

JUSTICE COMMITTEE – CBA BRIEFING NOTE ON AGFS

INTRO

1. S.I., 2018, No. 220 concerns the Advocates Graduated Fee Scheme (“AGFS”): the way barristers and higher court advocates are paid in criminal trials in the Crown Court.¹
2. The SI came into force on 1 April 2018 and imposed a new fee scheme which radically changed the payment structure for Crown Court advocacy.
3. The overwhelming majority of cases in the Crown Court, if legally aided, are remunerated under the AGFS. (There are a very small number of ‘Very High Cost Cases’ which fall outside the scheme).
4. The first iteration of AGFS was introduced in 1997, however over the following 20 years there were many changes to it, designed to reduce expenditure. By 2017 the changes had resulted outcomes that had caused increasing discontent within the profession. Fees in some categories of case had fallen by more than 70%. Many of the changes were irrational and iniquitous. The principal proxy for an uplift to the level of the brief fee was the number of pages of prosecution evidence (PPE). For a variety of reasons this was becoming too crude a way of measuring complexity, seriousness and preparation time.
5. Against that background the Bar attempted to work collaboratively with the MoJ to design a new AGFS fee structure. However, the new AGFS scheme made law by the recent SI was not the scheme the Bar devised. The MoJ changed the structure in many respects and suppressed fees to achieve ‘cost neutrality’ at 2014/15 expenditure levels, historically the lowest level of annual spend.
6. The process that led eventually to the new AGFS Scheme began life in response to a threat of a further across the board cut of 8.5% to all fees (the 2013 ‘Transforming Legal Aid’ consultation). That would have resulted in a halving of fees since 2007. Even at that stage the fee levels vastly undervalued what is required of the Criminal Bar, and were causing real harm to its long-term future. The situation has got even worse. **AGFS spend has fallen by 40% since 2010.**
7. Many within the profession, assisted by civil servants and the Bar Council, worked hard to devise a new structure to replace one that was, in so many respects, unfit for purpose. If introduced as proposed the new scheme would certainly have cost

¹ Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 (S.I., 2018, No. 220).

a little more, but it would not have restored the full extent of the cuts that had been sustained by the profession. The leadership of the Bar believed that the proposed settlement struck a proper balance between the demands of the public finances, and the public interest in securing a sustainable future for the independent criminal Bar.

8. But the process was hamstrung by the requirement that was then insisted upon by the MoJ, at a political level, of 'cost-neutrality', and this has caused such dismay that the Bar have been forced to take action. The Bar's good faith, hitherto, and collaborative working has not been repaid. The Bar entered into this process on the understanding and on the basis that there would be new investment in AGFS to reverse, to some extent, the deep cuts to fees which have led, for example, to many young practitioners, and those with caring responsibilities to leave the profession in increasing numbers.
9. The scheme proposed by the Bar was different, in terms of both structure and anticipated fees at all levels. The Bar also sought some form of future proofing, to avoid the real term consequence of inflationary cuts.
10. At no time has the Bar accepted that the existing levels of funding were adequate - quite the contrary. The scheme requires investment.
11. At no time has the Bar accepted that fees should stay the same, year on year, becoming steadily eroded by inflation - quite the contrary.
12. Both were made clear by the Bar throughout the process.
13. The previous AGFS scheme had been the victim of repeated irrational cuts and changes. Examples of this are (1) the abolition of payments for the second day of any trial, (2) no payment for any sentence hearing, (3) after 40 days of a trial the day rate (refreshers) are reduced to a third of the standard refresher until day 50 when they are paid at about half the full rate, this is regardless of the original trial estimate (a number of years ago trials lasting beyond a certain length were eligible for uplift payments), (4) any non-trial hearing (mentions, pre-trial reviews, bail applications) was unpaid. (5) Cracked trial fees were cut by over 70% in certain categories of case.
14. The new structure 'pays' for the second day of all trials, 'pays' for sentence hearings, and 'pays' for all other hearings. This has become known as 'unbundling' However, this has been achieved by 'rearranging deckchairs', not, as the Bar

argued vigorously for, by new investment. Brief fees in almost every category have had to be reduced to shift money to the 'unpaid' hearings.

