Accelerated measures

Amending Criminal Legal Aid Fee Schemes

MARCH 2020

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 71 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. We have been completely consistent in our responses to the government's various attempts to improve the AGFS since 2017; we have welcomed every improvement in the rates and conditions while pointing out that they have been far too modest. A brief history of the course of events and our responses over the last three years was set out in our response of October 2018, to which reference should be made.

3. In previous times, the government has expressly or implicitly fallen back on the familiar refrain that this is all that can be afforded in times of austerity. That won't do now. The coronavirus pandemic has revealed the shocking state of every aspect of the criminal justice system after a decade and a half of neglect and under investment. Worse, the courts have been plunged into a state of suspended animation for who knows how long, with devastating impact on the earnings of all criminal practitioners, from the most junior to the most senior. It has never been clearer that the small improvements in this latest consultation are woefully inadequate.

The Questions

QUESTION ONE: DO YOU AGREE WITH OUR PROPOSED APPROACH TO PAYING FOR WORK ASSOCIATED WITH UNUSED MATERIAL? PLEASE STATE YES/NO AND GIVE REASONS.

4. Our response is as follows:
    a. Yes, we agree with the introduction of payment for reading unused material,
    b. We disagree that it should be "*subject to assessment*", and
    c. We disagree with the proposed rate, which is very substantially short of what would be a proper rate.

The Principle of Payment

5. Remuneration for the consideration of unused material is long overdue.

6. There is a general consensus amongst practitioners that the volume of unused material has increased in recent times. That increase is a product of the growing range of investigative techniques that yield ever greater quantities of evidence capable of deployment at trial. When the Graduated Fee Scheme was devised, CCTV footage, for example, was uncommon and material derived from mobile telephone handsets unheard of.

7. It is important to note that, under the Criminal Procedure and Investigations Act 1996, unused material is only disclosed to the defence if it undermines the case against the defendant or assists the case that the defendant is to mount. The assertion in paragraph 50 of the consultation paper that unused material is "*relevant to a case*" is an understatement. If the disclosure regime is properly applied, the unused material thereby disclosed is more than merely relevant: it can be directly dispositive of the question of guilt.

8. As the consultation paper makes clear, the importance of proper disclosure has been underlined in various reports and reviews, including that undertaken by the Attorney-General which reported in November 2018.

9. The *Attorney-General's Guidelines on Disclosure* make clear that fair disclosure to the accused is an inseparable part of a fair trial. The experience of those who defend in serious criminal cases is that wrongful convictions can result when the disclosure rules are not applied properly or at all. It follows that the consideration and assimilation of unused material is an essential feature of case preparation and one that defence practitioners cannot overlook.

10. Any scheme which provides no separate remuneration for the consideration of such material is not one that is fit for purpose. Therefore, the proposals contained in the consultation paper are a welcome, but very small, step in the right direction.

11. We advance two caveats:

    a. We do not agree that guilty pleas should be excluded from the proposal. Material that undermines the prosecution case or assists the case for the defendant is often relevant to advising the defendant on plea, preparing a basis of plea or to mitigation. In any event, given the disclosure test, it is never right in principle for unused material to remain unconsidered by those defending;
    b. We consider that payment should be made for reviewing Schedules of Unused Material which, in large cases, can be lengthy. Our understanding is that this is not included within the present proposal. If that is not, our view is that it should be.

Consideration of Unused Not "*Subject to Assessment*"

12. The consultation paper proposes that a flat rate equivalent to 1.5 hours work should be payable for cases where 0-3 hours work were undertaken. We recognise the force in having a system that is administratively simple. However, we reject the proposition that it is ever right to pay for 1.5 hours work when an advocate has undertaken double that, even if it is the position in only a minority of cases. We are also unconvinced that the dataset from which the proposal derives is a fair and/or complete representation of the position in the generality of cases. We take the view that a flat rate payment equivalent to 3 hours work should be made in all cases.

