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15 March 2023

Dear Deputy Prime Minister,

I hope that you are well.

I am writing with urgency in relation to the final part of the deal as agreed between the CBA and the MoJ which was due to come into force in February 2023.

The Deal

To assist, the relevant part is below:

An additional £3m of new funding for special and wasted preparation. This will include expanding special preparation to include written work, considering digital, video or audio evidence and the proposals as set out by Sir Christopher Bellamy in the CLAR review.

This includes the removal of 'substantial' and the introduction of complexity markers. Written work and digital, video or audio are specific categories which will attract a bolt on fee of 0-3 hours and thereafter an hourly billing model currently utilised for unused material.

The definition of wasted preparation will also be expanded to implement the recommendations including removal of 18(2) (requirement for case to go to trial and trials lasting in excess of 5 days or cracked trial and ppe exceeds 150) and reduce the applicable hours to over two.

Wasted preparation will include the situation where cases are either not listed for trial within the warned list period or are ineffective. The latter will adopt the bolt on payment for 0-3 hours and thereafter hourly billing model currently utilised for unused material. This is to ensure remuneration for work done. The detail and supporting legislation to be finalised in October for implementation in February 2023.

The amount of money committed now is £3.3 million. It is a low amount relative to the criminal justice system.

CLAAB's function to date has been to support the implementation of the deal. It remains without a Chair. If it had a Chair, undoubtedly the baseline recommendation to the Lord Chancellor would be implementation of CLAR (which is reflected in the final part of the deal).

Urgent Issue

There is an obvious breach of the timeline of implementation which is not desirable as the government was allowed a MoJ realistic timetable.

However, yesterday the MoJ informed us that the government was about to lay a Statutory Instrument (coming into force in April) that would add a bolt-on fee to trials and cracked trials of £62 with a review in September (nearly a year after the ballot and with only 18 months left of the Spending Review) in place of the final part of the deal.

The MoJ's reasoning is that this will ensure that the value of the deal is kept (£3.3 million over the Spending Review period). It argued that its analysis of spend if the final part of the deal were implemented is much higher than £3.3 million.

The CBA has spent many hours working through with the MoJ and illustrating that its figures (always) are vastly inflated.

Historically, MoJ projections always are far in excess of actual spend. Historically, barristers never receive the underspend amount.

The Agreement between Government and the CBA

Importantly, the government has committed to honouring the deal between the Ministry and Justice and the CBA which concluded in barristers' acceptance of the deal after ballot on 10 October 2022. This resulted in the Criminal law barristers suspending action.

I had taken from the meeting last Autumn and from a recent letter from Minister Freer, dated 3 March, assurances that the government will comply with the deal.

It is not a complex process. The words are in the agreement.

And a review can be fixed in June for monitoring of spend.

Undoubtedly, at that review, the Criminal Bar will advocate for higher than criminal legal aid rates as the £3.3 million is unlikely to be spent over the period of the Spending Review (even if extended to two years) on new cases.

Criminal Bar Association and Ministry of Justice

A fundamental part of any agreement is trust. And barristers placed trust in government when they voted.

I and the CBA emphasised over several weeks that any attempt to revise the already inadequate hourly rate downwards (which is the effect of a £62 bolt-on) will be a rejection of CLAR (contrary to the government position), a backward step and inflammatory to the profession.

In negotiations in September 2022, the CBA agreed to take its case to increase the hourly rate from criminal legal aid rates to -at least- civil legal aid rates through the new Criminal Legal Aid Advisory Board (CLAB) as part of the medium- term reform.

Criminal legal aid rates already form a floor that cannot be further reduced. The rates are miserly.

Facts and Realistic Calculations

The MoJ continues not to take into account that increased payment applying only to new cases mean that these claims will not materialise in any substantial numbers until **2024-2025**.

This removes risk of “overspend’ during the Spending Review Period (and beyond).

A solid comparator is the last increase in legal aid where the MoJ’s modelling can be compared to the reality.

In summary, after over four years, the lowest part of the estimate still has not been reached.

Accelerated Asks Comparator

Prior to the CLAR report the MoJ had implemented the "Accelerated Asks", one of which was to pay for unused material a 1.5-hour rate in all cases claimed to cover 0-3 hours, and at an hourly rate for claims for over 3 hours.

