LCCSA response to Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes

We welcomed the concept of accelerated changes when it was raised on 20th June 2019 as a gesture of good will, with the expectation of a consultation to take place in August 2019 and implementation in November 2019. We had therefore hoped to be considering the final CLAR proposals at this time.

To our members this offer is inadequate in amount, needlessly complex and continues to use austerity-era benchmarks for its calculations. It does not provide the necessary injection of funding that is required pending the full review. It does not suggest that the Ministry of Justice is listening to our concerns about the precarious nature of the supplier base, in both the short and the longer term.

In March 2014 the then Lord Chancellor cut all rates of criminal legal aid payment to solicitors by 8.75%, the first of two such cuts, which could only have been sustained by the profession by the introduction of what was known as the Two Tier contract intended to force mass consolidation of the market. When those reforms collapsed, the first cut was not reversed (the second 8.75% cut was reversed), despite the advice given to the Ministry that the market could not sustain it.

To ignore this injustice does not treat the two schemes equally. The AGFS scheme was not subject to the 8.75% cut in 2014 and now is the time to restore the balance. This is relevant to Questions 5 and 6 below.

We have repeatedly proposed that a short-term cash injection, pending a wider review, can be fairly and simply achieved by reversing the March 2014 cut. However, this consultation prefers to trial new concepts, such as payments for unused material. Rather than create hybrid schemes in the interim period, we consider that new methods of payment are more appropriately left to be considered as part of the wider CLAR review.

Our position is that the quickest and easiest way for an urgent cash injection into the struggling market and to demonstrate a position of much needed good will to the supplier basis, is for the 8.75% cut to be immediately reversed and adjusted to take into account inflation from March 2014 to present.

Further, if the Ministry insists on bringing in the proposals outlined in this consultation, our position is that as an absolute minimum, all proposed hourly rates should be re-adjusted to remove the 8.75% cut and to take into account inflation. It is not appropriate to wait until the wider review to consider hourly rates. We strongly object to these paltry hourly rates and the MOJ insistence on using them. They do not properly reflect the importance of the work done and have not been increased since the mid to late 1990s. An inflation only increase from that time would see the rates doubled. The current proposals do not even take into account inflation from when the consultation first started.

The accelerated area of payments for pre-charge engagement does not form part of this consultation. We note that no attempt appears to have been made to increase any of the other areas of proposed accelerated items to make up the shortfall this has

created with regards to the overall proposed interim package. Our position is that the money earmarked for the pre-charge engagement should be reflected in the other accelerated area proposals as a gesture of good will and to demonstrate that the purpose of the accelerated items is overall to give an urgent short term cash injection to the profession pending the wider review.

Question One: Do you agree with our proposed approach to paying for work associated with unused material? Please state yes/no and give reasons.

No.

The accelerated payments package should not confuse the task of providing short-term respite funding for service providers with acting as a pilot for new proxy payments under a reformed LGFS scheme.

The proposed hourly rates of payments are derisory. At a time when members are looking for signs that the MOJ are serious about funding the service fairly, 1990s rates of payments are being proposed without even adjusting to take into account inflation.

The data upon which the 1.5-hour and 3-hour figures was based is in our view flawed and unrepresentative of actual work undertaken. The CPS was asked last summer to provide the Ministry with a selection of cases, many of which involved cases where consideration of unused material barely featured. We do not agree that these time estimates fairly reflect the work required to peruse unused material and so this is likely to lead to solicitors continuing to undertake a large amount of work unpaid. As technology continues to evolve, we only expect the amount of unused material requiring consideration to increase.

We do not agree that paying the equivalent of 1.5 hours work for 0-3 hours work is reasonable. For too long solicitors have been expected to undertake work free of charge. Initially we were told that this was on a “swings and roundabouts” approach but the various perceived benefits to the profession of such an approach have long since been removed. There is no swings and roundabouts approach any more – the profession merely loses out (e.g. the removal of the committal fixed fee which had itself replaced the fee under the standard rate scheme for magistrates’ court payments). It is clear this concept does not work and it is time to move away from this to an approach where solicitors are fairly paid for all work undertaken. If using a 0-3 hours band, solicitors should be paid for 3 hours’ work.

We do not agree that a special preparation claim is an appropriate or proportionate way to be paid for cases where in excess of 3 hours is spent on unused material. On a costs-benefit basis, a number of firms already do not claim special preparation for example in cases where PPE exceeds the 10,000 cap as it is disproportionately time consuming and administratively burdensome for the hourly rate of return, especially true of Grade A fee earners. Thereafter the culture of refusal at the LAA means that claims are routinely rejected or reduced for arbitrary reasons in any event.

