BIRMINGHAM LAW SOCIETY

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Response to Ministry of Justice Consultation on the Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes

March 2019

Response of the Criminal Law Committee of the Birmingham Law Society to the Ministry of Justice Consultation on the accelerated measures for Criminal Legal Aid Review

Founded in 1818, Birmingham Law Society is the largest regional society of its kind, representing more than 5000 legal professionals across Birmingham and the Greater Midlands.

Through our core values of community, advocacy and excellence, we are dedicated to connecting, championing and supporting all of our members.

The Criminal Law Committee consists of members drawn from Birmingham and its surrounding areas. Its co-opted members include representatives of the judiciary and the Legal Aid Agency, as well as HMCTS staff, probation officers, prosecutors and others.

The Committee liaises with prisons, police and the courts about issues affecting all of our members. It also responds to consultations, and lobbies on behalf of both members and clients.

Question 1 – Do you agree with our proposed approach to paying for work associated with unused material? Please state yes or no and give reasons.

We agree that the review of work associated with unused material is timely. To date, defence practitioners have been penalised due to the need to review such material without remuneration. There are many cases in which the number of pages of prosecution evidence (PPE) is not an accurate proxy for the amount of unused material, all of which requires careful review. We agree that the work should be properly remunerated, given the importance of full review of material which, by nature of its service, is indicated to have potential to undermine the prosecution case or support the defence.

We do not agree with the proposal to remunerate the first three hours of work with a payment representing 1.5 hours of work. The Ministry of Justice and Legal Aid Agency has on numerous occasions in the past advocated the principle of "swings and roundabouts" applying to fixed fees. The reality for practitioners is to shoulder all of the burden and experience very limited instances of payment over and above work undertaken. An ongoing example is provided in the scheme for fixed fee payment for police station attendance during the investigation stage, where the same principle was applied but the bar set too high for practitioners to benefit from payment of exceptional payments.

We have concerns regarding the methodology for payment. We would prefer a scheme in which the work of reviewing unused material is remunerated at an hourly rate, in a similar way to claims for special preparation. We have experienced a tendency for downward review of existing standard fee schemes where the work completed is above, but not significantly above, the increased fee level, in relation to summary trial. Our concern is that once again firms will be expected to adopt the risk that work undertaken will not be remunerated despite having been carried out. Where, for instance, four hours of work are undertaken in reviewing unused material, a downward assessment by the Legal Aid Agency of an hour of that work will result in payment for only 1.5 hours work – a reduction of 62.5%.

We can envisage a perverse incentive for the Legal Aid Agency to downward assess what they consider to be marginal claims above the threshold for work which has already been

undertaken by the practitioner. As with all forms of assessment, the burden of administration falls not on the Legal Aid Agency but on the practitioner who, having carried out the work, is not remunerated for the process of justifying work undertaken, often many months earlier. The provider is not remunerated for its inevitable correspondence with the Legal Aid Agency or in seeking independent cost review or judicial review of those decisions. The time engaged is far in excess of the hours undertaken, which will lead some practitioners to question the cost benefit of engaging in representations to recover the sums at stake. Taken globally and spread across a bundle of cases in a financial year they potentially comprise a significant loss to practitioners.

Question 2 – If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

In view of our response above, we advocate payment of time engaged in reviewing unused material at an hourly rate without the fixed fee proposed for the first 0-3 hours of work undertaken. The principle of fair payment for work undertaken should apply. We oppose a system which will incentivise less reputable firms who will receive payment irrespective of whether they in fact peruse material (1.5 hours without having progressed the case) and prefer a system which rewards those firms who undertake the work and properly claim for their time engaged.

We do not anticipate a disproportionate impact on the work of the Legal Aid Agency. We advocate aligning payment with work properly undertaken. The service of unused material varies widely from case to case. There is no reliable proxy available depending on case type.

We do not agree with the proposal to remunerate all work at the rate applicable to junior solicitors or paralegals. We see no reason for the distinction between barristers of differing levels of experience and solicitors/experienced legal clerks in the preparation of cases. In practice firms apply their more experienced litigators to the cases of greatest severity and complexity. We advocate payment at applicable rates relevant to trainees, junior and senior solicitors.

