**GARDEN COURT CHAMBERS**

**RESPONSE TO AGFS CONSULTATION 2017**

## EXECUTIVE SUMMARY

The Government's consultation on 'reform' of AGFS is in fact a consultation on cuts to AGFS. We understand it to be another attempt to dismantle the criminal justice system by increment. Our comparison of fee income under the current and proposed schemes demonstrates reductions in fees across all case types except sexual offences and across all levels of call. We oppose the introduction of the proposals, particularly so because of the impact of the cuts for our most junior practitioners and the consequent impact for diversity within the profession, and the judiciary.

We invite the Government to acknowledge the evidential link between income for the 0-7 call bracket and the future diversity of the profession. We assert that the proposed reforms impact negatively on retention of talent for practitioners from ordinary and disadvantaged socio economic backgrounds; that there is a complex related negative diversity impact for retention, and that the financial impact for women practitioners in particular, who plan to, or have taken, maternity leave (and a male practitioner, in the event he is the primary carer) are aggravated by the proposed cuts.

**We decline to answer the specific questions set out in the consultation because they are predicated on the false premise, that the proposed scheme is a cost neutral redistribution of fees.**

**We invite the Ministry of Justice to supply the full anonymised data supporting its assertion that these reforms are 'cost neutral'; withdraw the consultation and undertake a further period of informed dialogue with our professional bodies.**

**Any future consultation must consider the following:**

- A fee increase for our most junior practitioners to counter the presently discriminatory impact of poor remuneration in the early years, particularly for women who go on to have children;

- Re-instatement of index linking (as applicable to public sector workers and MPs[1]) to keep pace with inflationary rises in the cost of living (currently predicted to be 2.7%[2] by the end of 2017);

[1] http://parliamentarystandards.org.uk/payandpensions/Pages/default.aspx
[2] http://www.bbc.co.uk/news/business-37860880

- A properly informed diversity impact assessment. We do not accept that the assessment which accompanies the consultation adequately considers the issues that we raise;

- A review of the volume of 'unpaid' work presently undertaken outside court as part of the brief fee (for example, pre-recorded cross examination; preparing examination in chief, cross examination, interview editing, bad character and hearsay argument, defence statement, chasing the Crown for disclosure and review of the unused material) and a re-consideration of what amounts to fair remuneration for the same;

- A consideration of service thresholds for the Crown, or some other mechanism to deal with the expansion of 'page count', which does not, as these proposals do, simply remove payment from defence practitioners for consideration of the evidence in a case, which means that the Crown has no disincentive to "flood" the defence with material.

## SUMMARY OF OUR FEES COMPARISON ANALYSIS

Our fees clerks have undertaken a comprehensive comparison of fees under the current and proposed schemes across different offence types using a representative sample taken from our chambers financial data. We have evidenced the following.

An average **reduction** in fees for the following sample offence types of:

**Fraud: -19.3%**

**Firearms: -10.1%**

**Drugs: -48%**

**Terrorism: -9.2%**

**Murder: -14.6%**

**Sex Offences – we accept that in this category of offences in some instances AGFS would increase under the proposals. However, it is inaccurate to assert that this increase, and other instances of increases for specific types of cases means that the overall scheme is "cost neutral".**

We have also compared annual fee income of a representative sample of members of chambers across all levels of call. We found **reductions** in fee income under the proposed scheme within the following ranges when broken down by level of call:

**QC: -0.3 to -4%**

**Senior Junior: -10 to -32%**

**Mid ranking Juniors (15 year call bracket): -10.2 to -45%**

**Juniors under 7 years call: -0.7 to -21%**

We do not, therefore, accept the accuracy of the Government's own statistical analysis, which asserts[3]:

Silks – increase of 10%

Leading Juniors – decrease of 6%

Led Juniors – increase of 1%

Juniors – decrease of 1%

All sample fees comparisons for individuals contain a large number of variables making a 'one size fits all' percentage impact analysis all but impossible. However, it is an undeniable conclusion that reductions in fees result from the proposed scheme whether calculated by individuals, level of call, or offence type. However the figures are presented statistically, the 'reform' proposed by the consultation represents a fee cut for the overwhelming majority of criminal defence practitioners.

