Bar Council's Advocates' Graduated Fee Scheme (AGFS) Working Group
Draft proposal for a new Scheme

Executive Summary

Our Group

1. This proposal for a new Advocates' Graduated Fee Scheme is the work of the Bar Council Advocates' Graduated Fee Scheme (AGFS) working group. The group consists of representatives from each circuit, from the institute of barristers' clerks, from the Criminal Bar Association and amongst those individual members are represented barristers of all levels of call – from the young bar through to silks. In addition a wide range of specialisms are reflected in the working group membership and where necessary we have consulted more widely where issues of particular specialism are engaged.

2. The scheme that we have designed is a complete re-drawing of a graduated fee scheme for advocacy in Crown Court cases. We started with a blank canvas and aimed to devise a scheme that met some key and shared objectives for the Bar and MOJ. In particular we have sought to draft a scheme that rewards skill, experience and above all quality in the delivery of Crown Court advocacy. Moreover, we have drafted a scheme that we are confident can be provided within the existing AGFS envelope.

Key Elements of our Scheme

3. The scheme has the following key elements:

(i) The abolition of pages of prosecution evidence as the principal proxy for the graduation of fees;

(ii) The abolition of the number of witnesses as a proxy for the graduation of fees;

(iii) Graduation through an expanded range of categories of case and banding within categories determined by the presence of objectively verifiable complexity and seriousness proxies;

(iv) Relativities between categories and bands of cases that rationally reflect differing complexity and seriousness;

(v) Refreshers tailored to reflect and reward the skill and experience of advocates across the categories and bands of cases;

(vi) The creation of a single standard case category into which a significant number of basic cases will fall;

(vii) The abolition of special preparation;

(viii) A fair and permanent mechanism for ongoing review of the operation of the scheme;

(ix) Restoration of separate payments for sentences, Plea and Case Management Hearings and other ancillary hearings.

Key shared benefits for the MOJ and advocates

4. We consider that the scheme may have the following key benefits for the MOJ and advocates remunerated under it:

(i) **Quality** – by restoring graduation through the scheme and rewarding the skill and experience of the advocates instructed in any case on a rational basis a career path for advocates would be restored. Those with skill, experience and ability would be appropriately rewarded;

(ii) **Quality** – the expanded categorisation and banding of cases would facilitate a grading of cases at each level of seriousness and complexity that could very easily link into a panel scheme for advocates and thereby ensure that advocates of the highest quality were instructed in the most complex and serious cases;

(iii) **Quality** – by setting proper rates for the standard category of case sufficient numbers of advocates at the entry level would be sustained and the long term viability of criminal advocacy preserved;

(iv) **Certainty** – each case can be costed with precision and does not depend upon the vagaries of the pages of served evidence or the number of witnesses. The advocate is similarly guaranteed an appropriate rate of payment in every case determined by rational factors and not the vagaries of the number of pages of evidence or the number of prosecution witnesses;

(v) **Objectivity** – the proxies for payment are all objectively verifiable reducing the administrative burden involved in administering the scheme from both the LAA and advocates perspective;

(vi) **Simplicity** – the process of paying cases would be streamlined and the opportunities for costly appeals to costs judges reduced or even eliminated;

(vii) **Simplicity** – the standard category of case will catch a significant proportion of cases in the Crown Court;

(viii) **Flexibility** – the scheme is amenable to simple amendment or review to accommodate changes in working practices, evidence and the introduction of new offences;

(ix) **Trust** - Adoption of this re-worked scheme, with a commitment to annual review and the ring fencing of advocacy payments would restore much needed trust between the professions and the MOJ. That is in the long term interests of us all.

Rationale for a new Scheme

A Brief History of AGFS

5. The Advocates Graduated Fee Scheme (AGFS) was introduced by the Legal Aid in Criminal and Care Proceedings (Costs) (amendment) (No.2) Regulations 1996. In its first incarnation the scheme was designed to provide a mechanism for the graduated payment of advocates conducting standard criminal cases in the Crown Court.

6. As originally envisaged the scheme did not apply to the majority of the most serious and complex cases tried in the Crown Court. Those cases were instead remunerated on an ex post facto basis ('the red cornered form'). It is worth remembering that the first scheme applied only to trials of less than 10 days, with fewer than 1000 pages of evidence and fewer than 80 witnesses. Guilty pleas were outwith the scheme if there were over 400 pages or 80 witnesses and cracked trials were paid on an ex post facto basis where there were over 250 pages of evidence or 80 witnesses. There were many more exceptions that were capable of lifting a case out of the graduated fee scheme and into the ex post facto system of payment.

