Bar Council response to the "Reforming the Advocates' Graduated Fee Scheme" consultation paper

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 paper entitled "Reforming the Advocates' Graduated Fee Scheme".[1]

2. The Bar Council represents over 15,000 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.

Overview

4. The Bar Council supports the new structure for the proposed new Advocates' Graduated Fee Scheme (AGFS) set out in the consultation document, but considers that there must be adjustments to some of the detail to ensure that it achieves its intended effect. Moreover, whilst advocates' fees have historically been cut over many years there has been further erosion to the value of those fees as a consequence of inflation. It is therefore essential that any new scheme includes index linking to prevent future erosion of the real value of those fees by inflation.

5. Many barristers and sets of chambers have undertaken their own calculations whereby they have compared the fees that they have in fact been paid under the current scheme against the fees that they would be paid under the proposed scheme. A great many such calculations have resulted in a fee cut, and concern has been raised as to whether the new scheme would

[1] Ministry of Justice, 2017, "Reforming the Advocates' Graduated Fee Scheme" https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/

indeed be cost neutral. One suggestion that has been made is that for the first six or twelve months of a new scheme, the old scheme could be run in parallel with it, after that period it would be possible to compare the total of the two calculations and adjustment be made as necessary. Others are concerned that running two schemes in parallel would be a significant administrative burden for advocates and the Legal Aid Agency (LAA). What is clear is that there should be ongoing reviews of the Scheme by some method, so that adjustments can be made in the light of experience.

6. The Bar Council notes that the cost neutrality assessment was based on the 2014/15 case mix, which was the full year of data available at the time the scheme was drawn up. Since then the 2015/16 data has become available. By its own admission, as set out in paragraph 69 of the Impact Assessment, the Ministry of Justice (MoJ) recognise that the currently proposed scheme amounts to a cut when compared against the 2015/2016 data: "Using 2015-16 data the proposed scheme was estimated to cost around 3% less than the current scheme." As a necessary starting point therefore the rates in the tables in the consultation should be increased by 3% to reflect the more recent data set. Uncertainties about cost neutrality are likely to remain, but what is certain is that any scheme which is introduced, if it does not have index linking built in, will result in a year on year fee cut. It is essential therefore that index linking is introduced in order to have the confidence of the profession. For several years, due to austerity, the public sector pay increases have been limited to 1%. By comparison, there is no justification that for advocates undertaking a demanding public service, their fees should have been successively cut, and then be kept at 0%.

Origins of the scheme and general support

7. As acknowledged in paragraph 1.3 of the consultation document, the origins of the basic structure and case categorisation of the MoJ scheme being consulted on comes from a proposal from the Bar Council published[2] in October 2015. The Bar Council appreciates the constructive engagement that has taken place with the MoJ since that time, and would wish to see that constructive engagement continue, for the benefit of all.

8. In terms of overall structure, comparison of the Bar's original proposal with the MoJ consultation can in overview be seen by reference to the Bar Council's news release of its October 2015 proposal:

> "Bar Council's Advocates' Graduated Fee Scheme (AGFS) Working Group, made up of Bar representatives from every Circuit at all levels of seniority, and the Criminal Bar Association, has been working for the last year to design a new scheme structure, which includes:
> - The abolition of pages of prosecution evidence as the principal determinant of the level of fee
> - Restoration of separate payments for sentences, Plea and Case Management Hearings and other ancillary hearings
> - The abolition of the number of witnesses as a determinant of the fee;

[2] http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2015/october/bar-council-working-group-re-designs-agfs-model/

- Daily payments tailored to reflect and reward the skill and experience of advocates across the categories and bands of cases
- The creation of a single standard case category into which a significant number of basic cases will fall, and
- A fair and permanent mechanism for reviewing of the operation of this Scheme."

The above features of that original proposal are present in the MoJ consultation, with the exception of the final bullet point, about which, as stated above, we seek assurances.

Supporting restructuring that is based upon the difficulty and amount of work required

9. The Bar Council supports the restructuring of the AGFS to be more closely aligned to the level of difficulty and amount of work involved in advocacy of criminal defence cases.

