Martin Murray and Associates solicitors

Response to the Ministry of Justice consultation

Litigator's Graduated Fees Scheme and Court Appointees

Introduction

1. We are a firm of criminal defence solicitors operating in West London and the Thames Valley region. We have a long history of providing criminal defence services across the full spectrum of alleged offences. We have what has been described as an "exceptional" reputation for the work that we do among the local judiciary.

2. We are a member of the Big Firms' Group of solicitors, a group of the largest legal aid providers who between us account for 25% of criminal defence work nationwide. We act in cases at all levels from magistrates' court proceedings to charges of the utmost gravity and complexity, including murder, serious drugs and fraud offences.

The unsustainability of a further cut

3. In stark contrast to the recent consultation concerning the Advocates' Graduated Fee Scheme, what this consultation proposes is not reform in any meaningful sense. What is proposed is, quite simply, a substantial cut in remuneration for undertaking the most serious and complex cases.

4. In addition, the government proposes to inflict a cut in the fees of court-appointed advocates instructed for the purposes of cross-examination only. This is on the somewhat tenuous basis that the work required is similar to legal aid work, and on the basis of an increase in spend in this area over the years.

5. We make the point that, whilst the consultation refers to an increase on overall spend between 2013-2014 and 2015-2016, the general trend is in the opposite direction. The quarterly statistics for July to September 2016 show a 16% reduction on the same period in the previous year (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5

84590/legal-aid-statistics-bulletin-july-sept-2016.pdf). We make the point below that delaying the consultation until the publication of the final quarter of last year is published on the 29th March 2017 would be a fairer and more prudent approach. None the less, it would be bizarre and irrational for the Government to justify such significant cuts on the basis of an increase in spend which, when looked at in the round, is an anomaly against the overall trend of a reduction in spend (a trend which seems certain to continue).

6. The history of cuts in criminal legal aid will be well known to the government. It serves no useful purpose to set them out in full here. It is suffice to say that over the past 10 years, solicitors conducting publicly-funded criminal work have had to bear continuous barrage of cuts in their remuneration. In the foreword to the consultation, the minister expresses the view that the rule of law is "*underpinned….. by expert litigators defending those suspected or accused of crime*". However, that statement has not been properly or fairly reflected by the government's treatment of solicitors. Despite it being unarguable that the public service provided by solicitors working for legal aid in publicly-funded crime is essential to society the cuts have continued almost unabated. No other area of public service has been cut as hard and as fast those working for legal aid.

7. It is unnecessary to go in to significant detail about the effects of these cuts, for the simple reason that they have already been recognised by the government. On the 28th January 2016, the then Lord Chancellor, the Right Honourable Michael Gove MP, abandoned the tendering process for criminal legal aid provider contracts in a written Ministerial statement (https://www.gov.uk/government/speeches/changes-to-criminal-legal-aid-contracting). At the same time, he also suspended a second fee cut of 8.75% for a period of one year. It is plain that the only basis upon which he could have done this was in recognition that the market could not sustain a further cut as it currently stands.

8. It is to be remembered that the whole purpose of the tendering process that had been undertaken by the Ministry of Justice was to achieve consolidation of the

market so as to make further reductions viable. Indeed, the government appeared to expressly accept that consolidation was required before the market could sustain further cuts during the course of challenges made to the process by way of judicial review (see paragraph 48 of *R (on behalf of the London Criminal Courts Solicitors Association) –v- Lord Chancellor* [2015] EWHC 295 (Admin)).

9. This approach by the Lord Chancellor was the only approach reasonably open to him in the light of the reports that were prepared for the purposes of that exercise by Otterburn Legal Consulting LLP and KPMG. Those reports made it abundantly plain that the position of providers of publicly-funded criminal defence services are fragile and precarious. Further cuts cannot be sustained without a fundamental alteration of the model by which these services are provided.

10. As has been noted by Andrew Keogh of Crimeline Law Ltd, the irony of the current proposals is that it has been the police of the Ministry of Justice for something approaching ten years to secure consolidation of the market. Whilst that policy has been open to much criticism, it is a policy which the majority of providers have been obliged to comply with so as to continue operating. Many providers have therefore up-scaled their operations significantly in contemplation of these policies. Businesses have been developed and structured accordingly. The cuts that are now proposed will disproportionately affect these providers, who tend to handle a higher volume of complex and evidence-heavy cases. The unfairness of this is indisputable.

11. However, it is not simply larger providers who will be affected by these proposals. Large, evidence-heavy cases represent a valuable source of income for many smaller providers, particularly in rural areas where coverage of providers is more limited. Further, anyone conducting cases under section 38 of the Youth Justice and Criminal Evidence Act 1999 faces a significant cut in the remuneration for the work that they undertake.