7. At its inception, and given that the scheme was intended to determine payment only in the vast majority of standard cases, the mechanism by which graduation would be achieved was a combination of a) offence category b) the number of pages and c) the number of witnesses. Each proxy affected the payment that was made in any given case with different weightings applying to each, determined by the offence category.

8. Over time the scheme was expanded. The cases to which AGFS applied were extended by virtue of the criteria for ex post facto payment being tightened, albeit that the most serious cases were inevitably paid by that alternative mechanism. Expansion of the range of AGFS was of course not the only change that governments introduced, as over many years a trend to cut fees on an arbitrary basis across the scheme also developed. Throughout these changes pages and witnesses remained, as if by default, the two key proxies by which the level of payment were determined.

9. By 2006 the constant adjustments to the original scheme had left it unfit for purpose and, when inflation was weighed in the equation, the rates for advocacy in the Crown Court had fallen to desperate levels in standard cases. In the most complex and serious cases levels of payment had been sustained by the ex post facto system but the Government had signalled a determination to end such payments and contract the most serious cases as VHCC's on a panel advocate basis.

10. From that low point emerged the Criminal Defence Service (Funding) Order 2007, or in simple language 'Carter'. The Carter scheme, negotiated with the Bar, was designed to address the crisis faced by those conducting advocacy in the Crown Court. It was a scheme that saw a significant re-adjustment in the distribution of monies across the AGFS scheme and in particular the rates for standard cases saw significant increases at the expense of payments for the most serious and complicated cases.

11. However radical the Carter scheme was in terms of the structure of payments (the brief fee to represent payment for preparation, preliminary hearings and days one and two of trial, no additional payment for certain 'bolt ons', fees paid to the instructed advocate) the scheme proceeded on the assumption that graduation could and should be achieved by reliance upon the proxies of case category, pages of evidence and number of witnesses.

12. Since 2007 there have been nine rounds of cuts to the Carter AGFS scheme. They have been largely unfocussed and have amounted to either a crude 'bacon slicing' of fees without any pause for an assessment of their effect across the scheme as a whole or targeted reductions for the most serious and complex types of case (for example the alignment of murder rates with those for serious sexual offences).

13. The net effect of the cuts has been that the scheme has become unrecognisable from the one designed with the Bar as part of the Carter settlement. Furthermore an absence of access to reliable data has inevitably made it very difficult to gain any accurate understanding of the practical effects of the scheme on the criminal Bar.

14. Crude cuts to the rates of payment are not the only factors that need to be considered in the context of the history of AGFS and when considering whether the scheme remains fit for purpose. Comparatively generous levels of funding for relatively minor cases as compared with rates for the most complex and serious work have led to an imbalance in the scheme that threatens the future of criminal advocacy. There is no incentive for the best advocates to take on the most serious and complex work, there is career stagnation, a lack of retention of advocates at the criminal bar, and the relatively easy pickings at the lower end of the scheme create a clear incentive to brief cases on a commercial, rather than a quality basis.

15. In addition, post-Carter, we have seen significant changes in legislation that have affected the viability and validity of the scheme.There have been significant procedural changes, including ground rules hearings, pre-recorded cross examination, intermediaries, anonymous witnesses to name but a few, Reams of new offences have been created, none of which have ever been categorised and all of which are deemed as Category H offences.

16. Add to these changes the fact that the nature of evidence presented in criminal cases has also evolved significantly during the history of the scheme. We are all familiar with the increasing reliance on expert evidence, telephone evidence, electronic and video recorded evidence, and more recently with the constant round of appeals to costs judges, rulings by trial judges and lengthy disputes with the LAA over the 'page count'.

17. Particularly in the context of electronic evidence we cannot consider the defence AGFS scheme in ignorance of the CPS Graduated Fee Scheme C. That scheme dictates that electronic evidence is not to be counted as a page of evidence, even when served in paper form. There is plainly therefore no common ground between the prosecution and defence schemes and we are all familiar with the difficulties that lack of symmetry creates. The Crown resists serving material, the defence are desperate for it to be served, sometimes not because it makes any difference to the preparation of the case but because the cuts in fees have had such an effect that boosting the 'page count' by securing the service of as many pages as legitimately possible is the only way to secure anything approaching a reasonable brief fee that comes close to compensating for the complexity and seriousness of a case. We have to assume that these issues will not diminish going forwards.

18. These are but a few of the problems and pressures that are being brought to bear on a fee scheme (and more particularly on the proxies it applies to achieve graduation) that was designed two decades ago, in a very different criminal justice environment and with the criminal Bar in a very different position to the one that we find ourselves in now.

The Future?

