



Bar Council response to the Ministry of Justice consultation “Amending the Advocates’ Graduated Fee Scheme”

1. This is the response of the General Council of the Bar of England and Wales (‘the Bar Council’) to the Ministry of Justice’s (‘MoJ’) consultation on Amending the Advocates’ Graduated Fee Scheme (‘AGFS’).¹

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)

Overview

4. The present Consultation is narrow in its scope. It examines where the £15²m will be allocated in the AGFS Scheme, (called AGFS Scheme 11). Whilst narrow, the Consultation must be considered in a wider context, which we address first.

¹ <https://consult.justice.gov.uk/digital-communications/amending-the-advocates-graduated-fee-scheme/>

² Based on 2016/17 data in comparison to AGFS Scheme 10 (and see later).

5. Whilst the injection of further funds into the AGFS Scheme above the original proposals in AGFS Scheme 10 is a welcome first step, the Bar Council wishes to make clear that it must be regarded as just that – a first step in an ongoing process. Whether one looks at the original proposals in AGFS Scheme 10, or the current proposals in AGFS Scheme 11, it is clear that they are insufficient to address the long term sustainability of the self employed Bar insofar as a practice in criminal legal aid is concerned. Within the profession, the conditions for individual practitioners to which the present levels of remuneration have led are having sustained detrimental impact on their wellbeing. All of this has an immediate impact in terms of recruitment and retention, which will shortly result in a ‘point of no return’. This seems likely to ensure that, over the medium to long term, the funding of criminal defence work will become more expensive for the MoJ, and lead to poorer quality justice outcomes. This unattractive situation is avoidable – but only if the MoJ takes seriously the current position and is willing to put in substantial work to improve it. The Bar Council intends to engage with the MoJ immediately on these issues and we will not wait for the proposed review. The Bar Council’s position is simple and straightforward, as it has been throughout: Immediate action is required to increase legal aid payments to advocates to a level which provides fair and proper remuneration for the important public interest work that the criminal Bar undertakes. At present, it does not do so.

6. Whilst the Bar Council welcomes the £15 million³ for legal aid, even that sum is small, overdue and only the beginning. Recent evidence published since the Consultation started, and which led to its extension, demonstrates that the increase offered when compared to the actual AGFS Scheme 9 expenditure for 2017/18 is, in fact, only £8.6m. This has caused huge disquiet in the profession. That disquiet is shared by the Bar Council. Whilst the Consultation questions ask whether we “agree” with the proposed legal aid fee increases, to which we have answered “yes” that should not be misinterpreted. AGFS fees are still in real terms approximately 40% lower than they were ten years ago.⁴ The present 7% or less does not represent an overall increase in legal aid payments for criminal advocacy. Much more still needs to be done.

7. It is not correct to state, as the Consultation does, that it was the Bar Council which suggested what the appropriate level of a brief fee should be in any one of the

³ £15 million is based on the 2016-17 Legal Aid spend and case mix, contrasted to AGFS Scheme 10. It is inclusive of VAT [as set out in the Bar Chairman’s ‘Revised AGFS £15m AGFS Note’ footnote 1, released on 7 June 2018 before the CBA vote].

⁴ In 2013 research was undertaken by Professor Martin Chalkley into AGFS fee cuts between 2007 and 2013. He reported, “My findings are that as of 2013 AGFS prices have been reduced by 21.0% in cash terms equating to 37% in real terms” (page 52 of the Bar Council’s October 2013 response to the Governments “Transforming Legal Aid: Next Steps” consultation).

More recently, the Justice Committee of Parliament reported in July 2018 that “The general downward trend in expenditure on [criminal] legal aid [...] shows a fall of 33% in real terms between 2011–12 and 2017–18” (paragraph 79, House of Commons Justice Committee, “Criminal Legal Aid: Twelfth Report of Session 2017–19”).

specific bands of cases being consulted on. The Bar Council, along with the Criminal Bar Association, assisted in identifying the bands where the £15m could be allocated and where it would be most effective. That exercise was undertaken with the sole intention of mitigating what would otherwise have been an even greater loss of income to advocates instructed in cases in those specific bands. The Bar Council also specifically focused on ensuring that £4.5 million was aimed exclusively at offences or hearings that junior advocates would usually deal with. The exercise (giving a figure of £15m) was based on the 2016/17 legal aid spend and case mix, which was the only and most recent data made available to us. Importantly, however, the £15m available to be allocated, was determined by the MoJ alone. It is not and never has been the Bar Council's position that the £15m offered was or is sufficient to make AGFS fee rates sustainable or that it will ensure that reasonable fees are paid for all cases. As we have made clear, the Bar Council has approached this proposal on the basis that it is 'the first step' endorsed by a narrow majority of those at the criminal Bar. We note as well in this context that when the review of AGFS Scheme 11 will fall due it will take place at a time when austerity will have come to an end for 2019 Spending Review purposes⁵.