The table on the top of page 7 of their Impact Assessment at the time, estimated that in a "steady state" the expenditure on this element on AGFS would be £4m-£11m up to 2021.

<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/results/clar-impact-assessment.pdf>

The actual AGFS expenditure from April 2021-March 2022 was:

£1,098,351 for 0-3 hours claims.

£ 879,381 for over 3 hours claims.

Total: £1.97m.

It has apparently increased in the latest figures up to December 2023 but still is below £4 million.

Spending Review

If the £3.3 million only applies to new representation orders (the MoJ would not apply it to the ongoing work of barristers in the “backlog” cases – a considerable saving for the MoJ), this will not result in claims for around 12-36 months due to backlog. And so, expenditure will be low.

Written work - time on cases.

Looking at current cases, the CCSQ show median time of 1.5 hours on hearings.

These cases will not have written work (too short). The third quarter showed a drop in case disposals (and hence claims).

Complex cases are the small minority in number.

It is these that will require written work/special prep with a tiny minority of application to dismiss cases.

Guilty pleas will not require written work and a very low number of "cracked" trials.

Most trials themselves are short (2-3 days) and do not include written work.

Audio/visual material (AV)

The MoJ AV figures are too high as evidenced below.

As considered by Professor Chalkley:

The proportion of cases that have any AV evidence remains uncertain -- the CPS survey indicates 34% but then does not record any actual evidence for a number of these cases. A lower bound for the proportion of cases with AV evidence from the CPS survey is 26%.

If it could be contemplated to change the 1.5hour bolt on (for up to 3 hours) into a 1-hour bolt on (for up to 2 hours) or even a 0.5 bolt on for (for up to 1 hour) then the cost of AV evidence will be reduced.

6. A number of scenarios.

Number of Cases	Proportion that has AV Evidence	Bolt on arrangement	Cost including VAT
74000	0.34	1.5 hours for 3 hours	£2.9m
60000	0.34	1.5 hours for 3 hours	£2.3m
60000	0.26	1.5 hours for 3 hours	£1.8m
60000	0.26	1 hour for 2 hours	£1.4m
60000	0.26	0.5 hours for 1 hour	£1.12m
60000	0.26	No bolt on - pay for minutes.	£1.1m

So, the MoJ "lower" bound is the top row. Then according to assumptions and alternative mechanisms you get the figures in the rows below.

Special preparation/wasted preparation.

The MoJ high model values is driven/inflated by:

- excessive volume
- The MoJ continues to work with a calculation of a high volume of cases which is not supported by evidence (76,000 as opposed to @50,000 cases). In addition, data shows that receipts to the Crown Courts are going down further.
- the failure to distinguish between different types of cases (again – the reality of barristers' practice is not considered).
- using the bolt-on approach without following through the specifics of how that might be appropriate or not to the particular items being paid. The purpose of the CLAR recommendations is for barristers to be paid for work done.

Here the bolt-on approach can be moderated or abandoned in favour of measuring and paying for **work actually done**, this would revise down the projected spend.

False Economy

Trials regularly are adjourned as there are not enough barristers left at the Criminal Bar.

It is hoped that prosecution barristers now will return due to the latest increase of fees.

The implementation of the deal should assist with recruitment and retention of defence barristers. The non-implementation will have the opposite effect. Any movement away from it will push a fresh exodus from the criminal bar. It is a devastating waste of public money for trials not to go ahead due to lack of barrister. It is devastating to complainants, victims, witnesses, and defendants.

As the MoJ should have calculated, it may drive the CBA back to a further ballot.

On a financial plane, it also makes no economic sense not to implement the last part of the deal as agreed with the (poor) criminal legal aid rates.

The cost of adjourning trials and waste of court time far outstrips the spend in this part of the deal.

The CBA is working to attract and retain barristers into the Criminal Bar. It is in the interests of the government that it works with the CBA.

In summary, the Criminal Bar looks to the Ministry of Justice to discharge the trust placed in it by the 57% of the profession who voted for the deal.

Conclusion

The CBA continues to lead with the latitude it extended to previous breaches, whilst listening to and keeping its members informed.

I and the CBA remain available to meet to make progress on implementation.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Kirsty Brimelow', with a long, sweeping horizontal line extending to the right.

Kirsty Brimelow KC

Chair of the Criminal Bar Association