## IMPACT ON THE JUNIOR BAR

Research by the Bar Council shows that in the last ten years, the Junior Bar has shrunk. At 5-10 years call, the numbers in the profession are down 20%. At 0-5 years call, the numbers are down by 30%[4].

Junior barristers come to the Bar to practise in crime because of a commitment to the principle of justice. Many will have turned down better paid job offers from city law firms or commercial chambers. The work routinely requires overnight preparation, travel throughout the country (which comes from their own pocket – frequently not reimbursed by the Legal Aid Agency) and amounts routinely to over 90 hour weeks. Almost all will be saddled with large student debts. The current cost of training on the one year BPTC programme alone is approximately £19,000. This is on top of debts incurred at university and from the law conversion course.

**Our analysis shows that the junior bar would be expected to absorb reductions in offence type fees for a number of 'bread and butter' type trials (offensive weapons, ABHs, burglary, low level drug dealing) reductions in the payments for PTPH, sentences and mentions despite the ring fencing of those payments and a reduction for many in a cracked trial scenario.**

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[3] https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/supporting_documents/agfsimpactassessment.pdf

[4] CBA Monday Message: 23rd January 2017.

**Further, many junior barristers conduct advocacy in the Magistrates' Courts where the fees are £75 for a half day trial; £150 for a full day trial. For a first appearance, mention or sentence hearing the fee is £50. It is not uncommon for such a hearing to take all day due to the chaotic listing process. There is no payment for any preparation time undertaken during anti-social hours, at very short notice, the previous evening. The same fees apply in the Youth Courts where pupils/third six pupils and juniors are increasingly dealing with very serious offences (s.18, robbery etc).**

**The junior bar cannot absorb any further reductions. Barristers on the cusp of a Magistrates/ Crown Court practice require an increase in fee income, if those practices are to remain financially viable.**

We have particular concerns about the impact of the proposed scheme on the training and development of junior barristers. The result of the scheme is likely to drive more junior barristers out of advocacy based work such as short trials and into lengthy secondments. This work does not train our juniors as the advocates of the future. It operates as a revolving door out of the profession, as we have seen in recent years.

## REJECTION OF PRINCIPLES UNDERLYING THE PROPOSED REFORM

We reference p.7-8 of the consultation:

'The proposed scheme reflects a different approach. It dispenses with witnesses as a proxy for complexity, and radically reduces the role of PPE. Instead payment is graduated based on a more detailed and sophisticated breakdown of the offence that the defendant is charged with.

Currently there are eleven offence categories. The proposed scheme features sixteen offence categories, which encompass a total of forty twos separate bands. The category and band, designed to reflect the average amount of work required in a typical case, would become a critical factor in determining what the advocate is paid.

In tandem, the amount of time spent by an advocate performing their duties, would become an increasingly important variable in determining the fee paid. We consider that it is right that "work done" is accounted for as fully as possible in the proposed scheme. At its core, that "work done" is the advocacy conducted in the Crown Court. Through the detailed revised design (see Sections 3-8 and Appendix one) the proposed scheme places more weight on this.

We recognise that the roles of litigators and advocates are very different, especially in relation to the consideration and preparation of evidence. We consider that the balance in the AGFS should be altered for advocates, with a greater emphasis on advocacy "work done".

The proposed AGFS scheme is designed to account for the reality of the current Crown Court process, and to be better suited to likely changes in the future. For example, the nature and quantity of evidence served, and the boundary between used and unused evidence is likely to evolve continually over the next few years. A fee scheme built on a more detailed split of offences, and time spent conducting advocacy, is likely to be far more durable.

There is also no intention in reforming the scheme to either increase or decrease the overall cost envelope for the AGFS. One of the principles that the members of the working group agreed was cost

neutrality. This is a scheme that should cost the same overall, but provide more certainty for advocates about their fees.'

