



Young Barristers' Committee's Response to the "Reforming the Advocates' Graduated Fee Scheme" consultation paper

1. This is the response of the Young Barristers' Committee (the YBC) to the Ministry of Justice consultation paper entitled "Reforming the Advocates' Graduated Fee Scheme".¹
2. The YBC is a committee of the General Council of the Bar of England and Wales (the Bar Council). It is made up of barristers, employed and self-employed, of under 7 years' practice. Approximately a third are elected members of the Bar Council, and two thirds are appointed to represent particular constituencies.
3. For the purpose of responding to this consultation, the YBC formed a working group of five criminal barristers, which was chaired by the Chairman of the YBC. This consultation response has been compiled by that working group.
4. In order to inform this response, the YBC convened a panel discussion for young barristers. Members of the working group also attended the Criminal Bar Association's panel discussion on the new proposed scheme. The YBC has also received a number of communications from young barristers which have been taken into account in compiling this response.

Overview and General Comments

5. The YBC supports the underlying rationale of the proposed new scheme. Remunerating advocates for the work actually done on a case is self-evidently fair and appropriate. The proposed new scheme should be better in this regard than the current scheme in eliminating anomalies and inconsistencies. The YBC is therefore broadly supportive of the proposed new scheme. That said, there are some (extremely important) matters of detail with which the YBC does not agree, and those are explained in our answers to specific questions below.
6. Further, while the YBC understands why a requirement for the new scheme is that it should be cost neutral, it cannot support such a stance. Research commissioned by the Bar Council in October 2013 found that between 2007 and 2013, AGFS fees reduced by 21% in cash terms equating to a 37% reduction in real terms.² The real terms figure will be considerably worse today.

¹ Ministry of Justice, 2017, "Reforming the Advocates' Graduated Fee Scheme"

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

² Research undertaken by Prof Martin Chalkley, "Bar Council response to the Transforming Legal Aid: next steps consultation", page 52.

7. While this has had a devastating impact on the Bar as a whole, its effect on the young Bar has been particularly extreme. The number of practicing barristers under 5 years' call fell by 30% between 2005 and 2015. Much of this fall is likely to be attributable to falling numbers of criminal barristers under 5 years' call. Such a fall is not surprising given the dramatic cuts to remuneration for criminal work. This is combined with large increases in student debt. Last year the Bar Council estimated that it could now cost a student £127,000 to qualify as a barrister in England and Wales.³ When high levels of debt are combined with ever-increasing housing costs and falling pay it is not surprising that the number of young barristers is falling.

8. This decline in numbers is a cause for concern in itself. The young Bar are the future, and the health of the Bar is vital to the health of the justice system as a whole. The justice system needs a strong cadre of well-trained and able specialist criminal advocates. Young barristers are those best placed to provide this service, but cannot continue to do so at the current levels of remuneration. Those levels of remuneration are unsustainable.

9. The health of the young Bar also affects other matters of the utmost public importance. The young Bar today will largely make up the QCs and judiciary of the future. However, being a young criminal barrister has increasingly only become possible for those with other significant financial means. If the Lord Chancellor and the Ministry of Justice are serious about judicial diversity, they need to ensure that being a criminal barrister is a career open to all who possess the requisite talent. This is increasingly not the case due to the current low levels of remuneration.

10. Accordingly, the YBC cannot support the requirement that the proposed new scheme be cost neutral. However, while this requirement may to a certain extent be understandable, the lack of any mention in the consultation of linking the proposed fee levels to inflation is not. Given the precarious state in which the criminal Bar as a whole, but the young criminal Bar in particular, finds itself. The fees proposed in the consultation should at the very least be index linked to avoid continued erosion of fee levels by inflation.

11. As well as a link to inflation, the YBC would propose that any new scheme be subject to regular review in order to ensure that the scheme is meeting its stated aim of remunerating advocates more fairly for the work undertaken. An important element of that review should be to consider what impact any new scheme is having on the young Bar.

