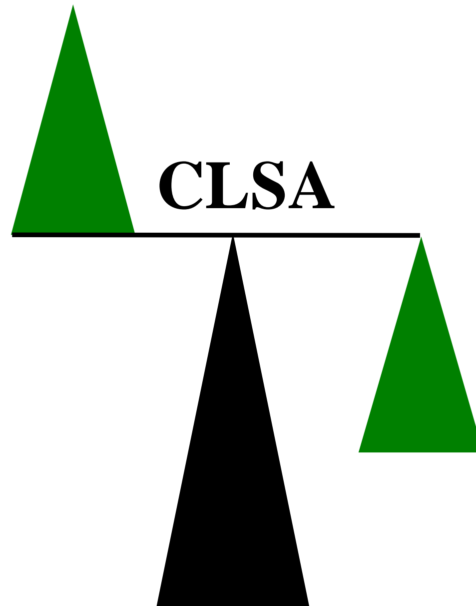

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CLSA response to Reforming the Advocates' Graduated Fee Scheme

INTRODUCTION

The Criminal Law Solicitors' Association (CLSA) is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law. The CLSA is responding to the consultation on behalf of its members.

SUMMARY

1. The CLSA is vehemently objects to the scheme outlined in this consultation. Grave concerns are held over the cited "cost neutrality" of the scheme, given the increase in payments to Queen's Counsel (QCs), and the irreparable impact that the operation of the scheme will have on junior advocates on both sides of the profession, for whom the outcome represents a savage cut.

2. The CLSA takes the view that it is perilous to embark upon reform of the AGFS Scheme in isolation from other vital components in the Criminal Justice System; namely, the Litigator Fee Scheme (LGFS) and that work encompassed by "Lower Crime" spend. In a Ministerial Statement dated 28th January 2016, the then Lord Chancellor Michael Gove stated ***"I will review progress on joint work with the profession to improve efficiency and quality at the beginning of 2017, before returning to any decisions on the second fee reduction and market consolidation before April 2017"*** A wholesale review of remuneration across the broad spectrum of the Criminal Justice system is the only way of safeguarding quality of advocacy. It is imperative that the Ministry of Justice makes good on this statement instead of herding through reform in a piecemeal fashion. There must be a recognition that Crown Court advocacy does not take place in a vacuum, it is the product of quality preparation throughout the life of a case. If that which underpins the trial is jeopardised, no individual ability will be equipped to compensate for the shortfall in the process with dire consequences for witnesses and the Accused, many of whom are the most vulnerable people in our society. It also has to be recognised that crown court advocacy is not within the sole remit of the independent Bar and that a significant degree of this work is carried out by both Barristers and Solicitor Advocates employed in private practise. The global effect of any reforms has to take into account any impact of the commerciality of any scheme from a business perspective, not just from the perspective of an individual on a self- employed basis.

3. The timing of the reform is irrational as impact assessments have not taken into account savings from Better Case Management (BCM) and impact of The Allocation Guideline. BCM was rolled out nationally in our courts on the 5th January 2015, the aim of which is to front load case management with result that far fewer hearings take place between PTPH and trial. This immediately removes the applauded benefit of unbundling and separate payments if such hearings, more likely to be conducted by junior advocates, are simply not going to be held.

4. The Allocation Guideline effective in Magistrates' Courts from 1st March 2016, states that. In general, either way offences should be tried summarily unless:

- ***the outcome would clearly be a sentence in excess of the court's powers for the offence(s) concerned after taking into account personal mitigation and any potential reduction for a guilty plea; or***

- ***for reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a very substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific; the court will rely on the submissions of the parties to identify relevant cases.***

In cases with no factual or legal complications the court should bear in mind its power to commit for sentence after a trial and may retain jurisdiction notwithstanding that the likely sentence might exceed its powers.

Cases may be tried summarily even where the defendant is subject to a Crown Court Suspended Sentence Order or Community Order.

Both of these initiatives will have a significant impact on both higher and lower crime spend and the volume of cases reaching the Crown Court at all. Anecdotal evidence is that many, on both sides of the profession fail to appreciate the operation of the Allocation Guideline and what it actually means for the pool of available work in the Crown Court. The effect will be that there will be significantly less cases being tried in the Crown Court and if these cases do reach the Crown Court at all, it will purely be on the basis of a committal for sentence. This cannot be underestimated when considering the economics of the new scheme.