15. What 'unbundling' the fees payable for criminal defence work has achieved, however, is to show the true level of payment for each element in every case, and it can clearly be seen that the fees are just inadequate. This leaves many of the most talented unwilling or unable to remain in practice at the Criminal Bar. Quite simply they can, and may need to, earn more for their skills and talents in other fields of practice or in other walks of life altogether.
16. The introduction of the new scheme was seen as an opportunity to reinstate a more realistic fee structure, which fairly and properly remunerates advocates for their commitment, learning and professional responsibility but this has not happened. The most junior are dismayed that they see no prospect of meaningful career progression, as incomes will flatline very early in a career. The more senior juniors are demoralised and astounded that fees which had been cut so brutally since 2007 will fall once again, to subsidise payment elsewhere. Many are modelling fee cuts of a third in their annual income. There is no incentive to undertake the more complex and challenging work, as all cases in a particular category or sub category now pay the same fee, regardless of the true demands of the case.
17. There are three principal problems with the new AGFS scheme.
 - a. No Investment.
 - i. The MoJ imposed 'cost neutrality' on the new structure taking the spend figure for 2014/15 as the baseline.
 - ii. 2014/15 was the lowest ever spend on AGFS.
 - iii. MoJ say following very limited changes to some proposed fees that there will be an increase of £9million spent on the scheme as against 2014/15 figures. However when the same modelling exercise is done against 2016/17 figures expenditure would have fallen. The alleged '£9m' is not new investment it has only served to prevent a larger reduction in the budget;
 - iv. The reality is that many practitioners doing the more difficult work will see significant falls to their income.²
 - b. The new scheme redistributes money from 'middle/senior juniors', to the most junior practitioners, and to a limited extent to QCs. However the

² In response to complaints from the Bar raised during the consultation very modest adjustments have been made to the scheme increasing some fees by between £25 and £50. Most fees have been unaffected by this and the MoJ estimates that the impact of these modest increases (c£9m) will leave annual spend below 2016/17 levels

suggested gains to juniors are now modelled by the MoJ to be no more than 1 or 2% overall, and from a very low base.

- i. Impact on successful senior juniors is significant: 35% cuts reported.
 - ii. Benefits to junior practitioners are very modest.
 - iii. Contradicts key objective of any new scheme: 'promoting career progression'.
 - iv. It exposes the lack of money in the system. Incomes at all levels have been falling sharply for many years.
- c. There is no money at all to deal with 'disclosure' or to reflect complexity within the categories. For example:
- i. A case with 250 pages pays the same as one with 5000;
 - ii. A case of a single complainant and defendant in a rape would have the same fee as a case involving the rape of multiple victims and multiple defendants (e.g. the Rotherham and Oxford grooming cases), the latter of which is also exacerbated by the considerable amount of unpaid disclosure e.g. social services, medical, police records etc;
 - iii. There is no mechanism to reflect for example the specialist skills required in cases with vulnerable witnesses, children, or the mentally unwell.

18. As a result the Bar is unified across the country in refusing to take on any work at the new rates and are prepared to escalate action if the government won't commit to rational and significant investment.

Context

19. The MOJ budget has suffered deeper cuts than any other Whitehall department since 2010/11. Notwithstanding this, HM Treasury in November 2017 set a further cut of £600m in MOJ investment over the next two financial years of 2018/19 and 2019/20. This represents a further 9% decline in MOJ annual budget compared to 2017/18. The MOJ states that it will have had to take a cumulative real term decrease in spending of 40% in just 9 years by 2019/2020 compared to 2010/11 (see table below.)

20. In early May the loss of a further 40% of jobs (6,500) within the Court estate was announced.³ People, human capital, are what keep the criminal justice system functioning. The same is true of the CPS and the police.

