AGFS CONSULTATION AUGUST 2018

25 BEDFORD ROW RESPONSE

Introduction

1. 25 Bedford Row is arguably the leading specialist set of criminal defence practitioners. We only defend. We have been representing defendants in the criminal courts at every level for over 40 years. Our 68 members range from the most junior to leading juniors and QCs and we are culturally and ethnically diverse. The majority of our work is taken on a legally aided basis.

2. While the MoJ has clearly listened to the concerns of the profession and some progress has been made, which is welcome, there remain such significant flaws in this latest iteration (now called Scheme 11) that we cannot give it more than qualified support.

The First Consultation: 2017

3. The process of reforming the AGFS has now been going on for 3 years since the Bar Council first published its proposals in October 2015. That delay alone has fuelled discontent; we continue to suffer chronic underfunding while the

government drags its heels, its attention seemingly distracted by the political process of Brexit.

4. The MoJ published its first consultation in January 2017 and in March we provided a 28 page detailed and considered response. We expressed qualified support for the *principles* of the scheme. We accepted that the then current scheme (Scheme 9 as it is now known) needed improvement but we found the new proposed scheme (Scheme 10) was seriously underfunded and, on balance, we did not support it.

5. We highlighted concerns about the lack of index linking; the fact that the new scheme was not cost neutral; the unacceptable impact on the junior bar; the fact that the scheme was flawed structurally; flaws in offence categorisation and banding; and the fact that even if PPE were to be removed as a proxy any new scheme should still give weight to page counts as an indication of the amount of work required to prepare cases. PPE is not a perfect proxy for the complexity of a case, but neither is it irrelevant. We pointed out that a consequence of the removal of PPE was the risk of there being no incentive for the Crown to be discerning in what is served. This married with the narrowing of the remit of the special preparation regime would only increase the unpaid workload of the defence.

6. We made it very clear that any new scheme would be flawed without the injection of extra funding into the criminal justice system; that a new scheme would need to reflect the fact that as counsel, our roles are not limited to the advocacy conducted in the Crown Court but also the work carried out in preparing cases for presentation which is often underrepresented by the amount of advocacy that takes place in court hearings.

Scheme 10 Implemented: February 2018

7. The MoJ published its revised Scheme 10 in February 2018 and implemented it with effect from 1 April. Our view was that this revised scheme was still seriously flawed. We wrote that consideration of the detail of the scheme and the rationale behind it demonstrated clearly that the criminal justice system as a whole was dangerously underfunded. This problem was not limited to advocates' remuneration. Action was necessary to redress that chronic underfunding.

8. What we wrote 5 months ago was prophetic. As the year has developed we continue to face the consequences of underfunding in the criminal justice system. Court buildings are literally falling apart; disclosure failings due to

lack of training and manpower have resulted in the collapse of trials; while barristers continue to do their best to uphold the system, filling in the gaps of funding by working through lunch hours, late into the night and on weekends.

9. It was clear that under the proposed scheme there would be an overall drop in receipts by counsel. Our own calculations reflected this. Contrary to assertions made by the Ministry of Justice, junior tenants continued to be affected in real terms by cuts to their fees but also indirectly. A key point to be considered in any proposal for a new scheme is retention. Junior tenants must be able to see viable career progression. If the more simple work is better remunerated at the cost of moving funding away from more complex work, this only creates disincentives for upward movement within the profession. If there is no hope of moving into better-paid work in future years, there will inevitably be a dissipation of counsel from the profession.

10. We wrote that the flaws in the proposed AGFS scheme were symptomatic of a wider malaise within the criminal justice system, that the system is already on its knees.

Scheme 11: September 2018

11. Action was suspended because we were told that if we accepted the £15m, the SI would be laid in October but, if we didn't, any changes would be delayed until April 2019. Now we are told it's not £15m but £8.6m and the SI cannot be laid until 21 December. By apparently dragging its heels and being so penny-pinching, the government has created the impression in its latest paper that it has not kept its word. Rightly or wrongly, that has generated a great deal of anger in the profession.