We note the prevailing rates and would be remiss if we were to fail to point out on behalf of our membership that they are decades overdue a significant upward review. The hourly rates are entirely out of touch with the cost to practices of retaining experienced, capable staff. They have not kept pace with inflation, the cost of living, cost of maintaining premises, investment in IT equipment and infrastructure to meet the demands of the modern criminal justice system. A review of the mechanism of payment should include urgent review of hourly rates of payment: rates last visited in the mid-1980s. With the exception of salt as a commodity, no other commodity or service has seen a stagnation of its value comparable to the neglect of legal aid rates.

Question 3 – Do you agree with our proposed approach to paying for paper heavy cases? Please state yes/no and give reasons.

Yes. We agree with the proposed approach to increasing payment for paper heavy cases. We do so in the context of representating that the time is long overdue to review the underlying level of rates and refer to our point in answer to question 2 above.

Question 4 – If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

Not applicable.

Question 5 – Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.

Yes. We agree that the review of cracked trial fees is timely. We welcome the increase in fees paid to 100% of the basic fee, and recognition that all cracked trials, not just those cracking in the final third should be included. The former scheme built in a perverse incentive to crack trials at a later stage in the case, weighted advocate preparation to the later stages of the case and was not consistent with robust trial management or the overriding objective.

We see no basis to distinguish between advocates and litigators in this regard. The consultation paper indicates that a review of litigator fees is pending. We do not accept the rationale for distinguishing between advocates (whether at the Bar, solicitor advocates, self-employed or in-house) and litigators. Our proposal is that the same approach should be taken for advocates and litigators at this stage. There remains significant risk that more firms will cease criminal defence work if review of the litigator fee is delayed further. A review of litigator fees is no less urgent than that for advocates. When a trial cracks due to the decision of the prosecution not to proceed, or due to the entry of a guilty plea or acceptable plea basis that position is commonly reached due to work undertaken not by the advocate but by the litigator. It is the litigator who is engaged in liaison with the Crown Prosecution Service, who takes the defendant's instructions and who obtains expert opinion from independent consultants. A common basis for the prosecution to review charges and its stance in a case arises from service of defence expert evidence which challenges and/or undermines the premise of the prosecution. It is illogical to review the fees paid to advocates in such circumstances and not to apply an equally relevant increase in the fees paid to litigators.

Question 6 – If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

We do not oppose the proposed increase in the AGFS but as indicated above propose a parallel increase in litigator fees where a trial cracks.

Question 7 – Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.

We welcome the recognition that work is, should and must be undertaken before cases are sent to the Crown Court if the overriding objective is to be met from the earliest stage in cases.

We do not agree with the proposal to exclude cases which are committed for sentence. That proposal is fundamentally flawed. It ignores that it is the work undertaken by solicitors in the summary court which results in committal for sentence, rather than sending for trial. Early advice to defendants to establish if they have a defence, if a defence advanced is realistically likely to result in an acquittal, representation as to level and number of charges are all a vital component in ensuring the entry of early guilty pleas, leading in appropriate cases to a committal for sentence. The robust application of credit for plea at the earliest stage is only one part or the consideration.

We remain of the view that the earlier and more comprehensively the defence are provided with appropriate levels of disclosure, the greater the prospect of identifying cases which should properly be listed for trial and those which should instead proceed to sentence. The defence operate with hands tied behind their back if they are not properly served with the resources they need to make an independent assessment of evidence which is crucial to the provision of robust advice.

We therefore advocate payment for advocates in the summary courts for their time engaged in the post charge, pre-sending review of cases and provision of advice prior to the point of plea. The work should be remunerated irrespective of the plea entered. Payment of advocates for their work at this stage will incentivise early advice with all the benefits this brings to the criminal justice system.

We note that the rate cited is that for practices located in London. We anticipate that, although that rate is cited in the consultation, a lower rate will be paid outside London. We repeat our representations that the rates paid both in and outside London are long overdue review if criminal defence practice is to be sustainable for the future. Moreover, the proposed fee equates to a payment in the region of a third of the fee formerly paid for committals up to 2011. We welcome the acknowledgement of the work carried out by practitioners before a case reaches the Crown Court but do not accept that the fee proposed properly remunerates that work. We opposed the abolition of committal fees on the basis that it constituted an unjustified cut. Whether under the former arrangement or when cases are sent for trial solicitors are required to assess evidence, advise on plea and in appropriate cases engage with the Crown Prosecution Service with regard to acceptable alternative charges and the basis of plea. That work should be appropriately remunerated.