19. The immediate future for the criminal justice system will involve further radical changes to working practices that will likely serve to compound what are emerging as the failures of the current scheme. The Crown Court is about to commence the pilot of digital working which will see every case litigated in the Crown Court served in an electronic format. This pilot begins in Leeds and Southwark this summer and will be rolled out nationally by the end of 2016.

20. If implemented in full, the Leveson report will see many cases that are currently tried in the Crown Court in future being retained by the Magistrates. The Crown Court will see an even more interventionist case management regime. The courts will pursue a national early guilty plea scheme that will reduce still further the number of cases that are tried.

21. Despite that gloomy background, the government has, following the Jeffrey review, indicated a strong commitment to preserving quality in criminal advocacy and more recently has observed that a strong and viable independent criminal Bar is at the heart of that. We all wish to see the Bar survive (and thrive) as an independent referral profession that promotes excellence.

The AGFS working group

22. With all of the above in mind the former Chairman of the Bar Nick Lavender QC established an Advocates' Graduated Fee Scheme (AGFS) working group that met for the first time in November 2014.

23. The group was established to grasp positively the opportunity that has been presented by the deferment of any changes to the AGFS scheme until the summer of 2015. Not only do we have an unprecedented opportunity to take the initiative and propose and shape a scheme that is in the long term interests of criminal advocacy, but we are also, with appropriate data security and anonymisation, able to measure in real terms the effects of the current scheme on payment across the profession at all levels of seniority.

24. The aims and objectives of the group are to: "To consult with colleagues on Circuit in order to gather ideas to restructure the Advocates' Graduated Fee Scheme within the fixed funding constraints in a way which:

24.1. accommodates the ever increasing amount of electronic evidence;

24.2. is flexible to accommodate future changes;

24.3. has fair relativities in respect of: guilty plea / cracked trial / trial;

24.4. has fair relativities in respect of: case classification;

24.5. protects the viability of the Bar as a specialist referral profession;

24.6. fairly remunerates at all levels of seniority, and

24.7. to assist in the preparation of a new AGFS

25. The group consists of representatives from each Circuit at all levels of call, together with representatives from the Criminal Bar Association and the Institute of Barristers' Clerks. The composition of the group ensures that all interest groups are represented and a diverse range of opinions are heard and considered.

26. We have proceeded on the basis that there will be no expansion in the envelope for AGFS spending in the near future. That is neither an acceptance of defeat nor an indication that we do not ourselves seek to achieve a better global financial settlement for the Bar. Rather we were tasked to devise a new AGFS scheme making the assumption that there would be no more money; that is what we have done.

The Ministry of Justice data

27. The evidence from the MOJ has been considered by a dedicated team from the Bar and in particularly by our statistician Professor Martin Chalkley. For the purposes of our working group looking at the future of AGFS there are two significant findings from the data:

27.1. In the majority of cases very little graduation is in fact achieved by the uplifts paid for pages and witnesses, in comparison to other cases of the same offence category;

27.2. The scheme as a whole is almost completely flat with very little graduation in payment as criminal practitioners move through their careers at the Bar.

28. What is plain from the data is that the current AGFS scheme is failing. It is failing to adequately distinguish between a simple case of its type and a complicated one, because pages and witnesses are no longer an effective proxy for payment and it is entirely failing to achieve graduation through complexity and seriousness of cases conducted by advocates.

29. As a result there is no proper progression in earnings throughout a career at the criminal Bar as advocates gain skill, experience and ability. The net effect is to discourage ambition and aspiration.Over time this will present as serious a threat to the long-term viability of the profession as will the competition for the work available to the junior Bar. This is one of the greatest threats to the long-term viability of the criminal Bar, and therefore one of the greatest threats to the long-term provision of quality criminal advocacy.

Our Key Considerations

30. We have had the benefit of approaching the drafting of a new AGFS scheme with an entirely blank canvas. In approaching the task in this way we have been able (we hope) to think strategically and develop a scheme that not only suits our current working environment but is also attuned to the anticipated changes that we have identified (see above).

31. Our shaping of the scheme has been informed by some basic core issues and some equally simple practical key aims and objectives:

31.1. The focus of the available resources in any AGFS scheme should be trial advocacy. The future of the criminal Bar is surely as a referral profession of specialist trial advocates;

31.2. There must be restored a gradient within the scheme that weights payment toward the most serious and complicated cases, so that the expertise of advocates is properly rewarded, and quality of advocacy in those cases is preserved;

31.3. Graduation can be achieved without reference to 'the page count' in most types of cases. That is so because the page count produces anomalies, makes little difference to payment in the majority of cases, is variable and unpredictable, leads to endless wrangling with the LAA, will become increasingly obsolete in the digital court scenario;

