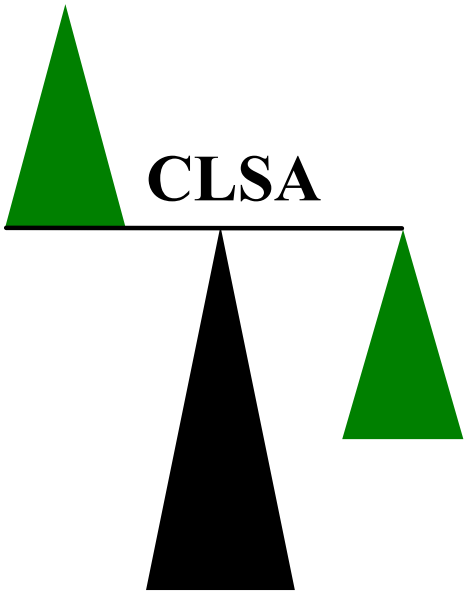

Criminal Law Solicitors' Association
Suite 2 Level 6
New England House, New England Street
Brighton, BN1 4GH
DX 2740 Brighton
Email: admin@clsa.co.uk
Tel: 01273 676725

Response of the Criminal Law Solicitors Association to the Criminal Legal Aid Review Accelerated Package of Measures amending the Criminal Legal Aid Fee Schemes Consultation

Introduction

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.

The CLSA has welcomed the Criminal Legal Aid Review recognising that there is a crisis facing the profession. There have been no fee increases for over 20 years. Instead over that time there have been numerous cuts. Placed alongside the increased complexity of the Criminal Justice System, the increased cost of living and the impact of inflation, the profession has reached a point where the remuneration available means that their practices operate at best on the margin of profitability.

The perilous state of the profession can be seen in the reduction in the number of firms practising crime work. In 2010 1861 firms held crime contracts. In 2018 it was 1271, a drop of 36%. We anticipate that since 2018 more firms will have closed their doors to criminal defence work. In 2014 the Otterburn Report showed that crime firms were operating on the margins of profitability with an average profit margin of 5% and some making no profit at all. Shortly after that report the LAA enforced an 8.75% cut. The impact of that cut, along with the additional real terms cut caused by a further 6 years of inflation means that firms now operate in an environment where the fee schemes make it very difficult to return any profit.

This has had a consequent impact on the salaries firms are able to offer their employees which in turn impacts upon how many people can afford to choose a career as a defence solicitor. Fewer than 3% of training contracts now include an element of criminal defence work. Many of those who are already qualified as defence solicitors are leaving the profession. The previous incumbent Director of Public Prosecutions, Alison Saunders, openly stated when giving evidence to the Justice Select Committee that the Crown Prosecution Service has been able to recruit from the defence profession as a result of being able to offer better pay and conditions. The result is that there was a 29% drop in the number of accredited duty solicitors on the rota between 2016 and 2019. The recent recruitment drive by CPS with its promise of salaries that legal aid lawyers could only dream of has seen many more defence lawyers move across. In 2018 the Law Society published a heat map showing the ageing nature of the profession with very few young solicitors choosing a career in criminal defence work. That heat map showed an average age of 47. In the last two years, it is very likely that average age has increased .

We had understood that the Accelerated Package was produced following recognition that the crisis facing the profession was so severe that it could not wait until the outcome of the full Criminal Legal Aid review and that action was required now.

Since the consultation was published the Covid-19 pandemic has struck. We do not lose sight of the fact that the primary impact has been a tragic loss of life across the world. However, it is right to say that the impact upon the criminal defence profession has been severe. The reduction of work at police stations, magistrates' courts and crown courts has had a significant impact upon firms that were already facing a crisis.

In this context, the proposals in this consultation fall woefully short. They are based on hourly rates set in the 1990's. They do not begin to address the crisis facing the solicitors' profession.

Question 1

We do not agree with the proposed approach.

It is based upon the premise that the remuneration for unused material can be treated as special preparation, either by way of a claim made using the special preparation hourly rate or a fixed fee based upon those hourly rates. This premise is flawed for three reasons.

Firstly, the hourly rate is derisory. The LGFS rate for special preparation has not been increased for inflation since the LGFS was introduced in 2008. In fact the rate was cut in March 2014 when Solicitors fees were cut by 8.75% across all areas. When the special preparation rates were introduced they were based upon hourly rates for remuneration in legal aid cases which had not been increased for inflation since the 1990s.

It is simply not economic for firms of Solicitors in 2020 to be paid based on hourly rates that have not been increased for inflation in over 20 years and have been cut instead.

This point is illustrated by the rates that are applicable when advocates are appointed by the court to cross examine witnesses when the Defendant is not legally aided and is prohibited from conducting cross examination in person. Of course, the tasks of the court appointed advocate include consideration of the unused material and its deployment in cross examination which is exactly the work that is to be remunerated by this proposal. These rates are based upon

Solicitors Guideline Hourly rates set in 2010, and (notwithstanding they are themselves 10 years old) more properly reflect the rates that are appropriate in 2020.

The net effect of the fixed fee element of the proposal for there to be an additional payment of £59.08 for a junior advocate (£39.39 x 1.5) and £64.68 for a solicitor (£43.12 x 1.5). It should be immediately obvious that such limited additional payments will do very little for the sustainability of the profession or remunerate for the work required to consider the wealth of unused material that can be generated in certain cases.

Secondly, special preparation only remunerates the reading of material, and not its use when read. Unused material does not exist in a vacuum in a case. Once it has been read, very often something has to be done with it. By definition, unused material is material that is reasonably capable of undermining the prosecution case or assisting the defence case. If it does undermine the prosecution case or assist the defence case then there is work that is necessary to deploy that material to assist the Defendant. That work is not remunerated by special preparation.

