Haldane Society of Socialist Lawyers

Response to the 2017 Consultation on

"Reforming the Advocates' Graduated Fee Scheme"

About the Haldane Society of Socialist Lawyers

This is the response of the Haldane Society of Socialist Lawyers to the Government's consultation on further reforms of judicial review.

Since its foundation in 1930, the Haldane Society of Socialist Lawyers ("**the Haldane Society**") has provided a forum for the discussion and analysis of both national and international law and legal systems from a socialist perspective. The Haldane Society is independent of any political party but has trade union and labour affiliates. Its membership consists of qualified lawyers, academics, students and legal workers, as well as others with an interest in socialist legal issues.

The Haldane Society is an active member of the European Association of Lawyers for Democracy and Human Rights and the International Association of Democratic Lawyers.

For more information on our work, see www.haldane.org. Our previous consultation responses in relation to recent legal aid reforms can be found at on our "Consultation Responses" page.

General Observations

The consultation is inadequate in that it fails to address the central problems of the AGFS: it is systematically underfunded, and in the absence of any linking of fees to RPI there is an annual real-terms pay cut. This system is unsustainable. It drives some of the best practitioners out of the system. The single most important qualification for being a criminal advocate at present is the possession of independent means of support. This does not guarantee quality of advocacy.

The following are necessary at a bare minimum to prevent the system moving towards a wholesale collapse due to exodus of skilled practitioners:

- A fee increase for our junior practitioners to counter the presently discriminatory impact of poor remuneration in the early years, particularly for women who go on to have children;
- Index linking of all fees to keep pace with inflationary rises in the cost of living (currently predicted to be 2.7% by the end of 2017).

However, on the basis of fees analyses carried out by a large number of barristers' chambers who have submitted responses to the consultation, we are concerned that the fundamental premise of the consultation, that it is "cost-neutral", is incorrect. Every analysis that we have seen[1] suggests that the proposed scheme represents a cut both in terms of the absolute amount of money in the system, and in the amount that would be paid for the same "basket of cases" as in the reference year of 2014-15. This concealed fee cut is unacceptable.

We are particularly concerned by the following passage in the Impact Assessment in the table following paragraph 44 which cannot be consistent with cost-neutrality reflecting the "basket of cases" (as the consultation claims) rather than overall spend: "*In the aggregate, a change in volumes (holding case mix constant) would still result in a cost neutral scheme, i.e. if all offences increased in volume by 1%, the proposed scheme would still be cost neutral.*"

We invite the Ministry of Justice to demonstrate, by providing further information by way of evidence, why it is that they maintain that this scheme really will be cost-neutral in both operation and administration.

Although we accept that the overall structure of the proposed system is preferable to the current system, the fee levels are too low, and amount to a pay cut across the board. This is not justified. In a choice between the current system and the proposed system, the Haldane Society would strongly oppose a move to the proposed system.

[1] We draw particular attention to the following material which has been published publicly before the completion of our response. However, we are aware of a number of other chambers who have produced figures demonstrating stark cuts to their fee income.

1. Garden Court Chambers https://www.gardencourtchambers.co.uk/wp-content/uploads/2017/02/AGFS-Submission-Garden-Court-Chambers.pdf;
2. Lincoln House Chambers http://www.lincolnhousechambers.com/wp-content/uploads/2017/02/Lincoln-House-Chambers-AGFS-Consultation-Response.pdf and http://www.lincolnhousechambers.com/response-lincoln-house-chambers-agfs-consultation;
3. Farringdon Chambers http://www.farringdon-law.co.uk/images/stories/reference/fyfees.pdf

Responses to Consultation Questionnaire

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

No.

The proposed bundle includes the first day of trial, standard appearances beyond the first six, and three conferences or views. We see no reason for standard appearances beyond the first six to be included in the bundle. If the scheme seeks to remunerate work done, then the work involved in standard appearances beyond the first six should be separately remunerated, as with all other standard appearances. Cases involving more than six standard appearances are likely to be more complex, or have issues which require additional work to resolve. This should be remunerated. There are likely to be few such cases, when the impact of Better Case Management is considered. As such this is likely to have a minimal impact on the overall cost of the scheme.

We are particularly concerned that any failure to remunerate any standard appearance will have a disproportionate impact on the most junior advocates, and therefore on women and ethnic minorities. This is because, in comparison to more senior advocates, the most junior advocates are more likely to be women and from ethnic minorities. The most junior advocates are also the most likely to cover mention hearings on other advocates' cases, whereas those at the most senior end of the profession will very rarely cover others' mention hearings. As a result, any failure to pay for hearings will affect the most junior advocates most severely. This has not been considered in any equality impact assessment.

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

Yes.

One of the policy objectives of the proposed scheme is "*ensuring the scheme pays for work done*". To this end, all work done should be specifically remunerated. For this reason all standard appearances should be paid separately.

