



**THE RESPONSE OF THE CHAMBERS OF SARAH FORSHAW QC
& MARK HEYWOOD QC TO THE CONSULTATION PAPER:**

“REFORMING THE ADVOCATES’ GRADUATED FEE SCHEME”

We are a set of barristers’ chambers who continue to undertake publicly funded criminal defence advocacy. We do not regard ourselves as ‘defence advocates’. We are principally an independent specialist criminal set and the vast majority of us undertake both prosecution and defence work.

While this is a single Response, it has been circulated amongst all tenants and should be regarded as representing the combined views of no fewer than 49 individual members of the Bar.

Overview

1. We applaud the renewed *“focus... on the skilled advocacy that barristers and solicitor advocates demonstrate in the Crown Court”* in the Ministerial Forward to the Consultation Paper.
2. We broadly agree with the architecture of the proposed scheme, subject to a number of qualifications we explain below. The proposed scheme is clearly the product of a great deal of hard work, but also cooperation between the Ministry and the Bar, which we hope will continue.
3. **However, our chief concern is that the new scheme is not brought into force without a fuller analysis of the most recent fees data from the year 2015-16 as these data show a very different picture to the 2014-15 data (please refer to our answer to Q11 below for further detail). With so much at stake it is critical that the ultimate decision is properly informed.**
4. No Consultation on reform of the AGF Scheme in 2017 can responsibly ignore the history of fee cuts - the salami-slicing of Legal Aid fees by the Ministry - that have brought the Criminal Justice System to the state it is now in.
5. Since the adoption of the revised scheme in 2007 (post Lord Carter’s enquiry into Legal Aid in 2006, which recognised the fact that if AGFS prices are frozen in nominal terms they are reduced in real terms), AGFS has been subject to a series of nominal *reductions*. AGFS prices have now been subject to both erosion by inflation AND reduction.

6. By 2013 AGFS prices had been reduced by 21% in nominal terms equating to 37% in real terms.¹ The Ministry was warned then that successive cuts would lead to:-
 - (a) A year on year depletion of those prepared to undertake criminal legal aid work at the self-employed criminal Bar – a specialist referral profession of excellence founded on the Chambers system;
 - (b) A reduction in quality of those prepared to work at rates which have become unsustainable, save for those with private means;
 - (c) A resultant impact upon diversity at the criminal Bar;
 - (d) A resultant increase in cost to the taxpayer for criminal justice. See The Right Hon Lord Hughes’ comments at the Eighth Ebsworth Memorial Lecture: “And, because it is no good forgetting that money is in very short supply and that there is no natural right to a dole-out from the taxpayer’s limited funds, it is essential to understand that good advocates save money. A bad advocate costs a huge amount; trials take too long, and things go wrong which require appeals to people like me (not one but 3 of us) to put right.”²
 - (e) A reduction in the quality of the judiciary, many of whom are currently drawn from the Bar;
 - (f) A serious decline in the regard in which our justice system is held overseas, with the inevitable impact upon investment to this jurisdiction;
 - (g) A reduction in the quality of justice and our Rule of Law.
7. Four years on, there has been no increase in fees – just further erosion by inflation – and the impact which those involved in the justice system warned the Ministry about has already begun.
8. So it is that successive rounds of cuts have been pursued with little or no regard to their cumulative effects either alone or in conjunction with the erosion in real value due to inflation.
9. **This scheme, as all previous ones, has no mechanism for increasing fees annually, and so builds in unnoticed an annual reduction in real terms. Our professional costs are not capped annually, and nor is the cost of living. Thus it is that the criminal Bar is yet again invited to sign up to further real terms reductions. That is not acceptable or appropriate. It will lead to a continuation of all the problems identified at paragraph 6 above. Absent agreement by the Ministry to proceed by inflation linking AGFS prices, the current Consultation, while re-arranging the structure of payment on the basis of cost neutrality with the position in 2014-2015, does not resolve the underlying problem of stagnation and erosion by stealth.**

Consultation Questions

Q1: Do you agree with the proposed contents of the bundle? Please state yes/no and give reasons.

Q2: Do you agree that the first six standard appearances should be paid separately? Please state yes/no and give reasons.

¹ Findings of Professor Martin Chalkley in October 2013

² South Eastern Circuit ‘Getting it Right First Time’ 2013

Q4: Do you agree that the second day of trial advocacy should be paid for separately? Please state yes/no and give reasons.

Q20: Do you agree with the proposed approach on sentencing hearings? Please state yes/no and give reasons.

10. Yes – we agree with the proposition in each of the above questions (Q1, Q2, Q4 and Q20). We are in favour of unbundling as a means of better matching remuneration to work done. The bundled brief fee under the current scheme has ever been a source of unfairness and it is high time that this is corrected.

Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle? Please state yes/no and give reasons.

