



**A TALE OF TWO CONSULTATIONS**

**THE BAR COUNCIL AND THE CRIMINAL BAR ASSOCIATION GUIDE TO VHCC AND RAGFS**

**PAPERS**

**From**

**The Legal Services Commission**

**&**

**The Ministry of Justice**

**23 January 2010**

1. Most of you are pretty familiar with the story of how we got to where we are. For those of you who aren't or who want to be reminded, a brief history lesson.

### **LSC VHCC Panel Scheme November 2007**

2. In November 2007, the LSC announced its replacement VHCC panel scheme to widespread hostility from the Bar. That hostility was based on two main features: the poor rates and the intrusive, bureaucratic contract. The Bar voted with its feet and the scheme was still born. The government panicked and political pressure was put on to rescue at least one high profile trial, Rhys Jones, by converting it from VHCC to RAGFS.
3. In early 2008 the MoJ set up a VHCC Steering Group, comprising representatives of the Bar Council, the Law Society, the CPS, the LSC and the MoJ, to design a new scheme for both advocates and litigators. The MoJ/LSC imposed a cost parameter, that the new scheme should come within the cost envelope of the rejected 2007 scheme ie be 5% less than the 2007 scheme. We stress, that parameter was imposed, not negotiated.
4. Throughout the summer and autumn of 2008 the Steering Group struggled to square the circle of litigators who wanted hourly rates and barristers who wanted a fixed fee type scheme. The deadlock was only broken when the MoJ accepted the Bar Council's suggestion of different schemes for litigators and advocates, a simple, obvious but apparently unthinkable, solution until then.
5. In November 2008, we secured an increase in the rates (or rather a decrease in the reduction) at the cost of restricting the grant of certificates for two junior counsel. This restriction of two junior certificates has become entrenched, of course, with no proposals to restore the granting of such certificates to previous levels now that rates are being reduced again.

### **LSC VHCC Consultation Paper December 2008**

6. In December 2008 the LSC issued its consultation paper, once again to widespread hostility from the profession. The new scheme was based around the concept of core tasks which would be paid at fixed rates, a step in the right direction of fixed fees, but the LSC dataset used to fix the rates was deeply flawed and the resulting

scheme seemed to combine the worst of fixed fees and contract managers. It was again rejected by the profession, so it was back to the drawing board.

7. At the suggestion of the Bar Council, the Steering Group agreed to allow a sub group of advocates to design a fixed fee type scheme which would be acceptable to the Bar, modelled on RAGFS but tailored to the complexities of VHCC cases. The group comprised both barristers and a solicitor-advocate from the SAHCA.

#### **First MoJ RAGFS Paper August 2009**

8. Throughout 2009 the advocates sub group worked on the scheme and the draft was due to be delivered to the LSC in early September 2009. On 20 August, a few days before that delivery deadline, the MoJ issued the consultation paper that first announced the proposed cuts to RAGFS. In the consultation paper, it was said that CPS fees were on average 23% lower than RAGFS fees and that the reductions in defence fees were justified regardless of the current economic circumstances.
9. The Bar Council team was understandably angry at this development and came very close to withdrawing from the Steering Group and refusing to deliver the proposed scheme. In the end, it decided that withdrawal would not be in the best interests of the Bar but the scheme was delivered under a very strongly worded protest letter to the Chairman and Chief Executive of the LSC.
10. From September onwards the scheme, by now known as GFS Plus, was refined and modified and the final version of the scheme took account of all the queries and objections raised by the Law Society and the LSC as well as other stakeholders such as the LCCSA.

#### **LSC VHCC Consultation Paper December 2009**

11. The final version of the scheme was delivered to the LSC in early November and, in what by now was becoming recognisable as a pattern, a few days later, the Commission unilaterally announced it was intending to add a third option to the paper, the extension of RAGFS from 40 days to 60 days.
12. This was a shocking development for three reasons. Firstly, such an extension had been considered and rejected as impracticable and unworkable by all the stakeholders, including the LSC and the MoJ, at a very early stage of the Steering

Group's work in 2008. The RAGFS was never designed to deal with the longer and more complex cases, which had been remunerated under a VHCC scheme, and no proper impact assessment had (or has) ever been carried out to see whether these cases could ever be properly remunerated under the RAGFS regime.

