CBA Response to The Ministry of Justice Consultation

The Criminal Legal Aid Review & Accelerated Asks

29th May 2020

Preface

1. This consultation response is written at a time of national and international crisis. Reform of the Advocate's Graduated Fee Scheme ("AGFS") is very important to members of the Criminal Bar Association ("CBA") and to criminal practitioners more widely. Irrespective of the difficulties that the country is facing, there is an obvious public interest in ensuring that there is an adequately funded and sustainable system in place to remunerate criminal advocates. It has been widely recognized that the sustainability of the Bar at all levels of call is essential. The financial pressures caused By Covid – 19, together with the cumulative effect of deleterious policies is without exaggeration, the greatest threat the Criminal Bar has ever faced. Whilst we recognize that there are pressures on Treasury and indeed the Ministry of Justice, this particular area we submit, is one that needs to be prioritized.

2. The re- engagement with the Criminal Legal Aid Review ("CLAR") and its process is welcome. There is now, more than ever, particularly given the issues surrounding the cessation of and the consequent slow return to trials, a pressing need not to let the timetable slip any further, than has already been occasioned.

"The accelerated asks"

3. The consultation and therefore this response solely deals with three areas of AGFS reform:

    - Payment for unused material
    - Payment for paper heavy cases
    - Payment for cracked trials

4. These areas have been accelerated from the wider CLAR. Both the Ministry of Justice ("MOJ") and the legal profession have been working together to propose sustainable solutions to these three discrete areas.

5. There is an urgency to this: the principles that advocates must be remunerated for unused material and appropriately remunerated for paper heavy cases and cracked trials has been accepted by the MOJ since the summer of 2019 and a scheme is now very urgently needed to put this into practice.

Summary response

6. The consultation proposals amount are welcomed as a modest improvement in those discrete areas identified as "accelerated asks". They represent a temporary sticking plaster, and significantly more is needed in the future: they are insufficient to establish a properly funded and functioning criminal justice system.

7. Rates of pay for defence advocates remain unacceptably low. Significant improvements will be needed in the wider CLAR on various issues, including brief fees, hourly rates and importantly, annual inflation based reviews in order to create a funding system which is fit for purpose.

Unused material

Summary response

8. The proposal to pay advocates for reading unused material is welcomed by the CBA.

9. The proposal to pay a fixed amount in each case, is an acceptable way to minimize administration but we do not agree that in principle it is right to pay advocates 1.5 hours' worth of fees for 3 hours actual work. Work done ought to be paid for. We naturally support the proposal that where relevant, the advocate may claim for additional hours in cases where it is needed.

10. The hourly rate (£39.39 for junior counsel) is however far too low and this must be looked at as part of the wider CLAR as a matter of urgency.

11. The rate for special preparation was set 7 years ago in the Criminal Legal Aid Remuneration Regulations 2013 and has not been increased since. This hourly rate was, in itself a reduction from the figure previously paid for Special Preparation at £45 under the Criminal Defence Service (Funding) Order 2007. According to the Office for National Statistics inflation has meant that average prices have increased by, in excess of, 39% since 2007. Even accounting for inflation, this would still result in an inadequate hourly rate.

12. The current hourly rate is far lower than the MOJ pay for experts in criminal cases and far lower than is paid under civil legal aid rates, which also do not represent fair remuneration for the level of work done and skill set.

Response

13. Increasingly large amounts of material is disclosed by the prosecution on the basis that it meets the disclosure test contained in the Criminal Proceedings & Investigations Act 1996 (i.e. "that it might undermine the prosecution case or that it might be reasonably expected to assist the case advanced by the defence"). It is therefore vital that this material is read by the defence advocate preparing the case for trial. It is not an optional extra: it has been disclosed because the prosecution believe that it might assist the defence.

14. The CBA believe that this new scheme needs to be streamlined as much as possible so that it is fair to advocates and can be efficiently dealt with by the Legal Aid Agency ("LAA").

15. This can only be achieved if the material is served by the Crown Prosecution Service ("CPS") with a clear index in each case. Ideally unused material will be uploaded to the Crown Court Digital Case System ("CCDCS") so that it can be viewed in one place rather than served piecemeal through various emails, discs and hard copy paperwork at Court (this is the experience of advocates currently). An index to unused material would have great advantages for case preparation (all parties and ultimately the Court would know

what has been served and what has not been) but would also allow the LAA to know the volume of unused material served in any given case.