<u>The Government's approach to the profession</u>

12. The foreword to the consultation states: "*Subject to the outcome of this consultation the Lord Chancellor is minded to not reinstate the second fee cut, which was suspended for 12 months last April, while targeted and modernising fee reforms are taken forward.*" This phrase is most unfortunate, as it can be (and has been by many) read as a veiled threat that a failure to acquiesce to the proposals in the consultation will result in the further cut being re-instated. In effect, providers are told to accept the cuts proposed by the consultation or face an alternative cut. This does not suggest that the Government is prepared to work with the professions or negotiate in good faith. To the contrary, the consultation simply amounts to giving the condemned man a choice as to the method of his execution.

13. We also note that whilst the Government has included some figures within the consultation demonstrating the level of spend and the purported need for action, it has not acceded to calls for an extension of the consultation beyond the publication of the quarterly statistics for legal aid expenditure, which it is understood are due on the 30th March 2017.

14. The significance of this is that we believe that overall legal aid spending will continue to decline in light of previous changes introduced. In the written ministerial statement of the 28th January 2016, the then Lord Chancellor noted that overall legal aid spend had reduced from £2.4bn to £1.6bn. We believe that with falling crime volumes (as the consultation paper itself notes) it is likely that the overall spend will remain stable or continue to fall. If that proves to be the case, then the justification for further cuts will be comprehensively undermined. If the Government is truly seeking an open and respectful dialogue with the profession, then the consultation must be extended so that responses can take this in to account.

<u>Fair remuneration for work done</u>

High PPE cases

15. Our opposition to cuts per se does not mean that we do not accept that remuneration should fairly reflect the amount of work actually done. However, we should point out that the current rates at which legal aid work is paid for litigators are not, in our view, fair. They have suffered repeated cuts from levels which were once accepted to be fair and sustainable.

16. In our view the consultation makes a number of significant errors in asserting that the current system does not reflect fair remuneration for work done, and that the proposals advanced would make the system fairer:

    a. Reliance on the absence of an increase in claims for special preparation as demonstrative that increased PPE does not reflect work actually done is to misunderstand the realities of practice (see paragraph 8). The reality is that once a case surpasses the 10,000 PPE threshold, fees for special preparation can be claimed by providers. However, in practice the process of applying for special preparation is burdensome and complicated with no guarantee that payment will be forthcoming if the claim is refused by the LAA. It is our experience that because of these administrative burdens many solicitors do not claim the special preparation they might be entitled to where the PPE exceeds 10,000 only to a limited extent (for example by a few thousand pages). This does NOT mean that the case has not required work which justifies the payment of the case at 10,000 PPE.

    b. It is not simply in cases of electronic evidence where page counts might exceed the proposed 6,000 cap. We understand that the consultation is geared towards cases where telephone billing data has inflated the page count, which as the consultation observes can sometimes be searched electronically. However, not every case where the page count exceeds 6,000 will be because of electronic evidence. In one current case in which we act there are four defendants and six complainants who have each given numerous ABE interviews about sexual offences. The indictment spans a 20-year period, and the social services records themselves take up thousands of

pages. This is not a case where a simple search function could allow the material to be reviewed quickly. The proposals penalise diligent litigators who must read every page of the material in detail.

c. It must also be born in mind that many cases of high PPE would previously have been dealt with as VHCC cases, which pay hourly rates significantly greater than those paid under the special preparation provisions. It is misleading and disingenuous to suggest that the expenditure on LGFS cases has gone up because of the number of 6,000 – 10,000 PPE cases has increased where a substantial part of the reason for that increase is the re-categorisation of cases as LGFS from VHCC.

17. It is the inescapable reality that crime and criminal investigations are becoming more complicated, with increasing reliance on mobile phones and digital evidence. That is simply the justice system becoming a modern justice system dealing with modern crime. The Government cannot insulate itself from having to bear some of the cost of this. Politically unpopular thought it might be, investigating and trying modern crime will inevitably generate more evidence and require greater work. It is unrealistic to expect defence practitioners to bear this burden for free.

18. It is important to note that the Government is not, even now, bearing the cost of all of the additional evidence generated by modern criminal cases. In our response to the consultation on reforming the advocates' graduated fee scheme, we said as follows:

"*12. It is vital to recognise that the increase in digital evidence, and therefore pages of prosecution evidence, is only one half of the story. The other half is that the defence have never been paid for reviewing unused material, which is a function of equal importance to reviewing the evidence. That work goes entirely unremunerated under the current scheme. Yet unused material can also run to thousands of pages which themselves may be served digitally through secure e-mail. Our experience is*

that volumes of unused material have also increased. In particular, it may often be the case that telephone material collected as part of the investigation will be served as unused material rather than evidence. In one case in which this firm is currently acting, there are just under 2,500 pages of prosecution evidence. The unused material, which must all be reviewed for no remuneration runs to approximately three times that.

