Bar Council response to the Criminal Legal Aid Review: 'accelerated package' consultation.

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation entitled "Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes."[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Response

4. As stated in the Bar Council's original Press Release[2], the consultation proposals set out a modest, stop-gap improvement in discrete and specific areas of criminal defence fees. The original interim consultation is a clear acknowledgement by the Government that the current rates of pay for defence advocates and solicitors are far too low to maintain a barely functioning criminal justice system, even *before* Covid-19. The critical issues which the profession has continued to press with the MoJ

[1] https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/
[2] https://www.barcouncil.org.uk/resource/bar-council-responds-to-government-s-accelerated-criminal-legal-aid-plans.html

concerning the inadequacy of brief fees, hourly rates and annual review of fees will still need to be addressed in the ongoing wider Criminal Legal Aid Review (CLAR). Greater investment is critical across the whole criminal justice system to ensure that the system does not completely break down, and so that the rule of law is observed.

5. Covid-19 struck the United Kingdom with such force that by mid-March all jury trials had stopped and many courts had stopped all but the most essential business. The pandemic is putting the criminal Bar under extraordinary financial pressure. It has exposed flaws in AGFS11 which must be quickly addressed by the wider CLAR process. In the meantime, even if the government implements these three accelerated areas which, subject to the responses below the Bar Council broadly support, the criminal Bar will continue to suffer from the impact of Covid-19 for a considerable time to come, which directly inhibits its ability to survive.

6. The following issues arise:

6.1. The Bar Council has repeatedly stated that AGFS11 does not adequately reward advocates for their work and that the fee arrangements make a career at the criminal Bar unsustainable. The pay an advocate receives remains simply too low. This chronic weakness in the fee scheme has been clearly exposed and exacerbated by Covid-19. As a result of the pandemic, the income advocates may be able to earn and, just as importantly, be paid for (when they have conducted the limited hearings during lockdown) will remain far too low to sustain them or their chambers for any length of time. The paltry level of earnings before Covid-19 is reflected in the plight of the criminal Bar now. Their lack of financial savings and their fragility going into this crisis are directly related to the amounts paid under AGFS11: the result is that advocates cannot sustain themselves going forward for any significant period of time without extra support.

6.2. The key event AGFS11 pays an advocate for is the trial. Consequently, the opportunity to earn money has been decimated due to ongoing listing difficulties. The fundamental and simple problem is that, where the largest sums are now dependent on a trial, but there are only a trickle of trials coming through, there is a systemic limitation on what the Bar is capable of earning. So far, the MoJ has refused to amend the regulations to pay individually for hearings such as PTPHs (Plea Trial and Preparation Hearing) which would release some, albeit limited, cashflow. Until trials are heard, there remains no real opportunity to translate that into cashflow. The amendments to the regulations for Hardship claims are of only limited value, because, whilst the listing of cases is in a state of confusion, there is no guarantee that the barrister would be able to treat the hardship payment as their own, because the barrister may have to subsequently return it to another advocate if the trial is re-listed

on a date at which they are unavailable. Regrettably, we can well envisage that courts will not list delayed cases to ensure that the original instructed advocate is available.

6.3. The complete loss of trials during lockdown, and now, looking toward a different future, in which a tiny percentage of trials can happen (due to social distancing requirements), has put and continues to put an advocate's ability to earn any form of income (let alone a sustainable one) at real risk. Trials are only resuming very slowly. That is not a criticism, but a recognition of the challenges in getting all the significant elements of a trial to function properly and safely. This reality directly undermines the criminal Bar's sustainability, which was one of the main objectives of the original CLAR. The review of legal aid payment structures aimed to ensure the sustainability of the profession. This 'new normal' and the consequential impact it will have on advocates must be recognised.