³ <https://www.theguardian.com/law/2018/may/02/6500-jobs-to-be-lost-in-modernisation-of-uk-courts>

21. In planning more cuts, Ministers are making an unequivocal commitment to underfunding the legal system, and to refusing to provide a quality of justice that the public are entitled to expect

Q Asked by **Richard Burgon** (Leeds East) [N] Asked on: 13 November 2017

Ministry of Justice © 112641

Ministry of Justice: Public Expenditure

To ask the Secretary of State for Justice, what the charge has been to his Department's budget in real terms in each year since 2010; and what the projected charge will be in real terms in each year to 2022.

A Answered by: **Dominic Raab** Answered on: 16 November 2017

The table below shows the annual change in the Ministry of Justice's funding from HM Treasury in real terms to 2019/20, this information is available on gov.uk. Budgets for the years 2020/21 and 2021/22 will be set in the next Spending Review.

	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Total Resource DEL *	8.3	8.1	7.7	7.4	7.0	6.2	6.5	6.4	6.0	5.8
Total Resource DEL (restated in 2017/18 prices)	9.3	8.9	8.3	7.9	7.3	6.4	6.6	6.4	6.0	5.6
Annual real terms increase/(decrease)		-4%	-7%	-6%	-7%	-12%	3%	-3%	-7%	-6%
Cumulative real terms decrease		-4%	-10%	-15%	-21%	-31%	-29%	-31%	-36%	-40%

Advocates Graduated Fee Scheme – “AGFS” (subject of the SI)

22. Spend on AGFS since 2010 (incl VAT).

- a. 2005/06 - £362m
- b. 2009/10 - £278m
- c. 2010/11 - £266m
- d. 2012/13 - £242m
- e. 2013/14 - £226m
- f. 2014/15 - £213m (lowest ever year spend. New “cost neutral” scheme baseline)
- g. 2015/16 - £226m
- h. 2016/17 - £224/226m⁴

23. Spend on Advocates' 'Special/Wasted' Preparation

- a. Fallen from £14m to £3m between 2009/10 & 2016/17.
- b. New AGFS scheme modelled by the MoJ to reduce this to £1.5m.

⁴ £52m reduction since 2009/10. Also VAT increased from 17.5% to 20% in Jan 2011, which has a net impact of an additional £6m reduction.

24. Spend on Very High Cost Cases (“VHCC”) outside of AGFS scheme, for both advocates **and** litigators:

- a. 2009/10 - £95m
- b. 2010/11 – £93m
- c. 2011/12 - £92m
- d. 2012/13 - £65m (of which £12m on Advocacy)
- e. 2013/14 - £56m
- f. 2014/15 - £36m
- g. 2015/16 - £26m
- h. 2016/17 - £31m (£65m reduction since 2009/10)

25. No other area of government spend has had budget reduced to the same extent as the MoJ. The budget for advocacy in the Crown court has been cut relentlessly for years. AGFS spend has fallen by **40% since 2010**.

Average income for Barristers

26. The average GROSS income was £56k in 2014/2015. This equates to £28k pre tax:⁵

- a. Gross fees paid to advocates do not represent taxable income.
- b. The headline figures include VAT (20%)
- c. Criminal Barristers must meet the unavoidable overheads of practice (which range from between 25-35%), including expenses (travel etc), the costs of training and compliance with professional obligations.
- d. Criminal Barristers are self employed, with no entitlement to pensions, holiday pay, sick pay, maternity/paternity pay.

27. Young Legal Aid Lawyers, in their recent survey of young legal aid lawyers up to ten years qualified found that 30% of respondents were earning less than £20,000, 53% less than £25,000 and 83% of respondents less than £35,000.⁶

- a. The fact is, there is “...*little incentive for debt-saddled graduates to opt for a career in legal aid work...*” – **House of Commons Committee of Public Account.**

⁵ Bar Council/MoJ: Median salary from criminal barrister (2014/15): £56,000 but that did not include/allow for expenses/deductions e.g chambers fees and expenses resulting in equivalent salary of £28,000.

