Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes

Consultation response from Legal Aid Practitioner Group

Introduction

1.1 Legal Aid Practitioners Group (LAPG) is a membership body for firms and organisations with a contract to carry out legal aid work. Our members are based throughout England and Wales and are both private practices and not for profit organisations. Our members carry out civil and criminal work and cover the whole range of sizes from small sole principal firms to some of the largest providers of legal aid services in the country.

1.2 We are acutely aware of the precipice on which firms which engage in legally aided criminal defence work currently exist. Without a properly funded legal aid system the state cannot ensure that those accused of a crime can have a fair trial; that the guilty are properly convicted and the innocent are acquitted. Against that background it is startling that in the last 25 years there have been no increases in legal aid rates, and the year on year effect of inflation is that there has been a significant decrease. More recently, in 2014 there was a cut of 8.75%. There have been other cuts which have hit criminal defence firms hard, including the removal of the committal fee and London rates.

1.3 We were encouraged by the idea of the Criminal Legal Aid Review (CLAR), and hopeful that there may be a commitment to pay legal aid practitioners fairly for work done. That fairness would in our view necessarily involve consideration of the legal aid rates. We understood that the process would take time, to ensure a proper understanding of the complex nature of the work being undertaken, and to ensure that any scheme would stand the test of time and ensure the sustainability of the criminal legal aid market for years to come.

1.4 The imperative to address certain aspects of criminal fees described as accelerated areas within the current consultation was also a welcome and refreshing approach. We do not agree however that what is proposed is in any sense a fair settlement to solicitors in particular. This cannot be dismissed as only a temporary measure, as we fear that these rates and amounts will influence the final review recommendations.

1.5 The disparity between what is being offered to litigators and advocates in percentage terms supports the view that the Ministry of Justice (MoJ) wants to be seen to be doing the right thing rather than actually being fair or in fact doing the right thing. As the Law Society response (which we have seen and support) makes clear, the actual value to litigators is less than the value to advocates, as it is in percentage terms (para 17-18).

1.6 Recruiting new solicitors and barristers is now more difficult than ever. When funds are thrown at the Crown Prosecution Service (CPS) to recruit more lawyers, it has and will inevitably lead to a drain of solicitors from the defence to the prosecution. Criminal defence firms simply cannot compete with the wages/terms that are currently being offered by the CPS. The result will be that more and more firms withdraw from the legal aid market and/or decline to act in certain cases, for which the remuneration is wholly inadequate.

1.7 This was an opportunity for the MoJ to show a commitment to supporting the criminal defence market and to encourage firms to recruit, train and retain staff. As a marker for what is to come it gives us little faith that there will be a properly, fairly funded criminal legal aid system.

1.8 This has a wider impact. There are many firms committed to providing a legal aid service to the public in crime as well as other areas such as family law, housing law and community care. The lack of remuneration in one area will lead to decisions being taken about the viability of the whole firm.

Unused Material (AGFS and LGFS)

Q1: Do you agree with our proposed approach to paying for work associated with unused material?

1.9 No. The work done in reviewing unused material is not simply an exercise in reading or viewing the material. It involves a reconsideration of the evidence that is relied on to establish how the prosecution case is undermined. It often involves consideration with the accused and further investigation if it is material that assists a known defence.

1.10 To the extent that these proposals have been made following consideration of CPS information on the volume and type of case material being shared with the defence, the proposal is flawed. The CPS routinely fails in its duty to properly consider unused material – often simply looking at a Schedule – or awaiting argument in court before any real consideration is given. The CPS also has no concept of the consequential work that needs to be done following review of this material. Since there has been no or inadequate payment for considering this material it is extremely likely that time spent has not been properly recorded by defence firms, so any such survey is likely to be at best a guess.

1.11 It is not sufficient to pay an hourly rate for reviewing / reading the material. There is associated work which needs to be remunerated. The idea of paying the equivalent of 1.5 hours work for 0-3 hours spent reviewing unused material is simply unfair and unreasonable. It means that the second 1.5 hours of work done in reviewing material is simply unpaid. It makes no allowance for any consequential work that has to be done. To the extent that it influences behaviour it means that consideration of such material is likely to be rushed (as only the first hour and a half is paid for) which will potentially lead to material being overlooked and miscarriages of justice.

1.12 The proposal indicates that the MoJ is content for litigators to work without proper remuneration. It indicates that the MoJ is not in fact prepared to pay for work done.

1.13 Most solicitors have little or no confidence in the Legal Aid Agency's (LAA) ability to fairly assess special preparation claims. This view is borne of experience and a perception of a culture of refusal at the LAA (please refer to ongoing discussions between LAPG and the LAA on the outcome of LAPG's recent 'LAA decision-making survey' which demonstrated a high level of dissatisfaction about LAA's processes). That rationale is why many firms choose not to make such claims and lose additional unpaid time arguing backwards and forwards over the claims made. Our experience is that this culture within the LAA means that claims are routinely reduced whether on the basis of hours spent or grade of fee earner. We therefore have no confidence in the special preparation system as being one where firms will be fairly remunerated for considering unused material.

1.14 Finally we object in the strongest terms to the hourly rates which are being proposed for this work. This reflects a legal aid hourly rate which has not been increased for 25 years, and indeed was cut by 8.75% in 2014. It in no way fairly reflects the expertise of practitioners nor the significance of the legal work involved. These hourly rates are derisorily low which makes the proposal derisory one.