6.4. The Bar Council looks forward to urgent and constructive action from the Government on how it will alleviate this underlying situation. To date, Government financial assistance offered during the Covid-19 period has generally proved unsuitable or inapplicable to barristers or their chambers, where they do publicly funded work (save the furlough scheme for its employed staff). The publicly funded bar has requested specific financial relief from the Government with five key asks:

1. Expand the types of acceptable evidence required to be eligible for self-employed relief, to include those under the threshold but without 2018/2019 tax returns.
2. Increase the threshold above the £50,000 trading profit for self-employed barristers, to ensure that more junior barristers are eligible for relief, thereby going some way to ensuring the sustainability of the profession.
3. Extend business rates exemption relief to barristers' chambers.
4. Provide an urgent rescue package for those at the publicly funded Bar who provide a vital public service but are ineligible for the self-employed scheme.
5. Provide an urgent rescue package for chambers doing publicly funded work.

6.5. To date, not one of those recommendations has been adopted by the government.

6.6. Two months since lockdown started, the only change has been a limited regulatory change to the Legal Aid regulations on hardship provisions and even that is fraught with difficulty. No other assistance has been provided at

all. This cannot continue, and the case for the preservation of an independent Bar which undertakes the most complex and challenging of criminal cases, and which both prosecutes and defends, must be heeded by Government and acted upon now. If it is not, there will be a loss of experience and talent from all levels of the profession but, in particular, from the younger cohort, and with that, the Government will see a reversal of the positive changes in mobility and diversity within the profession that have taken decades to build up. If no action is taken the criminal Bar will also become an increasingly unattractive career option for prospective barristers, particularly those from non-traditional backgrounds, since it will become more and more difficult to earn a living. The criminal Bar needs a steady flow of pupils and new tenants in order to ensure that it is sustainable.

7. As regards the details of these specific proposals, changes need to be made to ensure that good intentions are not lost in practice, through illogical application of formulae in setting page thresholds, or oppressive and unfair bureaucracy in the fee claim process.

Question One: Do you agree with our proposed approach to paying for work associated with unused material? Please state yes/no and give reasons.

8. "Yes" to paying for unused material; "no" to the requirement of "assessment" by the LAA and "no" to the proposed rate.

General approach

9. The proposal to pay for reading the unused material is a long overdue, and welcome change. Paying a fixed amount in every case for the first three hours, with the possibility to claim for additional hours is a sensible balance.

Wrong terminology of "special preparation"

10. There are dangers in using terminology that elides the "special preparation rate" payment scheme to that of reading unused material. It implies that reading unused material is something that an advocate only needs to do in "special" or exceptional cases. Paragraph 50 of the consultation document itself correctly states that "*unused material is material that is disclosed to the defence because it is relevant to a case*". Unused material is information, usually but not invariably in document format, which has met the statutory test in the Criminal Procedure and Investigations Act 1996 (CPIA 1996) which the prosecution has assessed either undermines the prosecution's case against an accused or it assists an accused's defence. It is material which, by definition, is relevant and often goes to the heart of the issue in a criminal trial. Given its importance to the trial process, defence advocates are professionally obliged to read all of the

unused material as it has been deemed relevant under the Act. It is not a task that is done only in special or exceptional cases. The wording of the Funding Order should therefore use a clear term as to what the funding is for, for example "unused material rate".

Danger of "Subject to assessment"

11. Paragraph 13 of the Consultation states that "*For those cases where more than 3 hours is spent reviewing unused material, we propose payment should be at hourly rates [...] subject to the assessment of those claims by the LAA*." No details are given as to what "subject to assessment" means, and a draft wording of the Statutory Instrument to be followed by the LAA has not been made available.