13. Secondly, there could in fact be no proper data to test the proposal. We knew that because that was the very reason we were given by the LSC for relegating our GFS Plus to the annex of the consultation paper. The alternative, that there was now such data, would have meant we had been seriously misled by the LSC or the MoJ during our Steering Group meetings.
14. Thirdly, and perhaps worst of all, the sums showed that, far from observing that 5% reduction that had been imposed on us from the start, the extension of RAGFS was intended to produce savings on VHCCs of between 30 and 50%, yes 50%.
15. The explanation given to the sub-group for this appallingly late change of tack was simply that "*Ministers wanted it.*" This was therefore something imposed on the LSC by the MoJ. We know that this is an option which has been dreamt up on the hoof because it had simply never featured in any discussions or negotiations we had had with the LSC and the MOJ in the previous 18 months.
16. Once again, we had negotiated with the government in good faith and once again the government had repaid us by not so much moving the goal posts as knocking them down and repainting the pitch into the bargain.
17. Even so, we were confident that the proposed extension of RAGFS (what we now call Extended or EGFS) would not be attractive to the profession once GFS Plus was fully explained. The GFS Plus scheme enjoyed the support of all the stakeholders. The only reason it was not being formally consulted upon was because, as we were told, the LSC did not have enough financial data to test it: if it were a formal consultation option and the Bar and the Law Society accepted it, the LSC felt they would be writing a blank cheque in the absence of data.
18. That's why it is in the annex but we were quite positive that once the scheme was explained to members and once the fresh data had been collected, GFS Plus would be the replacement scheme for VHCC. That's why the CBA wrote to its members on 8 December suggesting they vote for Option 2, as the best "holding" option until the data was in to quantify the variables in GFS Plus.

## **Second MoJ RAGFS Paper December 2009**

19. That was the position until the bombshell of the MoJ paper of 16 December 2009, the consultative follow up to the August paper. The MoJ now conceded, as it had to, that its original figure of 23% for the differential between prosecution and defence fees was wrong and that the correct figure is 17.9%. And they now claim the real reason for the reduction is the £360 million the government says has to be saved.
20. In this second paper, the MoJ wants to save £47-48 million on advocacy, as opposed to the roughly £6-7 million that a 5% cut in VHCC would have produced.
21. The one impact we can be certain of is that it will mean a reduction in fees – this time of between 30 and 50% - and that is before we take into account the proposal to reduce RAGFS fees themselves by between 13.5 and 18%! In other words if EGFS is implemented for 40 – 60 day cases the reduction in those fees will be 30 – 50% from what they would have paid as a VHCC followed by a further 13.5% cut.

## **A TALE OF TWO PAPERS**

22. In this paper, I am going to:
  - briefly explain the two papers that are out for consultation at the moment, the first from the LSC on VHCC and the second from the MoJ on AGFS;
  - set out some provisional and early thoughts on how we might proceed.
23. I assume that most if not all of you will be familiar with the thrust of these two papers and many of you will have read them through and through, so what follows is a summary, no more. It is no substitute for reading the papers.

## **LEGAL SERVICES COMMISSION VHCC PAPER**

24. The first consultation paper (“the VHCC paper”) was issued by the LSC on 2 December 2009 and is due to close on 8 February 2010. It offers advocates the choice of three options:
  - Option 1: The existing panel scheme. You have to sign the 3 year VHCC contract that most of us rejected but if you choose not to, you can do these cases on the present “ad hoc” system, where you are paid by your solicitor as a disbursement, not by the LSC. This is how most counsel are currently doing VHCCs
  - Option 2: A variation of the present scheme called Benchmarking, in which many common tasks that are presently negotiated, such as the minutes per page of

statements and exhibits, are standardised and paid at a minimum rate that cannot be reduced but can be increased by negotiation. You do not sign the panel contract but a one-off contract for that case only and you are paid directly by the Legal Services Commission

- Option 3: The extension of the existing RAGFS to cover cases lasting between 40 and 60 days. ["EGFS"]

25. In the annex to the paper is the Advocates' Sub Group's scheme called GFS Plus. That scheme is not being formally consulted as the Legal Services Commission claims not have accurate data to test it. I will outline the structure of the scheme later.

26. When I wrote to you on 8 December 2009 that members would be likely to find Option 2 the most attractive of those being consulted upon, essentially the existing ad hoc scheme but paid by the LSC. That was to have been a potential holding option until the data was collected that would enable GFS Plus to be properly evaluated and consulted upon.

#### **MoJ RAGFS PAPER**

27. However, on 16 December 2009, without any warning, the MoJ issued the second paper ("the cuts paper" following up that issued on 20 August) that proposed to purport to equalise prosecution and defence fees by cutting the latter by 23%, later revised to 18%.