16. It is of course accepted that some unused material will not be able to be uploaded and paginated in the usual way (such as mobile phone downloads). However, the CPS ought to be able to specify in each case the volume of pages contained on each disc. This would streamline the process further.

17. Once volume has been established, the MOJ and the LAA ought to allocate a specific amount of time per page. This would allow advocates, in cases where in excess of 3 hours has been spent reading, to submit a simple work log, to specify the unused material that has been read and to paid on the basis of an specific amount of time per page.

18. The CBA agrees with the submission from the Bar Council that this specific amount of time should be set at a **minimum** of 4 minutes per page of unused material.

19. Such an approach has significant advantages for both advocates and for the LAA: certainty for the advocate that work done will be remunerated and a streamlined and efficient method of determining claims for the LAA.

20. This would contrast with the experiences of criminal advocates who have submitted claims for special preparation or wasted preparation in the past in which huge and disproportionate amounts of time have been spent by the advocate in collecting and submitting evidence and justifying the reasonableness of work done.

21. The starting point must be that if the CPS have served unused material on the defence then the advocate must read it. No justification ought to be needed from the advocate or sought by the LAA.

22. The detailed schedule of unused material ("MG6C"), is a lengthy and detailed document in complex cases. It requires careful consideration and is a vital part of the disclosure process. The reading of this schedule must clearly be remunerated as "work done" as it is only through a consideration of this schedule that the advocate is able to establish what has

been served, what has not been served, what is undermining and what needs to requested as part of the ongoing disclosure process. In addition payment under unused must encompass the increased usage of "DMDs" in particular in cases involving allegations of a sexual nature and fraud. DMDs require a deal of active consideration at an early stage, often demonstrating reasonable lines of enquiry. The consideration of unused material is in any case a priority.

Paper heavy cases

Summary response

23. The proposal to pay an hourly rate for the consideration of used material in paper heavy cases is welcomed. The MOJ is correct to conclude in the Impact Assessment that paper heavy cases that are under the 10,000 page threshold are insufficiently paid.

24. However, the proposal does not go far enough and does not catch the correct cases. It needs to be amended, in particular in relation to murder and other homicide cases.

25. As set out above with regard to unused material, the hourly rate (£39.39 for junior counsel) is far too low. The Ministry is referred to those observations.

Response

26. Under AGFS Scheme 9, paper heavy cases were more adequately remunerated than under the subsequent Schemes. With the exception of most drugs offences and most dishonesty offences, page count is irrelevant for the vast majority of cases under AGFS Scheme 11.

27. The CBA would have preferred a system of enhancements inside the AGFS scheme rather than the proposal in the consultation. Scheme 11 contains a model for enhanced payments in drugs cases where more than 1,000 pages of prosecution evidence have been served and further enhancement for more than 5,000 pages. A similar scheme could have been considered for all other offence areas taking into account the category, page threshold

analysis and methodology. This would have been far simpler and far more streamlined to administer than the approach that has been taken.

28. However, an hourly rate for reading paper heavy cases is welcomed with the following important caveat: by using the particular statistical model that has been chosen, the MOJ have excluded payment for paper heavy cases in respect of murder and manslaughter, arguably the most important cases of all.

29. There will be no scheme to remunerate advocates for work done reading the first 10,000 pages in a murder case. This is in contrast with the proposal to pay an advocate an hourly rate for reading all but the first 350 pages of a 10,000 page robbery case. The differences are stark, arbitrary and unjustifiable.

30. The current proposal would lead to this scenario: one junior counsel is instructed in relation to the first defendant charged with murder. 8,000 pages of prosecution have been served. She can make no claim for reading them. Another junior counsel is instructed in relation to the second defendant charged with murder and assisting an offender. He can make a claim for reading up to 7,400 pages of prosecution evidence. This is unacceptable.

31. Much of this problem is caused by the woefully low brief fees in murder cases (£2,575 for junior counsel in the vast majority of murder cases compared with, for instance, £5,860 for Class A drugs importation or £2,325 in a Modern Slavery Act 2015 case). It is accepted that brief fees are part of the wider CLAR and not part of these accelerated asks. The commitment to consider murder brief fees by the MOJ is welcomed. However, in the interim something must be done to deal with paper heavy murder cases as a matter of urgency. The statistical tool used by the MOJ does not adequately deal with murder cases. It ought not to be followed slavishly and it is proposed that murder ought to be dealt with differently. There is no principled rationale for such an approach.