However, the fees proposed for these hearings are far too low. At present under a Bar Council protocol, where hearings generating a standard appearance fee are not covered by the

trial advocate, the trial advocate will pay the covering advocate a fee of £87 (which can be "depleted" in certain cases). The proposed scheme involves a substantial pay cut to £60. Further, the PTPH fee of £100 again amounts to a cut compared to the Bar Council protocol. This will obviously affect the most junior advocates, who inevitably are those who cover such hearings for more senior advocates. For reasons set out elsewhere in this consultation response, this will have significant impacts on the most junior advocates and, by extension, on women and those from ethnic minority backgrounds. This has not been considered in any equality impact assessment.

> *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.*

No.

Please see our answer to questions 1 and 2.

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

Yes.

One of the policy objectives of the proposed scheme is "*ensuring the scheme pays for work done*". To this end, all work done should be specifically remunerated. To pay for the second day of trial separately helps to achieve this aim. It also correctly differentiates between 1-day and 2-day trials.

It is also a guiding policy objective to "*remove as far as possible any perverse incentives*". The proposed scheme removes the perverse incentive to ensure that cases are completed in either 1 or (more likely) 3 days. This may provide savings to the Legal Aid Agency.

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

Yes.

A more nuanced system is appropriate to correctly assess the relative complexity, difficulty, and work involved in different offences. However, for the reasons set out below, we think that improvements should be made to the categorisations and bandings.

A more nuanced system is essential in particular to avoid the classification of all new offences as "Class H: Miscellaneous other offences", irrespective of their complexity. The tendency for this to happen has led to offences being inappropriately classified in this relatively low class.

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

No.

The current system of counting PPE and witnesses can be a marker of complexity. It may be that a more "complex" system of capturing complexity provides a more accurate assessment of complexity. Such a system may, for example, include PPE, witnesses, and additional factors. Although the proposed structure will simplify determinations of how complex cases are, that does not mean that it is the "best way" to capture complexity.

We take particular issue with the proposed way of "capturing complexity" as on all available evidence it appears to disguise a pay cut for the vast majority of criminal advocates.

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

Yes.

This is not truly the introduction of a "category of standard cases", but rather is a restatement of the existing "Class H: Miscellaneous other offences". There is no objection in principle to a category of standard cases. However, it should be appropriately remunerated. The current scheme does not appropriately remunerate standard cases. These are not inherently the least complex.

We are particularly concerned with the differential in pay between standard cases and cases at the highest end of the scale of complexity proposed. The most complex cases are not necessarily *fifteen times* as complex as any standard case, as would be suggested by the pay differentials proposed by the Consultation at 5.7.

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

No.

Whereas the proposed system of categories is an improvement over the present system, we invite the Ministry of Justice to consult further on the categories with a view to providing further categories and bandings in order to more accurately capture the complexity of cases.

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

No.

Whereas the proposed system of bandings is an improvement over the present system, we invite the Ministry of Justice to consult further on the bandings with a view to providing further categories and bandings in order to more accurately capture the complexity of cases.

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.

No.

The mapping of offences includes within the "standard" cases a large number of offences dealt with regularly by those at the most junior end of the profession. Such junior members of the profession are disproportionately women or from ethnic minority backgrounds, due to the disproportionate attrition that both of these groups suffer as they attempt to progress in their careers. We are concerned that this represents a pay cut, and that the categorisation of "standard" offences has been insufficiently thought through. We invite the Ministry of Justice to produce properly detailed proposals in relation to mapping of offences to categories and bandings.

With thanks to the CBA, we provide the following examples of obviously inaccurate categorisations. They are examples only and demonstrate the failure in the consultation process to properly consider the mapping of offences. It is concerning that these common offences are mischaracterised, as it suggests that less-common offences are also very highly likely to have been mischaracterised.

1. Section 20 OAPA 1861, wounding or inflicting grievous bodily harm. Consider catastrophic brain injury cases. These can be exceptionally complex yet will pay out at a standard case fee. This offence should be reclassified as 3.4.

2. Conspiracy to burgle, high value burglary (e.g. in excess of £100,000). Consider high value vehicle thefts from multiple dwellings or a Hatton Garden-type burglary. These should be classified as 10.1 cases. They are rare, and would be easy to categorise by the value of the goods stolen (or where attempt is made to steal). Sentencing in these cases depends on such a valuation. It is inconceivable that there would not be a case summary or witness statement that sets out the loss or potential loss to evidence value.

3. Certain sexual offences. We have identified some sexual offences that appear to have been incorrectly categorised, e.g. incest by a man with a girl under thirteen, pursuant to the 1956 Act, which is presently category 'J' would now be 4.3 (the lowest category). There needs to be a further review and rationalising of how these offences are categorised so that advocates are not caught out (and underpaid) in certain historic cases, which are, by their nature, often the hardest cases to conduct.