12. It appears likely that the LAA will want to adopt the same methods for assessing claims for reading unused material over three hours, as it currently adopts for assessing claims for special preparation. This model requires disproportionate amounts of evidence to be supplied by barristers in order to justify every claim. If the type, format or amount of evidence supplied is not to the LAA's satisfaction the LAA will reduce the claim, resulting in time consuming and costly appeals so that the barrister is paid the amount they are entitled to. Examples of this culture can be seen from the following two extracts of the LAA's "Crown Court Fee Guidance"[3]

> "*advocates must supply details of all the work that was carried out. The appropriate officer must be able to be satisfied that all the work claimed is eligible preparation and be able to assess what preparation would be "normal" in such a case. Where a claim for Special Preparation does not satisfy the criteria, or has insufficient supporting documentation then the claim will be rejected*." *Crown Court Fee Guidance*, Section 2.17.
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> "*a decision on whether the material should be counted as PPE must be based on how important or integral it is to the case and the work involved in considering it*." *Crown Court Fee Guidance*, Annex D.

13. Paragraph 62 of the MoJ consultation offers no reassurance when it states: "*A benefit of having a fixed payment for 0-3 hours' work would also avoid the need for individual assessments for small claims, reducing the administrative burden on providers, and the LAA*." This implies that in every case over 3 hours work, advocates will be subjected to an administratively burdensome individual assessment as is presently faced with special preparation claims. Why is an assessment needed at all for work that exceeds the 3 hour proposed limit, when the MoJ has acknowledged that all of the material needs to be read in every case where it has been served by the prosecution having met the

[3] https://www.gov.uk/government/publications/crown-court-fee-guidance page 33.

statutory test laid down in the Act? Where any 'assessment' is required that raises the inevitable possibility that the LAA may reduce the number of hours an advocate has worked on a case because the LAA seeks to make a retrospective judgment that the work was not important or integral to the case, as is barristers' experience with special preparation. With respect to the LAA, when it comes to unused material and its import to a case, the LAA is not in a position to make that judgment or assessment. Nor would such a reduction in payment be appropriate given that the material has been disclosed in accordance with prosecution's duty under the Act. Where the statutory gateway for disclosure is met, the material **must** be considered, the advocate is required to consider it, and it is acknowledged now that the advocate must be paid for that work.

14. The Bar Council suggests that to avoid the need for any subjective retrospective assessment by the LAA in the over 3 hour category, the MoJ should draw on the VHCC regime and allocate a known amount of time per page of unused when the material is in document format (or can be computed to a page count). We suggest that a **minimum** of 4 minutes per page should be allocated to advocates to read unused material. The page count will be known, and this will clearly identify the amount of time for which an advocate will be paid to read that unused material. As in the original VHCC regime this method will ensure that there is both a robust measure and obviate the need for a retrospective subjective assessment by the LAA, thereby cutting down its administrative burden and costs. The Bar Council suggests 4 minutes per page is the **minimum** allocation of time that the MoJ should use for this system because a lower allocation of time would not be sufficient for advocates to digest complex tables and data for example as found in mobile telephone records and downloads.

15. Where the unused material comprises of audio or video material the Bar Council proposes that the actual time the advocate takes listening to or viewing that media should be recorded by the advocate and paid by the time taken. Unused material can frequently include different media. An example of this is ABE (Achieving Best Evidence) interviews with witnesses. These often require a significant amount of time to review and digest, particularly where no transcripts are provided (which is often the case where the material is being disclosed rather than served as an exhibit). This type of media must be included within the definition of unused material.

16. The term unused material, and payment for that work, must also include reading the unused MG6c schedule. The MG6c schedule is of critical importance in the disclosure process. It is a key reference point for all parties, including the court, to ensure that all relevant and disclosable material has been made available. The MG6c schedule is consequentially critical to the disclosure process functioning correctly. The advocate must read and understand it, as it is as important to the process as reading and understanding the underlying unused material which is produced from it. In longer cases, the MG6c schedule(s) can be extensive, with numerous entries on each page. Schedules can regularly exceed 500 pages. On occasion, there are cases where

the schedules exceed 1500 pages. The prosecution and court will not entertain 'open ended' requests for disclosure. Such applications are deprecated under the various unused material protocols. Advocates are required to make targeted and relevant requests by reference to an item number on the MG6c schedule.

