Independent Review of Criminal Legal Aid

Submission of the Criminal Bar Association

Introduction

1. "I want people to have confidence in a justice system that is fair, open and accessible, that protects victims and makes our streets safer – a justice system of which we can all be proud and whose values will and must endure". This is the commitment made on 30th July 2019 by the current Secretary of State for Justice, The Rt Hon Robert Buckland MP, when he was sworn in as Lord Chancellor. He has repeated that commitment many times since both in his capacity as Secretary of State, and on behalf of the entire Government. A commitment to public confidence in a justice system to which all have equal access regardless of background and which protects all its citizens from harm underpins our shared notion of the rule of law, a principle that allows our collective economic and social well-being to function and thrive. In that swearing in ceremony, the Secretary of State made reference to the continuation of a commitment made by his four predecessors that, "I have sworn an Oath that I will defend the independence of the judiciary and respect the rule of law. It is the safeguard of fairness and freedom in our society, providing for important principles like equality under the law and access to justice."

2. This commitment is one which we share across the Criminal Bar. We are, effectively, agents of the Government's on-going stated commitment and the public's rightful expectation of a functioning, fair system with equal access to justice for all members of society from the most privileged to the most vulnerable.

3. The commitment to the criminal justice system is one which stretches back six years when the first of those four predecessors as Lord Chancellor, The Right Hon Michael Gove MP,

explained in more detail the link between upholding the rule of law and social and economic cohesion.

4. In his first public speech since taking office on 23rd June 2015, the then Secretary of State for Justice expressly referred to the essential role played by criminal advocates in effecting that link, alluding to "the quality of our barristers". He went further, stressing "both as a matter of enlightened economic self-interest and as a matter of deep democratic principle, it is vital that the institutions which sustain and uphold the rule of law are defended and strengthened." He continued, "[i]t requires understanding of the importance of a healthy independent bar, to make sure high quality advocacy. It means awareness of the special virtues of an adversarial criminal justice system, with arguments tested in open court and guilt having to be proven beyond reasonable doubt before an individual's liberty is curtailed."

5. Lord Chancellor Gove emphasized under the sub-heading, 'Social Justice at the heart of our justice system' that "[l]egal aid is a vital element in any fair justice system. There is a responsibility on government to make sure that those in the greatest hardship – at times of real need – are provided with the resources to secure access to justice."

6. At the heart of those 'resources' to which he made reference, and which are relied on by today's Secretary of State for Justice and both the Ministry of Justice and Home Office, are the criminal barristers who glue our criminal justice system together. This resource, however, has been denigrated after more than a decade of underfunding to criminal legal aid which has seen rates of pay for public service criminal advocates fall in absolute and real terms. Poor overall rates of remuneration in criminal legal aid defence work have resulted in a reversal over recent years of the progress made by the Criminal Bar to bring greater gender, ethnic and social diversity to the profession and to better represent the diversity of the public it serves, whilst the exodus of junior advocates continues to increase.

7. One comparison demonstrates all too clearly the extent to which criminal legal aid rates have been undermined. The latest Advocates Graduated Fee Scheme ('AGFS') pays an hourly rate to junior counsel of £39.50, itself a fall in absolute terms from the £45 per hour

paid to such counsel in 1997. Those hourly rates are between a quarter and a half of the hourly rates paid for similarly complex and important public work delivered by advocates under the Attorney General's civil panel payment scheme, which has itself seen a freeze in rates since 2010, and where increases are long overdue.

8. This is at a time when far more barristers are needed to deal with both the current backlog (in excess of 48,000 outstanding Crown Court trials as of 31st March 2021) and the significant volume of extra cases expected to arrive in our courts as a consequence of a Government commitment to increase the number of prosecutions from their record current lows.

9. In addition to reiterating the need for a substantial increase to existing low rates of remuneration, this submission also seeks to find solutions for deficiencies and inefficiencies within the current system, from warned lists at court to inadequate pay mechanisms. Hundreds of hours of criminal advocacy work conducted each year in terms of case preparation and during trial are currently not remunerated. To address this would lead to a more efficient system without compromising justice for complainant and defendant alike.