13. We also reject the proposition that the Legal Aid Agency should undertake an assessment of the work in cases where there is in excess of 3 hours of preparation. We are troubled by the reference in paragraph 62 of the consultation paper to the

"*administrative burden*" of such assessments. The whole point of the graduated fee system is that it is designed to be easy to administer.

14. We are also concerned at the approach likely to be adopted by the Legal Aid Agency towards such claims given our experience in relation to claims for both wasted and special preparation. Most defence practitioners have their own stories of wrongly reduced or wrongly rejected claims or instances where those undertaking the assessments appear not even to have properly read what was provided. Those cases not only waste the time of busy practitioners but also the staff that they employ at their own expense. The founding principle should be that the Legal Aid Agency should accept that claims are genuine without a compelling reason to the contrary.

15. At a more fundamental level, we oppose the principle of assessment in this context. The consultation paper draws heavily on the language and principles of special preparation. In assessing such claims, the Agency forms a view as to whether the work undertaken was reasonable in the circumstances of the case and considers concepts such as complexity and novelty.

16. We consider that such an approach has no place insofar as unused material is concerned. Unused material has already been pre-assessed by the prosecution as either undermining its case or assisting the case for an accused. The reasonableness of considering it is therefore beyond question; it is a matter of professional obligation for an advocate and there is nothing novel or exceptional about it. It is not for the Agency to retrospectively form its own judgment as to whether it was reasonable for an advocate to review material of that nature.

17. Consequently, the scheme should leave no scope for an assessment of reasonableness. The only exception would be those cases where an advocate wished to seek payment for an amount in excess of the standard allowances.

Hourly Rates Very Substantially Below Proper Rate

18. When remunerating the consideration of unused material, the consultation paper proposes that the current rates for special preparation should apply. Those rates are £39.39 for a junior alone, £56.56 for a leading junior and £74.74 for Queen's Counsel. They are, of course, headline figures from which office costs and overheads must be deducted.

19. It is notable that the consultation paper does not even attempt to justify those hourly rates; it merely recites them and asserts that the level will be considered later. It does

not seek to explain why it is considered right to pay a Legal Executive more per hour than the single junior barrister with direct, personal conduct of the case in court.

20. The reason for that lack of justification and explanation is that there is none. We consider it unacceptable to pay a barrister of the relevant grade any of those rates for work of any category or description. The rates are manifestly inadequate. They are but a small proportion of what the government pays the consultants that it engages from time to time and a fraction of what it pays the lawyers it instructs to represent it.

21. In 2007, the special preparation rate for a junior alone was £45 per hour. Applying inflation to the current rate of £39.39, even from 2007, one is left with a rate of around £54. Applying it to £45, the rate is £63. In our view, the hourly rates should, be very significantly increased.

QUESTION TWO: 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.

22. We agree with the principle of payment for the consideration of unused material but we disagree with the proposals as to how and the extent to which that should be done.

23. The right approach is for payment to be calculated by reference to particular time allowances for particular categories of material. Such an approach would draw on the original scheme for Very High Cost Cases in crime.

24. We suggest that a proper per page allowance would be as follows:

    a. Witness statements: 3 minutes (2 minutes plus 1 minute noting time)
    b. Unused material akin to documentary exhibits: 1 minute,
    c. Unused material from telephone handsets (other than pages of incomprehensible technical data): 3 minutes,
    d. Unused schedules or charts: 3 minutes,
    e. Unused CCTV evidence and the equivalent: actual running time.

25. There should be remuneration for the consideration of unused material in all cases, including guilty pleas, and it should extend to considering the Schedule of Unused Material.

26. The system should not leave open scope for an advocate to be paid for 1.5 hours of work when in excess of that has been undertaken.

27. Payment should not be "*subject to assessment*" by the Legal Aid Agency. Instead, a system of standard allowances should be introduced for different categories of material. Only where an advocate wishes to argue for a time in excess of those allowances should there be any need for assessment.