31.4. Graduation can in part be achieved by a greater number of case categories than the current scheme provides;

31.5. Within each case category it is possible to identify factors specific to those types of cases (and which are objectively verifiable) that inevitably make a case more serious and complex and justify payment at a higher rate. That additional complexity and seriousness can be reflected by further banding of cases within categories;

31.6. There should then be a single category of 'standard case' that pays fixed fees for plea, cracks and trials under 150 pages (the data suggests that about 70% of the cases we have identified as 'standard' have fewer than 150 pages of evidence);

31.7. Above that page cut-off 'standard' cases should be paid at an enhanced fixed rate for pleas, cracks and trials;

31.8. Our proposed method of graduation will introduce certainty into the scheme and the factors that will determine category, and whether or not a case is to be paid at an enhanced rate are all objectively verifiable. We envisage a standard form that will be completed at the conclusion of the case and signed by the judge or court official (as is already done in other jurisdictions) and will confirm the category and banding of any given case thereby streamlining the claims process and reducing the administrative burden for the Bar and the LAA;

31.9. The rates for trials in 'standard cases' must be set at a sustainable level in order to protect the young Bar;

31.10. There must be a return to individual payment for the second day of a trial across all types of case. It is particularly important in standard cases, as these are the cases in which the young Bar are often instructed. When Carter was introduced the generous brief fees in such cases was compensation for the lack of payment for the second day. The massive erosion in the fees for such cases makes non-payment for the second day unsustainable. The problem is compounded by the fact that the very short cases are often listed as floating trials, are not reached until late in the day or are otherwise spun into a second day by features out of control of the advocate but attributable to the Court. The Bar should not have to shoulder the burden of inefficiency in the Court system and the young Bar in particular need to be protected from that unfairness;

31.11. Sentence hearings must be separately remunerated. The decision to remove payment was unconscionable and in ignorance of the complexities that modern sentencing exercises throw up on a daily basis. Moreover the decision to adjourn for a report or for other reason is not the advocates' but the court's. Why should the Bar (and particularly the young Bar) be penalised for inefficiency in the court system or the vagaries of judicial decision making?

31.12. Given that the Bar has no control over the listing of cases for mentions and other hearings, all hearings should attract a notional standard fee that at the very least compensates the attending advocate without eroding the fee payable to the trial advocate (post Leveson we are assured that the number of hearings should be greatly reduced but paying for them compensates the Bar for the actions of over-zealous judges);

31.13. All offences tried in the Crown Court need to be re-categorised. For many years successive governments have enacted thousands of criminal offences and not categorised them for the purposes of AGFS. This new scheme should aim to re-classify every offence before it 'goes live';

31.14. New offences will continue to be created every year. Moreover there will continue to be changes to procedure and working practices that will materially affect this scheme and the results it produces. We propose that there should be a standing committee with LAA, Bar and solicitor representatives that meets at least twice a year and is empowered to make reasonable adjustments to the scheme and categorise new offences to ensure that it continues to operate as intended;

31.15. Payments for advocacy in the Crown Court must be ring fenced to restore confidence in the professions that the Government has a genuine

commitment to the provision of quality advocacy services in the long term. These fees do not amount to a bonanza for criminal advocates. To the contrary we have sought to devise a scheme that can broadly operate within the current spending envelope. We have seen over the life of the current scheme the devastating effect that irrational bacon slicing of fees has had on the operation of a scheme and consequently on the viability of the professions. That plainly impacts upon the long-term sustainability of quality advocacy in the Crown Court. A commitment to ring fencing and an end to bacon slicing would restore faith. Moreover, and accepting that the scheme must continue to operate within the margins of the spending envelope, review by standing committee operating within a new relationship of trust would be to the advantage of all stakeholders.

The draft new Scheme

32. It is essential that the draft scheme is robustly tested against real cases to ensure that it does not produce unforeseen outcomes. It is also important that we receive any feedback or suggestions as to other factors that might be appropriate proxies for complexity and seriousness either in any given category or in terms of the general factors that lift all cases.

Calculation of Brief Fees

33. Every offence has been placed into a category. The new list of categories is an expansion of the current list. In addition to those categories that are tailored to the type of offence an overarching 'standard' offence category has been created.

34. If an offence falls within the 'standard' category and has under 150 pages of evidence the brief fee will be paid at the 'basic' standard rate. If it has over 150 pages it will be paid at the 'enhanced' standard rate.

35. For all other offences that are 'non-standard' they will be placed in a category determined by offence type. However, unlike the current scheme, each offence type has additional banding that reflects the wide range of complexity and seriousness within an offence type. The banding is determined by factors that have been deliberately selected because they are objectively verifiable.