5. The guideline Reduction in Sentence for a Guilty Plea Consultation published by the Sentencing Council on 11th February 2016 stipulates (at page 17) that for either way offences, the trigger point for full credit in the case of an offender aged 18 or over is at the allocation hearing in the Magistrates Court. The proper application of this guideline will result in less cases being sent to the Crown Court for trial and less cases being sent to the Crown Court, which ultimately crack.

6. To reform without first ascertaining the effect of these changes would be dangerously premature. To analyse the true impact on fee income based on an assumption of static volume is foolhardy.

7. The design of the scheme is disproportionately weighted towards senior advocates with a case mix that is predominantly trials in the more serious categories of work. This is under the banner of preserving quality and career progression. This is a false economy. It improves the position of those advocates who are already sufficiently experienced and renders the work unviable for those embarking upon a career in Crown Court advocacy. Those already undertaking this work of mid-range experience will not be able to remain in the profession.

8. The balance of remuneration under the new scheme creates a tension with the spirit of BCM. All recent initiatives rolled out within our courts have at their core the same aim: the early resolution of cases. The architecture of this scheme has the potential to create perverse incentives in that there is a financial incentive to delay plea

9. Geography dictates the case mix for any advocate and the leaching of remuneration from the lower end and what may be termed "bread and butter" cases will impact more severely on advocates depending on the area in which they practise. No analysis has been done in terms of case mix by area, which is essential to ensure that there are not large areas of the country where there is a lack of quality advocacy available so as to create a disservice to access to justice.

10. It is wholly unfair to expect the profession to make commercial assessments under a cloud of uncertainty as to other aspects of remuneration mechanisms. It is virtually impossible to make assessments as to business sustainability against a background of:

- imminent signing of new 5 year contracts which the supplier cannot terminate

- open consultation on Litigator Graduated Fee Scheme (LGFS) having a staggered closing date
- mixed messages from the Ministry of Justice regarding the suspension of the second 8.75% cut for litigators

This climate of flux carries great risk of market fragility. If the reform is cost neutral as stated, there is no financial impetus for any reformed scheme to be implemented now. As such, there cannot be any strong argument against delaying this reform and making it a component part of a much wider review, which encompasses the entirety of the criminal justice process. The CLSA calls for the MOJ to pause and reform only after a robust and broad-spectrum review has taken place.

QUESTIONNAIRE

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

No. A fundamental flaw in the timing of this consultation is that whilst significant changes as to how cases are progressed through the Crown Court have begun to take effect, inadequate time has been allowed to analyse the impact of those changes. A central objective of BCM being the need for fewer hearings in most cases. It is a fallacy to cast a perceived benefit in unbundling when the hearings are simply not going to be there due to the effective operation of BCM. This means that the proposed content of the bundle would adversely affect those engaging in such hearings when compared with the current bundle. Those engaging in such hearings are in the main the junior Bar and Solicitor Advocates seeking to gain experience in the pursuit of career progression and therefore this proposal penalises the very spirit of the reforms, documented as having the protection of career progression as one of its aims. It is not a fanciful conclusion that the financial constriction of this level of advocate will result in a lack of replacement talent in both sides of the profession, which will ultimately impact upon the talent pool available for the Judiciary.

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

Yes. All standard appearances should be separately remunerated under any new scheme. However, within this scheme, the effect of BCM removes any perceived benefit, which makes the provision in the current AGFS scheme more equitable than the proposed scheme.

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.

No. If the aim is payment for work done the suggestion that for standard appearance seven there should be no fee causes a number of issues:

- The vast majority of cases where there have to be in excess of 6 standard appearances are likely to be cases where things are going wrong. If this is the fault of the prosecution, (which it is accepted will not always be the case) then it is unfair to penalise the defence advocate.
- The court itself under BCM has adequate powers available to ensure that the cases with six plus standard appearances will be very unusual indeed and it is far from clear this cut off will result in any kind of significant saving given that the quoted figure of 96% of cases having fewer pre-dates BCM in any event.
- Some cases needing six plus standard appearances will be because of complexity. It is unfair to penalise the defence advocate because they are instructed in a complicated case

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

Yes. A second day of trial advocacy constitutes work done and should therefore be remunerated.