Question 8 – If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

We propose that payment should be made for cases both sent for trial and commited for sentence. There is no basis to distinguish between them in terms of the work undertaken by solicitors.

We do not agree that two hours is sufficient to reflect the work undertaken in liaison with the Crown Prosecution Service post-charge, to obtain disclosure, review that disclosure, attend upon the defendant to obtain instructions, advise in writing and then conduct the initial hearing. The work involved realistically comprises three to four hours work, or more in complex cases with significant levels of disclosure and should be remunerated at an hourly rate to reflect the work in fact done. We do not accept that two hours paid at outdated rates adequately remunerates this work or will create the appropriate incentive to robustly case manage matters at this crucial stage. We advocate the return to a fee which recognises the time expended by solicitors and is no less than the level of the previously abolished committal fee.

Question 9 - Do you agree with the conclusions and assumptions outline in the impact assessment? Please state yes/no and give your reasons. Please provide any empirical evidence relating to the proposals in this document.

No, we do not agree. It is of concern that the assumptions made to underpin the review of average times spent in review of unused material are informed in the main by analysis of CPS

case files. That review will no doubt have given an impression of the amount (in terms of page count) and type of material served by the CPS. It appears that assumptions have then been made about the time that was likely to be spent by defence practitioners in review of that material. A more authoritative source would have been provided by review of the case files maintained by defence practitioners in relation to that bundle of cases. Defence practitioners are required to record their times engaged in each case, irrespective of those times having no impact upon the payment they receive at the close of the case. The actual time spent in review of unused material provides an accurate indication of the time undertaken by defence practitioners. It is not apparent whether representations to that effect arose from consultation with defence practitioners or their representative bodies.

One of the assumptions made in relation to perusal of electronic material is that 1 megabyte equates to 75 pages of printed material "of which only 25% is relevant". The assumption is therefore made that 1 megabyte comprises 18.75 pages of "relevant" material and so should be remunerated as taking 18.75 minutes to review. In effect this equates to payment for just under 19 minutes of work per 75 pages of material. This analysis overlooks by whom the judgement is made that material is "relevant", and how that judgement comes to be made. The reality is that a defence practitioner served with 75 pages of unused material must read all 75 pages in order to determine what within that material may be relevant. Some, all or none may be relevant. The CPS do not signpost content they consider to be relevant when they disclose material, it is simply served for the defence practitioner to review. It is often served late, only after application to the court, and consequently reviewed as a matter of expedition.

For instance, in a multi-defendant murder trial recently proceeding before Birmingham Crown Court, telephone records requested by the defence in good time before the commencement of the trial were only served after an application to the Judge was granted during the trial. This required two litigators to be taken from work on other pending cases to review Blu-ray discs containing multiple files, in turn containing multiple PDF files and Excel spreadsheets, in some instances comprising tens of thousands of pages. It was necessary to search that material, not only to prove positive connection between co-accused and other relevant parties, but to establish the absence of such connection to make the defence point that a defendant could not be said to have been in contact with others by reference to call data and cell site analysis of their collocation. Under the analysis of what comprises "relevant" information for the Impact Assessment it might be concluded that the absence of a defendant's telephone within a vast array of call data comprised 0% or 100% relevant material, depending on whether one is prosecuting or defending the same case.

In another multi-defendant case involving allegations of conspiracy to blackmail, the prosecution served telephone call data and cell site material relating to five defendants by several DVD discs of material. The covering letter indicated that the discs were disclosed as served evidence to the extent that they supported the prosecution case, and unused material to the extent that they did not. There was no indication at that stage of which of the numerous individual data files enclosed on the discs fell into the former or latter category. At which point all such material is "relevant" unless and until it has been analysed and applied to the defence case. That of course may differ from defendant to defendant.

Question 10 – From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence in support of your views.

We do not believe that the proposals will result in a particular disadvantage to groups based on protected characteristics. Our analysis is that the immediate proposals provide a greater increase in fees received by advocates than by litigators. To that extent they may broadly be seen to have a more prejudicial impact upon female and BAME practitioners than white/male practitioners in view of the higher levels of representation of those groups among litigators than advocates.

Question 11 – What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

We submit that our proposals to harmonise changes to the AGFS and LGFS at the same time and in equal measure will ensure equality of provision.

26 March 2020

Linden Thomas
President
Birmingham Law Society