36. This system of an increased number of categories, with banding within categories and 'basic' or 'enhanced' levels of payment enables far greater graduation in the scheme based on factors that truly increase complexity, seriousness and which signal the skill and experienced required to conduct any given case. Because all of the factors are independently and objectively verifiable there is very little reliance on PPE; disputes as to served and un-served evidence can be avoided, the focus is shifted onto issues that really make a difference to the complexity of cases and the vagaries inherent in a reliance on pages are obviated.

37. We consider it would be possible to devise a single form that captures the case category, banding and 'basic'/'enhanced' status and can be certified by either the trial judge or the court clerk. There is no discretion in the scheme – a proxy is either present or it is not.

38. In terms of the values that we have attributed to cases across the categories and bands it is important that we explain how we have arrived at the figures, and important to understand that entire scheme and the inter-relation of figures is based upon relative complexity and seriousness.

39. In so far as the calculation of the brief fee is concerned we did not in fact approach this on the basis of money. Rather, we looked at the issue in terms of relativity and

graduation - where should the fee for one case be pitched relative to another. This is a principled and rational way to approach the distribution of money across the scheme.

40. Adopting that approach our starting point was to fix the price for the lowest paid case - the standard case, and then fix the price for the most complicated and serious case - a Band 1 Category A murder. In all instances we looked at this from the perspective of the juniors. We agreed that the silks rate would be double the junior rate and the leading juniors 75% of the silks and applied that across the scheme. We all agreed it was important to have our main focus on what the juniors would be paid for a case rather than looking at the silks and then working down. The juniors are the lifeblood of the bar and with proper graduation a clear career progression is restored, as is the incentive to apply for silk.

41. We fixed the brief fee for the most complex murder for a junior at £10,000. That then represented a value of 100 - the highest rate in the entire scheme. We fixed the brief fee in a standard case at £500 so that assumed a value of 5 in the scheme. From those fixed points we then worked through the table and allocated each band in each category a value - never more than 100 never less than 5 - that reflected the relative complexity and seriousness of the type of case we were considering. Having done that we could calculate the brief fee in every case - not on an arbitrary cash basis, but on a rational basis of relative complexity.

Calculation of Refreshers

42. The refresher would generally be determined by the case category only not by band although there are a few exceptions to that rule in a limited category of cases (fraud and drugs).

43. This scheme envisages that refreshers should be paid for every day of the trial (not only after day 2 as is presently the position). That is so because the current system penalizes the advocate and in particular the very junior advocate litigating the standard cases. It is almost always as a result of events out of the advocate's control that short cases run into a second day – usually because of the listing decisions of the court.

44. When arriving at the values for refreshers in this scheme it is important that we indicate how we arrived at particular values in particular categories or bands of cases. At the heart of the determination of refreshers was a principled decision that the refresher should reward the skill and experience of the advocate in any given case. Therefore the greater the seriousness and complexity of a category of case the greater the refresher should be. In that way graduation of payment as an advocate progresses through an advocacy career is achieved. At the other end of the spectrum the refresher in a standard case has to be set at a proper level to sustain those embarking upon a career in Crown Court advocacy .

Calculation of Guilty Plea Fees

45. Guilty pleas will be paid at a fixed rate dependent on category and banding. Guilty plea fees will be set at a rate that reflects the very welcome changes in working practices that the Leveson review heralds, in particular the new early guilty plea scheme. As the Leveson review indicates, the early resolution of cases by guilty pleas requires a significant investment of time and draws on the skill and expertise of the advocate in giving appropriate and early advice to the defendant. Where that advice is accepted and the effort rewarded by significant savings of court time and, inevitably, significant financial savings to the State, the fee payable to the advocate must be set an appropriate level. There must be no perverse incentive to list cases for trial because the rates payable for pleas are set too low. To that end we have set the guilty plea fee at 50% of the trial and cracked trial fee.

46. We considered and rejected any proposal that an 'early guilty plea' should attract some enhanced payment. That is principally because any such enhancement would

inevitably be perceived as a perverse incentive to force defendants to enter guilty pleas. What this new scheme does is to remove the current perverse incentive to advice a defendant to delay his guilty plea until a later stage in the proceedings when the papers have been served. At present an early plea will produce a truncated bundle of evidence and given that payment is by pages, will diminish the fee from that available at PCMH once a full bundle has been prepared. By removing the link with pages of evidence there is no perverse incentive to delay a plea for service of the full papers and early guilty pleas are not penalized as they are under the current scheme.

Calculation of Cracked Trials

47. Cracked trials do not represent satisfactory outcomes for the advocate any more than they do for the court. With significantly diminished volumes of work in the Crown Court and ever-increasing competition the advocate is unjustifiably and seriously penalized when cases crack; this is particularly so in cases of the greatest seriousness and complexity with longer listings. The statistical information provided by the MOJ and considered by the AGFS group bears out this contention and demonstrates just how badly affected the most senior and experienced practitioners are by cases cracking.