4. Violent disorder and affray. Both violent disorder and affray receive inappropriately low categorisations considering the factual complexity of many public order matters. This is particularly the case with respect to violent disorder which is often charged as an alternative to charging the offence of riot, when the offence of riot would be more appropriate. Such offences, where there has been an alleged serious breakdown of public order, often involve reviewing vast quantities of witness evidence and CCTV, and the cross-examination of a large number of police officers, and in some cases of opposing parties in an incident of public disorder.

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

No.

Quite obviously, based on the analyses carried out by multiple chambers set out above, the individual fees proposed in Annex 2 amount to an overall reduction in fees. This is unjustified. The AGFS is already brutally underfunded.

Further, the differential between the lowest cases and the highest cases remains far too high: this is at present a wasted opportunity for redistribution in favour of advocates who deal with the vast majority of work in the criminal courts, which is at the bottom end of the spectrum of

seriousness. Individuals at the most junior end of the profession are struggling to survive in practice.

We particularly draw attention to the fact that the rate for the "standard" case (which, in reality, encompasses a vast proportion of cases) needs to increase.

Further, we are concerned that pay progression is to be achieved by cutting the pay at the most junior end of the profession. This is not the creation of pay progression, and it does not incentivise anyone to progress. It is instead likely to have the effect of forcing the most junior members of the profession to leave the profession before they can achieve any form of pay progression. It is worth repeating that these members are disproportionately women and from ethnic minority backgrounds.

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.

No.

Please refer to question 11 above.

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

No.

Please refer to questions 11 and 12 above.

In addition, we do not believe that the size of the relativity between the most junior type of advocate and the most senior type of advocate can be justified.

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.

Yes.

PPE and numbers of witnesses are important factors for determining complexity of many types of cases.

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

No.

The fees for guilty pleas and cracked trials are too low. This is particularly the case for cracked trials, where the preparation involved will in the vast majority of cases be the same as for a trial which instead goes ahead (and in respect of which refresher fees would be paid if the case continued beyond the first day).

Analysis of the proposed fee structure shows that fees for almost all guilty pleas and cracked trials will be cut. Whilst this may not have a great effect overall in respect of fees for guilty pleas, particularly if the PTPH fee is increased to account for the work involved, the fee for a trial that cracks late, after much of the work is already done (including prison visits, views, editing of statements and interviews, preparation of case statements, provision of advices on evidence) should properly reflect that work which has been done.

The proposed relative fees for guilty pleas, cracks, and full trials represent an unjustified cut.

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.

No.

Actual service of the Certificate of Readiness ("**COR**") is unworkable as a trigger for the point at which a cracked trial fee can be claimed. A date fixed by the Court is more appropriate. This is for the following reasons:

- The proposal would create unfairness if instructing solicitors cannot serve the COR because of prosecution failings or an uncooperative client right up to trial;
- Counsel do not bear responsibility for service of (and, because they are generally not litigators cannot serve) the COR;
- The newly proposed arrangement is undesirable: it may (be perceived to) encourage manipulation of the system e.g. early service of the COR to gain the fee, thereby creating a perverse incentive which the proposed scheme seeks to avoid.

With thanks to the CBA, we propose either that the cracked trial trigger should remain as it is, or that an alternative trigger for a cracked trial would be the "Stage 2" date (i.e. after service of full case papers and the date for filing of Defence Statement). Such a date would necessarily be after instructed counsel will have properly reviewed the case, having worked on the basis that the trial would be effective. This ought to have a negligible impact on the cost of the scheme but a significant positive impact for advocates who have prepared a case – at an appropriate stage taking into account the encouragement given by Better Case Management to prepare a case early – but where the case then cracks for reasons outside of the control of the advocate.

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.

Yes.

Special preparation is an exceedingly small part of the overall budget. However, when an advocate is required to undertake special preparation, proper remuneration for this will make a substantial difference to them, ensuring that they are paid appropriately.

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

Yes.

Wasted preparation is unfortunate and, by the nature of the payment scheme, is not down to the individual fault of the advocate. Where wasted preparation occurs, in the absence of a fee for wasted preparation the advocate concerned may go unremunerated for a substantial amount of work which should have had real value if circumstances beyond their control had not intervened.

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

No.

We take the view that ineffective trial payments should be equal to the refresher. There is no justification for paying a fee for an ineffective trial at anything other than the normal refresher fee for the case.

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

No.

Sentencing hearings should be paid separately to the brief fee. The fee proposed is appropriate for simple sentencing hearings. However, where an advocate other than the trial advocate is obliged to cover a sentencing hearing in a complex matter, £100 will be disproportionately low for the work involved. An uplift should be available where the matter is particularly complex.

Further, appropriate provision should be made for Newton hearings. We invite the Ministry of Justice to consult specifically on this point.