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

No. Not as proposed by this scheme. In relation to Homicide, whatever the sentencing guidelines suggest, (which seems to be what the banding of category 1 reflects) a life sentence is mandatory, it is the ultimate sanction and notwithstanding the difference in tariffs available there is a lifelong impact on any defendant found guilty of murder. This is the only category where complexity should not dictate the level of fee.

Although the number of cases in category 7 is likely to be few, there is going to be a difference in complexity between treason, official secrets and perjury cases. Whilst the savings effect of banding in such unusual cases is likely to be minimal, it is inconsistent not to band this category also. The future application of this category needs more consideration if any of the proposed changes in the Law Commission's Protection of Official Data consultation are to be adopted.

With respect to category 10.2 there should not be a distinction in band between domestic burglary and third strike domestic burglary as a third strike has no link to complexity.

Category 14 ought to include all of the public order offences banded by seriousness.

The banding in dishonesty cases results in a major reduction in cases above and below 10000 pages. For example, in a very complex case that is 8000 pages, advocates will lose out. There needs to be a more nuanced way of rewarding the complexity of these cases. The drugs cases have a tapering of bands so there is a difference between 0-5,000 and 5,000 -10000. There is no apparent reason why this approach cannot apply to dishonesty offences.

In the drugs category, the thresholds for the higher bandings are set very high, at least either 5000 pages or a massive amount of drugs recovered. The overwhelming majority of drugs cases will come into the lowest banding, 8.7 for which the fee is very low.

Another banding problem is the failure to distinguish between adult and child sexual offences. For example, sexual assault is 4.2 but the arguably more serious and complex sexual activity with a child (which may involve cross-examination of a child witness) is 4.3. At the very least, all child sexual offences should be in 4.2.

The bandings are not nuanced to reflect the increased work in representing vulnerable clients; not those who necessarily need an intermediary but instead youth defendants and those with properly identifiable mental illnesses by reference to the Advocates' Toolkit.

Any departure from the current categories needs to be properly modelled and thoroughly tested before implementation. The profession cannot be satisfied that has occurred in this instance.

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

No. What may be perceived as a straightforward case can be very complex depending upon the nature of the evidence and nature of the Accused and/or witnesses. These factors can disproportionately affect the work required to be done.

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

No. Without a list of standard cases, it is hard to offer a meaningful response; but in general, the principle of having standard cases is inconsistent with the stated aims of remuneration based on complexity. The Consultation document states at paragraph 5.4 that the standard category will provide more certainty. The very antithesis of certainty is not stipulating what will be in the standard category in advance and the ability to move cases in and out of it at will.

An example is category 3.4, namely all other violence except standard. It is unclear whether offences contrary to sections 20 and 47 of the Offences Against the Person Act 1861 are included or whether they are to fall within the standard category. In relation to sexual offences at 4.3, there are a large number of sexual offences, which are not rape, assault by penetration or sexual assault. It is not clear which offences are in 4.3 and which will be standard.

In relation to burglary, a case involving forensic evidence is likely to be more complex than a burglary that simply relates to a disputed identification. Why both should be a standard case is unclear. Rather than rely on a standard cases category, more banding within a category would be the best way to ensure fair payment for work done.

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

No. See responses to Q5-7.

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

No. See responses to Q5-7.

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.

No. See responses Q5-9.

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

No. The level of fees in criminal cases has been generally too low for many, many years. The Government seems to rely on the willingness of those with both ability and a social conscience to work for less in order to shore up the obvious problems that low remuneration causes in attracting talent.

The fees proposed adversely and perilously affect the junior Bar and Solicitor Advocates. QCs are getting an increase at the expense of junior advocates. According to paragraph 50 of the impact assessment, QCs will get an increase of 10% in fees. The proposal is that QCs get double the junior rate, i.e. a 100% uplift. Under the current scheme in a Murder case of Category A, the basic fee for a

QC is £2868, for a junior it is £1632. This is a 75% uplift. There is no proportionate justification for increasing this uplift to 100%. If the reforms are cost neutral and the needle simply shifted, the net effect is an increase for QCs at the expense of the junior advocates.

Various analyses already published (Lincoln House Chambers and Farringdon Chambers) demonstrate that the operation of the proposed scheme represents a cut in the region of 24%. Whilst in the majority of cases the proposed basic fee is greater than the current fee, the extent of the cut is masked because the PPE element and uplift are removed. The proposed scheme does not represent fair payment for work done. It represents a cut for the majority of advocates and an increase for QCs.