48. The unfairness of the current AGFS scheme in this regard is compounded by the fact that cracked trials are almost always outwith the control of the defence advocate. More and more cases are cracking because the prosecution case collapses or pleas previously offered become acceptable. The other factor utterly beyond the control of the advocate and unaffected by the quality and robustness of advice is the desire of seasoned offenders to wait and see: will the witness attend, will the case collapse, will the Crown take a lesser plea, will they be able to enjoy bail for many months until the trial is listed because of long delays in listing at many major court centres?

49. The Bar fully supports the initiatives of the courts, spearheaded by the Leveson review, to increase guilty pleas, better manage cases, streamline justice, speed up the listing of cases and - by all of those measures – to significantly reduce the instances of cracked trials. We are confident in the measures proposed by Leveson, confident in the bar delivering greater efficiency and in the instances of cracked trials reducing. However, there will always remain (for the reasons we have already identified above) significant and complex cases that crack beyond the control of the defence advocate.

50. With that in mind this new AGFS scheme proposes that cracked trials will be paid at the rate of the brief fee that would have been payable were the case to have proceeded as a trial. However, that does not protect the most senior advocates undertaking the most serious and complex work. We propose that if a case has a time estimate <u>agreed by the judge</u> in excess of 4 weeks and cracks in the final third, the cracked trial fee should be the brief fee plus 4 refreshers – in short the fee that would have been payable for the first week of the trial. The number of cases caught by this rule will be small, but they are the cases that inevitably require the greatest investment of time in terms of preparation and will be the most complex and serious of their type.

Ancillary Hearings

51. We propose that payment for ancillary hearings should be restored. We do so for three principal reasons:

(i) We are assured that the Leveson reforms will significantly reduce the need for such hearings and the number of them – the Bar welcomes that development;

(ii) If cases are listed it is more often than not as a result of the court choosing to list a case for reasons outside the control of the advocate. The advocate

should not be penalized for the inefficiency of the court and paying for such hearings should incentivize the court to avoid them;

(iii) Sentence hearings in particular are complex and difficult and more often than not require significant preparation. Moreover, as at (ii) they are often adjourned not at the request of the advocate but at the direction of the court. Paying for such hearings fairly compensates the advocate but also presents an incentive for the administration and the court to 'get on with it'.

52. In terms of the fee that should be payable for ancillary hearings we consider that it should be modest and set at a level to compensate the Bar for the listing of cases but significant enough to act as a driver for the Crown Court to limit the number of mentions in a case. We suggest a payment of £80 for each ancillary hearing.

53. In terms of the fee payable for sentencing hearings we again submit that it should be set at a modest level to compensate the advocate for the hearing but significant enough to act as a disincentive for the court to delay or adjourn sentence other than where it is unavoidable to do so. We suggest a payment of £150 for a sentence hearing.

PTPH Fees

54. Case ownership is an essential component of the Leveson review and of good and effective case management. It is essential that the trial advocate is briefed at an early stage and attends the PTPH or further case management hearing. There must be no financial incentive to retain a case for PTPH or further case management to then return it to a trial advocate as that would defeat the aims and objectives of Leveson. For those reasons we propose that there should be only a modest payment for the PTPH and further case management hearings set at £100.

55. The success of case ownership of course depends on more than this scheme and is also dependent on the court accommodating the availability of successful, skilled and able (and therefore busy) advocates to attend PTPH, further case management and trial hearings. There is currently a marked inflexibility in the listing of cases exhibited by both listing officers and the judiciary who often refuse requests for markings or minor movements of cases on an arbitrary basis. The Crown Court, and its judges, should be expected to sit at any time within normal working hours to ensure that the vital initiative of case ownership is achieved.

Mechanism For Payment

56. The fee for a case should be paid to the advocate who conducts the main hearing in any case, be that the plea, crack or trial (as is the new arrangement under the current AGFS).

The Case Categories

57. Set out below are the case categories and the proposed bands within those categories. We welcome feedback and suggestions as to any anomalies that may be created by this categorization or any other factors that could and should be included in particular bands.