Background

10. The Advocates Graduated Fee Scheme ("AGFS") was introduced in 1997 as a fixed fee model for legal aid remuneration for defence advocates in the Crown Court. Over the last 24 years the essence of the scheme has remained the same: cases are categorised by type, size in terms of pages, seniority of counsel, length of trial and the number of ancillary hearings. Over time its scope has widened to cover more substantial cases: initially 10-day trials, but eventually increasing to cases lasting over 40 days. In comparison to when it was first introduced it is now extremely rare for any case to fall outside the AGFS as the threshold for AGFS cases was extended to 60 days.

11. Over time, the structure of the AGFS has been revised and reformed. In 2007, implementation of Lord Carter of Coles' 2006 Legal Aid Review: "A Market-Based

Approach to Reform" revised the AGFS. It achieved this by doing away with many of the fixed fees for individual hearings and payment for the second day of a trial.

12. The most recent iteration of the AGFS has its foundation in the AGFS10 scheme, introduced in 2018. The method of case categorisation was reformed and payment for the second day of a trial and payment for most ancillary hearings was reintroduced. This introduced 'flat' brief fees for all cases within a category, and resulted in overall cuts to the rates of payment. The most contentious aspect of the reform was the removal of payment geared to the size of a case in terms of pages of evidence. In simple terms, this resulted in a case with 5 witnesses and 80 pages of evidence attracting the same brief fee as a case with 100 witnesses and 8000 pages of evidence. Since then, two further iterations have seen modest amendment (AGFS11 on 30th December 2018 and, in its current form, AGFS11 with accelerated measures on 17th September 2020).

13. Over the last 24 years, the fee levels for the AGFS have fallen further and further behind the original 1997 levels in real terms. There were fee changes in 2001 which resulted in an unanticipated cut. In 2004 there was a below-inflation increase compared to 1997. Fees for Queen's Counsel were cut by 12.5% in 2005. The Carter Review introduced an increase in fees (8-18%), but this still kept fees below the original 1997 levels in real terms. In 2009 those revised Carter-level fees were then reduced year-on-year for three years by a cumulative 13.5% cut between 2010 and 2012. Further cuts were then proposed in 2013.

14. By 2013 the situation had become so desperate for criminal barristers that they took unprecedented 'industrial' action. It was only when the government postponed the anticipated cuts until 2015 that the Criminal Bar decided to call off the action. At the time, this was considered a truce by criminal barristers. Between 2013 and 2017 the Bar, through representatives of the Bar Council, Criminal Bar Association, and Circuits, negotiated with the MOJ and LAA to reform AGFS. Throughout those negotiations the MOJ maintained that any reform must be "cost-neutral". Criminal barristers tried to negotiate in good faith, but never conceded the "cost-neutral" terms set down by the MOJ.

15. The revised AGFS10 scheme, introduced in April 2018, resulted in immediate action as a result of the effect of the new scheme in reducing remuneration overall, and the savage cuts to the most complex and demanding cases. The fee levels, in real terms, remained historically low compared to 1997 and 2007. Modest changes were introduced in late 2018 (AGFS11) and again in 2020 (AGFS11 with the new measures) which made small incremental increases to daily trial rates and brief fees, as well as increasing the fees for some ancillary hearings. However, those changes were only introduced after further action was threatened by criminal barristers.

16. The sad reality is that, in the last 10 years, criminal barristers have only been able to prevent cuts or secure modest incremental increases in fees by taking or threatening action. The threat of action has never gone away. Even in 2018 when the revised AGFS11 was proposed by the government, criminal barristers approved postponing further action by the barest of majorities (51.55%). It was the promise of reform in late May 2018, as part of a Criminal Legal Aid Review which was to be conducted within 18 months, that persuaded just enough criminal barristers to postpone the action. This was followed in 2019 by a further ballot and mandate for action with regard to the AGFS supported by 94% of criminal barristers. This action has been in suspension since June 2019 when 60.72% voted to await the ultimate outcome of the promised independent Criminal Legal Aid Review. It is notable that 39.28% voted against doing so.

17. The AGFS has only ever been subject to cuts and modest below inflation increases (often resulting in less than the initial fee that was paid prior to successive and sequential cuts). Criminal barristers have now waited longer than two years for a proper review of the AGFS. In that time, fee levels continue to languish at rates which do not provide:

    1. An attractive career path to recruit a talented and diverse cohort of pupils.
    2. A sustainable income for new and very junior barristers.
    3. An incentive for those who leave the profession to return.