28. The closing date for this paper is 24 February 2010.

29. This cuts paper offers us 2 options;

- An immediate one-off cut of 18% across the board i.e. all hearings; or
- A smaller cut of 13.5% phased over three years starting in April 2010 providing we accept Option 3 of the VHCC paper i.e. the extension of RAGFS ("EGFS")

#### **CPS COMPARISON**

30. These cuts were based on the argument that post-Carter, the CPS rates are, on average, 18% lower than RAGFS and the CPS has had no difficulty in attracting advocates to work at their rates.

31. It is a fact that CPS rates are, on average 18% lower, although the profile of their scheme is rather different, so that in some cases the prosecution advocate receives

higher fees than the defence advocate while in others, most notably sex cases, the prosecution advocate can receive little more than half.

32. It is equally a fact that at the time of Carter and for two years afterwards there was a widespread understanding at the Bar that this anomaly would be rectified by increasing CPS fees. Peter Lodder QC, the then Chairman of the CBA, gave evidence to the Justice Select Committee about this differential and the expectation it would be dealt with.

33. It is also a fact that the government has turned this argument on its head in seeking to justify cuts that have in reality got nothing to do with any real or perceived disparity but, we are now told, are born out of economic necessity.

#### **OUR REACTION**

34. But unfortunately, this is all history now. We have made all these points and more, in the CBA campaign to MPs and we have made them, very forcibly indeed, face to face with Jack Straw and Lord Bach. These arguments and our wholly justified anger have got us nowhere. As they say in politics, we are where we are and it is not enough to be angry about how we got here.

35. The purpose of this paper is to explain the options open to you now and to explain some of the risks in accepting, Snow White-like, the shiny apple of VHCC Paper Option 3 (EGFS) and the Cuts Paper Option 2 (staged 13.5%). Any option that the government appears to want the professions to select, as it appears to in the way these choices are presented, must be viewed with a degree of caution. In this case justifiably so.

#### **A NO BRAINER?**

36. At first blush, the choice between the two options in the cuts paper is a no brainer. Who would want 18% cut now if they can have a 13.5% cut staggered over 3 years? Not only is the cut less, but who knows what will happen in the following 2 years? And if you don't or rarely do VHCC, why should you care about the extension of RAGFS to 60 days?

37. And isn't it right that we should encourage the junior bar by giving up some of the fees available on VHCC to help new and junior barristers?

38. Besides isn't it better to extend RAGFS to 60 days and get rid of the dreaded contract managers? Isn't that a price worth paying?

39. We must avoid falling into this trap that the government has laid, whether deliberately or not, by squabbling among ourselves between those who want to do the best they can for VHCC and those who want to minimise the cuts to RAGFS. We are all in this together. Very few of us live on VHCC alone and very few will never do a VHCC so while most live on a diet of RAGFS, VHCC is still important. We are all in this together.

### **THE GEARING EFFECT**

40. The spend on RAGFS IS about five times bigger than the spend on VHCCs. In the Legal Services Commission paper, the spend on advocacy on all VHCCs in 2008/9 is said to be £51m. I am told that the spend on RAGFS is about £280m i.e. over five times more.

41. This gearing effect means that savage cuts to VHCC make relatively little impact on the overall spend, so there will still have to make big cuts to RAGFS.

42. The Ministry of Justice want to save £47/8 million but EGFS "only" saves £8.7m, so it still needs £40 million savings from RAGFS

### **ANOTHER LITTLE NASTY**

43. You should also be aware of another little nasty tucked away in the Cuts Paper at paragraph 29. The MoJ says that because the Option 2 cuts are less than the 18% disparity, it is planning to issue a further paper *"early in the New Year.... on proposals to pilot a single graduated fee, as was originally recommended by Lord Carter. If we proceed to implement a single fee we anticipate that we might make some further savings that would help to make option 2 sustainable in the longer term."*

44. This is One Case One Fee, a further consequence of taking the poisoned apple.

### **WHAT TO DO?**

45. So what should you do? I am not going to be asking anyone to take concerted action, each of you as individuals has to decide what she or he thinks is in her or his best interests.

46. All I ask is that you **DO RESPOND** to both papers and that you consider the options very carefully before you do respond.

47. The goal is easy to state:

- Replace VHCCs and all that go with them with a variation on the graduated fee scheme and
- keep cuts to a minimum.

48. So what do I think is best, given what is on offer? I do want to replace VHCCs with a graduated fee scheme but not with EGFS.

