

CONFIDENTIAL

FROM THE PRIVATE SECRETARY

~~CCBG~~



HOUSE OF LORDS.
LONDON SW1A 0PW

25 June 1986

Nigel Wicks Esq
Principal Private Secretary to
the Prime Minister
10 Downing Street
LONDON
SW1

NBPN.

Dear Nigel,

There were no comments from members of EA on the Lord Chancellor's proposals in respect of the proposed increases in fees which the Lord Chancellor intends to offer to the Bar and the Law Society.

The Lord Chancellor is required to write to the Bar and the Law Society by 27 June, informing them of his proposals. The Bar and the Society then have the opportunity of further negotiations before the Lord Chancellor makes his final decision by 16 July.

I attach copies of the letters which the Lord Chancellor will be sending to the Chairman of the Bar and to the President of the Law Society on Friday. The terms have been settled with counsel.

Copies of this letter and its enclosures go to the Private Secretaries to the Lord President, the Home Secretary, the Chief Secretary, the Attorney General, the Solicitor General, the Chief Whip and Sir Robert Armstrong.

Yours sincerely,

Richard

Richard Stoate

CONFIDENTIAL



ГОРНОУСЛОВИЕ
ГОРНОУСЛОВИЕ



CONFIDENTIAL

The President of the Law Society -----

CRIMINAL LEGAL AID REMUNERATION

1. I undertook in March to complete discussions on the Peat Marwick Mitchell report and on all outstanding issues by 30th May. These discussions were completed in accordance with the agreed timetable, although I understand the Society's representatives have indicated that they would now like to continue discussions on matters on which they were not previously able to take a view. My officials were agreeable to this course and I do not think the matters concerned are of immediate relevance to the task with which I am now confronted. I must now inform the Law Society of any changes which, having regard to the discussions which concluded by 30th May, I am minded to make to the Legal Aid in Criminal Proceedings (Costs) Regulations 1982.

2. In forming a view on the proposals I believe I should make for changes in the 1982 Regulations as I am required by statute, I have had regard to the principle of allowing fair remuneration

according to the work actually and reasonably done. This involves the consideration of a number of relevant factors. The relevant weight, if any, to be attached to individual factors will of course vary from time to time. Those which I believed might be relevant were set out in a document which I understand has been discussed at some length with the Society's representatives. For the sake of convenience I now enclose a further copy of that document with this letter.

The Peat Marwick Mitchell Report

3. The Society's representatives have contended that the evidence which must be considered in respect of what they believe to be the most important of the factors - the levels of income that can be achieved and are achieved from legally aided criminal work and the level of overheads - is provided by the Peat Marwick Mitchell report on solicitors' remuneration from criminal legal aid. The Society's representatives have suggested that the next most important factor - the rates payable for different items of work, the amount of time reasonably devoted to each such item, and the skill which should be devoted to it - should be worded rather differently. I am not minded to accept all the modifications suggested, but my officials have already indicated that the rates payable should depend not only on the skill required, but also on the responsibility and experience

which requires be devoted to the work.

4. In 1984 Peat Marwick Mitchell carried out in a survey of the overheads of firms involved in criminal legal aid work. The 1984 survey also compared the contribution to profit of those receiving substantial parts of their income from criminal legal aid with the contribution of fee earners, and compared the profits earned by the criminal legal aid practitioner with the earnings of those employed by the government legal service.

5. I have a number of concerns about the conclusions drawn in the report. I am surprised that overheads in solicitors' offices have risen so much faster than inflation. While I accept that criminal legal aid practitioners are competing in the market place for their staff, I do not agree that this means that solicitors have no influence at all over the levels of salary they pay their staff, or over the way in which their staff are used. Although solicitors' firms operate in a competitive environment, there must remain some scope for increased efficiency.

6. The report also draws certain conclusions on the comparison of the contribution to profit of fee earners with a substantial criminal legal aid practice with that of the contribution to

profit of all other fee earners. I believe that the force of this comparison is significantly weakened because types of work done by the other fee earners may well be those which traditionally generate higher profits.