17. On occasion, the defence can request additional disclosure from the prosecution which the prosecution has not disclosed. The application is made under s.8 CPIA 1996. The defence application for this disclosure is overseen and determined by a judge. For an application to succeed the material must be in the prosecution's possession and it has to meet the statutory test for disclosure, having regard to the defendant's defence statement. Invariably, courts require in a s.8 application an analysis of why the material meets the statutory test and consider where it is listed on the MG6c schedule, including its description on that schedule from which a court regularly determines its potential relevance to the trial. This highlights the importance of the MG6c schedule and illustrates why it should be included within the payment scheme.

18. It is also an established practice for the prosecution in longer and more complex cases to write a 'Disclosure Management Document' which is shared with the parties and court. This sets out the steps that the prosecution has taken with unused material by reference to the MG6c schedules.

19. Given the MoJ's acknowledgement that advocates should be paid for the increasing burden that unused material creates in criminal litigation, the Bar Council asks the MoJ to recognise that the MG6c schedule acts as a key cornerstone to the proper acquittal of disclosure duties in all cases, and to confirm that reading these schedules will be included within the meaning of 'unused material'.

20. Consequently, the wording of the draft Statutory Instrument needs to ensure that the fee is payable for the number of hours done, and that there is no scope for the LAA to arbitrarily "assess" the reasonableness of the amount of material studied or how long it took. If the LAA considers that an advocate has been fraudulent in what they claimed, they can report the matter to the regulator (Bar Standards Board if a barrister; or Solicitors Regulatory Authority if a solicitor advocate). The Bar Council is not aware of evidence of advocates claiming fraudulently.

<u>The rates are too low</u>

21. We acknowledge that the issue of the level of hourly rates is to be considered as part of the wider CLAR in examining the sustainability of the profession. We put on record once again that an hourly rate of £39.39 per hour, out of which the barrister has to pay their staff (clerk) and office (chambers) costs etc, is wholly inadequate. It is a fraction of what the Government pays the plethora of consultants that it hires, which is evidence that the Government acknowledges that the market rate it is paying for

criminal legal services offered to the public, as opposed to the government, are far too low. The evidence of the reduction of payment is damning. In 2007 the "special preparation" hourly rate was £45 per hour - which was too low even then - and would be £63 when adjusted for inflation today. Also, the MoJ does not explain why in paragraph 67 it proposes that the hourly rate for a barrister for this work (£39.39) is to be less than that for a legal executive (£41.06 or £43.12), when the brunt of the work to be undertaken on unused material will be undertaken by advocates who are in control of the trial process.

Question Two: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

22. See above: the description of "special preparation" should be changed to something like "unused material rate". The Statutory Instrument needs to be worded to remove the concept of "assessment." The hourly rate needs to be increased.

Question Three: Do you agree with our proposed approach to paying for paper heavy cases? Please state yes/no and give reasons.

23. No. The consultation document correctly reports the problem that paper heavy cases under the 10,000 page threshold are insufficiently paid (Impact Assessment, Annex C, pages 4, 15 and 16). The consultation document then fails to do anything about this specifically in, for example, murder cases:

> "*AGFS Offence 1 (murder/manslaughter) has also been excluded. Applying the methodology on statistical major outliers to murder/manslaughter cases would produce a 12,000 PPE cut off point which is higher than the existing 10,000 PPE threshold*". Paragraph 72.

24. Furthermore, Table 22 on page 33 of the Impact Assessment shows how wild the outcomes of this formula are – cases captured range from 0% of murder cases, up to 13% of public justice offences. This demonstrates an inappropriate statistical methodology has been applied to produce such results. The average falls at around 7% of cases captured. Why not simply capture the top 7% of cases that fall below the current 10,000 threshold in each category?

