**Amending the Advocates’ Graduated Fee Scheme**

**Consultation Response**

**Q1: Do you agree with the proposed increases to basic fees in bands 4.2 and 4.3? Please state yes/no and give reasons.**

No.

It would appear that the new fees present as an improvement on fees payable under Scheme 9 until they reach a certain level of PPE. Thereafter they will present a reduction. This is even after additional payments for PTPH, Mentions, sentence and daily trial rate are factored in.

It may be that this PPE level is approximately 1000 pages but is hard to say with any certainty.

The proposed fee scheme must factor in additional payments for ‘paper heavy’ cases to continue to make these attractive to advocates. It will be difficult to attract advocates to represent defendants in the most paper heavy cases.

**Q2: Do you agree with the proposed increases to basic fees in bands 6.1, 6.2, and 6.3? Please state yes/no and give reasons.**

No.

Both 6.1 and 6.2 would have been payable as Class K offences under scheme 9.

The easiest example to give is that of the new 6.2 fee. Under Scheme 9 that would have attracted a basic fee of £1632 but an evidence uplift of £9799.02 plus the additional witness payments. As a result, the proposes fee, even taking into account other payments that will be due, is a fee reduction of in the region of £3000. The daily attendance fee is less than under Scheme 9 - £500 as against £530.

The difficulties will be magnified for cases that fall within 6.1.

Cases under 6.3 would again have previously been paid under Class K. Although the basic trial fee represents an improvement on the Scheme 9 fee, there will actually be a cut once PPE reaches a certain threshold. In this case it is likely to be around 1300 PPE. As a result, those undertaking more complex cases, albeit with a lower value, will find that their income is cut. The more PPE that is served, the greater the cut.

As a result, increased complexity no longer provides an increased financial reward across these types of case.

Perhaps more significant cuts are disguised as they are not part of this consultation. Another straightforward example is a guilty plea within category 6.2. Under Scheme 9 that would have paid £11177.98. Under Scheme 10 it pays £2500. This fee does not reflect the complexity of the work undertaken nor the degree of care and responsibility shown by the advocate.

Similarly, the cracked trial fee is now limited to the final third of a case. That is a significant fee reduction under Scheme 9 for cases that resolve prior to the final third. The fee payable is £2500 and would have been £8976.

Even where a case cracks in the final third, the Scheme 10 fee is only £4250 as opposed to £8976.

Fees can only be said to be broadly comparable where a trial actually begins. In many cases a trial is never needed. Advocates who are able to resolve cases early and prior to any trial will be penalised under the new scheme in relation to fees.

The fee levels for all of these cases should reflect the time needed to prepare them and the time that they take in court. Advocates undertaking these cases will be unable to take new cases if trials proceed and their practice will suffer as a result. The proposed fees do not provide an incentive for an advocate to take on cases of this complexity.

The fee scheme needs revising to ensure that additional payments are made in paper heavy cases.

**Q3: Do you agree with the proposed increases to basic fees in bands 9.1 and 9.4? Please state yes/no and give reasons.**

No.

A simple comparison demonstrates the fact that the proposals are a significant fee reduction in highly complex cases. A case within 9.1 that had 5000 PPE pays £5800 under the Scheme 11 proposal. It would have paid £6205 under the previous scheme. That may mean that with additional hearings the total fee is an improvement.

If that same case had PPE of 7000 then the old fee payable would be £8774.85. As PPE rises the cut in fees is amplified. There is no financial reward for taking on cases of this level of complexity.

Again, more significant cuts are being disguised by the fact that they are no being consulted upon. A guilty plea on a 9.1 case pays £2500 on a guilty plea with a PPE of 5000. Previously it would have paid £4744. This is a substantial fee reduction for a complex case resolved at an early stage.

The cracked trial fee is once again limited to the final third of a case. For those cases resolved in the second third, the fee would have been £4693. Now it will be £2500.

For cases that resolve in the final third the Scheme 10 fee is £4250, again less that the old fee of £4693. Although that may be, with additional hearings, an improvement in the fee payable that benefit will vanish once PPE rises above 5000 PPE.

In relation to Category 9.4, the simple calculation shows that this is a significant reduction on the Scheme 9 payment which would have been £3127 assuming PPE of 1000. The proposed fee is £2625. By the time PPE reaches 4999 the old fee would have been £8045. It is perverse that the additional work required by an additional 4000 PPE is not reflected by an increased fee. Rather it is ‘rewarded’ by a significant fee cut.

Issue in relation to guilty pleas and cracked trials will be replicated across this category of offence as well.