See: <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2015/december/crime-still-doesn%27t-pay-for-many-at-the-bar/>

⁶ Social Mobility in a Time of Austerity. See:

<http://www.younglegalaidlawyers.org/socialmobilityreport2018>

28. Debt incurred in the course of education and professional qualification (increased student fees, lack of bursaries and grants) combined with low salaries is a barrier to the profession. For example, on top of university fees, the Graduate Diploma in Law (average £8,345), the LPC for solicitors (average £11,000) or the BPTC (average £16,000) are required.
29. Unsurprisingly there is a recruitment and retention crisis at the criminal bar. The level of debt new entrants have to deal with, the collapse in fee levels, and the heavy demands of practice, which are increasingly incompatible with family life, have cumulatively resulted in the haemorrhaging of young criminal barristers from the profession, particularly young women.
- a. More than 1/3 of criminal barristers are questioning their career options in terms of criminal practice owing to poor income and work-life balance.⁷
 - b. The situation is particularly acute for those with caring responsibilities. There is a high attrition rate of women from the criminal bar. This is unsurprising when considering the demands placed upon barristers outside of court hours and the fact that child care often costs more than hearings are paid in the criminal courts. Child care is not tax deductible.
30. Solicitors are facing a similar crisis. The Law Society has predicted that criminal duty solicitors could be extinct in 5-10 years. The average age is 47 and, in many areas, the average age is now in the 50s.
31. The new fee scheme entrenches low levels of remuneration. Heads of Chambers across the country fear for the viability of the Chambers structure. The number of pupillages (on the job mandatory training year) has been falling for a number of years, as Chambers have tried to reduce their cost base. Chambers have historically acted as mini advocacy colleges, pooling experience and expertise, and providing training to future generations of advocates at no cost to the taxpayer.
32. This is having a deleterious impact on diversity and social mobility. This impacts on trust and confidence, and will have consequences for the future profile of the judiciary. This has profound consequences for public confidence in its ability to reflect British society and represent the communities it serves, as has been highlighted by the Grenfell tragedy.

The Bar, Practice and Goodwill

⁷ <https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2018/march/bar-council-we-stand-by-the-criminal-bar-association-the-criminal-bar/>

33. A career at the Bar is insecure, and financially uncertain. Trials can be moved by a Judge without consultation, witnesses can be taken ill, defendants might accept advice to plead guilty, charges might be dropped, all of which can result in significant falls in expected income with little notice or the ability to plan. Reasonable fees when cases go ahead are essential to make practice viable.
34. We work through lunch, overnight and at weekends preparing cases to keep the system going.
35. The pool of advocates, provided by the chambers structure, means that whenever a case needs covering at any level of seniority anywhere in the country there will always be an excellent advocate available to take it on either for the prosecution or the defence. The unpaid hearings are covered by other members within chambers.
36. The warned list system for trials is a good example of this. A case may be placed in a 'warned list' for trial. This is a period over typically 2-3 weeks during which the trial could be listed on any day. Notifications are sent out at approximately 4pm the day before. A barrister will have prepared the case but may for obvious reasons be unable to undertake the trial (it is not viable to keep a diary free for such a period on the off chance a 3 day trial will be listed at some point) and /or the trial may not be listed within the warned list period and be adjourned to a new warned list. There is no payment, save in exceptional circumstances for preparation (which may include e.g. extensive skeleton arguments or edits to a child witness' pre-recorded evidence) to the original barrister. A new barrister then has to pick the case up and prepare it overnight. Barristers are therefore constantly preparing cases for no payment which they are unlikely to be available for and having to prepare for new cases overnight to start the trial the following day.

Solicitors

37. Our sister profession is facing the same problems with regard to their fee scheme, known as LGFS. They have not received any fee increase since 1998 and instead have faced cut after cut after cut. The number of firms in England and Wales registered for criminal defence work has recently fallen from 1,600 to 1,200. The profession faces a ticking time bomb, owing to the ageing demographic profile. They offer a vital public service. Unsurprisingly, the Law Society has issued judicial review proceedings against the Government in relation to further cuts to their fees for Crown Court work.
38. All who are work in the criminal justice system are wholly demoralised. It is our collective 'goodwill' that keeps the system going.