7. The statute requires me to have regard to the principle of allowing fair remuneration according to the work actually and reasonably done. On this basis, I do not accept that criminal legal aid work should necessarily be paid at the same rate as all other work. The rate for the work has to be set in relation to the item of work done under the criminal legal aid order, not in relation to what might be paid for other work, whether civil legal aid or privately funded work.

8. Quite apart from these matters, I know that my officials were rightly concerned at the use of the salary of a senior legal assistant in the Government legal service as a comparator. While accepting that it might be relevant to have some benchmark against which to assess the level of earnings that can be achieved, they did not consider that direct comparison with the salary of an SLA - which in any event is now an obsolete grade - was appropriate; nor that a benchmark should be drawn so narrowly. They have suggested that a Crown Prosecutor in the new Crown Prosecution Service might be a more appropriate comparator. I am doubtful about this and am not persuaded that

comparisons between salaried employees and fee earning practitioners are ^{particularly} helpful.

The level of remuneration for civil legal aid work

9. The Society's representatives have suggested that the level of remuneration for civil legal aid is an important and relevant factor, perhaps somewhat higher in the order of priorities than some of the other factors listed. I am not satisfied that this is a more important factor than the others or that it should be given particularly significant weight. As the Society's representatives know, however, apart from the survey of matrimonial costs conducted in 1984 (which proceeded on an entirely different basis from that used by Peat Marwick Mitchell and for that reason is not a useful comparator), little information on the level of remuneration is kept either by my Department or by the courts. In the circumstances, it would be impossible for me at present to give this factor much weight. It may be, however, that this is an area in which useful information will be available in the future and it will then be for consideration what use should be made of it.

Recruitment and retention

10. It is a matter of great concern to me that a sufficient number of competent people continue to be attracted to and

retained in criminal legal aid work; and that the morale of those working in the criminal justice system is maintained. It is claimed by the Society that solicitors firms are giving up criminal practice because it is insufficiently profitable. However, the evidence available in the Legal Aid reports shows that the number of solicitors offices to which legal aid payments are made has in fact increased in recent years. I am also urged to have regard to the competence of practices as well as practitioners. The Society's representatives argue that the most cost effective practice structure for criminal legal aid work is a partnership supported by a hierarchy of fee earners with a range of qualification experience. It is suggested that the fee rates do not provide profits at a level which enables partners to employ fee earners in such a pattern, with the result that most work is done at a higher level than necessary. However, I do not regard this as having been established. In any event there is no guarantee that cost effective structures would evolve even if the rates were raised.

The structure of fees

11. My officials have raised with the Society's representatives the question whether the current structure of fees in the 1982

Regulations is the most effective and efficient which it is possible to employ. It is the wish of my Department that the current arrangements be replaced with a system of standard fees for the greater number of items in Crown Court work. It has not, however, proved possible to conclude discussions on this subject with the Society and I would therefore propose on this occasion to attach little weight to this factor.

Changes in working methods

12. It is important that the working practices of solicitors are efficient and economical, particularly in respect of the services provided under a criminal legal aid order. Discussions with officials have covered a range of topics, identified in correspondence with the Society, but I think it is true to say that such views as have emerged are in a relatively unformed state. It is clear to me that this is an area in which further work is required and I would like discussions to continue.

The Relative merits of other claims on the public purse

13. I know that the relevance of the relative merits of other claims on the public purse has been questioned by the Society's representatives and that a helpful memorandum setting out their views has been given to the Department. My officials have

prepared a memorandum on the Department's views on section 39(3). This is enclosed. Their analysis of this provision accords with my own. In my view the notion of fairness imports a band or range rather than a single figure. It is not susceptible to exact mathematical calculation. Account may be taken of cost in fixing remuneration within the band or range of fairness.

Fees Advisory Committee

14. I have received indication that the Society would welcome the introduction of some mechanism - perhaps a form of arbitration - which would assist in the resolution of difficulties. As I said in Lord Benson's debate in the House of Lords on 4th June, I would also welcome some mechanism which would help to establish common ground as the basis for the decision which the statute requires. I believe that some such body, perhaps to gather and agree the information which I need to carry out my statutory functions, could be of great benefit.

