**NOTE FOR THE SPJ ON AGFS SCHEME 11 (EFFECTIVE FROM 31st DECEMBER 2018).**

AGFS Scheme 10, which came into force on 1st April 2018, radically changed the fee structure for Crown Court defence advocacy. The details of the new scheme were first published on 23rd February 2018 in the ‘Government’s Response’ to the consultation on ‘Reforming the Advocates Graduated Fee Scheme’; the original consultation had been published in January 2017.

It was immediately clear to the Bar that the new scheme would result in very substantial reductions to fees in serious, complex cases with large volumes of evidence, and fees for cracks were also generally far too low. There was a widespread hostile reaction to the new scheme. The Bar took action in April and May 2018. This action was suspended when the MoJ agreed to put more money into the scheme, initially £15m, then after further negotiation an additional £8m, making a total of £23 million (both using the 2016/17 spend figures as a baseline and including VAT). The fundamental structure of the scheme has not changed, but certain fees have been enhanced within it. The AGFS budget has been cut very significantly since 2010; the new money can only be described as a modest first step.

The revised AGFS scheme (Scheme 11) was implemented by Statutory Instrument laid on 10th December 2018, and applies to new cases with representation orders dated from 31st December 2018. It should be noted that applying the new fees to the case load for 2017/18, produces an increase in spend of £15 million rather than the £23 million on the 16/17 figures, so without the new money the original version of the new scheme (scheme 10) if then in force would have resulted in a cut of about £8 million to the actual level of spend in 2017/18.

The new money enabled brief fees in certain categories, lower end refreshers and some other fees, like stand out fees, appeals against conviction and and appeals against sentence to be increased. As far as they go they are all positive and welcome, bringing benefits for the more junior, but the principal complaints about inadequate fees for the more substantial cases have not been addressed, and indeed can’t be without more profound changes to the scheme’s structure.

The most striking and financially significant feature of the new scheme was the change to the calculation of the brief fee. The new scheme ended ‘variable’ brief fees, which had previously been determined on the basis of a combination of (1) the category of offence and (2) the pages of prosecution evidence (or PPE), instead this is replaced with fixed, or ‘flat’ brief fees, which will not be subject to any upward adjustment however much prosecution evidence is served[[1]](#footnote-1), or however long or complex the trial might be. More categories were introduced, said to produce greater variation in remuneration between offences of similar type but graduating the seriousness. However in many instances the difference was marginal, often no more than £300, and many of the new brief fees were in any event very modest. About one third of the new brief fees for juniors were £1000 or less. For example, the standard category brief fee was only £550 however much evidence the case involved or however long the trial lasts. This brief fee was also significantly lower than any brief fee under the previous scheme (this was increased following the action to £725). The basic refreshers, £300 (now increased to £400), were also set at a lower rate than the lowest refresher under the previous scheme.

Fees for cracks and guilty pleas are also fixed, at 85% and 50% per cent of the relevant trial brief fee. This produces much less favourable financial outcomes for cases that plead or crack compared to the previous scheme, very significantly so in serious, heavy evidence cases.

Set out below are some examples of brief fees comparing maximum brief fees under scheme 9 (old) to scheme 11(new). This table sets out maximum differentials (ie 10,000 page cases) but most cases with between 2000 and 5000 pages, of which there are a significant number, are also subject to very severe cuts. The old applicable trial brief fee for 5000 PPE cases is also provided.

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| --- | --- | --- | --- | --- |
| *Offence* | *Trial (new/old max/5000ppe)* | *Crack (new/old max)* | *Plea (new/old max)* | *Max % difference* |
| *Murder (1.3)*  *(led junior)* | *£2575/£9691/£5641* | *£2190/£10,307* | *£1290/£8767* | *85%* |
| *Rape* | *£1900/£12,000/£7100* | *£1615/£10,222* | *£950/£7479* | *85%* |
| *Supplying Firearms (or poss w/i)* | *£2120/£11,500/£6600* | *£1800/£7093* | *£1060/£5603* | *81.5%* |
| *Violent disorder* | *£1400/£11,500/£6600* | *£1190/£7093* | *£700/£5603* | *88%* |
| *Consp to Burgle* | *£800/£11,000/£6100* | *£680/£3115.50* | *£400/£2288* | *93%* |
| *Att Murder* | *£3535/£12,000/£7100* | *£3005/£10,222* | *£1770/£7479* | *70%* |
| *S18 OAPA* | *£1200/£11,500/£6600* | *£1020/£7903* | *£600/£5603* | *89%* |
| *£1million fraud* | *£7700/£12,000/£7100* | *£6545/£8976.50* | *£3850/£6589* | *45%* |
| *Supply 5kg+ Class A drug* | *£5860/£11,500/£6600* | *£4980/£7903* | *£2930/£5603* | *49%* |
| *Human trafficking* | *£1900/£12,000/£7100* | *£1615/£10,222* | *£950/£7479* | *85%* |

The obvious and inescapable problem with fixed brief fees, regardless of size of case, is that a 3 or 4 day case with a few hundred pages of evidence pays the same as a 6-8 week trial with several thousand pages of evidence, and perhaps multiple defendants and/or complainants. The many more hours of preparation the more complex and substantial case requires are effectively unremunerated. Successful senior juniors whose practices mainly comprise these much larger cases are hit extremely hard by the new scheme; some will see their incomes fall by more than a third, possibly by as much as 50%. Junior juniors will do better under the new scheme, as will solicitor advocates but ambitious junior juniors are equally dismayed by the new scheme as they see meaningful career progression devastated.

Five further points are also worth noting:

1. The scheme 9 fees were themselves much lower than fees paid for the same work 10 years earlier, and had already been the subject of severe cuts (some had fallen already by more than 60%).
2. If more senior juniors decide that the bigger cases are not worth doing any more - the remuneration inadequately reflecting the pressure, time and skill these cases involve – this will put a squeeze on cases lower down the scale, with adverse consequences for the more junior, and may result in counsel of insufficient experience taking on the more difficult work.
3. A cohort of able and ambitious women, who previously chose to do a limited number of higher paying cases, which allowed them to be with their children during the summer and as much as possible during other school holidays, will not be able to organise their professional lives in this way any more. Fees have collapsed in these cases. They may leave the profession; several already have (‘the final straw’), others have indicated that they will.
4. The consequences of two big cases, perhaps representing 3 or 4 months work or more, collapsing in quick succession are now financially catastrophic for advocates. The cushioning affect of the previous fee structure, better reflecting the time required to prepare these cases, has gone. A very substantial case which cracks might now pay as little as £600 eg a s18 OAPA conspiracy charged alongside a principal, or principals, indicted for murder. This is not financially sustainable.
5. The impact on the chambers’ structure of the dramatic reduction in fees for the bigger cases should not be underestimated. As well as reducing overall turnovers, as fees fall at the top end and rise at the bottom it will become more attractive to become a freelancer/sole practitioner or in-house advocate, rather than a member of a chambers. Over time this is likely to have a very serious impact on the future training and support provided to junior advocates, career progression, diversity and social mobility, and the existence of a nationally available pool of high quality advocates available to cover serious cases across the country. The best will vote with their feet.

Chris Henley QC

Chair of the CBA

1. *There are two limited exceptions to this in drugs and fraud which both have a PPE threshold which moves the case up a category*. [↑](#footnote-ref-1)