28. The hourly rates of pay should immediately be doubled to reflect the impact of inflation and the fact that the rates were inadequate to begin with.

QUESTION THREE: DO YOU AGREE WITH OUR PROPOSED APPROACH TO PAYING FOR PAPER HEAVY CASES?

29. We welcome the acceptance that cases involving large page counts of evidence invariably require an increased number of hours of work to be undertaken by the advocate. Accordingly we support the broad proposal that a scheme should be in place for payment for that extra work. Our concerns with the MoJ proposals are as follows.

30. The basis on which it has been decided to set the level is not clear. For example, why is a category 13 (kidnap) set at 750 pages whereas a category 11 (aggravated robbery) is set at 350 pages. We can see no justification for this difference.

31. Our view is that for all categories where special preparation clams are permitted, the number of papers served to allow such a claim should be the same. By way of example, we can see no rational or fair basis for saying that pages 350-750 are not claimable in a kidnap case but they are in an aggravated burglary case. The advocate in each case will be required to read and analyse those pages of evidence, and so we suggest that a special preparation claim should be available to be made in both.

32. We are greatly concerned that category one cases are not included. It is not clear what the reasoning is for the exclusion of those cases but we can see no proper justification for it.

33. Our view is that if those cases are paper heavy then remuneration under the special preparation scheme should be available at a similar level, as that for all other categories (save for fraud an drugs offences where different considerations apply). We acknowledge that the brief fee for 1.1[1]. and 1.2 cases is high compared to some other categories but we maintain that this is because the seriousness of the offences justify a brief fee at that greater level. We further note that the rates for category 1.1 cases are exactly the same for example as category 2.1, but special preparation claims are proposed for category 2 cases over 750 pages, but not all for category 1 case. We simply cannot understand why this is said to be justified, and we would argue this

[1] Our experience is that offences under this section are so rare that the claims under it are negligible

tends to illustrate the arbitrary and unfair approach of excluding all category one cases.

34. Furthermore, it has long been our view that the brief fee for category 1.3 and 1.4 cases is far too low, especially when compared to other offence categories. In denying special preparation claims for these categories only goes to compound the inadequate levels of remuneration for 1.3 and 1.4 offences. By way of example, a 1.3 murder case has a brief fee of £2575 (led junior) whereas a 12.1 (firearms) has a brief fee of £2,120 (led junior). Under the current proposals, the 1.3 offence cannot claim special preparation whereas the 12.1 can (at 750 pages). Again, we suggest that this tends to illustrate the arbitrary and unfair approach of excluding all category one cases.

35. Murder and Attempted murder offences are of course incredibly serious. They place considerable demands on the advocate and can often be paper heavy. Where they are, it is our view that special preparation claims should be available for category one cases at a level similar to other categories.

36. Whilst we broadly welcome the proposal for special preparation claims the rates payable remain far too low across the board. The work undertaken by advocates in preparing cases requires specialist knowledge and expertise and follows many years of education and training. The work we do is plays a huge part in ensuring the CJS works effectively and efficiently and to ensuring and that it in turn provides the public with a system that meets the demands that are placed on it.

37. However, the rates on offer are less than the rates of pay for many manual jobs and significantly less than for other professions. This must be seen against the background of a significant and decline in rates of pay for our profession for a number of years and delays in the review by the MoJ for current pay scheme proposals.

38. As is set out at paragraphs 18 to 21 of this document, we have serious concerns as to the basis on which the current hourly rates are set for junior, leading junior and QC, and the fact that a legal executive is to be paid more than a junior advocate.

39. Many members of 25 Bedford Row have, over the last 18 months, supported and lobbied others to support, the CBA in its determination to work constructively with the MoJ rather than begin industrial action, as has repeatedly been suggested by many within our profession. We maintain that such an approach is sensible but its continuation depends in part on the MoJ ensuring that the rates of pay for special preparation go a significant way to redressing the difficulties faced by advocates who are instructed in paper heavy cases.