15. There are some aspects of this proposal which do however cause me concern - for example, how it could be made compatible in practice with the statutory duty in section 39(3). More importantly, I need to have a better picture of exactly what an advisory body would do, and how, before I could consult my colleagues with a view to their consent. I would propose,

therefore, that my officials) and the Society's representatives should continue to discuss what each side would expect such a body to do.

Proposals

16. I have considered the factors which I have said may be taken into account in the exercise of my discretion under section 39 of the Legal Aid Act 1974. I have considered the evidence which the Law Society have provided, particularly through the Peat Marwick Mitchell report, and the views that their representatives have expressed both in discussions with my officials and in correspondence with them. In particular I have considered their views on the various factors.

17. I believe that there is some force in the arguments that have been advanced by the Society in respect of the increase in solicitors' overheads since 1981. Some evidence has been produced which suggests that, taking the 1981 figures as a baseline, overheads have grown to a higher level than have the fees provided by the 1982 Regulations even with the regular upratings which have taken place in the April of each year since the 1982 Regulations came into operation. I do not believe that the taxpayer must inevitably underwrite every increase in overheads to the full amount; it seems to me that solicitors

must be able to exercise some influence over such matters.

18. I do not accept the contention that if the contribution to profit of a criminal legal aid practitioner is lower than average (whether because solicitors are obliged to pay market-competitive salaries to their staff or otherwise) that this in itself demonstrates that the rates paid for criminal legal aid work are necessarily unfair.

19. For the reasons I have given I have given little weight to the levels of fees for civil legal aid. Although I am concerned that competent solicitors continue to be recruited to and retained in criminal legal aid work, on all the information that has been made available, I believe that the current levels of fees are set at an appropriate level to recruit and retain competent solicitors in adequate numbers.

20. I am anxious that new structures of standard fees be introduced and that progress be made in those areas where current working practices count against the efficient administration of justice. Since these are matters still requiring discussion, I doubt whether I can on this occasion give them significant weight. I have not found it necessary to consider the relative merits of other claims on the public purse and, although I remain of the view that this can be a relevant and important factor,

taken it into account.
I have not this year ~~given it any weight whatever.~~

21. Taking all these considerations into account, I am convinced that I should give some prominence to the rise in overheads since 1981. I am not satisfied, however, that the growth in overheads has of itself rendered the current levels of fees unfair by the exact equivalent amount. I believe that improvements in efficiency -- such as the creation of more effectively structured solicitors' firms -- and more effective controls over the levels of increase made to the salaries of employees could have gone some way to meet this gap. I am prepared to accept, however, that such improvements could not cover all the shortfall. Against this background I believe that it would be right to offer an increase in fees of 4.5%.

22. The Society's representatives have pressed for an element of London weighting to be introduced into the fees. I accept that some such element should be introduced, but this will have to be found from within the overall increase of 4.5% I have proposed above. On the basis of this increase, I am prepared to offer a 2% lead this year in respect of London weighting.

23. My intention is that the increase of 4.5% (including the 2% lead for London practitioners) should take effect on 1st October. You will no doubt have views on the question whether

this increase should be applied selectively or across the board.

24. I am concerned that improvements in efficiency should be encouraged. I therefore propose a further increase of 2% which will be paid in respect of improvements in working practices made when the current discussions have concluded.

25. These increases, taken together with the increase of 5% made on 1st April, will give an overall increase of 11.5%.

CONFIDENTIAL

The Chairman of the Bar Council

CRIMINAL LEGAL AID REMUNERATION

1. I undertook in March to complete discussions on the Coopers and Lybrand report and on all outstanding issues by 30th May. Subject to some matters which it was agreed would have to be dealt with in correspondence after that date, I understand that, these discussions were completed in accordance with the agreed timetable. I must now inform the Bar of any changes which, having regard to those discussions, I am minded to make to the Legal Aid in Criminal Proceedings (Costs) Regulations 1982.

