

The Scrutiny Committee's report

(<https://publications.parliament.uk/pa/ld201719/ldselect/ldsecleg/88/8802.htm>) has now been published. The relevant extract is below.

Legal Aid (Remuneration)(Amendment) Regulations 2018 (SI 2018/220)

Date laid: 23 February 2018

Parliamentary procedure: negative

*Summary: This instrument reforms and restructures payments made under the Advocates' Graduated Fee Scheme ("AGFS"), the fee scheme through which criminal defence advocates are paid for carrying out publicly-funded work in the Crown Court. A key element of the reform is to move away from past reliance on Pages of Prosecution Evidence as a means of calculating the work done, because of the increasing use of electronic evidence, such as mobile phone, hard drive and video material. Instead payment is based on a more detailed categorisation of the offence that the defendant is charged with, moving from the current 11 categories to 48 which are set out in document, *Banding of Offences in the Advocates' Graduated Fee Scheme*. The Impact Assessment (IA) states that these changes will increase legal aid spend by an additional £9 million per year. Submissions from the Bar Council and the Criminal Bar Association dispute this conclusion and we have written to the Minister seeking an explanation for the disparity of figures in the Explanatory Memorandum and the IA.*

These Regulations are drawn to the special attention of the House on the ground they give rise to issues of public policy likely to be of interest to the House

24. These Regulations have been laid by the Ministry of Justice (MOJ) under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and are accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). The Regulations cross-refer to the document *Banding of Offences in the Advocates' Graduated Fee Scheme*¹⁴ ("the Banding Scheme"), which categorises offences. In conjunction with the instrument, this will determine the level of the payment an advocate will receive. We have received submissions on the revisions from the Bar Council and the Criminal Bar Association, and these are published on our website. ¹⁵

25. This instrument reforms and restructures payments made under the Advocates' Graduated Fee Scheme (AGFS), the fee scheme through which criminal defence advocates are paid for carrying out publicly-funded work in the Crown Court. The AGFS was last subject to major change in 2007. The MOJ states that these amendments are intended to reward the work done by defence advocates in Crown Court cases more accurately, are simpler and clearer, and support other reforms to the criminal justice system, such as the Better Case Management (BCM) programme.

The current scheme

26. The current AGFS calculates advocates' fees through a complex formula, which comprises a "graduated" fee and several "fixed" fees. Key considerations in calculating the complexity of the case, and therefore the level of graduated fee, are the number of witnesses or the number of Pages of Prosecution Evidence served (PPE). The graduated fee also includes several "bundled" payments that include, amongst other things, attendance at the first and second day of a trial, attendance at the Plea and Trial Preparation Hearing (PTPH), and attendance at four "standard appearances" (for example, the preliminary

hearing, or pre-trial review). These bundled payments are paid regardless of whether they occur in a case or not.

The changes proposed

27. A key element of the reform is to move away from PPE as a means of calculating the work done by an advocate in a case. Electronic evidence such as mobile phone, hard drive or video material, is being used increasingly, and the complex formula currently used to convert this into "pages" means PPE is no longer an accurate method for assessing the amount of work done. The formula also makes it difficult for advocates to know how much they will be paid before they take on a case.

28. Nor will the number of witnesses be taken into account; instead payment will be based on a more detailed categorisation of the offence that the defendant is charged with. Under the current scheme, there are 11 offence categories, the reformed AGFS, set out in the Banding Scheme Document, has 48. Tables set out in the Regulations may then increase the weight given to the amount of time spent by an advocate on a case, to determine the fee to be paid. The instrument also provides that certain tasks (for example, standard appearances, PTPHs) will in future be paid for individually, which the MOJ states is consistent with BCM reforms which aim to reduce the number of unnecessary hearings.

Consultation outcome

29. The Government consulted on proposals to reform the AGFS for eight weeks and received 408 responses from members of the legal profession and representative bodies. 43% to 50% of respondents agreed that the new categorisation of offences in the Banding Document should be introduced. Respondents expressed concern, however, about the potential impact of the proposed scheme on junior advocates who typically take the less complex cases. The MOJ states that the new AGFS has been adjusted to assist them, for example, by increased fees for standard appearances and PTPHs that are often undertaken by juniors. Both the Bar Council and the Criminal Bar Association acknowledge that the consultation was constructive and the MOJ responded to their most pressing concerns about fees for junior advocates.

Impact

30. The MOJ indicates that the impact of the new AGFS on individual advocates will vary according to the mix of work they undertake: for example, those conducting more trials are likely to be paid more under it, but those who take guilty pleas are likely to receive lower fees. Although it is difficult to predict the likely outcome, as it now depends more on the mix of cases, the IA states that these payment changes will not be cost neutral, and paragraph 10.3 of the EM estimates that the new scheme is "likely to increase legal aid spend by an additional £9 million per year".

31. We have received submissions from both the Bar Council and the Criminal Bar Association contesting this statement. Both point to Table 9 on page 21 of the IA which does confirm that MOJ anticipates that the spend will be £9 million above the figures for 2014-15, but goes on to state that this would be £3 million above the figures for 2015-16, and £2 million below the figures for 2016-17. So rather than being more generous as indicated in the EM, the MOJ's figures in the IA indicate that the restructuring will represent a cut in funding of around £2 million (with the caveats set out in paragraph 15 above).

32. Both submissions also mention that there is no inflation protection built into the scheme and that there is no mechanism for regular review. The Criminal Bar Association goes on to describe the negative effects this change will have on the recruitment and retention of self-employed practitioners whose costs will rise but whose income will not.

33. The Criminal Bar Association also mentions a transitional impact from the restructuring. Because the restructuring changes from 11 to 48 categories of offences and is to come into effect only five weeks after being laid before Parliament, this will create problems with billing. They state that the company that provides the majority of chambers with their billing systems (Lex) has indicated that it will not be able to update its systems for several months. This will mean that all billing is likely to be manual for a significant period of time. This will be slower and negatively affect the cash flow of advocates, with the most junior advocates being the worst affected.

Conclusion

34. We understand that the MOJ's standard policy with any review of fees is that the outcome should be cost neutral: the fees may be distributed in a different way but the total sum expended should not increase or decrease. Although the deviation in question is a small percentage of the total expenditure, there is a clear disparity between the figures in the IA and the way the information is presented in the EM. We have therefore written to the Minister to seek an explanation.

Declarations of Interest

Criminal Legal Aid (Remuneration)(Amendment) Regulations 2018 (SI 2018/220)

Lord Trefgarne

Close relative a barrister at the Criminal Bar

Baroness Blackstone

Chair of the Bar Standards Board

Attendance:

The meeting was attended by Baroness Blackstone, Lord Faulkner of Worcester, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, Baroness O'Loan, Lord Sherbourne of Didsbury, Lord Trefgarne, and Baroness Watkins of Tavistock.

[ends]