12. In summary, therefore, the YBC would propose two general additions to any new AGFS scheme:

- a. Index linking of fees to inflation.
- b. A review clause, with one consideration of any review being the effect of the new scheme on the young Bar.

http://www.barcouncil.org.uk/media/235755/bar_council_response_to_the_transforming_legal_aid_next_steps_final.pdf

³ <https://www.theguardian.com/law/2016/feb/23/qualifying-barrister-may-cost-new-students-127000>

Response to Consultation Questions

Q1: Do you agree with the proposed contents of the bundle? Please state yes/no and give reasons.

13. Yes. The proposed contents of the bundle appear to reflect accurately and fairly the preparation for a standard trial.

Q2: Do you agree that the first six standard appearances should be paid separately? Please state yes/no and give reasons.

14. Yes. Sequestered payment for standard appearances contributes to transparency and certainty for those actually undertaking the work, whether or not they are the trial advocate.

Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle? Please state yes/no and give reasons.

15. On balance, no.

The logic of this appears to be aimed at preventing excess pre-trial hearings and premised upon an assumed decrease in pre-trial hearings generally. It perhaps also assumes that only the highest paid, most complex cases, will require more than six pre-trial hearings. While this may in practice be the norm, this logic does not justify included payment, *per se*, nor does it recognise complex legal or disclosure-based issues that may require additional hearings in any category of case. Logically, therefore, all separate hearings ought to be remunerated separately. Judges will have full oversight over the necessity of such hearings.

Reliance on an updated Bar Protocol or chambers' policies to ensure that those undertaking hearings in excess of six does not afford adequate protection for those undertaking such work, predominantly the young Bar.

Q4: Do you agree that the second day of trial advocacy should be paid for separately? Please state yes/no and give reasons.

16. Yes. The current scheme is unfair in that an advocate is paid the same for a trial which lasts two days as for a trial which lasts one. The reintroduction of refreshers for the second day ends this unfair anomaly.

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed? Please state yes/no and give reasons.

17. Yes. The proposed new offence system better captures the range of complexity of cases which criminal advocates will encounter.

Q6: Do you agree that this is the best way to capture complexity? Please state yes/no and give reasons.

18. Yes. As a general rule, categorisation by type of offence is the best proxy for the complexity of a case.

Q7: Do you agree that a category of standard cases should be introduced? Please state yes/no and give reasons.

19. Yes. Given the sheer number of possible offences, this is the only practical way to proceed. If each offence had its own fee level it would quickly become unworkable.

Q8: Do you agree with the categories proposed? Please state yes/no and give reasons.

20. Yes. It is understood that these have been produced after extensive consultation. In the YBC's information-gathering exercise, we have not encountered any opposition to the proposed categories. However, amendments to the law and the introduction or repeal of particular offences over time are likely to have an effect on the appropriateness of the categories. There may also need to be further adjustments in light of practical experience under any new scheme. This is another area in which the review mechanism proposed above would be useful.

Q9: Do you agree with the bandings proposed? Please state yes/no and give reasons.

21. Yes, for the reasons given in the answer to Q8 above.

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4? Please state yes/no and give reasons.

22. Not entirely.

The inclusion of affray, s20 GBH and s47 ABH in Band 16 is wrong in principle. There is no logic in treating, as the scheme does, all cases of violence as low-level crime save for s18 wounding with intent. The distinction between s18 and s20 GBH, and in turn s20 and affray and/or s47 (and violent disorder and affray) is often very fine. The injuries will often be significant, or in the case of s47 offences, cases of regular or sustained violence, such as a campaign of domestic violence. Accordingly, the potential sentences are lengthy and so the bandings of these offences should reflect this.

Further, the YBC are deeply concerned that the inclusion of these offences in Band 16 will have a severe detrimental impact on the careers of the most junior barristers. These cases are typical of the work undertaken by young barristers and the significant cut in fees that placing these offences in Band 16 will cause will seriously affect the income of the young

bar, which is already seriously deficient. There will be a consequential impact on the diversity of the profession and, in the future, on that of the judiciary.

We see merit in the argument that an offence of violence that is in the Crown Court only by virtue of the defendant electing trial by jury should be treated as a Band 16 case, as such offences will necessarily involve low-level violence.