13. A similar point arises in respect of CCTV evidence. CCTV is increasingly being relied on in criminal cases. The use of body-worn cameras by the police is such that there are frequently several DVDs of footage served during cases. Over the past five years, it is our experience that such material has substantially increased, and we believe it is likely to continue to do so. Whether they are used or unused material, there is no remuneration for viewing footage, which again is a central duty of the defence advocate. It is a matter of regret that this substantial increase in advocacy work remains entirely unacknowledged under the proposed scheme.

14. Any scheme will involve an element of "swings and roundabouts". That is unavoidable. Under the current scheme, the increase in digital evidence will sometimes be reflected in pages of prosecution evidence, and sometimes it will be reflected in the unused material. The fact remains that defence advocates are duty bound to consider it whatever form it is in, whether evidence or unused, and the work required has gone up accordingly. The Government is only having to pay more for this work in the proportion of cases where the material is served evidence and not unused. Any argument for the abolition of pages of prosecution evidence as a proxy must be seen in this context."

19. We stand by these points as having equal application to the proposals to reduce the PPE threshold in the current consultation. The Government is only having to pay for a proportion of the increased quantities of evidence that are being accumulated in modern criminal cases.

Section 38 YJCEA

20. In respect of orders pursuant to section 38 of the Youth Justice and Criminal Evidence Act 1999, the work may be similar to legal aid work, but the circumstances under which it is conducted is very different. These cases involved potentially vulnerable complainants and witnesses. That is demonstrated by the simple fact of the order being made. To say it is the same as cross-examining average witnesses (for example police officers) who do not have those vulnerabilities understates the value of the work and the expertise required.

21. The fact that the Government considers that the work is very similar to legal aid work also, in one sense, makes the case for greater remuneration for these cases stronger. When appointed as a section 38 advocate, the lawyer must still take the client's instructions, consider carefully the evidence and unused material as a whole (not just the statement of the witness to be cross-examined, as it may be necessary to put other material to the witness being cross-examined), familiarise himself with the applicable law, potentially make bad character/section 41 YJCEA applications and conduct the cross-examination accordingly. All of this must take place within a shortened time scale where the lawyer does not have the security of a legal aid certificate and where, in the event of a late plea of guilty (a decision in which the lawyer has no input) could end up being done for no remuneration at all.

22. The increase in spend on section 38 orders must also be seen in the context of a significant tightening of the means and interests of justice tests applied in the magistrates' courts. Many people who were previously granted representation orders are now unable to secure public funding and are forced to represent themselves. It is in these cases where section 38 orders are routinely made. The overlap between the increased number of section 38 cases and the reduction in the number of representation orders being granted is, we believe, substantial and demonstrative of the fact that isolating one single area of increased spend in the context of an overall decline in criminal legal aid spending is unhelpful and misleading.

23. Section 38 cases are burdensome and difficult cases. However, the making of section 38 orders is essential for the protection of potentially vulnerable victims and witnesses. It is a necessity that there continues to be a supply of advocates able and willing to conduct these cases. We do not consider that altering contractual obligations to force providers to take these cases will maintain the supply of advocates. Not only are the enhanced rates fully justified, they are essential.

Question 1: Do you agree with the proposed reduction of the threshold of PPE to 6,000?

24. No.

25. For the reasons we give above, we believe that this is an arbitrary and unfair cut which will have a significant and disruptive effect to the overall viability of current providers.

Q2. If not, do you propose a different threshold or other method of addressing the issue?

26. The Government needs to recognise that it is not just the justice system that is changing, but the nature of crime as a whole is changing. Criminal offences and criminal investigations are becoming more complex and more difficult. The prevalence of mobile telephones and digital devices, and the changing nature of such devices inevitably means that more evidence is collected during the course of investigations, and served in support of prosecutions.

27. In our view, PPE remains a good way of analysing the amount of evidence in a case, particularly in light of the fact that it can only ever capture part of the work required as unused material and CCTV evidence remains outside of the scheme.

28. It may be that expenditure is increasing in this respect. However, overall legal aid spend has reduced sharply. If the Government wishes to have a functioning, modern justice system that prosecutes modern crime then it must be prepared to pay reasonable rates for it.

Q3. Do you agree with the proposed capping of court appointees' costs at legal aid rates?

29. No.

30. For the reasons given above, we believe that this proposal:

    a. Undervalues the importance of these orders, and the special difficulties that arise with vulnerable/intimidated witnesses;

    b. Fails to appreciate the practicalities and pressures of the work required in these cases;

    c. Amounts to an arbitrary and unjustified cut to already rock-bottom legal aid rates which threaten the viability of the supplier base.

Q4. Do you have any comments on the Equalities Statement published alongside this consultation and/or any further sources of data about protected characteristics we should consider?

31. We believe that these proposals will have a significant adverse effect on vulnerable and intimidated witnesses and complainants, who may be more likely to lose the protection of cross-examination by an appointed advocate if the rates paid are such that sufficient advocates to take this work cannot be found.

MARTIN MURRAY AND ASSOCIATES

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