49. On the basis of all the data that the Bar Council has been able to access and all the comparisons that the Bar Council has been able to undertake, in almost every case barristers will be worse off under an EGFS than they would be under any version of VHCC or GFS Plus. This is most simply demonstrated by the fact that the LSC is planning to save between 30% and 50% (the worst of the cuts affecting juniors!) of the current spend on VHCCs by extending RAGFS. I also want to keep cuts to a minimum.

50. The Bar Council and the CBA are jointly preparing a detailed response to the consultation. We will do all we can to circulate our response a week before the deadline for final responses so you can take account of it. I would urge you therefore to await our group response before submitting your own. We have written to Legal Services Commission asking for deadline on VHCC to be extended to 24 February. I will however offer some thoughts or early impressions of the options.

#### **MY POSSIBLE RESPONSE**

51. My response to the LSC “VHCC paper” will be:

- to vote for GFS Plus (the scheme in the Annex devised by the Bar Council and SAHCA) and Option 2 Benchmarking as a holding position until GFS Plus is ready to be implemented; and

52. My response to the MoJ “Cuts paper” will be:

- to vote for **neither** Option but to suggest instead a variation of Option 2, namely, that if cuts are really considered appropriate (despite the effective freeze on Legal Aid rates for a decade, the rigorous and recent costings by Lord Carter, and the front line nature of the advocate) they should be negotiated in an orderly fashion with the relevant professional bodies in a

structured, considered fashion and not simply imposed on the hoof and across the board.

53. Possible reasons for this approach could be that:-

#### **GFS PLUS BETTER THAN ANY VHCC**

54. Firstly ,GFS Plus is better than both the present and proposed VHCC regimes as:

- It objectively values the case rather than merely measuring the hours spent
- It simplifies case categorisation but still takes account of the defendant's role
- It makes Daily Payments during the trial that include not just a refresher but other preparation, at rates that are designed to be consistent with the pre-trial preparation rates
- It virtually does away with the need for contract managers.

#### **GFS PLUS BETTER THAN EGFS**

55. Secondly, GFS Plus is better than extending RAGFS to 60 days [EGFS] as:

- EGFS does **not** take account of the defendant's role in a case
- EGFS does **not** automatically pay for any unused material or conferences
- EGFS does **not** automatically make any stage payments pre-trial while the case is being prepared
- EGFS does **not** pay proportionately for significant pre-trial hearings
- EGFS does **not** pay full refreshers after 40 days
- EGFS does **not** pay for pages over 10,000

56. Most critically, a vote for EGFS is a vote for One Case, One Fee

#### **CRUCIAL POINT**

57. You will **all** be worse off under EGFS than you would be under the any version of VHCC or GFS Plus. This is shown by the fact the LSC are planning to save between 30% and 50% of the current spend on VHCCs by extending RAGFS (see pages 62,71 and 72 of the paper).

58. It may help if I give you a very brief outline of GFS Plus and some examples to show what I mean

## **GFS PLUS CASE CATEGORISATION**

59. Two criteria combine to arrive at Case Categorisation

- CASE SERIOUSNESS
- DEFENDANT'S ROLE

60. Case Categorisation takes place at the start of a case. Litigator and Advocate will separately agree categorisation with the Contract Manager. The nature of the prosecution case will be important. This is the only negotiation required by GFS Plus.

61. There are 2 classes of Case Seriousness and 3 levels of Defendant's Role but for simplicity's sake there are not six different Case Categories but four.

## **GFS PLUS UPLIFT FACTORS**

62. Each category has an enhancement – the "Uplift Factor". Uplift factors are defined relative to the lowest D category. Thus, relative to the least serious case with the lowest level of defendant role (category D) a case in category C will be paid 5% more, a case in category B will be paid 10% more and a case in category A will be paid 20% more.

63. Counsel will be paid according to the role they play, QC, Leading Junior, Led Junior, Junior Alone.

## **PRE TRIAL AND TRIAL RATES**

64. The Fee for Pre Trial Stage is determined by the Pages of Prosecution Material ("PPM"). The Preparation Fee = PPM x Base Page Rate x relevant Uplift Factor x Counsel Role Multiplier.

65. PPM to which the "Base Page Rate" is applied is all the used/served prosecution material in any format.

66. The scheme divides payment into eight 3-month stages giving 1/8th (12.5%) of the preparation fee which is paid every three months, based on assumption there is, on average, a 2 year pre trial preparation period.

67. The daily rate has been calculated to include all preparation work at trial and equates to the pre trial preparation rate.

68. We have provided some worked examples as follows. These apply the Base Page Rate of £2 per page and a Daily Rate of £800 as used out in the scheme set out in the Legal Services Commission VHCC paper.

