Response to Consultation on
Reforming the Advocates' Graduated Fee Scheme

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For further information contact:

Jodie Blackstock, Legal Director

Email: jblackstock@justice.org.uk Tel: 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100

E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. Established in 1957, JUSTICE is an all-party human rights and law reform organisation, its mission to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of jurists.

2. In September 2016, JUSTICE launched a working party on Mental Health and Fair Trial, chaired by Sir David Latham, with the assistance of 12 legal and medical professionals. The working party will be developing robust and practical recommendations for reform of the way in which the criminal justice system deals with vulnerable defendants - those who suffer from mental illness, learning disability or neurological difficulty - covering all stages of the criminal process, from pre-arrest, arrest and police processing, to commencement of criminal proceedings, trial and disposal, as well as recommendations relating to the relevant substantive law: fitness to plead, the insanity defence, duress, and diminished responsibility.

3. Although the working party will not be in a position to report fully until September 2017, the manner in which defence advocates are remunerated for cases involving mentally vulnerable defendants is clearly a significant concern within the working party's remit. We therefore thought it important to provide our current concerns and suggestions in response to this consultation.

Response

4. As the consultation paper quite rightly recognises, fair payment for work done, and more certainty for advocates – particularly junior advocates – is fundamental to ensure both the quality of defence advocacy and the survival of the bar, especially the junior bar. Since it is the junior bar in particular that seems to bear the brunt of cases involving mentally vulnerable defendants, there are particular and obvious consequences for the quality of future representation of vulnerable defendants if remuneration is not sufficient to enable representatives to sustain a career. Further, a lack of financial motivation for identifying and dealing with a vulnerable defendant can lead to inappropriate remands, inappropriate sentences and ultimately to a vulnerable defendant back out on the street without any proper intervention or support.

5. The revision of the AGFS should provide an opportunity to ensure that cases involving the most vulnerable defendants are properly remunerated. However, we note that there is no mention in the consultation paper of the particular difficulties posed by such cases. There is nothing in either the existing or the proposed scheme to reflect the additional work required in these cases, or the experience and expertise required to be able to obtain, understand and communicate the expert evidence, including communication of it to the defendant and his or her family.

6. Before the introduction of the graduated fee scheme, it was possible to be properly remunerated for a relatively minor case which had nevertheless involved a lot of work – for instance, because there was a considerable amount of defence psychiatric evidence. Since graduated fees were introduced, this has no longer been possible. Payment calculations are now made on the basis of offence category/prosecution evidence/prosecution witnesses only, which fails to provide proper remuneration for defence advocates for the great deal of extra work required in cases involving vulnerable defendants. This situation would be exacerbated under the proposed revised scheme.

Remuneration for 'work done'

7. One of the stated aims of the proposed scheme is to ensure that remuneration better reflects 'work done', which is, centrally advocacy.[1] This premise fails to account for the fact that – even in cases where the defendant is not vulnerable – there is a great deal of work done that is not separately remunerated: drafting defence statements, interview edits, drafting admissions, as well as trial preparation including, for example, preparing cross-examination. With a vulnerable defendant, the list is longer still. Typically, in such cases, the defence advocate would be required to perform the following tasks, all of which are unpaid:

    (a) Receive the brief, review the papers, advise on the need for psychiatric evidence, including reading any existing reports/medical notes;
    (b) Write or approve the solicitor's letter of instruction to the expert;

[1] *Consultation Paper,* p.7, para 1.12.

(c) Receive the expert report, consider any further questions to be asked of the expert and/or the need for a further report e.g. where the issue is fitness to plead or insanity;
(d) Draft the defence statement;
(e) Draft a note of expert agreement/disagreement for the court if appropriate;
(f) If the evidence is agreed, draft admissions where appropriate;
(g) Liaise throughout with the solicitor and counsel for the Crown.

8. This list would apply in a case which is resolved either in a guilty plea or in an uncontested insanity or fitness to plead, although the latter case also requires preparation for the trial of the facts.

9. Another feature of cases involving vulnerable defendants is that there is ultimately little or no dispute as to facts, and the case will end up as a guilty plea after a number hearings. The remuneration for this pattern is very poor.

Remuneration for interim hearings

10. Cases involving vulnerable defendants almost always involve more interim hearings than other cases, as issues as to reports have to be resolved. Typically, a first hearing may be adjourned awaiting a report on the defendant's fitness to plead (with further delays then likely as a result of difficulties with getting experts to comply with court timetables, and/or judges setting unrealistic timetables), awaiting reports as to disposal, or awaiting transfer under section 48 Mental Health Act 1983. Under the current system, up to four standard appearances are included in the brief fee, and any further hearings are separately remunerated.

11. Under the proposed revisions, up to the first six standard appearances will be paid separately,[2] a revision that is predicated on a desire to ensure that "the vast majority of advocates in the vast majority of cases would receive a separate fee for each hearing undertaken",[3] the aim being to protect junior advocates.[4] However, in order to fund this, standard hearings beyond the first six will be included in the brief fee.[5] The consultation characterises cases involving more than six standard hearings as

[2] *Consultation Paper*, p.13.
[3] Ibid, p.23, para. 4.11.
[4] Ibid, p.23, para 4.10.
[5] Ibid, p.13.

"outlying".[6] However, cases involving vulnerable defendants are precisely the kind of cases that are likely to fall into this category, meaning that the proposed changes would exacerbate the issue of proper remuneration in these cases in particular.

12. This change would exacerbate the existing problem of a lack of remuneration for the great deal of extra work that is required in cases involving vulnerable defendants.

Hospital Order case fees

13. The revision of the AGFS provides the Ministry of Justice with an opportunity to make further provision for hospital order case fees. The current scheme reclassifies the fee to billing category 'Class A' in the event that a hospital order with restriction(s) is made. The new scheme must amend this. It represents and arbitrary basis for remuneration: the same preparation and strategy goes into a case regardless of whether a sentencing court does in fact make a hospital order with restriction(s). It may also create a perverse incentive for a defendant to be sentenced to a hospital order with a restriction order.

14. JUSTICE invites the Ministry of Justice to consider the impact of the revised scheme on cases involving vulnerable defendants. The consultation goes some way toward recognising that the youth of a defendant typically adds a layer of complexity to a case by its banding of a murder/manslaughter case where the defendant is 16 or under at band 1.2.[7] However, this uplift is not applied to any other type of offence. An uplift taking into account the vulnerability of a defendant on account of his or her youth should be applied to all offences, and consideration should be given to providing an uplift in cases involving defendants who are vulnerable on account of learning disability, mental illness or neurological difficulty, as well.

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[6] Ibid, p.23, para 4.11.
[7] *Consultation Paper*, p.15.