10. The last time that the graduated fee scheme payment structure was closely examined to ensure that it related to the amount of work done was in 1996, when the first graduated fee scheme was originally designed by reference to assessed bills on hours of work completed. Since then, the scheme has been extended and case relativities changed many times with little or no reference to the amount of work required in each type of case. A restructuring of relativities based upon the level of difficulty and complexity required in cases from the experience of practitioners is therefore welcome.

11. The Bar Council welcomes, in line with the principle of the fee reflecting the work required, the rebalancing of the scheme in favour of remuneration of trial advocacy to reflect the amount of work required for those cases that go to trial. The Bar Council notes that some solicitor firms have argued that the AGFS should not be rebalanced because it could affect the remuneration levels of their firms (if they do not have solicitor advocates of sufficient experience whom lay clients might choose to instruct to undertake the most serious cases). The Bar Council is committed to the importance of the sustainability of the legal sector to provide access to justice. It is therefore important that the Litigators' Graduated Fee Scheme (LGFS) be rebalanced to properly reward litigators for the early stages of case preparation. The Bar Council notes the MoJ consultation[3] on LGFS and intends to respond to that consultation by the 24 March 2017 deadline.

12. As Professor Martin Chalkley has set out[4], in 2006, the proportions spent on AGFS were: 58% for trials; 35% for Cracks; and 6% for Guilty Pleas. This was changed in the 2007 revision to: 55% for trials; 34% for cracks; and 11% for guilty pleas. So, in 2007 there was a very substantial proportionate increase paid to guilty pleas at the expense of trials. Then, from 2007 to 2013 the Government introduced a range of fee cuts where trial fees were cut more severely than guilty pleas (17% cut for trials and 14% cut for guilty pleas).

13. The previous substantial proportional increase to guilty plea fees in comparison to trials appeared to be based on an assumption that if an advocate was paid more for a guilty

[3] https://consult.justice.gov.uk/digital-communications/lgfs-and-court-appointees/
[4] http://www.barcouncil.org.uk/media-centre/bar-blog/contributing-writers/2017/january/guest-blog-professor-martin-chalkley/

plea, then the lay client was more likely to plead guilty, thereby reducing court costs. No evidence was provided to support the contention that advocates advice to the lay client on plea was based not on law and but on the advocate's personal financial interests. The Bar Standards Board (BSB) Handbook requires that barristers (Core Duty 2), "… must act in the best interests of each client". The Solicitors Regulation Authority (SRA) requires that solicitors (Principle 4), "… must act in the best interests of each client." Our strong view is that fees should be set to remunerate the amount of work required in a case, not as an attempt to manipulate lay client behaviour. If trials involve more work, they should be paid more.

Supporting restructuring that can also enable career development

14. A restructuring that pays higher fees for the more difficult work has the welcome benefit of supporting and encouraging career development. The current AGFS scheme was found to be far less graduated than had previously been supposed. Research undertaken jointly by the Bar Council and the MoJ in 2015, which combined MoJ fee payment data with Bar Council barrister data on year of call, gender and ethnicity, and published on the MoJ website[5] found that under the current AGFS:

> "Most engaged barristers' average AGFS fee incomes increase with experience but the effect is small. Our estimate of fee progression suggests that AGFS fee income increases by around 2% for each five years of experience, equating to around a 14% increase over a 35 year career."

A restructure which will increase graduation is to be welcomed. Some of our specific proposals in relation to some of the details of the proposed scheme are intended to better reflect the amount of work required in certain cases and thus to reinforce this principle.

Supporting restructuring but opposing the fee levels

15. The Bar Council's support for restructuring does <u>not</u> mean that the Bar Council considers the rates proposed are adequate. Research commissioned by the Bar Council in October 2013 found that between 2007 and 2013, AGFS fees reduced by 21% in cash terms equating to 37% in real terms.[6] Another four years of inflation since 2013 means that those figures will be even worse today. This is an unsustainable situation and needs urgently rectifying. Not only does more money need to be put back into the scheme, but the scheme also needs to be made sustainable by index linking to prevent fees being eroded by inflation in the future. Without this the profession will become unsustainable.