4. Any significant form of career progression for junior barristers as they take on more serious cases.
5. Proper remuneration for Queen's Counsel who conduct cases of exceptional difficulty and gravity.

18. The overall structure of the AGFS is not the main issue for criminal barristers. Previous votes on the proposed reforms have shown that criminal barristers want a form of AGFS that pays them based on their seniority, the complexity of the case, size and length, and the various hearings that are required. The fundamental problem is the lack of proper funding for the scheme. With amendments and proper funding, the AGFS could work. This review must address this critical issue, or it will fail to gain any support from criminal barristers.

19. Criminal barristers want to work constructively with Sir Christopher Bellamy in his review. This submission contains reasonable proposals which will:

    1. promote efficiency;
    2. promote diversity by encouraging people of all backgrounds to view being a criminal barrister as a feasible career path;
    3. improve sustainability both for criminal barristers and the wider criminal justice system;
    4. improve quality by ensuring the instructed advocate is appropriate for the case, having regard to their seniority, experience and skill set;
    5. improve quality and efficiency through payment for specific preparatory work in order to promote case preparation as well as the early resolution of cases;
    6. identify and remove anomalies within the AGFS to make the scheme fairer and ensure payment for work done; and
    7. provide certainty of reasonable payment in cases which are not properly remunerated by the AGFS.

Proposals for a Revised AGFS

20. We set out below certain general proposals. It is our view that these are urgently required in order for the AGFS to function. All proposals are on the basis that the current AGFS continues to form the remuneration scheme for the majority of publicly funded criminal work in the Crown Court. Unless otherwise specified, the gearings currently used to calculate junior alone, led junior, leading junior and silk rates apply.

21. These proposals are sub-divided into three categories:

    1. Pre-Trial Hearings.
    2. Trials
    3. Specific Areas of Concern within the AGFS.

22. The justification for most of the proposals within the first two categories can be explained succinctly. In all cases, the need for an increase in the fee is a reflection of the work required to prepare a case for a hearing and the time spent at court. The "Specific Areas of Concern" category contains more detailed reasoning for each proposal.

23. Proposals for Pre-Trial Hearings:

    1. PTPH and FCMH hearings (currently remunerated at £125): Minimum fee of £300 to increase proportionately to £600 within offence bandings. Case ownership at an early stage needs to be an essential part of the criminal justice system and this will encourage timely resolution, where appropriate at an early stage in the case and, thereby, improve efficiency.

    2. Any legal argument hearings (currently remunerated at £131 for ½ day and £240 for a full day): Minimum fees to be set at the equivalent of a refresher in the category of the case to which the argument relates.

    3. Mentions (currently remunerated at £90): Increase to £150. Any mention is likely to require a review of the evidence as well as liaising with both defence

solicitors and prosecution and a minimum period of an hour at court in addition to the drafting of an Attendance Note and Advice after the event.

24. Proposals for Trials

1. Brief Fees: an increase to brief fees to reflect payment for work done is required across the board.

2. All brief fees need to be increased. Specific justification for increases in brief fees in relation to particular types of case are set out below at paragraphs 28-39.

3. The fee for a trial which does not last the expected number of days should include an additional payment of half a refresher in the category of the case to which it relates for each underrun day. Underrun fees are payable in family proceedings. This would be an important driver to improve efficiency.

4. Refreshers / Daily Allowance Fee: Minimum fee of £600 for standard cases, increasing proportionately to £1200 within offence bandings.

Brief Fees

24. Brief fees are generally paid at the conclusion of a case. A case is categorised by offence type, and then sub-categorised by its seriousness, size, or complexity. The AGFS has always split cases into three types of resolution, resulting in a different level of payment for each outcome:

    1. Guilty Pleas
    2. Cracked Trials
    3. Effective Trials

25. Historically, the number of pages of prosecution evidence was recognised as an imperfect but fair way of adjusting the level of fees in a particular case. That "page count proxy" was, for the most part, removed following AGFS10 with the intention of simplifying the

system. Criminal barristers have concluded that the removal of this "proxy" has produced an unfair and unsustainable system, particularly in certain categories of case. Overall, the AGFS is too crude a scheme, absent complexity proxies and markers.