QUESTION FOUR: IF YOU DO NOT AGREE WITH OUR PROPOSED APPROACH FOR PAYING PAPER HEAVY CASES PLEASE SUGGEST AN ALTERNATIVE AND PROVIDE EVIDENCE IN SUPPORT

40. As set above, we agree with the proposed approach, subject to the following:
    a. The number of pages that need to be served before a claim can be made should be the same for all categories (except for drugs and fraud) where different considerations apply
    b. Special preparation claims should be available for Category one cases.
    c. The hourly rates of pay need to be significantly higher than those proposed.

QUESTION FIVE: DO YOU AGREE WITH OUR PROPOSED APPROACH TO PAYING FOR CRACKED TRIALS UNDER THE AGFS? PLEASE STATE YES/NO AND GIVE REASONS.

41. "Yes", we agree with the proposed approach but "No", we do not agree with the rate.

42. We welcome the removal of the old "thirds" distinction, so that in future a cracked trial fee will be payable whenever the guilty plea is entered between the PTPH and the date on which the case is listed for trial.

43. We also welcome the proposed increase in the cracked trial fee from 85% of the brief fee to 100%. However, we do not consider a rate of 100% of the brief fee to be sufficient. The reason for the insufficiency lies in the history of AGFS. The present brief fee is less than it was; it used to cover the first two days of trial, nowadays it only covers the first day.

QUESTION SIX: 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.

44. For the reason given in the answer to Question 5 above, we believe that a fair and a reasonable cracked trial fee would be the equivalent of 100% of the brief fee plus one daily attendance fee.

QUESTION SEVEN: DO YOU AGREE WITH OUR PROPOSED APPROACH TO PAYING FOR NEW WORK RELATED TO SENDING HEARINGS? PLEASE STATE YES/NO AND GIVE REASONS.

QUESTION EIGHT: 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.

45. We have endeavoured to speak to our solicitors about these question since they are obviously better placed than us to comment. Unfortunately, the Covid-19 crisis has made that impossible. In the circumstances, we consider the Law Society is far better qualified than us to comment on the Litigators' Graduated Fee Scheme and we have nothing to add to their response

QUESTION NINE: DO YOU AGREE WITH THE ASSUMPTIONS AND CONCLUSIONS OUTLINED IN THE IMPACT ASSESSMENT? PLEASE STATE YES/NO AND GIVE REASONS. PLEASE PROVIDE ANY EMPIRICAL EVIDENCE RELATING TO THE PROPOSALS IN THIS DOCUMENT.

46. We welcome the use of focus groups to consider the impact that these proposals would have on the profession. It hopefully represents a movement towards centring the concerns and observations of members of the profession when devising or amending our payment schemes.

47. It is noticeable however that there is no data provided re the constitution of those focus groups. For example, whether they were representative of the profession's protective characteristic statistics revealed in the equality statement. It is difficult therefore to properly assess how representative are the observations recorded in the impact assessment.

QUESTION TEN: 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 THAT SUPPORT YOUR VIEWS.

48. The extremely low hourly rate for junior counsel is a concern. As observed in the data, the profession is more diverse towards the more junior end of the profession. An issue that we have is retention of those with protected characteristics who often have external pressures to ensure that they can earn a viable and stable income from an early stage e.g. childcare, single parent status, care status in any capacity. As a result of this, the impact of that lower hourly rate is more likely to be felt by members with protected characteristics.

QUESTION ELEVEN: 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.

49. The hourly rate: as per observations in Q10.

50. The proposals re unused evidence: as per observations in Q10. Furthermore, the administrative burden of the record keeping required for LAA assessment under these proposals will necessitate work to be conducted outside of court and normal business hours. This will be particularly difficult for those with responsibilities outside of work.

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