12. A continuing problem is that the scheme is anti-progressive because it still does not adequately reward career progression or reflect the responsibility involved and the experience required for more serious cases. It is imperative that any fee structure provides sufficient incentive for practitioners to advance from one level to the next. It is not just junior practitioners that are affected by an anti-progressive scheme.

13. The limited investment in the scheme, although welcome, leaves a chasm between the levels of funding deserved by the Criminal Bar and what is being paid. The lack of funding demonstrates a wholesale misunderstanding of the work of criminal barristers and its effect on their work-life balance. It fails to

recognise how our commitment to our profession encroaches on our personal lives and impacts on our well-being.

14. The BC's Working Lives Survey shows a staggering 48% of criminal bar unable to balance home and work lives. Low pay is causing experienced and able barristers to leave the profession, from whom judges are drawn, leading to loss of diversity and damage to whole system.

Our Suggestions for Improvement of the Scheme

15. We regard as a minimum that the MoJ must:
    a. Demonstrate that there is genuinely a £15m investment in the new scheme;
    b. Pay the 1% from when the SI is laid, not from April 2019;
    c. Address the rates for cracked trials. The drop in income in some cases is staggering, especially for non-fraud/drugs-related offences. This creates a perverse incentive for practitioners for trials not to crack and it is naïve not to acknowledge this. Moreover, a lot of work is usually undertaken in cases that eventually crack and the current scheme fails to reward this.
    d. Ensure the full review of the scheme is based on its having come into force on 1 April 2018;
    e. Acknowledge that 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.
    f. Help devise a scheme to pay advocates to read and work on unused material, an ever-increasing feature of modern trials. Some cases can involve literally hundreds of hours of unpaid work pre and during trial;
    g. Reconsider how restrained funds under s.41 POCA could be used to pay for private representation.

The Questions

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.

A qualified yes, subject to this important caveat, that the increased fees are still insufficient as they are not at the level of scheme 9.

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.

A qualified yes, subject to this important caveat, that the increased fees are still insufficient as they are not at the level of scheme 9.

Q3: Do you agree with the proposed increases to basis fees in bands 9.1 and 9.4?

Whilst the MoJ appears to have recognised the need to increase the fees in these two bands, which is welcomed, as is the tacit recognition of the relevance of the page count proxy, the increases simply do not go far enough. They also demonstrate a failure to appreciate the amount of work and level of complexity involved in cases of this type. Perhaps the clearest example of that lack of understanding is the fact that cases involving Class A drugs at the most serious level (9.1) are far greater in number and attract, in reality, far higher prison sentences than sentences in the dishonesty category at the most serious level (6.1), cases which are extremely rare in any event. However, notwithstanding those facts, the brief fee in Band 9.1 is substantially less than in 6.1. The brief fee in Band 9.1 is £5800 compared to £8,450 in 6.1 amounting to a disparity of £2650. That is arbitrary and unfair. There should be parity between the two and band 9.1 should at the very least, be increased to the same level, which of itself is not high enough.

In addition, and in light of the de facto removal of the page count proxy, the disparity between junior alone, leading junior, and QC is too great and should be bridged in favour of the 'junior alone' category. The reason for that is because it is rare to have leading junior counsel certificates granted in cases in Band 9.1 and largely unheard of to have certificates for Queen's Counsel granted in cases in that band. Cases in band 9.4 will never attract anything other than 'junior alone' representation. These categories are therefore largely redundant and any suggestion that there is further investment in the scheme resulting from their inclusion is wholly misleading and disingenuous.

In relation to Band 9.4 we consider that the increase in funding does not go far enough and that additional investment is required across the board in that band.

In terms of the so-called increases in guilty pleas/cracked trial, these are woefully inadequate for both categories.