‘Junior’ junior advocates are more likely to seek to make a living representing defendants facing allegations that fall within Band 9.7 of Scheme 10. Again, the effect of the new scheme is disguised by this consultation.

Scheme 10 pays a fee of £400 upon a guilty plea where sentence is the same day. This would be likely where a starting point would be 4 ½ years after trial for supply of a Class A drug. The number of pages within such a case can be as high as 999 without potentially placing the case in a different class. The Scheme 9 payment for such an allegation would be £694 with the potential for an additional payment of £809 for PPE, so a total fee of £1503. The new fee is only 26% of the old fee. The core fee is only 58% of the old fee. This cannot be said to be a scheme that supports or encourages the ‘junior’ junior advocate.

Were this same case to proceed to trial the fee cut is amplified. Previously the supply of Class A 9.7 case would have been paid as a Category B case. The trial fee, absent any allowance for PPE, would have been £1305. With PPE up to 999 that fee would be £2284. It is now a flat fee of £800. Again, it is hard to see how this fee reduction for the type of trial dealt with by a ‘junior’ junior will allow such advocacy to remain financially viable.

The fee scheme needs revising in its entirety to make the fees payable sustainable over the short to medium term. Again, these cases which are often of some length and complexity will be unattractive to advocates. Guilty pleas dealt with by junior advocates are not financially viable and will leave such advocates significantly worse off. Any financial benefit of preparation prior to the final third to resolve any trial is removed.

**Q4: Do you agree with the proposed increases to fees in the standard cases category? Please state yes/no and give reasons.**

No.

Assuming that ‘standard cases’ would have fallen within category H of Scheme 9 as not worthy of categorisation it would appear likely that these are cases that will be dealt with, again, by ‘junior’ junior advocates. This is the category that is key in attracting new entrants to the professions as it is the work that they will undertake and with which they will have to make a living for several years.

The basic trial fee for Class H trial cases was £816 with the PPE uplift. The proposed Scheme 11 fee is £650. This will represent a cut in nearly all cases where there is a PTPH and then simply a trial because of the removal of the PPE payment.

The daily refresher fee under Scheme 11 is to be £350, whereas it was £408.

Again, further cuts to payments for the work of the ‘junior’ junior bar is disguised by the manner of this consultation. The Scheme 9 payment for a Class H guilty plea was £490. The Scheme 10 fee is £275. This is a little over half of the original fee. Any perceived benefit from any additional hearings is illusory as on a guilty plea the probation service prepares a stand down report on the day for non-custodial sentences, or an immediate custodial sentence is imposed. Again, this must be a cut to the fees of new entrants into the profession.

The cracked trial fee would have been £618 plus the PPE uplift under Scheme 9. The fee under Scheme 10 is now £470. The new scheme removes this payment for cases that crack in the second third. This will almost always result in a cut to payments to the ‘junior’ junior advocates.

Fees for the most straightforward cases likely to be dealt with by new entrants to the profession have been substantially reduced. This will achieve the opposite of what was intended by the revision of the fees. Such improvements in fees actually benefit more senior advocates, but it is impossible to survey the entire effect here.

I believe that that Ministry of Justice has failed to appreciate that there is a gradation within the category ‘junior advocates’. This runs from ‘junior’ juniors to ‘senior’ juniors. The tone of the consultation document is that of simply splitting the professions into ‘juniors’ and QC’s. This is the incorrect approach to take.

I do not accept the assertion in paragraph 86 that Scheme 10 reflects and *‘upward trajectory of fee progression’.* The examples that I have given above show that there has been a dramatic reduction in the fees that could be expected as an advocate progresses through either side of the profession and is asked to accept briefs in relation to more complex cases.

I believe that Scheme 10 and the proposed Scheme 11 will continue to discourage new entrants to the profession. The tinkering around the edges of fees do not make the fees more attractive in those cases that new entrants will undertake.

There then comes a point that the fee structure provides a disincentive for more experienced advocates taking on complex cases.

The ‘unbundling’ of fees has, in fact, provided a perverse incentive to drag matters out and does not sit well with the current climate in which as much progress is achieved within the fewest number of hearings. Since Scheme 9 (and possibly Scheme 10) were devised, my experience as a regular Crown Court advocate is that there are fewer adjournments and far more cases are dealt with in a single hearing.

The old fee scheme provided an incentive to deal with matters efficiently. The same fee was paid whether there were one or four hearings. This no doubt benefited the courts, defendants and witnesses as well as advocates. There was not, in my view, a significant problem in advocates being paid their share from a single fee.