Q11: Do you agree with the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

23. No. As stated in the overview above, the fees are too low across the board. However, even if one accepts the requirement to remain cost neutral, certain offences are miscategorised, as explained in the answer to Q10 above.

There is also considerable concern amongst young barristers in relation to mention fees. The most junior barristers will frequently cover mentions for more senior barristers. The payment of £60, when reduced by typical chambers rent of 20%, will be £48. Travel expenses will also be deducted from this. This amount is wholly insufficient as a daily rate.

It also represents in general terms a reduction in what a barrister currently receives from the overall brief fee when they cover a case for another barrister. For those usually more junior barristers, who regularly conduct these hearings on behalf of other barristers, this drop in remuneration for standard appearances will be particularly felt.

A young barrister will typically prepare in the evening before a mention and will often be at court, waiting for the case to be called on, for several hours.

The payment proposed for standard appearances covers a wide range of hearings - some may be straightforward, others less so. It is important that barristers instructed in these hearings are conversant with the papers so that they can assist the judge on matters properly. The rate of remuneration for such hearings should reflect the work involved and the high standard of work that the judiciary rightly expect of advocates instructed in these hearings.

As Better Case Management increases, there should be fewer mentions and so a more appropriate fee for mentions should be affordable even on a cost-neutral basis.

Q12: Do you agree with the relativities between the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

24. Yes. Subject to those points made in answer to Q10 and Q11 above.

Q13: Do you agree with the relativities proposed to decide fees between types of advocate? Please state yes/no and give reasons.

25. Yes. It is right that quality and experience is appropriately rewarded, and although the QC appointments scheme is not perfect, the YBC has confidence that it is broadly effective in identifying those of experience and talent.

Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases? Please state yes/no and give reasons.

26. Yes, for the reasons given in paragraph 5.11 of the consultation document.

Q15: Do you agree that the relative fees for guilty pleas (50%), cracks (85%) and full trials are correct? Please state yes/no and give reasons.

27. Broadly, yes. We agree that the relativities for guilty pleas, cracks and full trials seem fair.

However, we have concerns that the rates of remuneration for cracks in relation to less serious offences, such as standard cases, in particular are too low. This is likely to have a disproportionate impact on members of the young bar whose practises will likely be predominantly made up of standard cases and other less serious offences. It is commonly perceived that less serious offences are more likely to crack.

Q16: Do you agree that the point at which the defence files a certificate of trial readiness should trigger the payment of the cracked trial fee? Please state yes/no and give reasons.

28. No. As with CPS billing, it is submitted that a cracked trial fee should be paid once the matter is adjourned for trial, to reflect the substantial amount of work done early on to prepare for trial, for example, advising on evidence, drafting the defence statement and chasing the prosecution for service and disclosure.

The failure to file a certificate of trial readiness may be through no fault of the advocate, and disputes over whether the certificate has been served - or whether any equivalent period has elapsed - will only serve to increase the administrative burden on the Bar and LAA.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document? Please state yes/no and give reasons.
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29. Yes. There is a need to cater for exceptional cases, and the balance struck in paragraphs 7.1-7.6 of the consultation document seems appropriate.

Q18: Do you agree that the wasted preparation provisions should remain unchanged? Please state yes/no and give reasons.

[The plan is to endorse the Rem Com response, which is currently:

30. No. paragraph 18 of Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 state:

“18.— Fees for wasted preparation

(1) A wasted preparation fee may be claimed where a trial advocate in any case to which this paragraph applies is prevented from representing the assisted person in the main hearing by any of the following circumstances—

[...] (c) the trial advocate has withdrawn from the case with the leave of the court because of the trial advocate's professional code of conduct or to avoid embarrassment in the exercise of the trial advocate's profession;

[...] (2) This paragraph applies to every case on indictment to which this Schedule applies provided that—

(a) the case goes to trial, and the trial lasts for five days or more; [...]"