58. This list should be read in conjunction with the spreadsheet of offences that we believe contains every offence currently within the AGFS scheme. That spreadsheet lists the current category, the proposed category, indicates whether a case would be standard and lists any particular feature that would lift a standard case into another category (for example fraud over £30,000)

A Sustainable future – mechanism for review

59. We have identified the pitfalls that the endless rounds of bacon slicing have caused to the AGFS structure. To repeat that with this new scheme, would be contrary to delivering on the promise of ensuring quality in Crown Court advocacy, and would also be devastating to the trust between the professions and the MOJ. At the same time we accept that it is necessary to deliver a scheme that is financially sustainable in the longer term from the perspective of both government and the professions. To that end we would invite the MOJ to consider placing future amendments of the scheme in the hands of a standing committee that represents the interests of all stakeholders and can meet perhaps twice a year to ensure that:

(i) The scheme is not producing unintended consequences in terms of cost;

(ii) New offences can be categorised and placed in appropriate bands as and when they are created;

(iii) Changes to procedures in the Crown Court and working practices generally can be reflected by appropriate adjustments within the scheme;

(iv) The sustainability of the rates within the scheme can be reviewed in the context of the Government's commitment to quality in the provision of Crown Court advocacy;

(v) We would also invite the MOJ to consider making a commitment to increasing the rates across the scheme by not less than the 1% settlement for the wider public sector.

And Finally – a recipe for some free goodwill

60. We have alluded several times to issues of trust as between the professions and the MOJ. We suggest that there is here a free opportunity to restore faith and signal a real commitment to long term sustainability of quality advocacy in the Crown Court. Simply indicate that advocacy fees will be ring fenced for the life of this parliament. It is not very difficult to do and it signals a genuine commitment to quality.

Category A Murder / Manslaughter:

Band 1:	Killing of a child Killing of two or more persons Killing of a police officer, prison officer or equivalent public servant in the course of their duty Killing of a patient in a medical or nursing care context Corporate Manslaughter Manslaughter by Gross Negligence Missing body killing
Band 2:	Killing done with a firearm or knife Murder committed for gain Defence is diminished responsibility Defence is loss of control
Band 3:	All other cases of murder
Band 4:	All other cases of manslaughter

Category B Terrorism

Band 1: Terrorist Murder (section 63B of the Terrorism Act 2000).
Explosive Substances Act 1883 offences; especially sections 2 & 3.
Preparation for terrorism, section 5 Terrorism Act 2000
Disseminating terrorist publications, section 2 Terrorism Act 2006.
Possession of material for the purpose of terrorism, section 57 Terrorism Act 2000.

Band 2: All other terrorist Offences

Category C Serious Violence

Band 1: Attempted Murder of a child, two or more persons, police officer, nursing / medical context or any violent offence committed with a live firearm

Band 2: All other attempted murder

Band 3: Section18

Band 4: All other violent offences (unless standard)

Category D Child Sexual Offences

Band 1: Rape and Assault by penetration

Band 2: Sexual Assault

Band 3: All other offences

Category E Adult Sexual Offences

Band 1: Rape and Assault by Penetration

Band 2: Sexual Assault

Band 3: All other offences

Category F Dishonesty (To include Proceeds of Crime and money laundering)

Banding to be determined by value of loss / intended loss

Band 1: Over £10 million or over 20,000 pages

Band 2: Over £1 million or over 10,000 pages

Band 3: Over 100,000

Band 4: Over 30,000

Category G Property Damage Offences

Band 1: Arson with intent to endanger life / reckless as to endangerment of life, any campaign of arson (to be defined), Arson with value over £500,000

Band 2: Simple Arson and Criminal Damage over £50,000

Band 3: All other offences (unless standard)

Category H Offences Against the Public Interest

Suggest a single band: Perjury, Perverting the Course of Justice, Assisting an offender, Misconduct in Public Office etc

Category I Drugs Offences

Band 1: All drugs offences over 1 million or over 5,000 pages

Band 2: All drugs offences over £100,000 or over 1,000 pages or import / export

Band 3: All other drugs offences unless standard

Value should be upper street value

Category J Driving Offences

Band 1: Death and serious injury by driving cases

Category K Burglary Offences:

Band 1: Aggravated Burglary, Burglary with intent to GBH or Rape or value over £500,000

Band 2: Indictable only burglary or value over 100k

Category L – Robbery

Band 1: Robbery alleged to have been committed with a firearm / imitation firearm or value of property stolen / targeted over 100k

Band 2: Other robberies

Category M – Firearms Offences

Band 1: Possession or supply of a firearm / ammunition with any ulterior intent or any offence for which the maximum penalty is life imprisonment. Importation of weapons.

Band 2: Minimum sentence offence

Band 3: All other offences

Category N – Other offences against the person

Band 1: Kidnapping, False Imprisonment and Blackmail
Should there be Band 2 for others eg abduction of child by parent line 9 on chart, or is intention for all cases to reside in same band

Category O – Exploitation / human trafficking offences

All cases of this category should reside within the same band, thus no banding is proposed.