An increased fee for sentence is not particularly useful to an advocate if there are no longer sentencing hearings. Of course, if a case were to be concluded in a single hearing allowing an advocate to claim the basic fee plus a sentence fee then that may go some way to compensating efficiency. It would not, however, compensate for the fact that Schemes 10 and 11 appear to enact a substantial reduction in fee levels.

I agree with the comment in paragraph 90 that ‘*the changes…are not sufficient to allay the concern that junior advocates are not fairly remunerated for work done’.* They have failed to do so.

It is agreed that the proposed basic fee for Scheme 11 trials may be higher than the basic fee on offer for many cases under the old Scheme 9. However, this only remains true if PPE is ignored. Once page count is factored in, the reality of a fee reduction for high PPE cases is obvious. Fees in relation to guilty pleas and cracked trials are, on analysis, reduced.

Similarly in relation to the refresher fees, the additional payment is welcome, but as cases within this category become more complex and benefit is illusory as the fee that would have been brought by a significant PPE is no longer attainable.

In relation to 3.5 the proposed fee is actually a reduction on the Scheme 9 fee. Even if additional hearings are factored in the PPE does not have to rise greatly before this is an effective fee cut.

Similarly, in relation to bands 3.5, 6.4, 6.5, 9.7 and 15.3, while the increase must be welcome, it is illusory when the basic fees that would have been available under Scheme 9 for complex cases are taken into account and compared.

The basic fees must be revisited to ensure adequate and fair payment for cases as they become more complex and PPE increases. In particular the fees attracted by guilty pleas and cracked trials must be improved.

**Q5: Do you agree with the proposed increases to basic fees in bands 6.4, 6.5, 11.2, 12.1, 12.2, 12.3, 13.1, 14.1, 15.1, 15.2, and 15.3? Please state yes/no and give reasons.**

No.

The recategorization of, for example, money laundering into 6.4, has led to a fee cut for that class of offence. The fee under Scheme 9 would have been £1097.66 as a Category B case. Even with additional hearings being paid, the effect of the removal of PPE as a proxy has meant that in all but the most straightforward cases this is in effect a fee cut.

6.4 cases at first glance result in an improvement on the fee that would have been paid for a Class F offence. However, absent any PPE proxy, when PPE reached around 350 then the fee paid will begin to result in a fee cut in relation to Scheme 9. Bearing in mind this category could include PPE of up to 9999, the potential for injustice in terms of fees must be obvious. This is another example of where the proposed fee structure does not make proper allowance for complex cases.

In relation to robberies, these would have been paid under Class C of Scheme 9, attracting a trial fee of £898 plus the uplift for any PPE. The proposed fee is £750 under 11.2. The daily refresher is £360. This would have been £408. These are cases that, again, may well have been dealt with by the more junior of advocates. This is a fee cut for this area of work.

The guilty plea fee for this case is now £360. It would have been £449 plus the PPE proxy. This is a fee cut for ‘junior’ junior advocates.

The cracked trial fee for this case is now £575. It would have been £581 with the PPE proxy. The removal of this fee where the case cracks in the second third and the removal of the PPE proxy is a fee cut for ‘junior’ junior advocates.

The category 12 offences were broadly likely to fall within the old Category B. While the fees in relation to categories 12.1 and 12.2 are welcome, the fee in relation to Category 12.3 represents a cut. Again, category 12.3 cases are those where ‘junior’ juniors are likely to provide representation. The fee would have been £1305 plus the PPE proxy under Scheme 9. Now it is £900.

Once again, the calculations for guilty pleas and cracked trials show that the fee payments as a whole, particularly those in relation to category 12.3, result in a fee cut to the very members of the professions that the Ministry purport to wish to keep, or those that the Ministry wish to attract to the profession.

In relation to Category 13.1, these offences would have previously been paid as a Category B case. The fee proposed appears to be a marginal improvement, but will not be so because of the removal of the PPE proxy. The cut is magnified when guilty pleas and cracked trials are considered. This is a cut to the fees of more senior juniors, so will affect retention or the likelihood of securing advocates to deal with this level of case.

In relation to the Category 15 cases, for example affray would have been paid as a Class H offence. It was the sort of case that the ‘junior’ junior advocate would deal with. The proposed fee is a reduction on the Scheme 9 fee - £700 as opposed to £816. There is a reduction in the daily refresher - £325 instead of £408. The PPE proxy has been removed which is unfair as these cases will often involve multiple defendants and a significant page count. The fee reduction is magnified once guilty pleas and cracked trials are also looked at. Scheme 10 and the proposed Scheme 11 will do nothing to attract new people into the professions and retain those already in them.