We are concerned that by imposing this requirement, suppliers will still be undertaking work for free, spend more unpaid time making the application and effectively have to

"negotiate" back and forth with the LAA. This cannot be justified by most suppliers with limited administrative resources. This difficulty is recognised in the impact assessment on this consultation.

Further, the need for a special preparation claim leads to even more uncertainty in payments for work carried out which makes it difficult for providers to budget and manage cash flow. The whole point of a fixed fee approach should be to provide greater certainty as to the amount paid and when it is paid, as well as to reduce the bureaucratic burden on both the suppliers and the LAA.

Question Two: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

Instead of a special preparation claim, we would propose introducing a further fixed fee band; for example, in addition to 0-3 hours, introducing a 4-10 hours band. This would capture 96% of cases according to the impact assessment. The remaining 4% of cases could then be claimed by way of an "escape fee" or special preparation claim; which should be in addition to the fixed fee for time already spent on the first 10 hours. This would significantly reduce the bureaucratic burden for all parties. It would also be a proportionate response to the issue of proper payment for perusal of unused material.

The fixed fee payable should be set at the top of the hourly range, not the midpoint, so 3 hours equivalent for the lower band and 10 hours for the higher band. Only for cases with work exceeding 10 hours should an ex-post facto model be used. It is not reasonable or tolerable to expect litigators to work for free and so the fixed fee payment should be set at the maximum number of hours within a band.

The starting hourly rate should not be lower than that paid for preparation in the magistrates' courts; cases in the Crown court are by their nature more complicated. Any hourly rate taken from past legal aid schemes should in the very least be adjusted for inflation since its last rise, which would be from circa 1998.

An alternative and preferred approach would be to treat unused material as PPE. In terms of work done by the solicitor, the same amount of work and consideration is required per page whether or not it is deemed to be "used" by the CPS. The material is disclosed because it is capable of undermining the prosecution case or assisting the defence. If the Ministry is genuinely intending to pay solicitors for perusal of unused material, this would be the simplest way to do so, especially in the short term.

However, as this would not fairly remunerate work undertaken on video or audio unused material, a further add-on based on hourly rates may be required. It is not clear in the proposals how the Ministry intends to pay solicitors for work undertaken on such material. There has been a surge in service of Body Worn Video, CCTV and video mobile phone material which is time consuming to consider and could not have been envisaged at the time fixed fees for the LGFS were set. We propose that as a minimum, an hourly rate should be paid for this for the number of minutes of material considered with an hourly rate appropriately adjusted for inflation. The LAA should be

aware that such material cannot be viewed or listened to in real time and it takes much longer to consider a video or audio than the length of time it lasts.

Question Three: Do you agree with our proposed approach to paying for paper heavy cases? Please state yes/no and give reasons.

No.

While we agree that the scheme in principle should adequately reflect the additional work involved in page heavy cases, we do not agree with the proposed rates of payment. Many complex and serious cases will attract only £39 per hour and this payment does not come close to rewarding the skills and training required to conduct this work. This is about half the hourly rate of a plumber, electrician, carpenter, car mechanic etc.

Question Four: If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

The rates of pay should be based on the fact that it is assumed that it takes 3 minutes to read a page and therefore 20 pages in an hour. With a suitable hourly rate, a price per page can easily be established, much like the previous AGFS where the PPE was paid on a fixed rate per page in addition to the Brief Fee.

Question Five: Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.

No.

While we welcome an acknowledgement that payment should be made for work actually done when cases crack for Advocates, we reject the reasons given in paragraph 80 as a bar to this applying to both the AGFS and LGFS.

The reasons given make no sense. To imply that it is because the AGFS scheme is not based on PPE fails to understand that in an increasing number of cases, the PPE is either low or taxed down by the assessor, resulting in a cracked trial fee that fails to represent the level and quality of work conducted up until that stage. This is particularly apparent for example in high value Fraud cases.

Our position is that there is no logical basis to pay the Advocate a full fee and not the Litigator given it is the Litigator who undertakes all the preparation work required before an Advocate is even instructed for a Trial. If the Advocate is deemed to have prepared for a trial at the stage it cracks, then by default it must be true that the Litigator has prepared.

If anything, if the aim is to avoid potential duplication of work, we would expect the payment to be given to the Litigator but not the Advocate (we are not proposing this but demonstrating the illogical basis of this proposal).

Having recognised that payment should be made for work done, it is perverse to only reward the advocate for preparing the trial and not the litigator. The current differentiation runs counter to the principal of recognising and paying for work actually done, and is illogical, irrational and unreasonable.

