



YOUNG LEGAL AID LAWYERS

Response to the Ministry of Justice Consultation on Amending the Advocates' Graduated Fee Scheme

12 October 2018

About Young Legal Aid Lawyers

1. Young Legal Aid Lawyers (YLAL) was formed in 2005 and has over 3,500 members. We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales.
2. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.
3. This is our response to the Ministry of Justice (MoJ) Consultation on Amending the Advocates' Graduated Fee Scheme (AGFS).
4. Although the membership of YLAL includes junior criminal practitioners, both barristers and solicitors, as an organisation we are not best placed to comment on the detail of the individual categories within the AGFS. We have not, therefore, answered the specific questions in the consultation.
5. However, as a representative group for aspiring and junior lawyers, in this response we put forward the case for greater funding for criminal legal aid in order to ensure the sustainability of the profession, to push forward the stated aims of increasing diversity in the profession, and to protect access to justice.

Summary

6. Whilst we welcome the much-needed injection of additional funding into the Advocates' Graduated Fee Scheme (AGFS), we wish to make it absolutely clear that it is not enough. It is not enough to address the crisis within criminal legal aid and, more broadly, the criminal justice system as a whole.

7. The current fee schemes for criminal legal aid – both for advocates and litigators – have resulted in a profession facing a crisis of recruitment, retention and sustainability. Without greater funding for criminal legal aid, we believe there is a serious risk that there will not be a sufficient number of criminal defence lawyers to ensure that people charged with criminal offences receive adequate representation. The government must address this looming crisis in the criminal justice system before it is too late.

The offer

8. The MoJ has offered and intends to inject £15m (including VAT) of ‘new’ money from the Treasury into the AGFS. The MoJ previously consulted on reform of the AGFS between 5 January 2017 and 2 March 2017¹, and the current consultation on amending the AGFS has been open from 31 August 2018 to 12 October 2018.²
9. The question of whether this injection of new funding does in fact amount to the proposed £15m on which criminal barristers were balloted is contentious. The Law Society has noted that the MoJ impact assessment shows the proposals amount to £15m, including VAT, based on the 2016-17 case mix information. When applying the 2017-18 data, the proposals amount to £8.6m.³ In a survey of YLAL members, 93.5% said that £15m is not enough.
10. The MoJ negotiated the additional funding for the AGFS with the Criminal Bar Association (CBA)⁴ who then balloted their membership. The Criminal Bar voted narrowly to accept the AGFS proposal made by the government. A total of 3038 barristers voted; 1566 (51.55%) voted to accept the proposal and 1472 (48.45%) voted to reject it.⁵
11. No solicitors’ associations were consulted on the terms of the offer⁶ and considering that many in-house solicitor-advocates are remunerated under the AGFS, we consider it unfair that solicitor-advocates were not consulted.

The impact of the reformed fee scheme on junior criminal advocates

12. The reality is that *“as our system creaks, junior practitioners bear the brunt”*.⁷
13. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer QC MP, has recognised that *“[c]riminal advocacy is important and it is imperative that the professions continue to attract the best and brightest”*.
14. The consultation paper states:

¹ <https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/>

² <https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/>

³ <https://www.lawgazette.co.uk/practice/mois-15m-legal-aid-fees-offer-doesnt-appear-to-add-up/5067642.article#commentsJump>

⁴ <https://www.criminalbar.com/resources/news/members-announcement-2/>

⁵ <https://www.criminalbar.com/resources/news/cba-monday-message-12-06-18/>

⁶ <https://www.lawgazette.co.uk/practice/mois-15m-legal-aid-fees-offer-doesnt-appear-to-add-up/5067642.article#commentsJump>

⁷ <https://www.criminalbar.com/resources/news/cba-monday-message-16-10-17/>

"With regards to fees for junior advocates, we have heard that the current fees may adversely impact the recruitment and retention of junior advocates, with potential consequences for the diversity of the professions. And in terms of fees more generally, we have been told that without future increases, the longer-term sustainability of criminal defence work could be undermined".