25. Footnote 29 on page 16 of the Impact Assessment states that the statistical method used has been as follows:

> "*Within each offence type, the PPE threshold has been defined as the volume of PPE in the case that is at the point of the upper quartile threshold + 3*(interquartile range), when all cases within that offence type are ordered in terms of their overall PPE volume*."

26. It has been acknowledged over a significant period of time in the former level of fees paid under old Legal Aid orders that murder cases brought with them an exceptional burden and responsibility on the instructed advocates. The present payment for murder under AGFS11 does not adequately reflect this burden, and specifically where payment is being made for a category 1.3 offence. In terms of public confidence in the criminal justice system, the MoJ must recognise that it is vital that the payment scheme should encourage and reward advocates with the relevant experience and competence to appear in these high profile and most demanding of cases. For that to continue an appropriate and commensurate level of remuneration must be paid for this work. From a prosecution and police perspective, quite understandably, murder cases are heavily resourced investigations. They are more complex and have a higher average page count. In turn, using the MoJ's statistical analysis model, this results in a higher number of pages for the extreme outliers. Hence, for murder cases the formula would produce a case of 12,000 pages being an outlier, compared to a threshold of 350 pages for an outlier burglary case. Whilst the mathematics has a logic to it, the practical outcome is perverse, because the more complex the case is, the more it is punished by the formula. So, for example, a 9,000 page murder case would likely be paid less than a 1,000 page armed robbery case (depending on the number of hours claimed at the special preparation rate). That cannot be right. It is precisely the type of perverse incentive within the scheme which the Minister's foreword said the proposed amendments were seeking to prevent.

27. We welcome the commitment in paragraph 72 that in the next review the MoJ will consider the brief fee for murder cases alongside other cases. But this does not address the page threshold issue, which needs to be adjusted now as part of this consultation.

Question Four: If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

28. Table 22 on page 33 of the Impact Assessment shows that the formula comes up with a threshold ranging from 0% to 13%, with an average of 7%. A fairer approach would be to set the threshold at the top 7% of cases in each category that fall below the 10,000 threshold.

Question Five: Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.

29. "Yes" to the approach, "No" to the rates.

30. We agree with the approach to remove the "thirds" distinction, such that a cracked trial fee will be payable when it occurs at any time between the PTPH and the date on which the case is listed for trial.

31. We welcome that it is proposed to increase the cracked trial fee. However, we do not consider a rate of 100% of the brief fee to be sufficient.

Question Six: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

32. It used to be the case that the brief fee covered the first two days of trial. Today, the brief fee only covers the first day of trial. Therefore, a reasonable adjustment would be for the cracked trial fee to be the equivalent of 100% of the brief fee plus one daily attendance fee.

Question Seven: Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.

33. The Law Society is better placed than the Bar Council to comment on the Litigators' Graduated Fee Scheme.

34. We note that paragraph 21 of the consultation states that "*how litigators are paid for pre-charge engagement will be consulted on at a later stage*." In preparation for that consultation, the MoJ should be aware of the Bar Council's view that there should be a mechanism for the obtaining of Counsel's advice pre-charge, and for Counsel to be paid a reasonable fee for that advice.

Question Eight: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

35. Not applicable.

Question Nine: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please state yes/no and give reasons. Please provide any empirical evidence relating to the proposals in this document.

36. The MoJ and the Bar Council have entered into a Data Sharing Agreement with Professor Martin Chalkley, whereby Prof Chalkley receives LAA fee payment data and Bar Council data on the characteristics of the barristers who received those fees. The process of data matching is currently underway. Once that is completed it may be possible to model the effects of different fee change scenarios on different

characteristics within the profession. The Bar Council will share any relevant outcomes of that analysis with the MoJ. This is likely to be particularly valuable at the next stage of the Criminal Legal Aid Review work on the sustainability of the profession.

Question Ten: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

37. See answer to Question 9.

Question Eleven: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

38. See answer to Question 9

Bar Council
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