11. No – we do not agree that such hearings should be included in the bundle.
12. We do not agree that bundling hearings in excess of six “*support[s] the principles and aims of Better Case Management*”. The statistic from the Consultation Paper that 96% of cases feature six or fewer standard hearings itself is a strong indication that there is no demonstrable perverse incentive to generate extra mention hearings in cases in order to increase the overall fee payable.
13. There are a small minority of cases which, for reasons beyond the control of the advocates, require many hearings. These should be remunerated – the payments will mean a lot to the advocates concerned relative to the increased overall cost to the legal aid budget.
14. Where there are wasted hearings as a result of a failure by the advocate, the Court has jurisdiction to “*disallow, or (as the case may be) order the legal or other representative to meet, the whole of any wasted costs or such part of them as may be determined...*” (section 19A of the Prosecution of Offences Act 1985).

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed? Please state yes/no and give reasons.

Q6: Do you agree that this is the best way to capture complexity? Please state yes/no and give reasons.

Q7: Do you agree that a category of standard cases should be introduced? Please state yes/no and give reasons.

Q8: Do you agree with the categories proposed? Please state yes/no and give reasons.

Q9: Do you agree with the bandings proposed? Please state yes/no and give reasons.

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4? Please state yes/no and give reasons.

Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases? Please state yes/no and give reasons.

15. Qualified yes – we broadly agree with the proposition in each of the above questions (Q5 to Q10, and Q14), subject to four qualifications, set out below. We are in favour of

using complexity to determine remuneration and capturing complexity by offence type, save in cases where it is impractical to do so.

16. First Qualification: category 10 (burglary and robbery) should also be billable as category 5 (dishonesty), at the election of advocate. We justify this with the following example. A theft of a car worth £150,000 from the owner's driveway falls into category 5.3 with a brief fee of £2,000. If in fact the theft is during a burglary of the owner's house and is charged as an either-way burglary falls, it is only a standard case (category 16) with a brief fee of £550. This is an absurdity both under the old scheme and the proposed scheme and should be corrected in the simple way suggested.
17. Second Qualification: category 5 (dishonesty) band 3 (over £100,000) should be extended also to cover cases with over 5,000 pages. This is justified on the basis that there are many dishonesty cases where the value is unknown (e.g. conspiracy cases) so using value alone as a proxy for complexity is inadequate. PPE should be used in the alternative as in category 8 (drugs).
18. Third Qualification: there should be an extra band within category 5 (dishonesty) to cover offences over £30,000 or over 1,500 pages. We deal with the proposed fees in the next section. This qualification is justified because there is an unnecessarily large gap between a brief fee of £2,000 for category 5 band 3 and £750 for category 5 band 4. This is a larger relative gap than exists between any other consecutive bands in any other category. The lowest band in category 5 would then be for all other dishonesty offences.
19. Fourth Qualification: category 8.4 and 8.5 (drugs offences) should not be banded based solely on the quantity of drugs or PPE. Weight of seized drugs is a particularly blunt and ineffective method of establishing complexity. The vast number of supply cases are prosecuted on the basis of circumstantial and inferential evidence, such as the interpretation of text messages, phone communication or the recovery of cutting agents. Expert evidence is invariably relied upon, but often limited weights of drugs are recovered. We propose an additional factor to bands 8.4 and 8.5 based on the regularity (20+ occasions) and / or length of criminality (1 month+) alleged.

<p>Q11: Do you agree with the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.</p>

20. No – we do not agree with the principle of cost neutrality on the basis of 2014-15 data as focus on just one year is liable to produce an unrepresentative and therefore unfair result.
21. When the new scheme is applied to the 2015-16 data, there is a 3% reduction in overall fees according to the Impact Assessment at §69. The only explanation given is that the reduction is “*partly explained from an increase in the amount spent on evidence and witness uplifts, which would not apply under the proposed scheme, and a change in case mix.*”
22. Whilst we are against cost neutrality in principle because in our view there should be an increase to the budget for AGFS, if there is nevertheless to be cost neutrality:

- a. It is important that the initial baseline is a fair one. If and when fuller analysis of the 2015-16 data is carried out, we will be in a better position realistically to consider what baseline would be fair; and
 - b. The new scheme should include a period of review and recalibration to ensure that the cost neutrality is forward-looking. We would propose a review and recalibration at the end of the first, second and third years after the scheme is brought in.
23. Our own fee comparisons conducted by the 5KBW fees team (who were instructed to undertake no selection exercise in respect of cases but carefully to compare fees to be paid under the proposed Scheme with current fees paid between February 2016 and February 2017, in detail and by examining the indictment in each case) have found that the proposals result in an overall *reduction* in Chambers AGFS payments of 4%. While we appreciate that those results are indicative only and that even relatively large numbers of genuinely randomly selected cases may exhibit significant deviations from cost neutrality, it is a matter of real concern that we are unaware of other Chambers who, having conducted similar exercises, have produced results that show a balancing increase or are even themselves independently truly cost neutral.