32. We note that the proposed PPE threshold for attempted murder cases is 700 pages of prosecution evidence. This figure is far too high a threshold. We suggest that a lower figure ought to be adopted and would suggest 350 pages as per robbery. Further we suggest that this is used as a proxy for all murder/manslaughter cases.

33. The thresholds as proposed are set at too high a level across the board. We note in particular the threshold for sexual offences. These cases typically do not have a high page count, however these cases are complex evidentially and as such this ought to be reflected in an appropriate page threshold. For example, a multi-complainant case is unlikely to reach the threshold and will continue to result in the same payment as a single complainant/defendant case; which is necessarily an undervalue of counsel's work.

34. In terms of the levels of the hourly rates and in terms of streamlining the process, we make the same comments as have been made above in relation to unused material.

35. The starting point in relation to served material is that the advocate must read it. It would be negligent not to do so. It is evidence in the case, served by the Crown because it has evidential value in proving their case. As with unused material, once volume has been established, the MOJ and the LAA ought to allocate a specific amount of time per page. This should be on presumption of 4 minutes per page as a minimum. This would allow advocates in relevant cases, to submit a simple work log, to specify the served material that has been read and to be paid on the basis of a specific amount of time per page. Where time spent exceeds this proxy, counsel can justify the time spent. This relieves the administrative burden for both counsel and the LAA. There has to be a recognition that the present rates of remuneration are impacting on those who have achieved the level of expertise that allows them to conduct these page heavier cases. The rates are a deterrence. This is directly affecting the sustainability of the profession as there are clearly those who cannot afford to undertake the work. It further risks such cases being undertaken by much more junior and inexperienced counsel which is not in the public interest.

36. In short:

    1. Payment for both PPE and unused material (beyond the amount included in the fee) should be based on a Work Log to be completed by the advocate which sets out the work and the amount of time required to complete it.

2. The LAA should adopt a process which accepts, at face value, the hours claimed with payment made accordingly.

3. If figures of minutes per page are to be provided, then:
   (a) These should be as general guidance only;
   (b) The minimum amount must be set no lower than 4 minutes per page.

Cracked trials

Summary response

37. The proposal to enhance payment for cracked trials to 100% of the brief fee is welcomed but does not go far enough.

38. The proposal to remove the distinction that a cracked trial only becomes payable in the final "third" of the period between PTPH and trial is welcomed and is sensible.

Response

39. Trials can crack for a variety of different reasons, the vast majority of which, if not all, are entirely outside the control of the defence advocate. For instance, a defendant has a late change of heart, the prosecution are amenable to a plea to a lesser offence, critical evidence is served or disclosed very late in the day or the prosecution decide to offer no evidence at the door of court.

40. There is an emphasis on early engagement within the Criminal Practice Direction and Criminal Procedure Rules. A significant amount of the work to be done is frontloaded. Many cases that crack late have already involved a large amount of work done by the defence advocate. Further, the advocate is likely to have kept himself or herself clear for the trial in question and has turned down other work to do so.

41. For instance, junior counsel is instructed in a 10 day multi-handed robbery trial. The case required considerable preparation and multiple prison conferences, which are not remunerated under AGFS. Had the trial run its course, she would have been able to bill £4,400 for the 10 day trial. However, if the prosecution on day 1 indicate that they had reviewed the case and offered no evidence she would receive a fee of just £800 (the brief fee for an 11.2 offence). The increase from the previous scheme is welcomed (previously she would have received £680) but the situation remains inadequate. The payment does not adequately remunerate her for work done. It also takes no account of the fact that she kept her diary clear for a two week fixture and turned down other work to do so.

42. The CBA propose that to more properly reflect work done in cracked trial cases a payment of 150% of the brief fee is appropriate. This still leaves the advocate with an unacceptably low payment but is an improvement on what is put forward in the current consultation.

43. Again, we recognise that many of the problems are caused with unacceptably low brief fees which are part of the wider CLAR. We also note those cases where the defendant elects and the issues caused thereby. However, as an interim measure a payment of 150% of the brief fee would better reflect work done than the current proposal. This is all the more critical in the COVID-19 period.

CBA

29th May 2020