AGFS: WHAT'S THE CBA'S PLAN?

Scheme 11: Complex, evidence heavy cases are not adequately remunerated.

We are not satisfied with the current scheme (Scheme 11). The CBA's position has been consistently stated. Whilst improvements in fees for mainstream cases, election cracks and the elimination of non-payment for Day 2 of trials and all pre-trial and sentence hearings are positive, the new scheme has serious, unacceptable structural flaws. Brief fees in the most complex and demanding cases must reflect the work, skill and responsibility these cases require. Currently they do not.

In April the CBA organised a national boycott of the new scheme (scheme 10) as soon as the details were first published. It was immediately obvious that the difficult and preparation intensive cases would in future be paid as if they were straightforward 3 or 4 day cases, and many daily attendance and other fees were too low.

The AGFS budget has recently been increased, following our action and the narrow vote by CBA members to accept an offer of an extra £15m, but the structural problems remain. Too many long, serious and evidence heavy cases are not remunerated adequately. Who will take a six week case with thousands of pages of evidence if you would earn more and have to work less hard, with less stress, doing a few shorter, more straightforward cases? Fees for guilty pleas and cracks, when geared to inadequate brief fees are also inevitably too low.

Consultation with the membership, meetings across the country.

The CBA will now hold meetings across the country and survey the membership's views. These are intended to build on the earlier juniors' and HOCs' meetings held in November. At present we have no mandate for further action but the clear signs are that we need to consult the membership again.

- In my first Monday Message in September I said this: '*The [AGFS] scheme has too many flaws which need addressing, for example, flat brief fees regardless of volumes of material served result in unreasonably low remuneration in too many instances. A brief fee of £700 or £1300 (which includes payment for the first day of the trial) to prepare a case involving 5000 or 6000 pages of important evidence, sometimes more, is not adequate.*'

- On 1st October I cited a particularly egregious example of the problems: '*In a recent example a fee of only £900 was payable for a guilty plea in a multi-handed rape and grooming case with 15,000 pages of evidence. Fees at this level for many, many hours of work, and the heavy professional responsibility, will decimate career progression and threaten the viability of chambers.*'

- On 22 October I reported further 'appalling' fee examples: *'Two appalling examples of utterly inadequate remuneration under the new scheme were brought to us this week. One was an allegation of large scale conspiracy to produce and supply fraudulent documents to support bogus visa and passport applications, council tax exemptions etc. The trial estimate is 8 weeks, the indictment contains 27 counts, there are 15 defendants, and the prosecution is represented by a QC and junior. The PPE runs to 4000 pages. Defence counsel's brief fee is £650, with refreshers of £325. Under*

the previous scheme the brief fee would have been about £4500. I have sent this example to the MoJ for comment.

In the second example, again experienced counsel was sent the brief, to defend an allegation of assisting an offender, to be tried alongside defendants charged with murder. The trial will last several weeks and the pages of evidence which need to be read run into the thousands. The brief fee is £550 (including the first day), the refreshers are £300. We can all work out what the hourly rate for preparing such a case at these fees works out at. (If the case pleads the fee will be £275!)'

- On 5th November I commented*: [The Lord Chancellor, the Legal Aid Minister, and the Attorney-General] say they want a vibrant, diverse, high quality profession. This will only happen if remuneration is set at realistic levels, both for those at the start of their careers, but also geared to assist career progression, and to retain ambitious women, in particular, and increasing numbers of men, who may take career breaks or want to configure practice around other caring responsibilities. We are currently losing far too many of them.'*

- And in December when the government's consultation response was published the MM restated the CBA's position:

1. *This was not a scheme the CBA 'agreed to'. The new money is, and has always been, only the first step in securing a fee scheme that remunerates us properly. There is a considerable way to go.*

2. *There remain significant flaws in the structure of the new scheme. Whilst the new money brings real improvements to fee levels for work undertaken by mainstream juniors, brief fees for the most demanding and evidence heavy work remain too low, fees for 'cracks' and guilty pleas do not reflect adequately the work these cases require, and there is still no payment for reviewing unused material.*

Juniors see a bleak professional future

The unhappiness currently being publicly expressed, by many junior juniors about their long term futures in an open letter, and by some more senior practitioners who have set up an anonymous twitter account, is unsurprising, and effectively restates the CBA's consistent public position.

Scheme 10 fees were completely unacceptable in too many places. Scheme 11 fees are better, given the extra money allocated, but the fundamental problems in the remuneration of more serious cases remain completely unaddressed. As the new fees are being billed the profession is understanding better the long term damage we are facing to our sustainability, quality, diversity and retention. The juniors under 12 years call who have signed the letter are dismayed at what currently lies ahead for them as they seek to progress.

It is not inconsistent to say that it is a good thing that the many iniquities disproportionately visited on the more junior by scheme 9 have been righted. No one should want to go back to that. Brief fees will no longer be depleted to almost nothing by the pre-trial and sentence hearings, the outrageously unfair impact of no refresher for the second day in shorter cases has gone, stand out fees have almost tripled, as

have fees for appeals against convictions, and almost every refresher is higher than under scheme 9, in many instances by more than £100. This represents tangible progress and a change of financial direction for the first time.