The only way of compensating for the drop in brief fee in this category, if they are to remain, is to increase the daily refresher rates further.

Q4. Do you agree with the proposed increases to fees in the standard cases category?

No. The proposed increases do not go far enough and fail to reflect the work done for cases of this type.

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.

In light of our view that the current rates of fees paid under scheme 10 are inadequate, we are minded to support any proposals that increase in the fees paid. We agree that the rates for these categories are presently too low and so the proposals are welcome, as far as they go.

However, we note that the proposed increases apply to leading juniors and QC's. It is important to recognise that many of the categories above would almost never involve representation by a leading junior or a QC. Our experience is that defendants charged with offences under categories 11.2,12.2, 15.1, 15.2 and 15.3 would never be granted a representation order for a leading junior or a QC. Similarly, it would be extremely rare for such a representation order to be granted for offences under categories 6.4, 6.5, 12.1 and 13.1.
As such, any proposed increases in the rates of pay for leading juniors or QC's in these categories are largely meaningless and will have a negligible impact on our individual or collective earnings. We invite the MoJ to focus on the rates of pay for junior alone in these categories and would welcome any increase in the rates of pay for that category of advocate alone.

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. In light of our view that the current rates of fees paid under Scheme 10 are inadequate, we are minded to support any proposals that increase the fees paid. But with a caveat.

We are keen to ensure that proposed increases are likely to have a material effect on actual earnings. In that regard, we suggest that prosecutions for offences falling within the categories listed under question 6 are extremely rare, so any increase in fees for them is unlikely to have any meaningful impact. For example, our fees team have not been required to bill a case for the offence of "Harbouring an Escaped Prisoner" for at least the last 16 years. So whilst we encourage an increase in fees, we do not consider that for these categories the increases proposed will have anything more than a negligible effect on our individual and collective incomes.

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

Yes, with a caveat. £350 is not in fact proper recompense for an ineffective trial that may well be adjourned to a date which the advocate cannot attend. The reasons for trials being ineffective are sometimes, but in our experience rarely, the fault of the defence. Nearly always they will be a result of listing inefficiency, prosecution failures in making timely service of disclosure, or other difficulties out of the control of the court or the parties.

We acknowledge that the increase in this area was a key part of the negotiations with the MoJ and so we welcome the acknowledgement of the problem and the attempt to redress it. However, there will still be many occasions when an advocate has prepared a case fully only to lose not only the trial fee but also payment for daily refreshers. This is likely to involve a loss of substantially more than £350. It is not sufficient in our view to expect that the systemic problems leading to ineffective trials will be cured by 'Better Case Management' – many of the difficulties (e.g. bad listing practice, witnesses not coming to court, the inadequacy of the remuneration for proper court interpreters, etc.) will not be solved by BCM. Whilst £350 is an improvement on the current position, consideration should be given to paying the full brief fee rather than the refresher rate.

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

Yes, although we query why there is a leading junior rate. The circumstances where there will be two counsel in an appeal against conviction from the Magistrates' Court will be extremely rare, and if it is possible to reallocate funds set aside for 'leading' juniors into a further increase in the standard rate for juniors then this should be done.

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.

Yes but this is nowhere near enough. Whilst a 1% increase is a start, it does not cover the years and years of constant cuts made by the MoJ. With the proposed Scheme 11 fees, a 1% increase has little to no effect on the various case categories.
Since 2007 and the introduction of the so-called Revised AGFS post Carter (Scheme 4), there have been six further schemes introduced (Scheme's 5 to 10) all of which have come with their various cuts in the fees payable to counsel. The introduction of Scheme 10 has generated such animosity that the MoJ has had to come back with a revised model and increased fees in certain areas. The fact that this has been contemplated by the MoJ must mean that they can see how serious this situation is. There is still a need for an increase in the proposed Scheme 11 fees and this is before a percentage figure increase in April 2019 (not 1%) can even be discussed. There needs to be substantial investment in the whole criminal justice system and a 1% increase on the proposed Scheme 11 fees is not good enough.