26. There is a plateau within the AGFS, resulting in little reflection of career progression, seniority and increasing skill set. It is vital that this is addressed with regard to resolving problems of retention, attrition and diversity.

27. The Criminal Bar Association has identified the following categories of case as requiring significant increases in fee levels:

    1. Murder and Manslaughter.
    2. s.28 Youth Justice and Criminal Evidence Act 1999 cases.
    3. Cases involving a child or vulnerable witness or defendant.
    4. Youth Court work.
    5. Fraud Cases.
    6. Sexual offences.
    7. Serious violence.
    8. Elected Trials.
    9. Allowable Expenses

Murder and Manslaughter

28. When AGFS10 was introduced, cases of murder and manslaughter were categorised into 4 types:

    1. Band 1.1: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing.

2. Band 1.2: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally), or destroyed by fire or other means by the offender; the defendant is a child (16 or under).
3. Band 1.3: All other cases of murder.
4. Band 1.4: All other cases of manslaughter.

29. The difference in payment between each type of sub-category is vast. A trial for a junior barrister on a Band 1.1 case pays £8,585 opposed to £2,145 for a Band 1.4 case. All cases of homicide remain of the utmost gravity. The present system does not remunerate the majority of these cases properly. There is no distinction made by reference to the number of pages of evidence served, unless that is more than 10,000 pages of evidence. There are also serious anomalies between murder and the remainder of the AGFS scheme. For example, counsel representing a defendant on an ancillary matter (e.g. perverting the course of justice or a drugs offence) may receive a significantly greater fee than counsel representing the defendant charged with murder. The fees payable do not reflect the hard work, skill and experience required to conduct such cases, let alone the seriousness and gravity of the offence, and its importance to the administration of justice and the public interest.

30. The Criminal Bar Association proposes an amalgamated Band 1 based on page count at an appropriate rate: The minimum fee for Band 1.1 should be set as follows for all cases up to 600 pages to demonstrate the importance of such work:

Juniors	Leading Juniors	Queen's Counsel
£10,000	£15,000	£20,000

Any case with over 600 pages of evidence should be considered as a matter of special preparation as identified at Paragraph 48 below.

Section 28 Youth Justice and Criminal Evidence Act 1999 Cases

31. Pre-recorded cross-examination of vulnerable witnesses and children is gradually being introduced throughout the criminal justice system. Criminal barristers are expected to read and prepare the case, submit proposed questions to the court and conduct the cross-examination of witnesses some time before a jury trial occurs. The present scheme counts the days when such cross-examination takes place as being the first day of the trial, with any subsequent days of the trial being paid as daily attendance fees (refreshers).

32. The present scheme is insufficiently remunerated and requires adjustment. Counsel are required to commit to the case early, prepare it early and retain the case on an open-ended basis until the whole trial is concluded. The section 28 scheme requires full preparation of the case for trial twice. These cases are generally more complex than cases not involving pre-recorded cross-examination. Counsel are expected to review the video of the cross-examination and submit proposals for editing based on the video. This all takes significant time both before and after the hearing. The payment for this is a single day refresher rate, which is insufficient remuneration for time consuming and difficult work which falls outside the normal scope of trial preparation. A further percentage uplift in the brief fee or a daily rate (significantly greater than a single day's refresher) should be paid in cases involving pre-recorded cross-examination.

Cases involving a Child or Vulnerable Witness or Defendant

33. All such cases require experienced counsel with specialist Vulnerable Witness Training. Specially trained counsel should be remunerated properly for their experience and ability to handle sensitive cases and which are critical to the public interest. The Criminal Bar Association proposes that a percentage uplift should be paid on the brief fee in cases of this type. At present, there is no distinction in payment between representing a child or vulnerable person accused of, for example, an aggravated burglary compared to an adult defendant accused of the same offence. Similarly, there is no difference in payment when required to conduct cross-examination of child or vulnerable witnesses even though specialist training and course completion is required.