Thirdly, the use of hourly rates requires the submission of claims for assessment. This creates a significant administrative burden for both the Solicitor and Advocate preparing the claim and the LAA assessing it. There will be work created for Cost Masters in assessing appeals. The whole purpose of the AGFS and LGFS was to remove the need for hourly rate claims. The Consultation paper concedes that the amount of unused material is far from uniform across each case. Quite the opposite – there are a minority of cases which generate a large amount of unused material. That minority is likely to generate a special preparation claim for unused material in every case. While those cases are in a minority, there are a significant number of them and there will be a significant

additional number of claims as a result. The administrative burden will be most keenly felt by Advocates and Solicitors making the claims as they will be entirely unpaid for the time consuming work in preparing, submitting (and if necessary) appealing the claims.

Question 2

The full review will need to look at the AGFS and LGFS in detail, including how the work associated with unused material should be remunerated. In the interim we suggest that unused material should be included in the calculation of PPE.

It is our view that for the purposes of remuneration, unused material has the same significance as served material. It requires careful consideration and then action taken upon it to properly prepare the defence case. There is no principled or practical reason why the two should be treated differently. The inclusion of unused as PPE avoids the use of the antiquated special preparation rates, addresses the fact that the material requires more than just reading it, and does not require time consuming hourly rate claims to the LAA.

It this proposal is unacceptable, the hourly rates used to calculate both the fixed fee banding and the special preparation claims should be based upon a realistic hourly rate which is applicable to 2020 not 1990. We suggest the hourly rates which are used when advocates are appointed by the court to conduct cross examination provide a starting point as to what is appropriate. We also suggest an additional higher fixed fee to cover between 4 to 10 hours work. This would ensure that the overwhelming majority of claims would be covered by a fixed fee.

Question 3

This proposal also relies on the use of claims based on special preparation hourly rates. For the reasons set out in our answer to question 1, we do not agree. The rates are too low, they do not remunerate the use of material once read, and the claims will involve time consuming work for all involved but particularly for advocates who will not be paid for preparing them.

Question 4

The problem this proposal seeks to rectify arises as a result of reforms to the AGFS (and removal of PPE as a proxy) which were the subject of lengthy negotiation. Given that, structural reform of the AGFS may well need to await the full review. If claims based upon hourly rates are to be used to rectify this issue as an interim measure, then the hourly rates should be a realistic. We again point to the hourly rates applicable when an advocate is appointed by the court to cross examine.

Question 5

There is no principled or practical reason why this proposal should not be extended to the LGFS as well as the AGFS. It is no answer to say that the LGFS has other proxies that the AGFS does not have. The Trial/Crack and days of trial are both significant proxies in the LGFS scheme and can make a significant difference to the fixed fee paid.

When a case is listed for trial both the advocate and the litigator will have done a significant amount of work to have it properly prepared. If the trial cracks then they will both have done this work unnecessarily. They will both lose fees from the loss of refreshers. The rationale set out in the consultation for raising the AGFS fee to 100% of the trial fee applies equally to the LGFS, and it should do so. There is no proper reason why consideration of cracked trial payments under

the LGFS should not be dealt with in the same way as the AGFS and instead considered as part of the wider review, which could take some time to complete.

Question 6

The position for trials and cracked trials should be the same under the LGFS as it is under the AGFS. For the reasons set out in the consultation paper, cracked trials should be paid as 100% of the trial fee for the LGFS scheme.

Question 7

We agree that there should be remuneration for the work done by Solicitors when cases are sent to the Crown Court. Since that time Transforming Summary Justice (2015) Better Case Management (2016) and the Reduction in Sentence for a Guilty Plea guideline (2017) have been introduced. There have been consequent amendments of the Criminal Procedure Rules. All of these initiatives have required additional work to be done by Solicitors early in proceedings. For the past 9 years Solicitors have undertaken this work for no remuneration after the sending fee was abolished in 2011.

However we profoundly disagree with the consultation proposal as to how to remunerate this work. Until 2011 this the sending fee was £318, (ex VAT) which was considered to be the appropriate fee prior to the introduction of Better Case management and the amended sentencing guidelines on credit for plea. The proposal is that the fee is now £90.70, ie a cut of over 70% for a significant amount of additional work even before the impact of inflation over 9 years is taken into account.

The way in which the consultation paper has reached a figure of £90.70 (2 hours work at £45.35 per hour) emphasises the points we have made above regarding the hourly rates that are applicable.

Further, there is nothing in the consultation paper to indicate how the estimate of 1-2 hours of work has been reached. There is a significant amount of work that is now required prior to the sending of a case. To believe that only two hours work is required is wholly unrealistic.

Question 8

It is the view of the CLSA that the work required prior to a sending should be paid at least in line with the old fee plus inflation from 2011. This would equate to a fee of £500 (ex VAT)

Question 9

The primary assumption made by the consultation paper is that hourly rates set in the 1990's continue to be viable rates in 2020. This is simply not the case and is wholly unrealistic /we have set out above the hourly rates that are paid for the exactly the same work when advocates are appointed by the court to perform cross examination for an unrepresented defendant. Until this is addressed the proposals will always fall short of what is required to ensure the sustainability of the profession.

Question 10

The need for proper remuneration affects the entirety of the Solicitor's profession. The lack of new entrants into the profession and the ever increasing average age of the profession are both clear signs that the levels of

remuneration are such that work as a Criminal Defence Solicitor is not an attractive career option. Those with childcare commitments will be particularly impacted by this as the cost of child care makes it impossible to work for the rates of pay available as a Criminal Defence Solicitor.

Question 11

See above.