### **FRAUD: JUNIOR**

GFS Plus Level 3 defendant: EGFS Cat K

- 8,000 used pages 130 witnesses 4,000 pages unused, 420 minutes video

Hearings & Conferences

- 2 hearings less than half day and 2 half day plus prep
- 25 hours of conference

Trial

- 55 days to summing up
- 5 days to verdict

**Under GFS Plus = £70,440.00**

- But under EGFS (Option 3 LSC) = £42,312.80 (60% cut); and with the 13.5% cut phased over the following 3 years (Option 2 MoJ):
  - £40,408.72 (April 2010)
  - £38,504.65 (April 2011)
  - £36,600.57 (April 2012)

### **DRUGS UNDER £20m: JUNIOR**

GFS Plus Level 3 defendant

- 5000 used pages, 89 witnesses 1000 pages unused, 2400 minutes tapes

Hearings & Conferences

- 2 preparatory hearings each less than half day
- 15 hours of conference

Trial

- 45 days to summing up
- 4 days to verdicts

**Under GFS Plus = £55,880.00**

- But under EGFS (Option 3 LSC) = £31,781.74 (57% cut); and with the 13.5% cut phased over the following 3 years (Option 2 MoJ):
  - £30,351.56 (April 2010)
  - £28,921.38 (April 2011)
  - £27,491.21 (April 2012)

## **MURDER: JUNIOR**

### GFS Plus Level 3

- 1300 pages used 110 witnesses, 2000 pages unused, 2400 minutes tapes

### Hearings & Conferences

- 2 hearings less than an hour
- 2 more than an hour less than a half day
- 2 more than half day,
- 20 hrs conference,

### Trial

- 51 days to summing up
- 6 days to verdict:

### **Under GFS Plus = £49,850.64**

- But under EGFS (Option 3 LSC) = £35,863.70 (72% cut); and with the 13.5% cut phased over the following 3 years (Option 2 MoJ):
  - £34,249.83 (April 2010)
  - £32,635.97 (April 2011)
  - £31,022.10 (April 2012)

## **NOT THE LIGHT BRIGADE**

69. We have to be pragmatic and realistic. We have to recognise that in these economically straitened times, the government will want to make savings in public spending. But that does not have to mean these savage and unprincipled cuts to fees that have already seen their value eroded by a decade of inflation.

70. The savings sought by the Government can and should be delivered by a properly designed fee scheme that pays a fair fee for the work and cuts away the unnecessary bureaucracy. GFS Plus can do exactly that. The management of cases by the LSC is an expensive and unnecessary burden on the taxpayer which GFS Plus reduces to a bare minimum.

71. You may well have seen the devastating attack which the National Audit Office launched on the LSC. Its criticisms included not collecting data or evidence to back up its analysis and not properly understanding its suppliers, including the Bar. Yet within literally days of the NAO reporting, on 6th December 2009, the LSC and the MoJ have both issued consultation papers which plainly are not based on any evidence assessing the impact of the cuts at all. We are writing independently to the LSC and MoJ on this.

72. If cuts have to be made to our fees because of the economic mess the government has got us all into, they should be rational, measured and proportionate cuts which can be implemented without damaging the quality of the Criminal Justice system.
73. Savage across the board cuts will result in a flight from publicly funded work by the most able, to the detriment of the whole criminal justice system and at considerable cost to it. The fact is that GFS Plus can produce a saving to the MoJ of more than 5% before taking into account the substantial additional saving from reducing the need for and role of contract managers.
74. History has taught us that we cannot trust the government not to come back for more cuts later once these have been implemented. If there are to be cuts, we should strive for undertakings to guarantee that there will not be further cuts on the thinnest of pretexts imposed on the profession. Furthermore, we must also seek formal undertakings that once such cuts have been implemented, fees in future will be inflation linked to prevent the same saga that we had when AGFS was first introduced necessitating the whole Carter review.

## **SUMMARY**

75. I appreciate it is difficult for individuals to know at this stage what is the right way to respond but I hope this paper has provided some guidance and that by the time the Working Group has published its response, you will have enough information to make your decision. It seems cuts could be forced on us. These do not have to be the ones the government suggests. You must, of course, make your own individual decision there is no question of acting in concert. My present view is that I will:
- Go for Option 2 LSC paper “for now” but vote for GFS + as the system I want for VHCC work (delivering that conservative 5% saving and LSC administration cost savings)
  - Reject both options for cuts in the MoJ Paper – if cuts have to be imposed, I believe they should be done through negotiation with the profession and after a proper impact assessment.

Paul Mendelle QC  
25 January 2010