



The Rt Hon the Lord Trefgarne
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

6th March 2018

The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 (2018 No 220)

The Criminal Bar Association (CBA) is grateful to the Secondary Legislation Scrutiny Committee for its invitation to comment on The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018.

The issues to be considered are:

- Any significant change in circumstances since the original consultation.
- Any funding shortfalls.
- Any radical change proposed by the Statutory Instrument.
- The speed of implementation of the change and the potential effect on billing procedures.

This response is based on consultation with the membership of the Criminal Bar Association. This process is on going and as yet many members are still assimilating the detail of the reforms, which are radical and complex.

Change in Circumstances

The aim of the scheme as proposed by the Government was to “better reward work done”. It proposed that advocates no longer be paid uplift for pages of prosecution evidence (PPE). Each case will have a flat rate fee. There will be no separate payment for reviewing the evidence, however much is served. Since that consultation, the committee will be well aware of the recent failures in disclosure. The Director of Public Prosecutions has referred to the “vastly increasing use of social media and mobile phone messaging [that] bring challenges to all parts of the criminal justice system”. This significant change was not considered by the original consultation nor was the potential implications of the service of large amounts of material, which requires the consideration of advocates. This important work will be undertaken with no prospect of payment.

Funding Shortfalls

The scheme provides no new money. Funding has not increased at all and certainly not by 9m which could be the impression given by paragraph 10.3 of the Explanatory Memorandum. There is no new investment in the scheme. In fact it may be that the scheme will see a reduction in spend of £2m. A policy of cost neutrality was a basic requirement set by the MOJ in devising the final scheme. The Impact Assessment, (Table 9, page 21) states that against the most recent set of case data (2016-17), in order for fees to be cost neutral overall, fees should be set at a level which would involve a total spend of **£226m** a year (the actual spend in 2016/17, which includes VAT at 20%). Table 9 shows that the fees have actually been set at a level geared to a total spend of **£224m** a year. **£224m** was the early working figure for spend in 2016/17 but by December 2017 more complete and accurate financial information was available. There is no doubt that had the accurate figure been available in the early summer of 2017 the fee modelling would have been designed to achieve cost neutrality at the **£226m** level. The fee structure has not been revised to reflect this. £2m is a significant amount in the context of the low overall spend and could have resulted in more money being made available for junior bar fees – a key aim of the new structure. The Criminal Bar Association has drawn this matter to the attention of Ministers and asked that the £2m is made available.

There is no inflation protection in the scheme and no mechanism for a formal review with commitment to future investment - although an appraisal is to take place within 2 years. Advocates fees have fallen by 40% in real terms over the last 10 years. The viability and sustainability of a career at the Criminal Bar is under threat. Many talented young practitioners, particularly women, have been forced to leave the bar for financial reasons. Barristers must fund their unavoidable administrative overheads, holiday, maternity/paternity, sick pay and pensions from very low, declining and uncertain levels of remuneration. Those from less privileged backgrounds will be deterred from pursuing this line of work; the profession will become less diverse. This will impact on the future pool from which the judiciary are drawn.

Change

The proposed changes to the AGFS scheme are far-reaching and comprehensive. The result will be a fundamental and radical change in the way Advocates are paid. Significant concerns were raised as part of the consultation process. Some modest changes were made following consultation – for example increasing standard appearance fees and changing the categorisation of some cases.

Speed of Implementation

We are informed that the speed with which the Government proposes to implement the scheme (1st April) is likely to cause significant problems with billing. The company that provides the majority of chambers with their billing systems (Lex) has indicated that, given to the short notice and the significant nature of the change, updates to Lex will not be available for several months. This will mean that all billing is likely to be a manual procedure for a significant period of time. This will be slower and negatively affect the cash flow of advocates. As ever, those on the lowest incomes at the Bar, the most junior, will be the worst affected.

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