We repeat here what was set out in our opening remarks; in March 2014 an unjustified cut of 8.75% was imposed on litigators and needs to be reversed.

Question Six: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

Paragraph 80 does not list any LGFS proxies which operate as a bar to payment of the trial fee. It has failed to mention the most important proxy in this area: days of trial. The greater the number of days of trial the great the trial fee, subject to cases with exceptionally large PPE values. Were cracked cases to be paid as trial fee the number of days of trial would be entered as one and would not over-reward litigators under the scheme.

Our position is that if the Advocate is to be paid 100% of the trial fee for cracked trials, there is no logical explanation as to why the Litigator should not be paid the same.

Question Seven: Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.

No.

We agree that the reforms under "Better Case Management" have vastly increased the level of advanced preparation required for first appearances.

We do not agree that the work involved in sending cases equates to only 2 hours. This does not fairly take into account a number of factors including:

- The service of lengthy IDPC bundles which often include multiple media links such as Body Worn Video and CCTV, and extracts of mobile phone messages, which must all be considered in advance of the hearing;
- Holding meetings with defendants before the hearing, some of which will be in prison owing to them already serving or the case overlapping with other ongoing matters;
- The additional time taken when defendants require interpreters or have mental health or learning difficulties;
- The additional pressure on the Solicitor now to advise on plea for very serious offences given the loss of credit for waiting until the PTPH to plead;

- The additional scrutiny from the Court to identify the trial issues early which is akin to the work historically carried out by the Advocate at PTPH in the Crown Court;
- The time involved in travelling to and from Court and waiting time;
- Delays at Court outside of the Solicitor's control including delays in those on remand being brought to Court, a shortage of Probation officers, interpreters and liaison teams. These have been compounded by the closure of courts in London in particular.

The proposal to only pay for only 2 hours' work goes against the principle of paying for work fairly undertaken and fails to incentivise early resolution of cases before they go to the Crown Court where the cost to the public purse will be much higher.

We do not agree with the proposed hourly rate for the same reasons outlined throughout this consultation response; namely that it is not appropriate to propose rates from the 1990's and not even take into account inflation as a starting point.

The work involved prior to sending or committal did not disappear once the committal hearings were abolished. As the consultation points out, the reforms implemented under Better Case Management has only increased the level of advanced preparation involved.

Question Eight: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

The proposal looks back only to 2016 in assessing what has changed. Looking back to 2011 there is a simple and fairer payment scheme for this work, which was removed because the procedure was changed in name only and not because the work was no longer needed; payment for Committals.

Previously, all either-way offences attracted a fixed fee of £318 for committal hearings as a "bolt on" to the LGFS. Further back still, all either-way or indictable offences were funded through the magistrates' court fixed fee scheme. Appropriate use of this process previously created savings as it enabled many cases to be filtered before they reached the Crown Court.

Our proposal would be to re-instate the equivalent of a Committal fixed fee.

The starting point for the amount of this fee should be £318 adjusted to take into account inflation since 2011. Then to increase this by a reasonable amount to reflect the additional work required under the Better Case Management requirements.

The removal of the old Committal fixed fee was entirely an austerity measure. It was not accepted at the time by the profession which is why it should be re-instated, then an additional amount added plus inflation to pay fairly for work being undertaken now nearly a decade later.

Question Nine: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please state yes/no and give reasons. Please provide any empirical evidence relating to the proposals in this document.

The impact assessment sets out in tables 13 and 14 the real disparity of additional funding made available. Whilst the announcement suggests that the £50 million is split evenly it appears that the AGFS is benefiting from £ 20 - 29 million and LGFS between £12 -21 million with the percentage increases also significantly weighted to the AGFS. Furthermore, to calculate the figures on sending cases to be on the basis of last year's figures in order to forecast a possible increase in next years' figures is flawed because of the trend for retaining jurisdiction in many cases.

The division of funding fails to take into account the number of solicitors in practice (as opposed to firms) against the number practicing at the criminal bar and overheads that firms with criminal contracts are expected to expend to remain sustainable.

As an association we do not have the resources to analyse the respective financial models set out in the impact assessment.

Question Ten: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

Yes – negative:

London has a higher proportion of BAME solicitors and partners than the rest of England & Wales. In every other sector, public and private (of note, including the CPS) payments are given a London waiting. This must also apply to Solicitors to avoid penalising London solicitors who have no choice but to pay the cost of having offices in the capital and homes nearby. Suppliers are suffering a recruitment and retention crisis, and this is likely to have a disproportionate impact on BAME solicitors.

Question Eleven: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

All the schemes proposed should have a London weighting attached.