Youth Court Work

34. Youth Court cases can be complex. They always concern both young and/or vulnerable defendants and witnesses. The criminalisation of a young person can have serious and long-lasting consequences, yet it is the most junior of advocates who are instructed in these cases. The reason is financial: the fees are inadequate and senior barristers will not attend at the rates payable. The rates should be increased to reflect the sensitivity of these cases and the work required; this would attract more experienced advocates to the Youth Court, with a consequent improvement in efficiency and saving of court time.

Fraud Cases

35. Fraud cases are notoriously "paper heavy". As such, the number of pages of evidence served remains the best proxy for assessing the relative complexity of a case. Recent adjustments have increased the page threshold disproportionately to the amount of work required in reviewing all of the evidence. The page threshold should be lowered for placing cases into a particular category:

    1. Band 6.1 reduced from 20,000 pages to 10,000 pages.
    2. Band 6.2 reduced from 10,000 pages to 5,000 pages.

Sexual Offences

36. Generally, serious sexual offences are inadequately remunerated having regard to the skills required (as set out above), the gravity of the offences and the resulting serious consequences.

37. There are particular problems with multi-defendant / multi-complainant sexual cases. They are far more complex than single complainant / single defendant cases. The trials take substantially longer, as does the preparation, and are not appropriately remunerated under the scheme; indeed, such cases are amongst the most complex and serious in the whole of the criminal justice system and understandably are of significant public importance and government concern.

38. The Criminal Bar Association proposes the following with regard to Bands 4 and 5:

    1. 2 complainants/defendants = 200% brief fee.
    2. 3+ complainants/defendants = 300% brief fee.
    3. 5+ complainants/defendants = 400% brief fee.

Serious Violence

39. As set out in previous consultation responses, offences of serious violence are inadequately remunerated. The gravamen of such cases, the lengthy prison sentences involved (regularly including assessments of 'dangerousness'), and the life changing injuries sustained are not recognised or reflected within the current AGFS. The same is true of child cruelty cases, in which the AGFS wholly fails to take into account the seriousness of such cases, the amount of highly complex scientific evidence routinely involved, and the necessary expertise and experience of trial counsel.

Elected Trials

40. Where a defendant who is charged with an offence triable in the Magistrates' Court or the Crown Court elects a Crown Court trial, the advocate is paid a reduced fee if the defendant subsequently pleads guilty. This penalises the advocate without good reason and provides a financial incentive to avoid guilty pleas. It is submitted that all such cases should be dealt with as standard Crown Court trials with no reduction in payment.

Allowable expenses

41. Where there is good reason, the LAA can authorise the payment of counsel's travel and accommodation expenses for work off-circuit. The regulations, however, allow for the recovery of expenses in respect of the "main hearing only", thereby excluding all pre-trial and post-trial hearings. Furthermore, the accommodation rates have not increased significantly for many years and are capped at an unreasonably low level. The Criminal Bar Association submit that the regulations should permit the recovery of expenses for each hearing at which counsel is required to attend, and at realistic rates.

42. <u>Specific areas of concern within the AGFS structure</u>

1. Increase in hourly rates.
2. Ancillary fees.
3. Incorporation of complexity markers across the AGFS.
4. Cases which fall out of scope / exceptional cases.
5. Payments for trials placed in Warned Lists which are not heard.
6. Multi-defendant uplift: It is proposed that this mirrors the CPS payment scheme with a 15% uplift per defendant across the AGFS.
7. Sentence fee: it is proposed that this be at the rate of a daily refresher in the category of the offence charged. Sentences are becoming increasingly complex with reference to detailed Sentencing Council Guidelines essential and they regularly take a lengthy time to prepare.

We deal in greater detail with para 42(i)-(v) below:

<u>i. Hourly Rates</u>

43. The principal way that criminal barristers can be remunerated for those cases which are so unusual or large that the preparatory work falls outside the scope of the AGFS is through special preparation paid at an hourly rate.

44. Where criminal barristers need to read substantial amounts of unused material (ie. material not served as evidence) a claim can also be submitted which is paid at an hourly rate.

45. Similarly, claims for wasted preparation where a large case is prepared but, through no fault of their own, counsel has to return it, are also paid at an hourly rate. Claims such as these are relatively rare (they are not available in the majority of cases) but are nonetheless essential in ensuring that the overall fee paid to criminal barristers for a particular case is reasonable and fair.