The scheme devised does not achieve the aims that the scheme is said to be achieving in terms of recruitment and retention.

**Q6: Do you agree with the proposed re-banding of several offences – harbouring an escaped prisoner, the intimidation of witnesses, the intimidation of witnesses, jurors and others, and assisting offenders – from the standard cases category to the offences against the public interest category? Please state yes/no and give reasons.**

Yes.

As set out above, although any re-banding that leads to an increased fee must be welcome, the effect of the rest of the scheme is to reduce payments in complex cases.

The basic fees must be revisited to ensure adequate and fair payment for cases as they become more complex and PPE increases.

**Q7: Do you agree with the proposed increase to fees for ineffective trials? Please state yes/no and give reasons.**

Yes.

The proposed increase in fees for ineffective trial is again illusory however. The court currently lists cases for Mention if they are ineffective so, at least locally in Nottingham and Derby, the fee is seldom payable.

**Q8: Do you agree with the proposed increase to fees for appeals against conviction? Please state yes/no and give reasons.**

Yes.

The fee still provides inadequate remuneration in many cases however.

**Q9: Do you agree that fees across the scheme should be increased by 1% on cases with a Representation Order dated on or after 1 April 2019? Please state yes/no and give reasons.**

No.

While any proposed increase would usually be welcome, this one is simply inadequate.

1% will be less that inflation. It will be less that wage inflation in chambers or in private practice. It does not even allow an advocate to stand still in terms of finances. Such a rise does not assist in attracting people into the profession or retain those already there.

Any proposed rise should be significant and looked at in conjunction with an overhaul of the system that properly rewards those undertaking cases that are complex and time consuming. Neither Scheme 10 or the proposed Scheme 11 do this.

**Q10: Do you agree with the overall package of scheme amendments we have set out in this consultation document? Please state yes/no and give reasons. If you have alternative proposals, we would welcome case studies and examples to illustrate these.**

No.

I do not believe that this is a genuine consultation. I believe that it is simply a process to be gone through before the Ministry imposes what it sees fit on the professions. You may demonstrate procedural compliance, but this will only be to legitimise a decision that you have already made.

I support this assertion with the fact that the decision to implement Scheme 10 and then propose Scheme 11 were unduly influenced by negotiations with the criminal Bar rather than the Law Society and Higher Courts Advocates.

I also draw on the outcome of the LGFS and Housing Duty scheme Judicial Reviews and the damning assessment of your consultation processes to support this view.

The schemes proposed have to suit both sides of the profession. As a solicitor advocate within private practice, sustainability is based on a complex overlap of legal aid fees payable for several different types of work – police station, Magistrates’, prison law, litigator and advocacy. The absence of a ‘whole system review’ means that the Ministry can have no real idea how the new fee structure has affected the sustainability of solicitors’ practices. The process has been designed only to accommodate the wishes of the Bar, and in that case only a very small majority approved the scheme.

I do not believe that the £15m is ‘new money’. It may be ‘new money’ to the AGFS but I am confident that it will be taken from another area of the justice system, hence the need for a ‘whole system review’.

I rely on the research of the Law Society that shows that the £15m is not a fixed figure from one year to the next, includes VAT and is likely to be far less than the headline figure advertised.

Bearing in mind the complexity of the interaction between different fees within a solicitors’ firm, then there is a clear need to look at the entire fee structure. The profession is aging. That is because it is difficult to draw young people to the job. In all conscience I cannot recommend it as a career due to the lack of progression and salary expectation, and the inability of successive governments to stop tinkering.

Evidence of these problems have been the work of the Law Society in relation to Duty Solicitor schemes. We are currently the only firm on the Newark Scheme for example. Young Legal Aid Lawyers have also undertaken valuable work in relation to Social Mobility. Degrees and significant debt without the hope of adequate remuneration to manage that debt and have a house and a family will inevitably lead to less mobility in terms of career choice. This fee scheme does not make the professions more attractive to disadvantaged applicants.

The scheme has failed to keep up with changes in how courts work. As mentioned above, there are far more cases being dealt with at a single hearing. This is due to stand down reports from probation, or the courts deciding that there is no need for a report at all. This change was no doubt never contemplated when the new AGFS was brought it.

Similarly, there are far fewer ineffective trials at court, again as set out above. Cases are listed for Mention by the court instead, the fee being payable therefore significantly less.

I disagree with a scheme that puts so little weight on the volume of material to be considered by an advocate. The system needs to be revised to give proper weight to complex cases in terms of volume of material. PPE remains a good indication of the complexity of a case and the time required to prepare and present it. Scheme 10 and the proposed Scheme 11 fail to give sufficient value to these types of case.