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.

No. See response to Q11.

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

No. The fees proposed adversely and perilously affect the junior Bar and Solicitor Advocates.

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

Yes. This is subject to a caveat that any new scheme includes a mechanism for being properly paid for digital evidence. This scheme does not address that objective and is woefully inadequate.

The increase in the thresholds for claiming special preparation to 15000 and 20000 respectively belies a further cut. The current scheme remunerates by way of an uplift in the basic fee up to 10,000 pages and special preparation thereafter. Under this scheme, advocates will be paid nothing for the work required to be done with pages between 10,000 and 15,000-20,000.

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

Yes. The relative percentages are correct but the indicative fees payable are not. The fees proposed adversely and perilously affect the junior Bar and Solicitor Advocates.

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.

No. This event has very little correlation with the amount of work that has had to be done by the advocate. It is a misconception that all of the advocates' difficult work is done at trial. This ignores what can often be in depth preparation for the purposes of conference, particularly in complex cases or where cases involve complex clients. It is wrong to remunerate at the same level a case that has been the subject of a guilty plea at PTPH and a case that resolves in a plea at Stage 1 or beyond, when it will have been incumbent upon the advocate to consider additional material served by the prosecution which can and usually does, in many cases, result in a significant amount of evidence being served. The work required to be done is simply not comparable.

This proposal has great potential to encourage perverse incentives to delay plea until service of the certificate of trial readiness. This is at complete odds with the recommendations of Sir Brian Leveson and the objectives of BCM and will directly impact upon witnesses and the resources of the Court in terms of unnecessary trial listings.

It is often the case that it is not possible for the defence to file a trial readiness certificate because of some inaction or failure on the part of the prosecution and/ or the police. It is wholly unfair to place the advocate in a position whereby they are a hostage to the inefficiency of other agencies.

A fairer trigger point for denoting a cracked trial might be the service of a defence case statement at Stage 2, which is equally the trigger point for an Application for Dismiss, in an appropriate case. At that stage, the evidence will have been considered, a conference held upon it and the defence case committed to a document. Arguably, this is fairer remuneration for work done.

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.

No. The existing provision as to Special Preparation is fraught with difficulty in the pursuit of proper remuneration for work done but is preferable to that set out in section 7 which can only translate to a cut. This is especially the case as this scheme fails to adequately deal with digital evidence, which predominantly features in fraud and drugs cases.

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

Yes.

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

No. It makes no sense to move money in this way within an apparent “cost neutral” envelope at the expense of lower end cases that do go ahead and advocates who are actually engaged in trials.

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

Yes. A sentencing hearing should attract a separate fee. However, this point illustrates that the reforms are being done at the wrong time as practice in Crown Court has recently changed in that less pre-sentence reports are being ordered and it will be in a significantly less number of cases that a separate sentencing hearing takes place at all. On the face of it, this approach is cast as a benefit but it is not in reality if the hearings do not take place.

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

Yes. Maintenance of the status quo is supported.

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

No. See responses to Q1-20.

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.

No. This consultation fails to take account of:

1. Digital evidence – this is one of the most fundamental issues with remuneration under the current scheme. The way in which it is dealt with currently and under this scheme is inadequate. The way in which the CJS operates is changing and the defence community is expected to keep up with that evolution. It is therefore difficult to fully understand why a remuneration scheme cannot evolve concurrently and it is unfathomable that a "review" does not capture this problem and is incomplete in failing to do so.
2. The Allocation Guideline – the operation of this guideline will mean that there are significantly less cases before the Crown Court. True volume is key to enabling the profession to analyse the net effect of their fee income from these proposals. Insufficient time has been allowed from the inception of the guideline in March 2016 for a realistic assessment to take place.
3. Efficiencies created by BCM, which will result in fewer hearings between PTPH and trial.
4. Case mix by geography.

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

No. See response to Q23.

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.

Yes. The general impact of these proposals will mean that criminal advocacy will simply not be economically viable to attract replacement talent into the profession this applies equally to Welsh speaking talent who will not be coming through the ranks. The higher echelons will not wish to undertake the lower end cases, which represent the shift in the envelope, because of poor remuneration, which will mean that there is a lack of Welsh medium availability in the lower end cases.