The Rt Hon the Lord Trefgarne  
Chairman  
Secondary Legislation Scrutiny Committee  
House of Lords  
London SW1A 0PW

2 March 2018

The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 (2018 No 220)

The Bar Council is grateful to the Secondary Legislation Scrutiny Committee for its invitation to comment on The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018. Our views have been sought about two issues: the potential effect of the original proposals of the Ministry of Justice (MoJ) on junior advocates and the funding of the proposed scheme overall.

The Bar Council has expressed its concern, over many years, about the relentless succession of cuts in funding and under-investment in the criminal justice system which have put the viability and sustainability of practice for many at the criminal Bar in issue. The Bar Council was constructively engaged from the outset with the process of consultation and the refinement of the Ministry’s proposals. We consider the changes that were announced on 23 February represent an important step forward for the future of the criminal Bar by creating a structure that is simpler and fairer than the one it replaces.

The Bar Council agrees with paragraphs 8.2 – 8.4 of the Explanatory Memorandum, that the Ministry of Justice listened to concerns raised about how the proposals originally consulted upon might affect junior advocates (solicitor advocates and barristers). The MoJ made some minor but nonetheless welcome increases to the fees that are most keenly felt by junior advocates. For example, the fee for ‘Standard Appearance’ preliminary hearings has been increased from the £60 as originally proposed to £90.

However, the Bar Council is concerned that paragraph 10.3 of the Explanatory Memorandum might be misread for giving the impression that funding for the Scheme had been increased by £9m. This is true only as against the MoJ’s baseline year of 2014/15; it is not the case when compared with the most recent full year (2016/17) or, indeed, when compared with 3 out of the last 4 years. In fact, the expenditure in 2014/15 was notably lower than, and out of line with, those other years.
As we understand it, the policy intention has always been that the new Scheme should, as far as possible, be ‘cost neutral’, and the accepted approach following consultation was that this should be based on ‘cost neutrality’ as against the latest figures (i.e. those for 2016/17).

The Impact Assessment, Table 9 on page 21, states that against the most recent set of case data (2016/17), in order the for fees to be cost neutral overall, fees should be set at a level which would involve a total spend of £226m a year. Table 9 shows that the fees have actually been set at a level which would involve a total spend of £224m a year. We understand that the reason for this discrepancy is that when the fees were originally modelled by the MoJ, and agreed with HM Treasury, the data at that time showed a £224m spend. Since then more recent data have become available, showing a £226m figure. Regrettably, the MoJ and Treasury did not review the fees in the new Scheme to take account of the more recent data. The Bar Council have drawn this matter to the attention of Ministers and invited them to address what appears on the face of it to be a £2m shortfall, so that the Scheme is genuinely cost neutral.

It should of course be noted that ‘cost neutrality’ takes no account of inflation. Advocates’ fees have not been increased at all since 2007. Instead they have been subject to a succession of cuts, the result of which is that advocates’ fees are now around 40% lower in real terms than they were in 2007, thereby threatening the ability those who serve the public in criminal legal aid work to contribute to the efficient and effective administration of justice. The Bar Council has consistently stated that this chronic underfunding of the criminal justice system needs to be addressed urgently by Government. The new Advocates’ Graduated Fee Scheme is a step in the right direction but its effects need to be carefully monitored and we look to the MoJ to honour its promise to undertake such a review within 18 months to 2 years from the implementation of the Order.

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Chair of the Bar