We are particularly concerned that the abolition of witnesses and PPE as a proxy for case complexity, with no commensurate mechanism by which to gauge and remunerate the volume of preparatory work impacts disproportionately on the Junior Bar. We recognise that in sex cases specifically, the number of witnesses is a poor proxy for complexity, and indeed it is in any number of single complainant cases. However, we do not accept that it is a poor proxy in the majority of cases. The restriction of Special Preparation, by way of the amendment to thresholds for drug and frauds offences specifically, is similarly not replaced, under the new proposals, by a mechanism or 'proxy' for gauging the complexity of cases in which the advocate is required to consider large volumes of material. Both proposals would have a disproportionate impact on the Junior Bar and, our analysis shows, is the primary reason for the particularly harsh impact of the proposed cuts on the practices of some individuals.

Whilst welcome in and of themselves, we do not accept that:

- The concept of "career progression" absent any increase in fee income;
- Greater funding for labour intensive cases such as sexual offences;
- More detailed offence type categorisations;
- Ring fenced payments for pre-trial hearings.

ameliorate the cuts or that the proposed bandings and proposed hearing payments are fair ones in any event, nor do they establish the central premise of the scheme, namely "cost neutrality".

**The assertion made throughout the consultation that a barrister's work is predominantly advocacy, as opposed to preparation, has no evidential validity. The reality of modern criminal practice is much closer to an approximately 50/50 split between advocacy and preparatory work undertaken outside of court.**

We also raise the potential cost impact upon the court system. Defendants can only properly enter guilty or not guilty pleas when they have been fully advised on the law and the evidence. If a fees scheme is driven towards trials rather than **towards case preparation at an early stage**, this may well lead to **more** cases reaching the trial stage, consequentially leading to an increased pressure on the court service for trial listings.

We entirely reject the proposition that cases are becoming less complex or less preparation intensive because of the increased use of electronic service of material, or that the method by which evidence is served automatically reduces the workload of the advocate.

On the contrary, the volume and complexity of evidence is, in many cases, increasing, because of the ongoing changes in the way in which crimes are committed and investigated. The increased use of and reliance upon technological devices, be that by the defendant or the investigator, impacts a much wider number of offence categories than even a few years ago and continues to disproportionately impact drugs and fraud offence type categories, although also, increasingly, sex offences (social media/ phone type evidence).

## DIVERSITY IMPACT

We submit that the impact of any reform for AGFS for the 0-7 call category has a particular significance for the health of the profession to come. We observe that the 0- 7 year call range often (but not always) coincides with the point in a woman's career where, if she chooses to have children, she may be contemplating or has taken that decision. If a practice is not sufficiently financially viable to survive a career break for the duration of maternity, adoption or paternity leave, and the subsequent diminution of income triggered by the cost of full time childcare for the next four years and part time thereafter, the exodus of primary carers from the profession will continue unabated.

We rely on the following statistical analysis to inform our diversity submissions:

- 5000 barristers specialising in criminal law (MOJ estimate) (This figure does not appear to differentiate between criminal barristers who prosecute, those with mixed practices and defence only practitioners);
- 4726 solicitor advocates (of which 1482 have mixed civil/ criminal caseloads);
- In total therefore, around 10,000 criminal advocates (based on 2015 figures);
- *(No figures available for the following broken down by specialism but the BSB estimate that the criminal bar statistics reflect the following statistics for the Bar as a whole).*
- In 2015 (source – BSB) there were 12,757 barristers across the Bar, in self employed practice, of which 8487 were men, 4270 were female, 10,350 were white, and 1437 were BAME[5] (no BAME data available for 970). Of those, 1574 were Queen's Counsel, of which, 1367 were men, 207 female, 422 white, 100 BAME (with no data available for 52);
- Very broadly (if employed barristers are included) this equates to QC, 87% male, 13% female, 94% white and 6% BAME. Barristers, 64% male, 36% female, 87% white and 13% BAME;
- (Criminal solicitors are 51% male, 49% female, 85% white and 15% BAME);

[5] We use the acronym 'BAME' for the purpose of reciting these statistics because it is the categorisation chosen by the professional bodies that hold the data.