15. We question whether the MoJ has considered both the short-term and long-term impact on junior members of the profession. Whilst there is an argument for fee increases across the board, the most immediate concern must be the sustainability of the profession for those at the junior end. The priority should therefore be to inject any new money in to the fee categories for that cohort to ensure that their practices remain viable and the profession is able to retain junior lawyers.
16. However, we consider that both the current and the new fee scheme inevitably continue to impede the sustainability of the junior level of the profession. In March 2018, YLAL published a report on access to the profession, titled *Social Mobility in a Time of Austerity*, in which we concluded that there are "serious financial barriers to entering the legal profession, including the cost of the Legal Practice Course (LPC) and the Bar Professional Training Course (BPTC)." Our report noted that the then-chair of the Bar Council, Chantal-Aimée Doerries QC, had said in February 2016 that the cost of qualifying as a barrister can rise up to £127,000.⁸
17. In a survey of our members conducted prior to responding to this consultation, an overwhelming 96.2% of respondents stated that poor remuneration at the criminal bar was a deterrent from entering the profession. One of our members said:

"A career at the Criminal Bar is becoming unsustainable. This is due to poor remuneration, requirement to pay huge amounts in travel expenses up front, undertaking work that is not paid for (such as consideration of unused material), a very poor or non-existent work/life balance, rare ability to have lunch during the working day, impact on wellbeing as well as physical health, and Court buildings that are crumbling (lack of working toilets, leaks in the ceiling, lack of working lifts etc..). I am aware of several 'junior junior' barristers who are considering leaving the profession and are actively taking steps to pursue alternative employment opportunities. The problems are clear and greater funding is only the first step required to be taken."
18. Anecdotally, this account is typical of what we hear from YLAL members practising at the Criminal Bar. When considering this, it is clear that the rates of remuneration in the criminal legal aid fee schemes are simply inadequate.
19. We believe that there must be a full review of all legal aid fees, including for those at the senior end of the spectrum. However, it is those at the junior end who have been most significantly affected by reductions in fees, and it is submitted that this should

⁸ <http://www.younglegalaidlawyers.org/sites/default/files/Soc%20Mob%20Report%20-%20edited.pdf>

be the primary focus of additional funding in order to achieve the policy aim of mitigating the current recruitment crisis among both barristers and solicitors.⁹

20. The MoJ must recognise that pupil barristers and newly qualified barristers will have practices which encompass both magistrates' and Crown court work. Although payment for magistrates' court work does not fall under the AGFS, it should be noted that there has not been an increase in the fees for magistrates' court work since 1998.
21. Simply categorising advocates as either juniors or Queens Counsel (QCs) is not the correct approach to take, as there are many levels of graduation. It is within this context that we say that unless there is a substantial injection of funding into any fee scheme, and specifically into the areas in which the most junior members practise, the Criminal Bar will continue to be unattractive to new entrants and newly qualified advocates. To this end, we welcome an increase in fees for appeals from the magistrates' court; however, we consider that the increase is not sufficient.
22. We also note in respect of dishonesty offences (which form the basis of Q2 in the consultation) that there is a proposed increase in the fees for the top three bands but not the lowest bands. It would be unrealistic to think that junior advocates are briefed on a fruitful amount of 6.1, 6.2 and 6.3 cases. The frauds which junior advocates encounter are more likely than not to fall within band 6.5.
23. As one YLAL member responding to our recent survey told us:

"The new fee scheme pays derisory amounts for early guilty pleas and even cracked trials. Lower than the previous rates. Moreover, some cases where there is a significant volume of paper evidence have brief fees which are nearly 85% lower than the previous AGFS scheme. Yes, 85%. How are junior barristers expected to make a living, let alone think about career progression?"
24. These palpable feelings from the junior end of the profession **must** be taken seriously by the MoJ. Our members are the future of the profession, but far too many do not see a viable long-term future working in criminal legal aid.

Diversity

25. In an interview with The Guardian, the President of the Supreme Court, Baroness Hale, said with respect to diversity in the legal profession:

"[O]ther sorts of diversity are also important – principally ethnic diversity, where there is still a great deal of work to do, but also diversity in social, economic and professional background. The law, the legal profession and the courts are there to serve the whole population, not just a small section of it. They should be as reflective of that population as it is possible to be."¹⁰

⁹ <https://www.lawsociety.org.uk/news/stories/agfs-consultation-law-society-approach/>

¹⁰ <https://www.theguardian.com/law/2018/feb/15/lady-hale-courts-and-judiciary-should-reflect-diversity-of-uk>

26. Chambers and solicitors' firms want to recruit juniors from all backgrounds. They want them to be able sustain a practice. We want to be fairly paid for the work we do. We do not want anyone who has talent and commitment to leave, or worse still, never to consider joining, the profession because of the dire financial constraints of our work.¹¹
27. The judiciary in England and Wales in twenty to thirty years' time will come from those entering the legal profession today. Nothing will be done to address the serious lack of ethnic and social diversity within the judiciary if the profession cannot attract individuals from varied backgrounds today.