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.

No. Whilst Scheme 11 is an improvement on Scheme 10, there is still a need for substantial further investment, even after the proposed 1% increase. The AGFS of 2007 has been torn apart over the years and has become unrecognisable from the model that it once was.
There has been an improvement in Schemes 10 & 11 but these have come at a cost in other areas like PPE. In our response to the AGFS 2017 consultation paper, we stated:

"Although we accept that PPE is not a reliable proxy per se, we believe pages of evidence served is a factor that should be given greater weight than the proposed system allows.

The page count thresholds set for when a special preparation claim is appropriate are too high. We would suggest a single threshold of 5,000 pages across all cases so as to recognise cases involving many pages of evidence may require a lot of additional work. Payment would only be made in such cases if it could be shown that the work undertaken was necessary.

Moreover, if PPE is all but abolished, there is no indirect incentive to limit the service of material categorised as used. Introducing a cap of 5,000 pages before special preparation claims can be made will discourage the unnecessary service of material categorised as such".

We still feel that this is a valid statement that has been improved in some categories, but has not been applied across the board. It is not only dishonesty and drugs cases where a large number of pages can be served. In this modern day, the use of telephone evidence to prosecute a defendant is used in nearly every area of criminal law.

There are various categories of cases in the proposed scheme that have money allocated to them for QC's and Leading Juniors. Some of these categories, for example category 17, would never now obtain an extended Representation Order for a QC or Leading Junior as the updated Table of Offences has put most standard cases into their correct criteria. On the Excel spreadsheet provided with this consultation that contains the additional datasets, it can be seen that the categories of funding for QC's are 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, 15 & 17 (1 case). This means that there were no cases under categories 7, 10, 11 and 16 all of which have had money allocated to them for QC's costs. Using the same figures for Leading Junior it is categories 10 and 16 that do not appear in the dataset.

The model for Scheme 11 can be a workable one but without the correct amount of investment, a review of PPE and a review of the allocated fees, it quite simply will not work with counsel who have had years of cuts to their fees.

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.

The consultation rightly identifies some of those practitioners who will be affected both positively and negatively under this scheme. However we are concerned that the scheme when analysed closely is not progressive as it is intended to be and contains some significant negative impacts which have not been adequately identified. In particular:

a) The mapping of 2017/2018 case mix to the scheme when compared to the 2016/2017 data suggests that it will result in a significant cut in fee income for the Criminal Bar as a whole. The fact that this was not ostensibly the intention of the scheme but is its effect is deeply troubling and mandates both the acceleration of the April 2019 increase of 1% and an earlier review than currently intended.

b) The scheme has applied modest increases to some of the most junior practitioners but the cost of that is disproportionately high fee reduction for the more senior practitioners. There are some major problems with the remuneration of child sex offences, for example, which are not properly remunerated under this scheme and which may be expected to affect a number of senior female counsel disproportionately. The biggest cuts in income under this scheme appear to affect those between 10-20 years call, which is the point at which many practitioners are attempting to balance their career with raising a family. There is already a crisis in retention at the Criminal Bar and this scheme, whilst seeking to protect the most junior and aid recruitment, may have the perverse effect of making the retention problem worse.

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

No. See our response to Question 11. Whilst we understand that the MoJ has sought to provide 'new' funding for AGFS, the only proper mitigation for the impact on the profession of a scheme that moves away from using PPE as a proxy is to invest substantially more funds. That is doubtless true of other areas of the criminal and indeed civil justice systems. However, overall AGFS spend inclusive of VAT has been reduced by over £50m in the last ten years and the effects of that have been extremely serious. Cuts have consequences and the Criminal Bar is in crisis. Until

there is a frank acknowledgement that major investment is needed, there will not be adequate mitigation of the problems caused by this scheme or any other.

25 BEDFORD ROW
LONDON
WC1R 4HD
12 October 2018