Q12: Do you agree with the relativities between the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

24. Qualified yes – we agree but subject to the qualification that we have proposed above an extra band within category 5 (dishonesty) to cover offences over £30,000 or 1,500 pages. We would propose that the brief fee for this new band should be 60% higher than the band below it in category 5 and the refresher should be at the midpoint between that for the band above and the band below. Applying these relativities to the proposed fees the trial brief fee would be £1,200 and the refresher £375.
25. It is likely that the suggested extra band in category 5 would increase the cost of category 5 as a whole. If the increase is too large to be borne within the overall budget, the absolute figures in category 5 should be adjusted proportionately.

Q13: Do you agree with the relativities proposed to decide fees between types of advocate? Please state yes/no and give reasons.

26. Yes – the relativities proposed (100% uplift for QC from the junior fee and 50% uplift for leading junior) are straightforward and sensible, and eliminate the present anomaly whereby a led junior is paid less than a junior alone.

Q15: Do you agree that the relative fees for guilty pleas, cracks and full trials are correct? Please state yes/no and give reasons.

27. Yes – we agree with paying guilty pleas at 50% and cracked trials at 85% of the brief fee for trial, subject to the definition of a cracked trial as addressed below (in answer to Q16).

Q16: Do you agree that the point at which the defence files a certificate of trial readiness should trigger the payment of the cracked trial fee? Please state yes/no and give reasons.

28. Qualified yes – we agree, subject to the qualification that the trigger should be the earliest of:

- a. the date when the defence has filed a certificate of trial readiness;
- b. the date by which the Court has directed it to be filed; or
- c. 28 days before the date of trial.

29. In the Consultation Paper it is stated at §6.3 that:

*“... a certificate of trial readiness... should be served no later than **28 days** before the date of the trial... we think the point of this certificate being filed, or the point at which it is directed to be filed, would represent a more appropriate point after which to determine whether a trial has ‘cracked’”*

30. This qualification reduces the chance of the advocate losing out because a certificate of trial readiness has not been filed for reasons beyond their control.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document? Please state yes/no and give reasons.

31. Qualified yes – we agree but subject to two qualifications set out below.

32. First qualification: the 10,000 PPE threshold should apply to all cases except dishonesty cases where the threshold should be 25,000 pages. In our view, where there are over 10,000 pages and at least 5,000 pages over the top band threshold (i.e. 5,000 for category 8 band 1 and 20,000 for category 5 band 1), additional pages should be separately remunerated by way of special preparation.

33. Second qualification: we do not agree that it is necessary to remove the words “*very unusual*” from the other limb of the special preparation test. No evidence is provided in relation to the cost impact in any event.

Q18: Do you agree that the wasted preparation provisions should remain unchanged? Please state yes/no and give reasons.

34. Yes – we agree the new scheme does not change the role of wasted preparation and therefore the provisions should remain the same.

Q19: Do you agree with the proposed approach on ineffective trials? Please state yes/no and give reasons.

35. Yes – this addresses one of the most unfair problems with the current scheme and we agree that the fee should be equal to the standard case refresher fee i.e. £300.

Q21: Do you agree with the proposed approach on Section 28 proceedings? Please state yes/no and give reasons.

36. Yes – we agree that the first day of pre-trial cross-examination should continue to be treated as the first day of the trial because effectively trial advocacy is being carried out.

Q22: Do you agree with the design as set out in Annex 1 (proposed scheme design)? Please state yes/no and give reasons.

37. Qualified yes – we broadly agree with the design, subject to the following qualifications:
- a. In the absence of clear information on the cost impact of remunerating separately for hearings in excess six, we do not agree that such hearings should be included in the bundle (see answer to Q3 above);
 - b. The qualifying trigger for a cracked trial should be the earliest of: the date when the defence has filed a certificate of trial readiness; the date by which the Court has directed it to be filed; or 28 days before the date of trial (see answer to Q16 above);
 - c. In relation to special preparation, the 10,000 PPE threshold should apply to all cases except dishonesty cases (category 5) where the threshold should be 25,000 pages and the words “*very unusual*” should remain in the other limb of the test (see answer to Q17 above);
 - d. We disagree with the fixed fee for “*elected cases not proceeded*” because the fee of £194 is not a fair remuneration for work done and there is a perverse incentive to take a case to trial. These should be paid as standard cases instead.

Q23: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

Q24: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

38. Yes – we agree with the proposition in each of the above questions (Q23 to Q24) in relation to the equality statement.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

39. As a set based in London, we are not in a position to offer an informed opinion in answer to this question.

5KBW

19th February 2017