46. The present hourly rate set by AGFS11 for junior barristers in all these claims is a derisory £39.39. The hourly rate in 1997 was fixed at £33.50. The hourly rate in 2007 was £45.

47. The Criminal Bar Association therefore proposes as an urgent interim measure that the hourly rate should increase broadly to align with those under the Attorney General's civil panel payment scheme (see rates below). However, the Association notes that those hourly rates have themselves not been increased for a number of years and further work needs to be done:

    £60: under 5 years call
    £80: 5-7 years call
    £100: 8-10 years call
    £120: 10 years call plus
    £166: leading junior counsel
    £250: Queen's Counsel

48. This would support meaningful career progression, aid retention and diversity, appropriately reflect counsel's experience and skill, and ensure that the correct advocate was instructed in the case. These rates remain far below commercial rates and are rates subject to a 2010 pay freeze. As such it is a modest proposal.

ii. Ancillary Fees

49. The criminal justice system has evolved significantly over the last 20 years. Written applications and advocacy are an essential part of early case preparation, and are required by the Criminal Procedure Rules. The amount of written and preparatory work involved in cases has increased substantially over that time. The AGFS has not evolved to reflect this substantial extra burden on criminal barristers. The Criminal Bar Association proposes that fixed fees for specific applications or compliance with court directions should be payable on completion of the case. These should include the drafting and service of:

    1. Defence Statements.

2. Any document required by Criminal Procedure Rules or by order of a court, such as:
    i. Hearsay Applications or Responses.
    ii. Special Measures Applications or Responses.
    iii. Bad character Applications or Responses;
3. Skeleton arguments, where directed by the court, both before and during trial.
4. Draft cross-examination for a Ground Rules hearing.
5. Sentencing notes, where directed by the court.
6. s.41 Youth Justice and Criminal Evidence Act 1999 Applications.

50. In addition, as with the present system relating to unused material, we suggest these items be remunerated on a fixed fee basis based on two to three hours' work but with the option to make a claim for special preparation, as currently exists, where much greater time has been expended on the particular document.

51. Criminal barristers are now increasingly expected to conduct hearings outside normal hours or without any support at court. Fixed ancillary fees should be paid for each day of a trial where counsel is required to conduct a trial un-attended by a solicitor or paralegal (to cover the preparation of an attendance note and the extra work required at court).

52. The use of video and audio evidence has increased exponentially since the inception of the AGFS in 1997, yet thus far it has never been recognised as evidence worthy of payment. Even within the special preparation scheme, video and audio evidence is excluded from the hourly rate. A fee should be payable for viewing video and audio evidence including interviews, ABEs (recorded video interviews of witnesses), police body-worn footage, CCTV, 999 calls. It should be payable at hourly rates as set out above. Hourly rates for editing ABEs should also be paid.

53. At present, there is no allowance for video interviews of witnesses where transcripts may run to many hundreds of pages which require substantial review and editing before they are in a form that is ready to be presented to a jury. The exercise requires the cooperation of both prosecution and defence counsel to ensure that such material is ready, well before

the trial date. Such work is time consuming but it saves a great deal of court time. It should therefore be properly remunerated.

54. Only one fee is payable on any particular day. If a defendant is convicted after trial and the case proceeds immediately to sentence, only the refresher is payable. Both the refresher and sentence fee should be paid. Likewise, if at the conclusion of a Plea and Trial Preparation Hearing a bail application is made, only the PTPH fee is paid. Both fees for the PTPH and the bail application should be payable.

iii. Incorporation of complexity markers across the AGFS

55. As set out above, overall the AGFS is too crude a scheme, absent complexity proxies and markers. Using pages of prosecution evidence alone fails to recognise complexity. When AGFS9 was first canvassed the intention was always to include other markers across the scheme to capture the complexity of a case. These could include uplifts in cases where (by way of non-exhaustive examples) the following complexity markers are present:

    1. Where a 'conspiracy' is charged.
    2. Multiple complainants.
    3. Vulnerable witnesses / defendants.
    4. Child witness / defendant.
    5. Intermediary is involved.
    6. Two or more experts.

iv. Cases which fall out of scope

56. In any funding scheme there will always be cases which fall outside the fee scheme. The special preparation scheme is supposed to address those inadequacies. Unfortunately, it does not work as it was intended. The principal failing of the present scheme is the requirement that a significant number of pages of prosecution evidence are served before a claim can be made. It is possible to make a claim where a smaller number of pages have been served in cases which involve a "very unusual or novel point of law or factual issue",

but these cases are rare and do not cover paper (digital or otherwise) heavy cases which still need to be read.