The reality is that more money needs to be made available to reward the junior work that involves complex cases. The Ministry needs to appreciate the difference between ‘junior’ and ‘senior’ juniors.

Remuneration in relation to ‘junior’ juniors needs to be significantly improved to attract new advocates into the professions.

Remuneration in relation to ‘senior’ juniors needs to be significantly improved to retain ‘senior’ juniors and reward them properly for the work that they undertake.

Bearing in mind the loss of significant fees for ‘paper heavy’ cases I do not believe that either fee scheme will be cost neutral. On the examples I have provided above it would appear inconceivable that this is the case.

The scheme fails in its aim to adequately reward those entering the profession as shown by the limited calculations set out above. It is a fee reduction on Scheme 9 for those cases that new entrants depend upon to begin to build a practice.

Thereafter if fails in terms of retention. While it is accepted that there may be a ‘sweet spot’ within a certain range of cases where the fees are improved, either side of that they have been reduced. The calculations above show that there is a significant fee reduction for complex, ‘paper heavy’ cases that would usually be dealt with by specialist more senior juniors.

As a result I fail to accept that any review of fees must be within an existing budget. For example, were main hearing fees restored to the Scheme 9 levels with additional hearings paid on top as in the Scheme 10 payment mechanism that would be a positive step in improving fees and would represent, in many cases, a real increase.

Thereafter fee levels across the board must be pegged to inflation. Otherwise the fee levels result a year on rear reduction. Even this mechanism does not guarantee and increase in fee income to make the position of advocate sustainable as this will be dependent upon instructions and case type, but it would be a step in the right direction.

**Q11: 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.**

No.

You have failed to identify the fact that Scheme 10 is a fee reduction for those that you purport to want to join the profession. The impacts are generally expressed in terms of the cost to the whole fund. It is no expressed in terms of cost to a ‘junior’ junior embarking on a career or a ‘senior’ junior specialising in a complex area of law where the PPE is substantial.

You have not conducted a ‘whole system’ review before embarking upon these changes. As a result I find it hard to belief that you have correctly identified the range of impacts.

I am concerned that your modelled expenditure between Schemes 10 and 11 do not include the figures for Scheme 9 which would show that engaging in a certain type of case would lead to a significant reduction of fees payable for these classes of offence. Either the Ministry has not done the work to allow me to use it to respond or is hiding it. I suspect the latter, as a full comparison would show the true nature of the fees on offer – that they will lead to a significant reduction in fees.

One risk not identified is that the fee scheme provides a financial incentive to leave cases until the final third to resolve. Why do the work early when it can be done late? Why prioritise that case over others? Credit is already at 25% for the defendant, it won’t reduce until 10% until the day of trial? Resolve it after the certificate of trial readiness has been served instead. This must be a backward step in court efficiency and useful use of court time.

We note that the Ministry does not believe that any changes will be apparent for at least 18 months. I do not believe that to be the case. Nearly 6 months have passed which will permit a comparison of a comparable case load from this year to April 2017 to October 2017 where representation orders are granted after 4 April 2018.

**Q12: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.**

No.

I do not believe, for example, that there will be a review of the system within the 18 months to 2 years suggested. I rely on the LASPO review which did not take place within the time frame promised and has still not been concluded. I also rely on the findings of the recent legal aid judicial reviews. There is no willingness to undertake proper consultation or review.

The Ministry cannot be relied upon to follow through with assurances of reviews as set out in the document.

You don’t suggest any mitigation apart from a review which is unlikely to take place. There is no suggestion of a full review of the justice sector. There is no suggestion that you will engage and listen to the concerns of solicitor advocates over the bar.

For evidence I rely on you extremely poor record of ‘listening’, for example all of the failed policies of justice secretary Chris Grayling and the regular ‘turnover’ of Ministers in such a key area. It is not currently prioritised and I do not see any evidence that it will be in the future.

The only way to mitigate the damage caused by years of austerity is to put money back into the system to improve the position of all aspects of the justice system, rather than divide a fixed pot in a new way.

The only way to properly deal with the situation that we all now find ourselves is a system wide independent reviews that looks at the entire system and how it all fits together, before then making an informed decision of fee levels for each element of work.

It is entirely artificial to look at this issue in isolation.

**Q13: 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.**

Yes

I would imagine that of you are unable to draw appropriate candidates to the bar or to the solicitors’ profession then you are even less likely to draw those with a particular skill such as speaking Welsh. Proper and adequate remuneration for the job done is the only way to ensure that the Ministry is able to comply with any of its equality obligations.