8. The Bar Council draws attention to seven additional matters relevant to the wider context:

- (1) The present Consultation does not deal with the level of payment an advocate will receive for a case in one of the proposed amended bands where the legal aid order was granted after 1 April 2018 but before the statutory instrument ('SI') introducing the revised payment comes into force, assuming that the proposed changes are adopted.⁶ This must not be the case for any longer than can be avoided. This inequity is worsening by the day due to the delay the profession has experienced in this Consultation, and which the Bar Council has made representations about. The Bar Council and the profession had anticipated that any amended AGFS scheme 11 would be operative by now. It is axiomatic that cases in these bands continue to be difficult and challenging, and the work an advocate has to undertake to prepare and present them remains the same. To meet this shortfall, the Bar Council urges the MoJ to pay the additional 1% from the start of the amended scheme when the SI comes into force, and not in 2019. This will go a little way toward compensating advocates instructed in these cases and it would be a sign of wider goodwill toward the profession for the delay it has experienced. The Bar Council urges the

⁵ Prime Minister's Speech, Conservative Conference, Birmingham, 3 October 2018

⁶ Assuming the proposed changes are adopted, the MoJ maintains there can be no retrospective payment to advocates of the revised fees for work in the consulted bands until the SI comes into force.

MoJ to ensure that the new rates apply to all work done after the date on which the SI comes into force.

- (2) At this early stage in the operation of AGFS 10/11 it remains uncertain whether it is a scheme that is a 'more comprehensive case system [that] properly captures the broad spectrum of criminality' as the original AGFS scheme consultation suggested it would.⁷ There is a long and complex history to the design of the present AGFS 10/11 Scheme. It has been labelled by many as being the 'Bar's scheme'. Many barristers thought that The Bar Council, Criminal Bar Association and the Circuits played a large part in its design but to describe it as the 'Bar's scheme' is a lazy label and not accurate. The Bar Council and Criminal Bar Association assisted in the design of a scheme given the parameters that were set by the MoJ, which included cost-neutrality and the abolition of page count. The Bar did design a scheme that introduced the banding of offences that *partially* ignored page count as a proxy for fee calculation⁸ and, in turn, banding of offences that if they were properly remunerated would have meant special preparation was no longer needed for normal cases. This however ignores one key fact about the original proposals. The fee levels the Bar suggested were not adopted by the MoJ. It is the lack of adequate funding and in particular though its inability to deal with much higher end paper heavy cases, that will see Scheme 11 fail to adequately remunerate advocates. Had the bandings in Scheme 10/11 been adequately remunerated they would have properly captured a case's complexity. It is not the design of the scheme *per se* that is flawed, it is the level of funding in the bands of offences and its inability to deal adequately with the most evidence heavy cases that do not meet the Very High Cost Case (VHCC) criteria. For these reasons, special preparation remains essential and cannot be reserved for outlying cases. The definition of special preparation should not have omitted the phrase 'very unusual' to limit its application. This amendment to the definition has arbitrarily resulted in special preparation becoming unavailable in many cases, thereby preventing its use as an important 'pressure value' in a graduated fee scheme that cannot necessarily accommodate the complexities of each and every case and where the fees in the bandings are lower than are needed. As stated, this is particularly important in longer more complex, demanding (and often paper heavy) cases, where advocates are entitled to expect to be properly remunerated for the work they do in and out of court. The Bar Council will in its forthcoming discussions with the MoJ focus on these issues.