57. The present triggers for payment of special preparation vary wildly between different categories of case. In drugs cases and fraud cases, before a special preparation claim can be made, the required number of pages to be served (15,000 and 30,000 pages respectively) are unreasonably high. The rules governing payment for special preparation generally have become overly complicated and difficult for criminal barristers to navigate. The Criminal Bar Association proposes a simplified approach to claiming special preparation which will be triggered when cases reach a certain number of pages in each category:

Band 1 (Murder): 600 pages

Band 2 (Terrorism): 600 pages

Band 3 (Serious Violence): 600 pages

Band 4 (Sexual Offences - Children): 600 pages

Band 5 (Sexual Offences - Adults): 600 pages

Band 6 (Fraud and Dishonesty Offences):

6.1: 15,000 pages

6.2: 7,500 pages

6.3: 2,500 pages

6.4: 600 pages

6.5: 600 pages

Band 7 (Property Damage Offences): 600 pages

Band 8 (Offences Against the Public Interest): 600 pages

Band 9 (Drug Offences):

9.1: 10,000 pages

9.2: 10,000 pages

9.3: 10,000 pages

9.4: 2,500 pages

9.5: 2,500 pages

9.6: 2,500 pages

9.7: 600 pages

Band 10 (Driving Offences): 600 pages

Band 11 (Burglary and Robbery): 300 pages

Band 12 (Firearms Offences): 600 pages

Band 13 (Other offences against the person): 600 pages

Band 14 (Exploitation/Human trafficking offences): 300 pages

Band 15 (Public Order Offences): 300 pages

Band 16 (Regulatory Offences): 300 pages

Band 17 (Standard Cases): 300 pages

58. An alternative proposal for cases which fall out of scope is a variation of the Interim Fixed Fee Offer scheme that replaced VHCC. This could be a pre-emptive scheme which would work as an alternative to special preparation if both sides (LAA and advocate) were to agree in a particular case. If a case were to be unfairly remunerated under the AGFS (save for an ex post facto special preparation application), an application could be made to the LAA in advance of starting substantial work on the case explaining why the case could not be properly remunerated under the AGFS.

59. After making representations (in a similar way to the IFFO scheme) a fee would be agreed for all work in preparing the case. Once the fee was fixed, a renegotiation or claim for special preparation would depend on a material change in circumstances relating to the overall fairness of remuneration such as a significant increase in material served (e.g. as with the present IFFO a 30% increase in pages of material served from that which was previously agreed).

60. This would offer distinct advantages for both advocates and the LAA:

    1. Advocates would have more certainty about their fee.
    2. Advocates would not have to keep excessive records of all work done which would then need to be assessed.
    3. The LAA would have certainty of costs at the start (or early on) in cases.
    4. The administrative burden on the LAA would be substantially reduced as there would be no need assess all of the evidence and compare that to the advocate's work logs.
    5. There would be an inevitable reduction in costs appeals.

v. Payments for trials placed in Warned Lists which are not heard

61. The Criminal Justice System relies heavily on the goodwill of criminal barristers. That goodwill has been stretched beyond breaking point not just because of the historically low fees paid by the AGFS, but also because of the burden of having to prepare cases repeatedly for little or no reward.

62. Warned lists are a blight on the Criminal Justice System. Reviews by Sir Bill Jeffrey in 2014 and Sir Brian Leveson in 2015 both called into question the efficiency of listing cases in this way.