Q2: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

1.15 We submit that payment should be made for reviewing the material and all consequential work.

1.16 We can understand the merits of a banding system which reduces the administrative burden involved in a special preparation claim. However, we submit that it should be paid at the top end of the band, to be fair, rather than the middle of the band.

1.17 We would also submit that there should be an additional band for say 4-10 hours work, which should be paid as 10 hours work. As a scheme this would be similar to that which operates at present in the magistrates' court with lower standard and higher standard fees.

1.18 If the MoJ's intention was to remunerate criminal defence solicitor firms fairly for what has been identified as a critical piece of work and/or to provide a recognition of the current failings of the legal aid remuneration scheme we submit that this would perhaps be best done by a fixed fee which is claimable for all cracked trials and trials. This would be a concrete sign that the MoJ is prepared to adequately fund legal aid.

1.19 A further alternative would be to include unused material within PPE for the LGFS scheme. As a temporary measure this would ensure that the work is fairly remunerated, given the work done in respect of the material is the same as for PPE, and would guard against any change in practice/behaviour by the CPS, with more material being initially served as unused.

Paper heavy cases (AGFS)

Q3: Do you agree with our proposed approach to paying for paper heavy cases?

1.20 We agree that it is right to properly remunerate paper heavy cases. Whilst it is right to observe that the current AGFS was developed by the MoJ/LAA in association with the Bar, it is clear that the scheme does not adequately remunerate paper heavy cases.

1.21 However we disagree with the use of derisorily low hourly rates for the reasons outlined in paragraph 1.14.

Q4: If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

1.22 Within the previous AGFS schemes PPE was paid at a rate per page depending on the category of case, and whether the matter went to trial or cracked. This approximated to a rate of £1 per page. We would suggest reverting to that principle for the additional pages in the paper heavy cases.

1.23 It could then be fairly said that advocates were being remunerated for considering the evidence in these paper heavy cases.

Cracked trials in the Crown Court (AGFS)

Q5: Do you agree with our proposed approach to paying for cracked trials under the AGFS?

1.24 We do agree with the simplicity of identifying a cracked trial and removing the complication of whether the crack was in the first, second or third third. There are a multitude of reasons why a case is more likely to crack in the final third, and none of them are the responsibility of the advocate (or litigator). A statistical analysis of when cases crack also has to reflect the underlying reason, whether it is due to the service of further evidence, a witness not turning up, or a defendant deciding to plead guilty on the day of trial.

1.25 We welcome the increase in the cracked trial fee to 100% of the trial fee.

1.26 However as the MoJ has identified, if the principle that 'the advocates will be ready for trial ahead of the expected start date of trial' applies, then the same has to be said of litigators. Before an advocate can say he/she is ready for trial the litigator will have prepared the case ready for trial.

1.27 As a matter of principle it has to be right that if a case is ready for trial, it is ready insofar as the litigator is concerned and as far as the advocate is concerned.

1.28 It is extremely unfair given the amount of work that litigators put into preparing a case for trial that the litigators' fee should be dependent on what happens on the first day of trial and whether or not a jury is sworn and a case opened.

1.29 For this reason we submit that the Consultation is inherently unfair and irrational in applying this principle to advocates but not to litigators. Once again it suggests that the MoJ and CLAR are seeking to appeal to the public image of the criminal legal system, and seeking an appearance of fairness – rather than fairness in practice and in substance.

Q6: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

1.30 We agree with the proposal. We consider it to be perverse to apply the principle to advocates but not to litigators.

Sending cases to the Crown Court (LGFS)

Q7: Do you agree with our proposed approach to paying for new work related to sending hearings?

1.31 The Consultation is misconceived in terms of the proposed payment for the work done in sending cases to the Crown Court.

1.32 The Litigator Graduated Fee was never intended to remunerate solicitors for the work done in respect of either way or indictable matters which were committed for trial. There was a separate category of fees (Cat 3) which remunerated solicitors for the work done in those matters. Over the years indictable only matters became sendings, and committal for trial fees were abolished and replaced with a bolt on fee of £318.

1.33 When that fee was removed in 2011 it was not because there was any agreement that there was no work done prior to the sending/committal. It was an austerity measure; a straightforward cut.

1.34 There should not therefore be a concept of 'new' work done related to sending hearings. We submit that this payment should be to reflect the whole of the work done prior to sending.

1.35 As the Consultation makes clear the first hearing at the magistrates' court has considerable significance, both in terms of credit for a guilty plea, which is at a maximum if a plea is taken in the magistrates' court or at least an indication given, and also in terms of identifying issues. Once those issues have been identified the knock-on effect will no doubt be to limit the evidence served by the Crown and the length of any trial. There are consequential savings for the MoJ in terms of the litigators' fee, the advocates' fee, court time and potentially the costs involved in sentencing (prison/probation).

1.36 The proposal is woefully inadequate for the work that needs to be done.

1.37 Attendance at court for any such hearing will occupy a far greater amount of time – invariably a half or whole day.

1.38 For the reasons specified above in Para 1.14 the hourly rates are derisory and unacceptable.

Q8: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

1.39 We would submit that the appropriate starting point for this fee is the £318 which was abolished in 2011. This should however reflect the additional work /significance of better case management and be scaled to reflect inflation.

1.40 Once again the proposals were welcomed as a means to recognise how poorly funded the criminal defence system is at present, and whilst only a temporary measure it was a way of establishing credibility for the Review and providing an injection of funds to a system which is crumbling and has suffered greatly during the Covid-19 pandemic.

Impact assessment

1.41 We have seen the response of The Law Society and would echo the comments made therein.

Legal Aid Practitioners Group
16 June 2020