The Wider Criminal Justice System

39. Police budgets have been massacred leading to drops in the detection and prosecution of offences. Appalling disclosure failings have led to the imprisonment of the innocent and near misses of miscarriages of justice. Delays have resulted in complainants and witnesses losing faith, withdrawing from the proceedings and potentially allowing the guilty to go free.
40. The Crown Prosecution Service has seen unprecedented cuts. Courts are being closed and those left open are in states of abject disrepair, with Court staff undermined and underpaid. The former Lord Chief Justice, Lord Thomas of Cwmgiedd, has warned of a 'ticking time bomb' and unprecedented recruitment crisis within the judiciary.
41. The Probation Service and prisons are underfunded and understaffed, resulting in dangerous institutions where self-harm, mental illness, suicide, assaults and murder are at unprecedented levels.
42. All those unfortunate to experience it are failed daily; victims, witnesses, defendants alike.
43. The criminal justice system is broken and needs urgent investment. The rule of law and a modern democratic society demands a properly functioning justice system. The public deserve nothing less.

The Criminal Bar have decided enough is enough. If we do not take a stand now, we become complicit in permitting our justice system to collapse. We are not prepared to allow it because it is our legacy.

You don't need to take our word for it. The senior judiciary and politicians of every party are speaking out. The Criminal Justice System is in Crisis.

Sir Henry Brooke CMG PC:

“Things are so bad now that few are opting to become criminal defence lawyers.... This is not about money for lawyers. It is the liberties of England that are at risk”

Former Lord Chief Justice, Sir John Thomas:

“We have, over the last 20 or so years, seen less police officers and other investigating officers go to court, so they don’t understand the importance of disclosure... It seems to me that the cuts have gone too far... The obvious thing to do is to make sure proper resources are put into this vital aspect of our criminal justice system.”

Sir Brian Leveson, President of the QBD:

“We must recognise that the success of any system to achieve its aims is a product of the resources it is provided with. This is as true of the justice system as it is of premier league football teams. The question is: do we have the resources for the premier league, for the Championship or non-league football? Resources determine, or at least affect, quality...”

If we are to maintain quality standards now and in the future, it is critical that this work must both be seen to be, and must actually be, an attractive career option for practitioners entering the legal profession. More than that, if we are to maintain the high quality of our criminal judiciary in the future we need to ensure that high quality solicitors and junior criminal practitioners continue both to enter this area of practice and to stay within it. Any failure to act to reverse this situation today, will have long term and detrimental consequences for the pursuit of quality criminal justice in the future and will inevitably impact on the work of the CCRC as failures in the system are exposed, far too late.”

Lady Justice Hallett, VP of Criminal Division, Court of Appeal:

“With respect to all those [in the Treasury] who have really difficult jobs working out finances, we have to look at the job the Ministry of Justice has to do... Are we confident in ensuring that it’s properly financed? Because if it’s not we risk breaching our duties under the rule of law.

There’s a danger of underplaying the importance of justice. It’s going to become increasingly important with Brexit. We are always [stressing the] importance of providing access to justice for all our citizens.

Commercial courts, such as the Rolls Building in London, and arbitration

services “bring in billions, multibillions, into the country. Some people may think that as long as we protect the commercial courts everything will be all right – but that’s nonsense.

“We have to make sure that the entire system is the best in the world but we are hanging on by our fingernails.”

Secret Barrister:

“Walk into any criminal court in the land, speak to any lawyer or ask any judge, and you will be treated to uniform complaints of court deadlines being repeatedly missed, cases arriving underprepared, evidence being lost, disclosure not being made, victims being made to feel marginalised and millions of pounds of public money being wasted. And, as a consequence, every single day, provably guilty people walking free.”