⁷ Paragraph 7.2 Consultation, 5th January 2017

⁸ Page Counts do remain a proxy for fee calculations in certain offence bandings

- (3) The Bar Council looks forward to the MoJ devising a scheme to pay advocates to read and work on unused material ('disclosure'). Recent cases to hit the headlines about disclosure 'failures'⁹, which have brought about a CPS review and an ongoing Attorney General's Review, have only served to highlight the genuine problem that the Bar Council has consistently made the MoJ aware of regarding disclosure. This part of the criminal justice system, from the defence perspective, has been run on 'goodwill' and in the expectation that professionals will 'go the extra mile'. That goodwill is now running out. It is not sustainable to resource the police and prosecution to deal with disclosure but to think that the task is complete when the disclosure is handed to the defence. Work on disclosure can be significant and vital to an accused's case, as reflected in the existing Attorney General's Guidelines on Disclosure¹⁰. It is simply wrong and unsustainable for there to be a continued system where there is no designated payment for such an important aspect of case preparation. In the same way that the proper handling of disclosure is a cost to the police and prosecution, it must be acknowledged that it is also a cost to the defence which should be properly remunerated. Material disclosed to the defence has met the statutory test and it must be read by the defence as it may assist an accused's case or undermine the prosecution's case against the accused.
- (4) We welcome the proposed review of the AGFS 11 Scheme. However, as stated, we expect the MoJ to continually engage in active dialogue with the Bar Council on the structure of the Scheme with the benefit of operational data, and with a view to ensuring that the scheme is refined and kept fit for purpose for the sustainable future of criminal advocacy. We expect the MoJ to commence its formal review of the scheme based on it having started on the 1 April 2018. We do not expect drift on the delivery of that review as has been experienced for LASPO (Legal Aid Sentencing and Punishment of Offenders Act).
- (5) The Bar Council invites the MoJ to actively re-consider how a defendant's funds, where they are restrained under s.41 POCA (Proceeds of Crime Act) 2002, could be used to pay for private representation. Amendment to legislation to permit a client to use their own money to pay for private representation in criminal proceedings has been a long-standing request of the profession. It would alleviate pressure on public funds, particularly in longer and more expensive cases.

⁹ Failures which were in fact averted by the actions of advocates who undertook work on disclosed material to ensure the correct outcomes in court.

¹⁰ December 2013

- (6) The need to review the operation of AGFS Scheme 11 and to increase the level of remuneration it will provide to advocates has wider and important dimensions. The Bar Council's 'Working Lives Survey 2017' published on 29 May 2018 illustrates that 48% of the criminal Bar were unable to balance their home and work lives. This is due to the ever-increasing burden and workloads imposed on criminal advocates. There were 27% of the criminal Bar who felt emotionally drained by the work that they do. Most troubling of all, 33% of the criminal Bar said they would leave the profession if they could, in comparison to 12% in Chancery and commercial practice. Only 18% of the criminal Bar thought that they were 'paid fairly considering my experience'¹¹ in comparison to 77% of those at the Chancery and Commercial Bar. The message is clear and the level of disaffection at the criminal Bar is obvious. This poses a real threat to the future administration of justice with the loss of quality and experienced advocates from the criminal courts and an experienced cadre of advocates from which the future judiciary will be drawn. The level of payment an advocate receives from the AGFS for the work that they do and the large amounts of work an advocate is now required to do which goes unrecognised and unrewarded unquestionably affects morale and wellbeing. The Bar Council underlines in the strongest terms that we are at a pivotal point: many advocates now seriously question whether there is a financially viable future career at the criminal Bar. We believe that the MoJ has started to recognise this danger and the review is a step in the right direction, but it must go much further. We draw attention to this key issue because not only will it lead to the loss of the ablest, it will also undoubtedly mean that it will form a barrier to and impact on the future social and broader diversity of the criminal Bar.
- (7) Lastly, following the action by the criminal Bar and the narrow vote to return to work under the new scheme, the MoJ should be under no illusion that this scheme is under very close scrutiny by the criminal Bar and by the Bar Council on behalf of the whole profession. If it needs amendment, the Bar Council will not shrink from pressing for that. In addition to the issue of special preparation, for example, we expect as part of our ongoing dialogue with the MoJ to review the loss of page count as a payment criteria and in relation to the most evidence heavy cases in a graduated fee scheme if the value of the bandings remains too low. In particular, we will examine whether the loss of page counts creates perverse and/or unfair financial outcomes for Counsel given the work they do in the life of a case.

¹¹ Table 9.2 pg.11 Working Lives Survey, 2017

9. Further action is also needed in a range of other areas in the criminal justice system. The Bar Council, therefore, welcomes the statement by the Minister and her officials in her foreword to the consultation that:

“Criminal advocacy is important and it is imperative that the professions continue to attract the best and brightest. [...] These proposals are, however, only the first step in the process. I am committed to work with the legal professions – both barristers and solicitors – to ensure that criminal advocacy remains an attractive profession which is open to all. This must be a long term, system-wide process, far beyond legal aid.”

10. As part of our ongoing discussions, the Bar Council looks forward to working with the Minister to deliver on that commitment.

11. Regarding the distribution of these additional funds, we acknowledge the engagement that the Bar Council and Criminal Bar Association have had with the MoJ - as referred to in paragraph 43 of the Consultation - on how the limited ‘additional’ funds should best be targeted, following concerns raised by the profession about the initial scheme.

12. Lastly, AGFS 11 is structured in such a way that in any band of case, the established proportionality of fee distribution is that a junior advocate’s fee is half that of a QC’s fee, and a junior advocate’s fee when instructed as a leading junior is three quarters that of a QC’s fee. This long-established principle in publicly funded cases means that where a particular band has received additional money, a QC will in monetary terms, receive a larger sum for doing such a case than a junior. It does not follow that the £15m was targeted at QC’s as we have seen being suggested. The specific intention has been to address levels of payment for *offences* in certain bands.