2. In forming a view on the proposals I believe I should make *for changes in the 1982 Regulations* as I am required by statute, I have had regard to the principle of allowing fair remuneration according to the work actually and reasonably done. This involves the consideration of a number of relevant factors, of which the weight to be attached to individual factors will vary from time to time. In a document which has been discussed at some length with the Bar's representatives my officials set out those which I believed might be relevant. For the sake of convenience I enclose a further copy of this document with this letter, although I am

sure that the factors therein enumerated are as familiar to you as they are to me.

The Coopers and Lybrand Report

3. In the discussions which have just concluded one of the main issues was the weight which was to be attached to the Coopers and Lybrand report. Of the relevant factors, two ^{namely} the levels of income that can be and are achieved from legally aided criminal work and the level of overheads - relate directly to the evidence in the Coopers' report. The representatives of the Bar have told officials that they consider these factors, supported by the evidence in the report, to be among the most significant and that I should give them the greatest weight. They have also suggested that the conclusions drawn in the report relate as well to the first factor. These are the rates payable for different items of work, the amount of time reasonably devoted to each, and the skill which requires to be devoted to the item concerned. They took the view that in looking at the rates to be paid for particular items of work it is necessary to look at the incomes which barristers can earn assuming that all their work were dedicated to criminal legal aid.

4. Officials have a number of factual and technical reservations on the report. These have been discussed with representatives

of the Bar and are summarised in Mr Everett's letter of 20th May to Coopers and Lybrand. The doubts raised have not been put to rest by Coopers and Lybrand's response of 6th June and my officials remain concerned about the reliability of the report and about several flaws identified and discussed below.

5. The report uses evidence collected in the surveys conducted by Coopers and Lybrand to found calculations of what barristers are currently earning from criminal legal aid. These surveys suffer from a number of serious defects. The samples used are either too unrepresentative of barristers at large or too small in size for reliable conclusions to be drawn. On actual earnings, the report suggests that the actual median income in 1983-84, net of expenses but gross of tax, for counsel in London of 10-15 years standing specialising in crime, was £8,620. But in a supplementary survey of London specialists of 10-15 years call undertaken by the consultants, 25% of were receiving gross income levels of £30,000 per year or more. On the consultants' own assessment of practice expenses and desirable level of pension contributions, therefore, a quarter of those at the criminal bar were earning £16,000 or more in 1983-84 (net of practice expenses and pension contributions but gross of tax).

6. The information collected in the Coopers' surveys formed the basis of a model designed to show how much a hypothetical

barrister, fully employed from legal aid work, could expect to earn, both gross and net of expenses, at various levels of fees. The consultants concluded from this exercise that fee increases of 30-40% on the then current levels would be required to bring the earnings, net of practice expenses but gross of tax, of a specialist of 10-15 years call up to the salary of a senior legal assistant in the Government Legal Service. I have not been able to accept the conclusions drawn in respect of this model, both because of the unreliability of the surveys which underlie it and because I believe that a number of the assumptions used in the model are also unreliable.

7. The starting point for considering the number of cases which a fully employed barrister can expect to undertake in a year is the number of days on which he can expect to work. The report assumes 210 days. The advice I have received from management consultants retained by the Department is that the normal assumption in respect of a professional person is that they have 230 days available for fee earning, unless as part of the job they are required to devote extra time to matters such as business development and marketing, or self-development and training. Coopers and Lybrand's assumptions about the length of time cases take in court are derived from their surveys, and this produces figures in excess of the statistics held by my Department for actual hearing times. The result is that

the model underestimates the number of cases which it is possible for a barrister to undertake in a year. In my view the figures used by Coopers and Lybrand generally overestimate the length of time required by barristers to prepare cases.

8. My officials were concerned at the apparent unreliability of the surveys and the model. Their anxieties about the Coopers model led them to consider whether the Department already had information, or whether further information could be collected, which could be used to make a further check.