63. Sir Brian Leveson said this in his Review of Efficiency in Criminal Proceedings:

> "125. The exercise of listing cases for trial in the Magistrates' and Crown Courts has, to a real extent, become an exercise in risk limitation. List officers and Resident Judges understandably try to reduce, first, the inevitable impact of cracked or ineffective trials on courtroom utilisation and, second, the consequences that the ceiling on sitting days has on lengthening timescales for setting trial dates. With utilisation and timeliness being considered important measures of efficiency by HMCTS, the need to ensure each courtroom is fully utilised has understandably become a critical consideration when listing.
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> 126. A number of recent reports have commented on the current approach. Sir Bill Jeffrey made the following observation:
> "Inadequate preparation is the enemy of good advocacy. A combination of delay in assigning advocates (both prosecution and defence) and uncertainty over trial dates makes the system more hand to mouth than is conducive to good quality advocacy. […] To make best use of court time, some flexibility over the scheduling of trials is inevitable, but the "warned list" system as it operates in most parts of the country makes it very hard for advocates to plan their diaries, and increases the likelihood of changes of representative at the last minute."
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> 127. The ICPR report 'Out of the Shadows' highlighted the negative impact on the lives of those asked to attend court to give evidence because of the uncertainty around the listing of fixed trial dates.
>
> 128. "Cancellations and adjournments of court hearings are frustrating and stressful for victims and witnesses. More needs to be done to reduce this and all possible steps should be taken to minimise delays. Consideration should be given to limiting the number of times any case can be put on a 'warned list'".

> While these reports are referring to the impact of the approach taken to listing in the Crown Court and the use of the warned list, a similar conclusion may be drawn as to the impact of double listing in the Magistrates' Court. It is necessary to couple the above comments with the figures provided to the Review to the effect that over 65,000 witnesses were requested to attend court in 2013-14 to give evidence who then did not testify.
>
> 129. It is, therefore, a relatively easy conclusion to draw that the present approach to listing is likely to be a contributing factor to some of the most difficult problems affecting the criminal justice system, and that it has a particularly negative impact on efficiency and the experience of the public of our system of criminal justice."

64. The Criminal Bar Association proposes a severe limitation of the use of Warned Lists and recognition that preparation of such cases must be rewarded by payment of a daily refresher fee for each day a case is not listed for trial within a particular warned list. The present scheme means there is no advantage in preparing a case early when all parties know that there is a strong possibility that the case will not be heard. Moreover, the cases are routinely re-fixed or put into new warned lists when the barrister is no longer available. The payment of such a fee will focus the attention of the court in ensuring that cases are only put in such a list when there is a realistic expectation of the trial being heard during that period.

Implementation of the Revised Scheme

65. The present backlog of cases is so large that the benefits of any changes to the AGFS resulting from the Review will take many months, if not years, to be realised by the criminal bar.

66. The Criminal Bar Association therefore proposes that all cases under any previous AGFS scheme where the main fee has not been claimed should be billable under the new scheme irrespective of the date of the representation order.

Overarching considerations

67. The criminal justice system will continue to evolve. Working practices will change. The nature of evidence and the way in which it is served and relied upon will develop and

create new challenges for criminal barristers. Any AGFS must be "future-proofed" to ensure that it continues to pay for and reflect the trial advocacy and preparation required to conduct Crown Court criminal cases. There should be scope in any revised AGFS to adjust fees on a periodic basis, without the need for full scale reviews which regrettably take years to conclude.

68. The Criminal Bar Association, Bar Council and Law Society should be able to negotiate with the Ministry of Justice and Legal Aid Agency, on a fixed periodic basis, to impose incremental changes to the AGFS structure so that new case types can be categorised and anomalies in the system reviewed and resolved. This should include a commitment to regular increases in all fees to keep in line with inflation.

69. In addition, and as set out previously, we propose the establishment of an overarching independent fee review panel with binding authority.

Conclusion

70. Successive amendments to the AGFS, various reviews of legal aid and political statements of support for the need for investment in the criminal justice system cannot disguise the fact that the criminal justice system has been starved of funding and has been at breaking point for many years. It has survived in large measure because of the goodwill of our members. That goodwill is now exhausted. The criminal justice system cannot improve without a significant increase in funding. This must include criminal advocacy.

71. Criminal barristers share the same goals as the public and the Government: to improve justice for victims, witnesses, and defendants; to supply better, more competitive, services; to attract advocates of appropriate quality; to help clear the monumental case backlog in the Crown Courts; as well as be representative of the diversity in wider society. This can only be achieved if the Advocates Graduated Fee Scheme is properly funded.

The Criminal Bar Association

7th July 2021