- 113 new Silks appointed in 2017. 31 are women, 16 are BAME;
- Current predictions, by the BSB (2017): we are a century away from BAME representation that mirrors the BAME diversity of the UK and half a century away from parity for women;
- 51.3% of pupils are now women (BSB statistics 2017) and 16.3% are BAME; 36.5% of barristers are women and just over 12% are BAME;
- Bar Council retention data 2017:
    - call bracket of 10– 15 years, down by 10%
    - call bracket 5-10 years, down by 20%
    - call bracket 0- 5 years, down by 30%.
    - In the 0-5 years call bracket despite parity of entry by practitioners the disparity between men and women is already identifiable within those early year trends : 755 men in 2015, 584 women, 1109 white, 178 BME (52 no data).
    - Contrast with the 15 year plus bracket; 6773 men, 2845 women, 7826 white, 1089 BME (no data for 703).

We urge upon the Government a reconsideration of the diversity impact of these proposals, predicated on the historical precedent of estimated equality of entry into the profession in recent years for both genders and an improvement in diversity recruitment, set against a gender/ diversity analysis of the deteriorating retention levels set out above.

The criminal bar can make inroads into the quantifiable discrimination at the senior level of the profession if the historical precedent of equality at entry point is combined with a reinstatement of financially viable fees for the 0-7 call bracket, particularly in order to secure financially thriving practices for female practitioners (and any practitioner embarking upon a period of leave for the purpose of childcare) pre-career break. The current male-biased working model, where significant increases in income come post career break for the majority of women with children, contributes to the difficulty in retaining talent equally within the profession. Any restructuring of fee income must take into account this discriminatory working model and seek to mitigate it.

We do not suggest that a review of fee income for this bracket of call is a panacea for all of the discriminatory factors within the profession, and we make submissions in other arenas regarding working practices and conditions. However we do draw a direct link between income and talent retention in the early years.

We also submit that a similarly discriminatory financial impact bites across socio economic disparities in retention, which in turn, through a complex analysis, interlinks with diversity retention figures in a number of ways.

We do not accept that the cost of embedding discriminatory working income streams is affordable or ‘cost neutral’; either for the justice system or society. The issues

within the profession translate, indeed are even more embedded, in any diversity impact assessment of the judiciary, and in particular, the criminal judiciary.

That cost, to the profession and to society, is much higher, in a multitude of ways, than financing juniors in the 0-7 bracket adequately would be. **It is a cost to the calibre of talent from which we recruit our most able future advocates and judges, and therefore deprives society of the benefit of the same, which in turn impedes the highest quality of justice system. A justice system which does not draw from all of its communities is not fit for purpose**. Recruitment to the criminal bar becomes ever more difficult because of the financial hurdles that fees that do not provide for practices that are financially viable in the early years, for anyone other than those willing to work far, far and beyond the 'ordinary working week', or who have other financial support (eg. financial support from their family) presently pose.

## CONCLUSION

We object to the proposed reforms because our analysis has shown that these reforms are not "cost neutral". They represent a significant cut in almost all levels of work and for practitioners at all levels of experience. Criminal barristers do an extremely demanding job, which is an important public service. We will not accept further reductions in our fees.

More importantly we object at a fundamental level to this discriminatory set of proposals. A failure to oppose them will embed a discriminatory fees structure for another decade (the last AGFS reform was 2007, the MOJ estimate that introduction of the proposed scheme would cost approximately £1 million). The statistics tell us the Bar is between 100-150 years away from a diverse profession, representative of the society that it serves. Any reform of publically funded fees cannot be conducted blind to that inequality and in denial of the responsibility that we all have to address it within the professional lifetime of this generation. We cannot afford, society cannot afford, to haemorrhage talent.

**A judiciary that reflects the society that it serves is presently within our 0-7 year call bracket. What are we going to do to retain and then promote them?**

This is the question that we pose to our professional bodies and to the MOJ. It is a question that is outwith the scope of the present consultation. It should be at the very heart of any revised consultation process. This is why we decline to answer the detailed questions set out therein. We reject the terms of the consultation and hope that an extended period of dialogue and reflection, in order to find a proposal for reform that addresses this issue and meets with principles of fairness and fair remuneration for all levels of call going forward, will now ensue.

**Garden Court Crime Team**

**February 2017**