31. On the occasions counsel is required by their code of conduct to withdraw from a case mid-trial, this tended to precipitate a new trial with new counsel. New counsel would be entitled to their own brief fee for the new trial. The more recent trend, however, is for judges to press on with the current trial, giving new counsel time to read-in to the case. In those circumstances, the current regulations only permit the payment of one brief fee, to be shared between the two advocates, with one advocate able to claim wasted preparation (though even here the Legal Aid Agency have started to refuse to pay wasted preparation in some of these cases, and the Bar Council is aware that one such case is in the process of being appealed to a Costs Judge).
32. For the new Scheme the regulations need to ensure that both the counsel who is required to withdraw, and the incoming counsel, each receive a brief fee, to cover their work on the case. This is required by basic fairness, and it should also be noted is cheaper than the costs of an entirely new trial, which may be the only option once it becomes more generally known that an incoming advocate would have to share the single brief fee and as a consequence no such advocate would take on those cases. The Wasted Preparation provision should therefore be amended such that two brief fees be paid, rather than one brief fee and one wasted preparation.

Q19: Do you agree with the proposed approach on ineffective trials? Please state yes/no and give reasons.

33. Yes. For the reasons given at paragraph 8.2 of the consultation.

Q20: Do you agree with the proposed approach on sentencing hearings? Please state yes/no and give reasons.

34. Yes. For the reasons given at paragraph 8.3 of the consultation.

Q21: Do you agree with the proposed approach on Section 28 proceedings? Please state yes/no and give reasons.

35. Yes. For the reasons given at paragraph 8.4 of the consultation.

Q22: Do you agree with the design as set out in Annex 1 (proposed scheme design)? Please state yes/no and give reasons.

36. As stated above, the YBC broadly agrees with the principles underlying the new scheme, and therefore its design. Where the YBC has concerns, we have set those out above. Any further concerns which have not been dealt with directly above are set out below in this section.

- *Elected cases not proceeded at paragraph 17*

We strongly disagree with the proposal that elected cases should only be paid a fixed fee. The fixed fee under the current graduated fee scheme is unjustified and reform to this aspect of the fee scheme is overdue. We believe that elected cases not proceeded with should be treated in the same way as cases sent from the magistrates' court for the following reasons:

- a. The proposed scheme is designed to reflect payment for 'work done'. There is no difference in the work that needs to be done in an elected case and one that is sent. There is no justification for retaining this distinction between these two case-types under the proposed scheme. The distinction goes against the fundamental principle that underlies the proposed scheme to create a fairer way of remunerating advocates for work done.
- b. The retention of this distinction will have a disproportionate impact on the young bar, who are more likely to be instructed in elected cases than more senior barristers. The young barrister is often already under significant financial strain from a large amount of debt and having completed pupillage (or still in pupillage) with very limited financial support
- c. The fact that elected cases are likely to be less serious than those that are sent to the Crown Court for trial is already accommodated for under the proposed fee structure which determines remuneration via seriousness of offence.
- d. It is unclear from the consultation document whether the fixed fee for such cases would include all mentions and other hearings. It is assumed that such hearings will be remunerated separately, as with other cases in the proposed new scheme. However, if this is not the case, then it should be so. There is no rationale for treating elected cases not proceeded as different to any other type of case in this regard. If any fixed fee was to include all mentions and other hearings then it would often lead to extremely low and unfair rates of remuneration. For example, in a case where the advocate has conducted a conference, PTPH, a number of mentions and on the day of trial the prosecution ultimately offers no evidence or the client pleads

guilty. Such events occur through no fault of the advocate instructed in the case. £194 is expected to cover payment for all those attendances and extra work done by the advocate, such as drafting of responses to applications and a defence statement. That is simply unjust.

- *Hospital orders at paragraph 22*: In our view, this provision should be extended to circumstances where a hospital order is not necessarily made but where one is being considered by the judge. This would have necessitated the same amount of work on the part of the advocate and the rate of remuneration should also reflect this.

Q23: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

37. The impacts of any new scheme will only be fully known after it has been in operation for a period of time. That is why we have proposed regular reviews above. These reviews should be held in conjunction with representation from the profession. As has already been stated, we would recommend that the impact on the young Bar be a particular area of focus for any review.

Q24: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

38. See answer to Q23.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

39. The YBC does not feel qualified to answer this question.

**Young Barristers' Committee of the Bar Council
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