Q1: Do you agree with the proposed increases to basic fees in bands 4.2 and 4.3? Please state yes/no and give reasons.

Yes. This category of case did not attract the same level of remuneration as it had previously, therefore, it needed to be specifically addressed to achieve close parity to the former scheme.

Q2: Do you agree with the proposed increases to basic fees in bands 6.1, 6.2, and 6.3? Please state yes/no and give reasons.

Yes. This category of case did not attract the same level of remuneration as it had previously, therefore, it needed to be specifically addressed to achieve closer parity to the former scheme. We must note, however, that even the proposed allocation of

money using the £15m figure will still not bring dishonesty offences back to a level where they were previously.

Q3: Do you agree with the proposed increases to basic fees in bands 9.1 and 9.4? Please state yes/no and give reasons.

Yes. This category of case did not attract the same level of remuneration as it had previously, therefore, it needed to be specifically addressed to achieve close parity to the former scheme.

Q4: Do you agree with the proposed increases to fees in the standard cases category? Please state yes/no and give reasons.

Yes. Junior Counsel need to be able to have a sustainable practice. The targeting of funds in this area is therefore welcome.

Q5: Do you agree with the proposed increases to basic fees in bands 6.4, 6.5, 11.2, 12.1, 12.2, 12.3, 13.1, 14.1, 15.1, 15.2, and 15.3? Please state yes/no and give reasons.

Yes. For the reason acknowledged in paragraph 95 of the consultation, that the basic fees for these Bands in Scheme 10 do not fairly remunerate the work of junior Counsel.

Q6: Do you agree with the proposed re-banding of several offences – harbouring an escaped prisoner, the intimidation of witnesses, the intimidation of witnesses, jurors and others, and assisting offenders – from the standard cases category to the offences against the public interest category? Please state yes/no and give reasons.

Yes. The re-banding is necessary to recognise the work and expertise required in these cases in comparison to other standard cases.

Q7: Do you agree with the proposed increase to fees for ineffective trials? Please state yes/no and give reasons.

Yes. This change is necessary to provide more recompense in this situation where Counsel will have undertaken all the work necessary to conduct the trial.

Q8: Do you agree with the proposed increase to fees for appeals against conviction? Please state yes/no and give reasons

Yes. Scheme 10 fees did not properly acknowledge the complexity of these hearings.

Q9: Do you agree that fees across the scheme should be increased by 1% on cases with a Representation Order dated on or after 1 April 2019? Please state yes/no and give reasons.

In the Bar Council's March 2017 response¹² to MoJ's "Reforming the Advocates' Graduated Fee Scheme" consultation paper, we wrote:

"any scheme which is introduced, if it does not have index linking built in, will result in a year on year fee cut. It is essential therefore that index linking is introduced in order to have the confidence of the profession."

That remains the case, and therefore, whilst we do not reject the 1% fee increase, it is not enough when measured against the background of the historical and significant cuts the profession has sustained, such that a further injection of funds and index linking, to take account of future inflation, needs to be introduced in to the Scheme to make it sustainable for the future. Further, as stated at the outset of this response, the Bar Council suggests that the 1% should be paid from the point that the SI comes into force, not in 2019.

In terms of the balance of the fees within the scheme, we look forward to participating in the review of the scheme as set out in paragraphs 48 - 53 of the current consultation. The groundwork for this needs to be laid now, and we repeat the warning that the Bar Council has given before, that more urgent further action needs to be considered if advocates begin to reject cases on the grounds that cases under Scheme 10/11 offer inadequate remuneration in comparison to the amount they would have received under Scheme 9.

Q10: Do you agree with the overall package of scheme amendments we have set out in this consultation document? Please state yes/no and give reasons. If you have alternative proposals, we would welcome case studies and examples to illustrate these.

Yes. In the context of the observations made at the outset about the inadequate levels of investment in the justice system, and in particular to Counsel's remuneration, the limited funds on offer have been appropriately targeted at priority areas.

Q11: 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.

¹²

https://www.barcouncil.org.uk/media/555846/20170302_bar_council_response_to_agfs_consultation.pdf

Yes. We note that paragraph 26 of the Equalities Impact Assessment recognises that:

“The more junior section of the profession contains proportionately more members with specific protected characteristics – with proportionately more younger, BAME and female members for example - and this group is also likely to gain financially from the proposals.”

The Scheme needs to be kept under review to ensure that there are no unintended consequences and that the targeted amended fees are having the benefit intended.

Q12: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

See our answer to Q11.

Q13: 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 are not aware of a particular impact in this area.

Bar Council
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