Category P – Public order offences

Band 1: Riot and prison mutiny / riot (no of defendants does not enhance)

Band 2: Violent Disorder (no of defendants does not enhance)

Category Q – Regulatory Offences

Band 1: Health and Safety or environmental cases involving one or more fatalities or defined by the HSE or EA as a Category or Stage 1 "major incident"*;
Death of a child;
A "major accident" at a site regulated by the Control of Major Accident Hazards Regulations 1999 (as amended) ("COMAH Regulations";
Large scale explosion

Band 2: Health and Safety or environmental cases not falling within Band 1 but involving:

serious and permanent personal injury/disability and/or widespread destruction of property (other than that owned or occupied by the defendant);
extensive pollution/irreparable damage to the environment;
toxic gas release (e.g. carbon monoxide, chlorine gas);
cases involving incidents governed by mining/railways/aviation legislation.

Band 3: All other offences

* - NB: *HSE define this as a significant event which demands a response beyond the routine which has either caused or had the potential to cause multiple serious injuries or loss of life, or serious disruption/extensive damage to property.*

Standard Cases

There will be a broad category of standard cases. These are the most minor types of offending tried in the Crown Court and include all Theft and dishonesty value under 30k, dangerous driving, Affray, Assault occasioning Actual Bodily Harm, Drug possession and the like (the full list is set out in the spreadsheet of cases).

Other Scheme Rules

a. £30,000 is the cut off for fraud / money cases – below that threshold they will be paid as standard, above it they will be lifted in Category F and paid in the appropriate band.

b. All inchoate offences are to be included and paid at the rate for the substantive offence. The exception to this rule is in cases of attempted murder that fall into Category C 'Serious Violence'.

c. A Section 28 hearing will be payable as the first day of the trial.

d. Plea fees are paid at 50% of the brief fee thus set at a level to reflect the extensive work identified in the Leveson review as being required for the effective and early resolution of cases in the Crown Court.

e. Silk rates are set at double the junior rate, leading junior rates are set at 75% of the silk rate, there is no rate for a led junior and correspondingly no reduction in the fee for being led. It was a rather bizarre logic that operated to say that in the most complex and exceptional cases (as they had to be to merit silks being instructed) the advocate was paid less than they would be in a less complex case.

f. Payment for special preparation is abolished (save for in confiscation cases where the current fee arrangements will be preserved).

g. Fitness to plead hearings will attract the brief fee for trial on day that the determination that the defendant is unfit to plead is made. If a finding of fact hearing follows refreshers are payable for each day of that hearing.

h. Travel for conferences and / or views should continue to be paid at the same rate as under the current scheme.

i. Payment for confiscation hearings is currently made according to bandings of cases determined by the page count. We have considered alternative mechanisms for payment but are of the view that the current scheme operates well and, in that particular area of work, tends to reflect the complexity and seriousness of a case as well as any other proxy we might devise. In those circumstances we do not propose that there should be a new scheme for the determination of fees in confiscation proceedings.

j. A cracked trial is defined as any case that pleads in the final third. All other cases will be paid as a plea.

k. A determination that a defendant is unfit to plead is paid as the first day of the trial.

l. Trials of issue: The fee payable will be the appropriate plea fee, cracked trial fee or trial fee dictated by the stage at which the plea occurs. Each additional day on which a trial of issue is heard will be remunerated at the daily refresher rate for the class of case.

m. Appeals against conviction in excess of 1 day duration: Will be paid as per a standard case. Such appeals are exceptionally rare but do arise and demand better remuneration than a standard appeal conviction.

n. Ineffective trials will be remunerated at the rate of the appropriate refresher payable for the category of case.

o. Any case with a time estimate of in excess of 8 weeks should be eligible for categorisation as a VHCC if the advocate so elects.

p. Rules for claims for wasted preparation should be preserved though we advocate a simplified system in which 75% of the trial fee is claimable if the brief is returned in the final 3rd and a plea fee for any earlier transfer.

q. There should be a 20% uplift for each additional indictment or defendant represented by a single advocate.

r. Re-trials: The current definition of a re-trial is ridiculous and out of kilter with all common sense (particularly the requirement that the jury has to have retired to consider a verdict before a second trial can be considered a re-trial). We suggest that a re-trial is defined as any trial of the same case that commences more that 7 days after the discharge of the jury in a previous trial in which the case was opened and evidence was called. The brief fee payable for a re-trial should be determined by a sliding scale based upon the amount of time that has passed between the two trials. The rate of refreshers in any re-trial should be unaffected by the fact that the case is being re-tried. In any case in which a substitute advocate is instructed to conduct the re-trial the full brief fee and refreshers shall be payable to that advocate regardless of the length of any gap between the first trial and the re-trial.