



Kirsty Brimelow KC
Chair, Criminal Bar Association
Doughty St. Chambers
London
WC1N 2LS

27 March 2023

Dear Kirsty,

IMPLEMENTATION OF A NEW AGFS FIXED FEE TO REMUNERATE PREPARATORY WORK

I am writing to confirm the decision I have reached with regard to the optimal way of remunerating additional preparatory work within the Advocates' Graduated Fee Scheme (AGFS), pursuant to the Lord Chancellor's proposals on 30 September 2022.

We will lay *The Criminal Legal Aid (Remuneration) (Amendment) (No. 2) Regulations 2023* today, 27 March. The instrument has the effect of introducing a new fixed fee of £62 (+VAT) to the AGFS to pay advocates for types of preparatory work (for example, consideration of served prosecution audio-visual material) not currently remunerated under the scheme. The fee will be payable for all cases concluding by way of a trial or cracked trial (the types of case most likely to generate extra preparation), with a representation order date occurring on or after 17 April 2023, and is supplemental to any payments for Special or Wasted Preparation which may already be claimed. A payment of £62 (+VAT) is consistent with the existing bolt-on fee for consideration of unused material (£67.95 (+VAT)) for a junior advocate, covering the first three hours of work), which is the most comparable fee within the current AGFS.

The Lord Chancellor committed to expending an additional £3.3million on fees for preparation during the current Spending Review (SR) period. Given our Crown Court case volume forecasts, I anticipate implementing a fixed fee of £62 (+VAT) is the fastest way to expend the funding and will enable the MoJ to disburse the full amount by the end of the period. The Legal Aid Agency will implement a straightforward claiming process to promote a high level of take-up by practitioners.

I have decided to disburse the additional £3.3million allocated to enhancing remuneration for preparatory work by way of a fixed fee because analysts' research, which we have shared with you, indicates that the initial detailed proposals are not affordable within the funding envelope. We will therefore undertake an interim review of the preparatory fee in July 2023, to include an assessment of whether the level at which the fee has been set is appropriate.

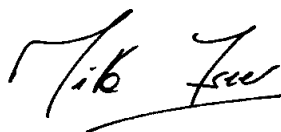
I note from your recent correspondence with Ministers and officials that you have two particular concerns regarding our decision to implement a fixed fee for additional preparation; first that take-up of the unused fee has not been at the level we estimated, and second that we have chosen not to allow an escape into hourly rates remuneration where the additional preparation time exceeds a certain threshold (for example 3 hours). In relation to the former, the latest data shows that in the 12 month period from November 2021 to October 2022 £3.9m was spent on AGFS unused material, which is close to our estimated range. With regard to hourly rates, there are significant challenges in replicating the approach we adopted for the unused fee. The unused fee is designed to pay for clearly-defined and readily quantifiable work (consideration of prosecution disclosure), whereas it is difficult to establish what is an advocate's "usual" preparatory workload (included in the basic fee) and what additional time should be allowable when necessitated by exceptional circumstances. An hourly rates-based escape mechanism for special/wasted

preparation would create a heightened administrative burden on both practitioners and the LAA, and an increase in time-consuming disputes over claims.

CLAIR found that the role of the defence advocate in Crown Court cases has evolved to encompass increasing amounts of pre-trial preparation, alongside the 'core' task of oral presentation of a case at Court, and the same trend was articulated by most respondents to our consultation on CLAIR's recommendations. I recognise that we have more to do to fully understand the nature of the advocate's role in current procedural and practice terms, and to refine the AGFS so it pays fairly in all circumstances. I will ask the Criminal Legal Aid Advisory Board (CLAAB) to incorporate examination of advocate preparation into its work on longer-term AGFS reform as a matter of priority.

Following our decision to uplift all AGFS fees for future cases by 15%, the Lord Chancellor announced a second package of measures on 30 September 2022, representing an additional investment of £48m, of which further funding in advocate preparatory fees was one element. We have successfully delivered on all components of the proposals, prioritising areas in which enhancements to advocate remuneration could be expedited. On 11 October 2022, we laid The Criminal Legal Aid (Remuneration) (Amendment) (Amendment) (No. 2) Regulations 2022 to apply a 15% uplift to 97% of existing cases that had not yet had a main hearing (we subsequently laid a further SI to capture almost all cases on 2 December 2022). On 30 January 2023, we laid an SI to implement a new fixed fee of £670 (+VAT) for section 28 hearings which came into effect on 1 February. We also moved swiftly to establish the CLAAB following CLAIR's recommendation, and subsequently to convene appropriate sub-groups tasked with examining discrete fee areas.

The Government remains committed to harnessing the principles described in CLAR and CLAIR, in consultation with the CLAAB, to optimise advocate remuneration for publicly funded defence work with the aim of supporting Covid recovery, wider criminal justice reform, and sustainability of the professions. It is clear to me that the Criminal Bar played a pivotal role in the Courts' return to a stable footing as the country emerged from lockdown, and erosion of the case backlog which had accumulated during the Covid period. I welcome the open, collaborative approach adopted by the CLAAB to date, and trust this will endure as we strive to realise our shared long-term goals.

A handwritten signature in black ink, appearing to read 'Mike Freer', with a horizontal line underneath the name.

MIKE FREER MP