



**Criminal Law Solicitors' Association**

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**Response of the Criminal Law Solicitors Association [CLSA] to the Consultation  
"Amending the Advocates Graduated Fee Scheme"**

The Criminal Law Solicitors' Association 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.

1. We very much regret that no representative of any Solicitor body (including the Law Society/CLSA/LCCSA) were consulted when Ministry of Justice officials met with representatives of the Bar Council and Criminal Bar Association prior to this consultation being brought forward. This is despite Solicitors firms employing Higher Court Advocates [HCAs] being affected materially by any redesign of the AGFS scheme.
2. According to figures collated by the MOJ in 2014/15, 35% of publically funded Crown Court Defence Advocacy was undertaken by HCAs Broken down by case type, HCAs constituted 43% of advocates in guilty pleas, 29% in Trials and 24% in effective Trials. These percentages may well have risen in the period 2017/18.
3. The CLSA has made the point for many years that continuous cuts to criminal defence work would lead to a crisis. We are now in the midst of that crisis. Recruitment for solicitors entering the field of criminal law is at an all-time low.
4. We firmly believe there are various reasons for lack of recruitment into our branch of the profession in spite of record numbers of law students passing through University and Colleges of Law.
5. Students are actively discouraged by Universities and Colleges of Law to look at a future in publicly funded work. Those Law Graduates who are not put off by those recommendations and are still intent on looking at a future in publicly funded criminal defence work go on to consider the harsh economic realities and many, even though keen, realise that with a large student debt to clear, there is very little point in beginning a career in publicly funded defence work, where it is clear that the rewards simply do not exist and the future is far from certain.
6. There is also a recruitment crisis with the Junior Criminal Bar. In some geographical areas members of the Junior Bar have left the profession to seek employment elsewhere. In other areas there has been a drift of the Junior Bar into advocacy in child care cases. Generally speaking, remuneration in child care cases far better recognises the work done and is paid at a higher level.
7. We would suggest that the Government considers remuneration in such cases and looks at what improvements can be taken from those schemes. We would suggest

this would certainly be a good starting point. In such cases, advocates are remunerated for mentions, for advocacy meetings, for interim Hearings and final Hearings.

8. There has been chronic underfunding with a of lack of inflationary increases, cuts to fees, removal of some work from the scope of legal aid, failure to recognise changes in working practices and work types and no investment to take into account additional burdens caused by Government imposed logistical changes, such as the closure of courts, together with demographic changes and new legislative priorities.
9. There have been no increases to legal aid rates since 1997. Since 1997 the impact of inflation has resulted in a real terms cut of 42%, even before actual cuts such as the 8.75% real reduction to solicitors fees in 2014.
10. Whilst we welcome any attempt to improve the sustainability of criminal legal aid, we firstly note that this is the first occasion that we can recall any fee increase being proposed in any aspect of criminal defence work for two decades. We secondly note that there would have to be a significant additional fee increase above what is proposed in the consultation document for the proposals to amount to the headline figure of placing an extra £15m into the AGFS.
11. It is clear the 'extra' £15m often referred to not only includes V.A.T. but also, in calculating it, the Ministry of Justice has used the case mix information from 2016/17. When 2017/18 data is applied, the actual increase is approximately £8.6m (inclusive of VAT), just over 50% of the amount actually promised.
12. Even the calculation of an additional £15m expenditure depends upon assumptions as to the case mix of the future. We are concerned that the consultation and its impact assessment give very little detail of the case mix upon which the assumptions of future expenditure are based.
13. In our response to the consultation that preceded scheme 10 we made clear that there had not been any proper analysis of the impacts of (i) the allocation guideline introduced in March 2016, (ii) the then proposed guideline on credit for a guilty plea (which then came into force on 1 June 2017), and (iii) the Better Case Management initiative.
14. What has the impact of these changes to the criminal justice system been to the case mix? Is the forecasted future spending set out in the consultation based upon trends that will continue going forward? Can there be any real confidence that the proposed fee increases will actually result in the investment anticipated? We still do not see any proper analysis of the impact of these issues and urge the government to urgently review their impact.
15. Since that time there have been further initiatives concerning defence engagement and disclosure which place additional burdens on the defence, none of which have been reflected in fee structures for either litigators or advocates. Those reforms are likely to have had a significant impact upon both lower and higher crime spending.

16. The stated intention of Government was that more cases will be tried in the Magistrates' Court and if cases do reach the Crown Court they will be by way of committal for sentence rather than for trial. (We made the point during the last consultation and repeat that the current AGFS scheme contradicts the Leveson principles by not incentivising early preparation and disposal and instead moving funds towards later work).
17. The scheme 11 proposals appear to offer disproportionately very little if any additional investment into cases of this type, which are often carried out by junior barristers or Higher Court Advocates which were said to be the focus of the additional investment.
18. In addition to all of the above, and as the consultation document acknowledges, the review of the remuneration for consideration of unused material (which is currently paid within the brief fee regardless of the amount of material) has been highlighted by the House of Commons Justice Select Committee as also requiring review. None of the recommendations in that report have been implemented in the proposed Scheme 11.
19. In this context we do not see that the fee increases proposed in this consultation properly address the sustainability of publicly funded criminal defence work in general or Crown Court advocacy in particular.
20. It is our view that Scheme 10 has fundamental issues in its structure, and the proposals for Scheme 11 do little to rectify those issues.
21. Government should urgently address remuneration across the board, not only in the AGFS and LGFS Schemes but also Police Station fees and Magistrates' Court lower crime fees. We appreciate that the LGFS Consultation is still to come.
22. We note that the Ministry of Justice expect to begin gathering "real time intelligence" on how the new AGFS scheme is operating in early 2019 and that there will be a review of the scheme 18 months from Jun 2018, i.e early 2020.
23. Those timetables should be kept. The Justice Select Committee recommendation of annual reviews in consultations with stakeholders including solicitors groups should be implemented.
24. We are concerned at the inequality of the distribution of fees under Schemes 10 and 11 which reward QCs to a much greater extent than members of the Junior Bar. We do not see that these proposed fee increases radically alters that position, nor do they meet the stated aim of investing in junior advocates to address the recruitment and retention crisis facing barrister and solicitors.
25. We agree with points that have been made by others in this consultation process that one partial solution would be a gradual closing of the substantial gap between fees paid to QCs and those paid to juniors for substantially similar work.

26. It is, we submit, no longer justified for QCs to receive double the fee of a Junior Barrister, nor does this reflect common practice in privately funded cases. However in order to reconcile this particular difference, we do not subscribe to the view that there should be a reduction in the fees paid to QCs but instead we submit there should be a greater increase in fees paid to Juniors including HCAs in order to close the gap over time.
27. The consultation poses certain questions. We do not propose to respond to each individual question but we make the point that the government's main priority must be to secure better funding for advocates and, as stated as above, to include the LGFS, lower crime and Police Station fees as a matter of urgency.
28. We note that when the new scheme is implemented, it should last only a short period of time as the MOJ is committed to further work on the scheme.
29. We are however pleased to note at long last the Government's acceptance of the need for investment in legal aid criminal Defence work, but would make it clear that there is a long way to go to right the ship following underfunding by previous Governments of all political persuasions, in times of economic prosperity and in times of austerity.