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

Yes.

The consultation is right that the first day of Section 28 cross-examination should be treated as the first day of proceedings (assuming, of course, that it takes place prior to trial). The work involved is exactly the same as work during the ordinary course of the trial.

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

No.

For the reasons as set out in detail above, the design of the scheme will remain unacceptable so long as the fees calculated under it remain so low.

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.

No.

It is obvious that the Ministry of Justice has failed to consider the disproportionate impact of the cuts to very junior advocates' fees, in particular the impact on women and those from minority ethnic backgrounds.

The most junior advocates, who are disproportionately women and from ethnic minority backgrounds compared to advocates as a whole, are most likely to be disproportionately affected by the proposal to set standard appearance fees at £60 and PTPH fees at £100. Hearings generating such fees are often covered for more senior advocates by more junior advocates. The fees currently set under a Bar Council protocol are higher than this. Such junior advocates would therefore face a reduction in income. In respect of standard appearance fees this is a cut of over 30%.

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

No.

For the reasons set out at paragraph 23 above the extent of the impact on women and people from an ethnic minority background has not been properly considered.

Further, the impact on the quality of advocacy in the criminal courts has not been considered. The proposals appear to amount to a significant cut for all practitioners. They also appear to amount to a significant cut for the most junior members of the profession. The consultation has avoided considering the position solely of those, for example, under 3 years' call. These individuals will face a devastating cut to their income. If people without independent means cannot survive the process of entering the junior bar, then as time goes by the bar will become even more white, old, male, and composed of those from socially privileged backgrounds than it is now. Indeed, those on the receiving end of every intersecting axis of oppression are likely to see themselves facing even more difficulties entering the profession than they ever have done before. It should go without saying that rich white men do not necessarily make the best advocates.

In addition, we are concerned that the equalities impact appears to show the greatest gain under the scheme for older white British advocates. We are also concerned by the 6% and 7% gaps respectively between the changes in fees for BAME and white male advocates, and BAME and white female advocates.

We are also concerned that there appears to be an error in paragraph 76 of the Impact Assessment where it is stated that white British males over 31 years call stand to gain the most, as this appears to contradict Table 10. We are concerned that this apparent error may reflect an underlying error in the handling of the data by the Ministry of Justice.

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.

Yes.

The proposals will impact negatively on the delivery of publicly funded criminal advocacy through whatever medium, whether English, Welsh, or any other language. However, we are not able to identify any *disproportionate* impact on its delivery through the medium of Welsh.

Further Observations

We make the following further observations.

Standard fees for elected cases

Standard fees for elected cases must go. This is a red line issue. This invidious fee has crept into the proposed scheme – see pages 40 and 44 of the consultation. The advocate has no control over mode of trial. Further, more cases are being deemed by magistrates (inappropriately) as suitable for summary trial. The fee is set at £194. This will affect primarily standard class cases, which pay £275 for a guilty plea. This hurts the most junior advocates the most. The current scheme creates a perverse incentive against advocates advising their client to plead guilty where this would be appropriate for the client. Removing this fixed fee will not only remove the perverse incentive but will also properly remunerate the most junior advocates who are currently affected by this issue.

Need to ring-fence mention fee hearings for confiscation proceedings

The proposals do not affect the fees payable to advocates for confiscation proceedings. This is a separate part of the court process, as an ancillary order, applicable after sentence has been passed. It should not be included on the standard appearance fee cap. This will affect comparatively few cases and protect those who work in this specialised area of law

Need to consider the impact on cases with vulnerable and/or mentally disordered defendants

The consultation is a missed opportunity to ensure that cases involving the most vulnerable and mentally disordered defendants are properly remunerated.

A great deal of extra work is typically required in cases involving the most vulnerable or mentally disordered defendants, for example, considering psychiatric reports, medical records and preparing for ground rules hearings. The current scheme is not fit for purpose in this regard as it fails to properly remunerate advocates for work done in such cases, which cannot simply be reflected by the category of case, PPE, or number of witnesses.

However, it is of grave concern that the proposed scheme appears to exacerbate the problem. In particular, the proposal that standard appearances after the first six will be taken out of the brief fee and the proposed restriction on the availability of special preparation (limiting it to cases dealing with novel points of law or fact; or cases where an exceptionally large amount of evidence is served and removing the 'very unusual' category), will have a disproportionate impact on cases involving mentally disordered defendants.

The consultation implicitly recognises that the youth or vulnerability of a defendant typically adds a layer of complexity. This is evidenced by the banding of a Murder/Manslaughter where the defendant is under 16 years old. However, this category uplift is not reflected in relation to any other type of offence. An uplift that takes into account the youth of a defendant should be applied to all categories of cases and consideration should be given to the provision of an uplift in cases involving extremely vulnerable and mentally disordered adults.