BUT (and it is a very big and problematic 'but') the price for these improvements has been paid very heavily by brief fees (for pleas and cracks as well as for trials) in high PPE cases, which have collapsed. The money secured by our action in April and May is very visible in many places when comparing scheme 10 to scheme 11 (for example refreshers for s20 trials were previously £325, but are now £505, and many mainstream brief fees have been increased) but the impassioned, angry complaints against inadequate brief fees for the bigger cases will continue. These complaints are soundly based because flat, inflexible brief fees, regardless of volumes of material or length of trial, or numbers of co-defendants or complainants, don't work. This issue has not been addressed. It must be.

We do not need to wait for a 'review'

As has been observed, and is unarguably true, we already know this; we will not learn anything new in this regard if we wait a further 18 months or two years. The CBA's consultation response set out our position on this. It doesn't require 18 months' worth of evidence to reveal that a scheme that remunerates the brief fees in cases with thousands of pages, potentially lasting many weeks, at the same rate as cases in the same category with a few hundred pages (or less), lasting a few days, has a fundamental flaw in its design. I have explained this directly to the Legal Aid Minister, the Attorney-General and more recently to the Senior Presiding Judge.

The real life example I have given them is a 6000 page multiple defendant and multiple complainant grooming case. The brief fee was a flat £1800. If the daily rate of £525 is subtracted to reflect the first day's attendance, the fee for preparing this case is £1275. If 2 minutes per page were allowed to prepare the case the hourly rate works out at £6.37/hr; at 1 minute per page the hourly rate rockets to £12.74/hr. Both figures are before 30% overheads are deducted. £1800 might be an acceptable fee if the case involved only 500 pages (£77/hr @ 2mins pp) or even 800 pages (c.£48/hr @ 2 mins pp), but not for cases considerably in excess of this. The same exercise can be repeated category by category. Fixed fees might balance out for cases with up to 2000 pages or even 2500, as most will have many fewer, but once cases exceed this sort of level, the fees become completely inadequate. The 'swings and roundabouts' arguments cut no ice because they simply do not apply to the bigger cases; all the fees are inadequate.

Special preparation is no answer to the problem

Special Preparation claims do not provide a solution to this problem. First, the page threshold for SP claims is set at 10,000 pages (15,000 for drugs and an even more inexplicable 30,000 for fraud) so will not apply to any case with between 3000 and 10,000 pages. Second, if claiming special preparation under the 'very unusual factual issue' criteria the advocate has no way of knowing in advance whether their claim for the necessary extra work they have to undertake will be successful. The advocate therefore bears a very substantial financial risk when taking such a case on, and the history of 'very unusual' claims tells advocates that their claim is likely to be refused. Third, there is a huge amount of extra admin and bureaucracy in submitting such a claim, then challenging and formally appealing the refusal; what is needed is certainty

of the full and appropriate fee at the outset. Fourth, the hourly rate for special preparation, £39.39, is in any case derisory.

The cuts must be reversed

So how might the Lord Chancellor answer these complaints? The fact that a little more money has recently been made available, after years of cuts is no answer. It is not enough. The fact that the MoJ's budget has been hacked to bits beyond reason, defying claims of a commitment to the rule of law, is no answer. This has been a deliberate political decision, also seen in the decimation of civil legal aid, started by the last Labour adminstration, as acknowledged by a penitent Lord Falconer a few days ago, but pursued with even greater vigour by the current government. The cuts must be reversed.

At meetings in November, we explained to Heads of Chambers, then to juniors, that the first step in our strategy was to make sure the 'full' £15million, the membership narrowly voted to accept, was honoured and deployed to the best advantage of junior and middle ranking juniors. This has been done. The financial air pockets, hurting the most junior, have been filled, a minimum refresher floor of £400 has been set for the first time and various other fees have been enhanced significantly. But there must also be progression. Brief fees for larger, serious and complex cases must be restored to more realistic levels to protect for the future a high quality, diverse and independent Bar.

Engagement: an objective and a strategy to deliver it.

We will now to consult on how best to go forward. We urge you to attend the meetings arranged by the CBA and engage with this process. We do not rule out days of action to demonstrate just how frustrated the Bar is. Undoubtedly we are a powerful organization when acting in concert. Identifying the problem is very easy. The CBA has done this for months and the anonymous tweeters have been doing so for the last few weeks.

Coming up with viable, intelligent solutions requires engagement, time and effort. Setting thresholds at 2500, 5000 and 7500 PPE at which points significant enhancements to the brief fee would apply might be a workable, immediate solution; it is one which we have been thinking about. Paying final third cracks at 100% of the brief fee with additional payments equivalent to one relevant refresher per full week of the estimated trial length, ie a 4 week estimate means four refreshers are payable in addition to the brief fee, would restore principles long embedded in AGFS but abandoned since last April. If brief fees were set at more equitable levels for these cases fees for guilty pleas geared to them would also be uplifted.

As Mike Turner QC said at the Heads of Chambers meeting in November we need a clear objective and a strategy to deliver it. Fragmented action with no plan, as a small group seem to be advocating, will undermine us and takes us nowhere. We need to remain cohesive, engage in an open, uninhibited debate amongst ourselves, but also ultimately to speak with one voice, (and when contributing to this important debate let's be honest about who we really are). Unity is imperative.

Achieving the objectives set out above does not happen overnight. Thoughtfulness and realism must inform our approach. At the conclusion of this direct consultation,

we can go back to the MoJ armed with your mandate on these issues. We can say how and what improvements are needed for the AGFS scheme 11. We will endeavor to continue our dialogue with Ministers in the hope that a resolution can be reached without significant disruption to the courts. If they choose not to listen to our arguments then that is a different matter.

Yours,

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Chair of the CBA

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