Access to justice

28. Access to justice, and ensuring fairness in the system as a whole, requires that lawyers are properly remunerated for work done. It is therefore troubling that there are numerous references in the consultation to the 'actual work done' by barristers. It is seemingly implied by this that the only real work done by criminal barristers is advocacy in courts. This is plainly incorrect. A significant amount of work is done out of court to prepare cases thoroughly, thereby ensuring justice is done. This flawed assumption is also reflected in the strikingly poor remuneration for cases that 'crack' (i.e. are discontinued unexpectedly) or where the defendant pleads guilty. A scheme that is underpinned by such an assumption is in our view flawed from the start.
29. As Andrew Walker QC, the Chair of the Bar, has said:

"[T]he inevitable consequence of both Government-imposed 'cost-neutrality' and the absence of index linking is that we still have a system of payment for the vast majority of criminal defence work in the Crown Court that undervalues the skills of the Criminal Bar, underestimates the amount of work that cases now require, and fails to recognise our crucial role in maintaining the rule of law and in making the administration of justice a reality."¹²

30. Justice cannot wait whilst the onslaught of cuts continues. By 2019/20, the MoJ budget will have been cut by 40% over a decade. The MoJ and the government as a whole must recognise that across the board within the criminal justice system, from the police and Crown Prosecution Service, from probation services to criminal defence, the cuts to justice spending are rapidly eroding a criminal justice system which has, at least until recently, been internationally lauded as a shining example.
31. The MoJ has failed to engage properly with the criminal legal aid profession. Importantly, it has not committed to an independent review of what is sustainable in criminal legal aid. The MoJ has failed to conduct a review of the whole system, and it is therefore difficult to see how the MoJ could correctly have identified all of the range

¹¹ <https://www.criminalbar.com/resources/news/cba-monday-message-23-04-18/>

¹² <https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2018/march/statement-from-the-chair-of-the-bar-on-agfs/>

of impacts. As Lord Thomas of Cwmgiedd recently stated in relation to the disclosure of criminal evidence, the “cuts have gone too far”.¹³ The MoJ must go back to the Treasury and put a case forward for greater funding for justice, and in particular the criminal justice system.

Conclusion

32. The AGFS has a direct impact on criminal solicitors' firms and criminal barristers' chambers. It also has a direct impact on the next generations of aspiring criminal legal aid lawyers, and those individuals currently working in the profession as paralegals, trainee solicitors, pupil barristers, newly qualified lawyers and those with criminal higher rights of audience.
33. The underfunding of the Advocates' and Litigators' Graduated Fee Schemes, together with the significant difficulties concerning disclosure of criminal evidence, create a grave danger of miscarriages of justice taking place.
34. Criminal justice is in crisis. The Crown Prosecution Service regularly fails to disclose crucial evidence. The criminal legal aid fee schemes do not take into account modern day digital disclosure. The MoJ and its executive agency, the Legal Aid Agency, change their position in relation to Pages of Prosecution Evidence, and create inordinate difficulties for legal aid practitioners seeking remuneration for vital work reasonably and necessarily undertaken for their clients.
35. For decades, criminal legal aid lawyers have faced the unknown as a series of cuts have been made to fee schemes. To many criminal defence lawyers, it feels like a cycle of discontent every few years.¹⁴ Whilst the concept of new funding being injected into criminal legal aid is welcome, it is not enough. We cannot keep applying sticking plasters. We need a permanent solution.¹⁵
36. The offer made by the MoJ is, in practice, a sticking plaster for a gaping wound. It has already been described by Bob Neil MP, Chair of the House of Commons Justice Committee, as a “patch repair.”¹⁶ We agree. A long-term solution for criminal legal aid is urgently needed.

Recommendations

37. YLAL believes that the government should:
 - a) Commit to an independent review of the long-term sustainability of criminal legal aid
 - b) Index link the Advocates' and Litigators' Graduated Fee Schemes to inflation
 - c) Adopt the recommendations of the report by the Bach Commission on Access to Justice, *A Right to Justice*¹⁷

¹³ <https://www.criminalbar.com/resources/news/cba-monday-message-30-04-18/>

¹⁴ <https://www.criminalbar.com/resources/news/cba-monday-message-21-05-18/>

¹⁵ <https://www.criminalbar.com/resources/news/cba-monday-message-14-05-18/>

¹⁶ <https://www.criminalbar.com/resources/news/cba-monday-message-18-06-18/>

¹⁷ http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf

38. If the government does not address the crisis in the criminal justice system and commit to a sustainable solution to criminal legal aid funding, the criminal defence profession will wither on the vine. The government must listen to criminal lawyers, and it must act as a matter of urgency. Access to justice, a fundamental pillar of the rule of law within our democratic society, is under serious threat.

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