further consultation with the profession.

Neither the present or proposed system reflects the reality of the work undertaken in the preparation or the defence. That is not purely dependant on the prosecution page count. In instances where the defence are required to instruct defence experts, trace and proof defence witnesses, establish alibis and in many other ways support the defendants' response to the prosecution case the work is done irrespective of the nature of the prosecution case. A case with a relatively small page count may still give rise to considerable investigative work on the part of the defence team. It pays no attention to the additional work required where the defendant or his/her witnesses are vulnerable, youths, have mental health or other impairments, or require the services of an interpreter. The method of payment utilised at present and proposed for the future fails to identify the real factors impacting on the work that is necessary to present the defence case. The move from payment for the work in fact undertaken to a series of fixed fees has created a perverse disincentive to some firms to cut corners and act as little more than brokers between the client and Counsel. That is a development which endangers the defendant and the safety of convictions.

We have continued to prepare cases fully even when it may not be economic to do so in a particular case because we are compensated by fees paid in other cases through the "swings and roundabouts" principal on which the fixed fee scheme is based. This reform distorts that system unfairly.

We note the observation that costs have risen while case volumes have fallen. The comment does not arise from comparison of like for like cases or a fixed criminal justice system. There has been a significant change in the requirements of the Criminal Procedure Rules from the way in which defendants are produced before the court to the use of the digital case system. In the same period the focus of prosecuting agencies the police has shifted with a visible reduction in the numbers of cases in which charges are brought. One explanation for the phenomenon observed is the charging of fewer cases and the move to an increase in the seriousness and complexity of those cases charged. The experience of the Society's members is of a significant reduction in the number of cases charged, particularly those handled in the summary courts. That in turn no doubt results from changing Government policies aimed at diverting defendants from the court process, conditional cautioning and the increased use of out of court disposal and local community resolutions (in many instances for serious offences). The change in emphasis of the allocation guidelines has also had a marked impact. We are consequently not satisfied that the comparison made is of a like for like bundle of cases.

Further, if the Ministry intends to revisit the wholesale reform of the system within the next twelve months, as is suggested in the introduction, there seems little purpose in making the proposed changes at this juncture. We advocate waiting until such time as proposed changes can be considered together rather than piecemeal.

3. Do you agree with the proposed capping of court appointees' costs at legal aid rates? Please give reasons.

No.

We do not accept that the work done by an appointed advocate is no different to a lawyer providing representation under a public funding certificate. By its very nature the work undertaken by the lawyer is limited to preparing for and then cross examining sensitive witnesses. The lawyer is not enabled to prepare to cross examine all prosecution witnesses, to engage with the Crown Prosecution Service as to the presentation of the case, or respond to interlocutory applications. Indeed the service given is limited such as not to involve the representative in making closing submissions.

Instructions are commonly provided at such a stage as to require expedition of the preparation or the case. Inevitably some work undertaken, particularly in contact with and attendance on the defendant in advance of the trial is not funded, despite our view that it is time quite properly incurred.

At present the rates of payment compensate for the element of expedition involved in these cases and the different requirements arising when the advocate is able to present the trial. We are concerned that the reduction in rates of pay proposed will act as a disincentive to firms accepting such instructions. We point out that these are appointments but there is no onus on firms to accept such instruction from the court. Unless such cases are appropriately remunerated there is a risk that the aim to avoid sensitive witnesses being cross examined by defendants will fail. That is contrary to the interests of justice for complainants, potentially vulnerable prosecution witnesses and defendants.

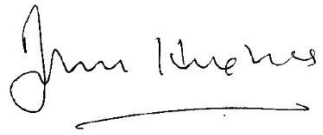
We are not satisfied that the proposals identify a genuine issue requiring resolution. In our submission the tax payer already enjoys appropriate value for money in these instances. We are confident that HMCTS, Crown Prosecution Service and the various bodies protecting the interests of vulnerable witnesses place a higher value on the service provided by defence practitioners than the Ministry.

We have liaised with HMCTS and the Legal Aid Agency at a local level and are aware of their concerns regarding the practices of some firms with regard to applications for court appointment. We deplore, the alleged practice of the minority, of applying for such instructions for defendants who would otherwise be entitled to public funding for representation in the entire case. To the extent that this concern feeds into the desire to reduce rates of pay for this work we submit that the issue can be resolved quite simply by requiring providers to demonstrate the refusal of a representation order on the grounds of means or interests of justice, or to demonstrate the defendant's income to be above the financial threshold. We submit that would remove inappropriate appointments with a consequent saving in payments from the central fund. It is a consequence of the restriction of the grant of representation orders that there are an increasing number of litigants in person appearing before the courts, which has in turn created the need for court appointment.

4. Do you have any comments on the Equalities Statement published alongside this consultation paper and/or any further sources of data about protected characteristics we should consider?

No.

20 March 2017



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