9. They accordingly conducted an analysis of information held by the Department on the levels of payments to barristers for criminal legal aid work in the Crown Court alone. This exercise was conducted with the assistance of a management consultant retained from Hay MSL. The analysis combined information held for 1985-86 with a supplementary analysis of information on payments made in March 1986 which was specially collected. It was calculated (as Coopers had also tried to do) what would be earned by barristers fully employed on Crown Court defence work, by applying arithmetic factors for the volume, mix and time taken on the work. Some of the factors are direct measurements from court records; others are estimates believed by officials to be realistic. The results suggested that a barrister fully employed for all his fee-earning hours on Crown

Court defence work would earn fees on average of the order of £30,000 a year net of expenses but gross of tax. The Coopers and Lybrand model predicted that the median income of a London specialist of 1015 years call, again net of practice expenses but gross of tax, would have been no more than £19,158 at 1984/85 fee levels.

10. This exercise appeared to me to demonstrate that officials were right to be concerned about the reliability of the Coopers' approach. They informed the representatives of the Bar of the results as soon as they could and made sets of the data used available for further checking on 23rd May. The representatives of the Bar have now commented on this exercise. But my officials advise me that their initial conclusion on the Coopers' report - that it is possible for a criminal specialist to earn significantly more than the amounts suggested - has not been altered.

11. Quite apart from doubts felt by officials about the reliability of the Coopers' surveys and models, they were rightly concerned at the use of the salary of a senior legal assistant in the Government Legal Service as a comparator. While accepting that it might be relevant to have some benchmark against which to assess the level of earnings that can be achieved, they did not consider that direct comparison with the salary of an SLA

- which in any event is now an obsolete grade - was appropriate; nor that a benchmark should be drawn so narrowly. They have suggested that a Crown Prosecutor in the new Crown Prosecution Service might be a more appropriate comparator. I am doubtful about this and am not persuaded that comparisons between salaried employees and fee earning practitioners are ^{particularly} helpful.

The level of remuneration for civil legal aid work

12. I believe that the levels of remuneration which can be and are achieved from certain other types of work may be relevant to the question whether the levels payable in respect of criminal legal aid constitute fair remuneration. My officials, have, however, explained that, apart from the survey of matrimonial costs conducted in 1984, little useful information on the level of remuneration is kept either by my Department or by the courts. I understand that the representatives of the Bar accept that, in the absence of useful information, it would be impossible for me to give this factor much weight. It may be, however, that this is an area in which useful information will be available in the future and it will then be for consideration what use should be made of it.

Recruitment and retention

13. I am much concerned that a sufficient number of competent people continue to be attracted to and retained in criminal

legal aid work. In considering this, first of all I have in mind the facts that the practising Bar has approximately doubled in numbers since 1970 whilst in the interval the qualifications for call have become more exacting. I have also had in mind the conclusions drawn in the Phillips report on the quality of entry to the Bar, but this appears to me to be more concerned with those entering into areas of the Bar's work other than criminal legal aid. Such evidence as there is on the quality of those undertaking criminal work is little more than anecdotal and does not reveal any obvious drift away from this work. I do however perceive a lowering in morale among members of the criminal Bar. This is a matter of ~~some~~ concern to me since it ^{gives rise to a danger that} ~~could affect~~ relationships with court staff and others working in the criminal justice system ^{may be affected and thus cause} ~~and make~~ the day to day business of the courts ^{to be} more difficult.

The Structure of Fees

14. My officials have had a series of helpful discussions with the representatives of the Bar on the question whether the basic structure of fees for criminal legal aid work is the most apt structure. It is my wish, which I know you share, that the current arrangements be replaced with a system of standard fees

for the majority of items forming Crown Court defence work. I attach particular importance to this change since one important consequence will be that barristers will be paid more quickly than is possible under present arrangements. Agreement on such a structure has now been reached. This will result in about 90% of cases in the Crown Court being subject to standard fees rather than to the present detailed assessment after the event on a case by case basis. That will be reserved for only the most complex and difficult cases.

Changes in working methods

15. It is important that the working practices of the Bar are efficient and economical, particularly in respect of the delivery of services under a criminal legal aid order. Discussions with officials have, I know, covered a range of topics (identified in a paper of May 1986 presented by the Bar) and I am aware of ^{the genuine} concern on the part of the Bar to ensure that the skill and knowledge of the profession is used to the best advantage of the public. The representatives of the Bar have already indicated that they would have no objection to a change in the regulations which permitted legal aid to be granted for a defendant to be represented by a QC alone in suitable cases. The two sides of the profession have already agreed that the requirement for a solicitor to attend in every case in the magistrates' court

should be abandoned and for its part the Bar is content that this be extended to at least some cases in the Crown Court. There are other areas - for example the use of pre-trial reviews and amendments to the committal procedure - where constructive discussions on potential changes are continuing. The achievement of improvements in working practices may itself justify an enhanced award within the band of what is fair remuneration.

The Relative Merits of Other Claims on the Public Purse

16. I know that the relevance of this factor has been questioned by the representatives of the Bar and that a helpful memorandum setting out their views has been given to me. My officials have prepared a memorandum on the Department's views on section 39(3) which I enclose. Their analysis of this provision accords with my own. In my view the notion of fairness imports a band or range rather than a single figure. It is not susceptible to exact mathematical calculation. Account may also be taken of cost in fixing remuneration within the band or range of fairness.

Other Relevant Discussions

17. I have also borne in mind discussions between my officials and representatives of the Law Society and discussions between

officials of the Crown Prosecution Service and representatives of the Bar in connection with prosecution fees. I am of the firm view that there is no difference in public importance between the work of prosecution and defence. Each entails an equal degree of importance. However I also accept that there are certain factors which are peculiar to the nature of the prosecutor's role and to the Crown Prosecution Service. *In particular, though not exclusively* I have in mind the conclusions of the Farquharson Report. These factors are relevant and may properly inform the approach which should be taken in fixing fee levels appropriate to prosecution work.

Fees Advisory Committee

18. The representatives of the Bar have pressed me to consider the introduction of some mechanism - perhaps a fees advisory committee - to make recommendations on the level of fees. As I said in Lord Benson's debate in the House of Lords on 4th June, I would welcome some mechanism which would help to establish common ground as the basis for the decision which the statute requires me to take. I believe that some such body, perhaps used to gather and agree the information which I need to carry out my statutory functions, could be of great benefit.

19. There are some aspects of this proposal which do however cause me concern - for example, how it could be made compatible

in practice

with the statutory duty in section 39(3). More importantly, I need to have a better picture of exactly what an advisory body would do, and how, before I could consult my colleagues with a view to their consent. I would propose, therefore, that my officials and the representatives of the Bar should continue to discuss what each side would expect such a body to do.

Proposals

20. I have considered the factors which I have said may be taken into account in the exercise of my discretion under section 39 of the Legal Aid Act 1974. I have considered the evidence which the Bar have provided, particularly through the Coopers and Lybrand report, and the views which their representatives have expressed both on my officials' reservations on the Coopers' report and on the various factors. I have given some but relatively little weight to the levels of fees for civil legal aid. I have not found it necessary to consider the relative merits of other claims on the public purse and, although I remain of the view that this may be a relevant and important factor, I have not this year taken it into account.

21. I am satisfied that the fees which can be and are achieved for criminal legal aid are, at current levels, within the range of "fair remuneration according to the work actually and

reasonably done". However, I am concerned about the level of morale of those practising at the criminal bar; I also wish to make progress in those areas where current working practices count against the efficient administration of justice.

22. Taking all these considerations into account, I have decided that I should propose ^{as from the beginning of next term} an immediate increase in fees of 3%. My intention is that this increase should take effect on 1st October with the commencement of amending regulations which would also introduce the system of standard fees agreed with my officials. I therefore enclose tables which set out first, the current levels as applied to the new system of standard fees and second, what those levels would be with a 3% increase across the board. I am also doing the same in respect of the work not covered by the standard fees. I shall ~~want~~ ^{wish} to consider between now and 16th July how the increase should be distributed.

23. I also propose a further increase of 2% to be paid in respect of improvements in working practices when the changes discussed with my officials have been introduced. These increases, together with the increase of 5% made from 1st April this year, will give an overall increase of 10%.