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[5] "The composition and remuneration of junior barristers under the Advocates' Graduated Fee Scheme in criminal legal aid", The Bar Council and Ministry of Justice Research and Data Working Group. Ministry of Justice Analytical Series 2015, page 2. https://www.gov.uk/government/publications/composition-and-remuneration-of-junior-barristers-under-the-advocates-graduated-fee-scheme-in-criminal-legal-aid

[6] Research undertaken by Prof Martin Chalkley, "Bar Council response to the Transforming Legal Aid: next steps consultation", page 52. http://www.barcouncil.org.uk/media/235755/bar_council_response_to_the_transforming_legal_aid__next_steps__final.pdf

16. We now turn to the specific questions in the consultation.

The consultation questions

Q1: Do you agree with the proposed contents of the bundle? Please state yes/no and give reasons.

17. Yes. The inclusion of the first four standard appearances and PTPH (Plea and Trial Preparation Hearing) in the current Scheme, whilst well intentioned when it was introduced in 2007, has had a detrimental impact, particularly for the junior end of the profession. The defence advocate is not in charge of the number of standard appearances - which are driven by the actions of the Court and the prosecution. In cases where there are a substantial number of standard appearances, the remuneration of the advocate is seriously eroded, particularly at the junior end where brief fees are lower. Court listing officers often do not set hearing dates in a way which takes account of the diary of the advocate, so the advocate will often have to pay another advocate to cover the standard appearance out of their brief fee.

18. The fact that the public purse has, since 2007, not had to pay for standard appearances has meant that there has been no data or financial incentive to drive down their number. Better Case Management is having a beneficial effect in reducing the number of unnecessary hearings, but the principle of payment for work done remains and those hearings that remain should be remunerated. This will also enable the more effective monitoring of their number and provide a financial incentive to further reduce unnecessary hearings. Further action also needs to be taken to remove the practise of some courts of having "warned lists" which are a huge cause of diary uncertainty and misuse of advocates' time which in turn has detrimental financial consequences for the advocate.

Q2: Do you agree that the first six standard appearances should be paid separately? Please state yes/no and give reasons.

19. Yes. For the reasons given in answer to Question 1.

Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle? Please state yes/no and give reasons.

20. Some amendment to the proposal is required. The Bar Council would prefer for every standard appearance to be separately paid, rather than just the first six, because that is consistent with the principle of payment for work done. Nevertheless, we recognise the need for the MoJ to have some reassurance over potential costs. The Bar Council would not support the MoJ holding back substantial funding for trials, cracks and guilty plea fees in order to keep money in reserve for a feared flood of cases with more than seven standard appearances - which do not then materialise. Having some limit to provide reassurance to the MoJ may therefore be a necessary compromise. Nevertheless, the Bar Council proposes that there should be some adjustment, such that interim hospital orders and post sentence POCA (Proceeds of Crime Act) standard appearances, both of which fall outside of the normal Crown

Court trial regime, should be separately remunerated and not 'count' towards the six. Repeated hospital orders are required under the legislation and a reduction in the number of such hearings is wholly outside the control of the advocates. Consideration also needs to be given to hospital order cases in general, because these require a great deal of additional work unrelated to the difficulty of the case itself. One suggestion is for a final hospital order to be paid as a refresher commensurate to the Band of the case.

Q4: Do you agree that the second day of trial advocacy should be paid for separately? Please state yes/no and give reasons.

21. Yes. This is also in line with the principle of payment for work done. A two day trial should be paid more than a one day trial.

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed? Please state yes/no and give reasons.

22. Yes. Whilst many barristers would prefer to keep the Pages of Prosecution Evidence (PPE) proxy, the Bar Council accepts that maintaining a PPE system for all cases is unlikely to be sustainable in the long term with the ever increasing amount of electronic evidence and debate over what constitutes a page in order for it to count as PPE. An alternative proxy for amount of work, difficulty and seriousness is therefore required and the introduction of more categories and bands to provide the graduation by reference to the relative amount of work that different types of case involve is a good way forward.

23. Some barristers are concerned that the new categorisation would be open to 'cherry picking'. In the current scheme cases with a very high page count are much better rewarded in order to compensate for the additional work involved. Under the proposed scheme they would have the same fee as another case in the same category with a low page count (apart from bands 5 and 8 where page count would play a role in banding). The concern is that solicitor firms might inappropriately influence the lay client in choice of representative, directing the lay client to an in-house advocate for cases with low page count, and 'briefing out' the higher page count cases to self-employed advocates. The Bar Council continues to await the MoJ response to its October 2015 "Enhancing the Quality of Criminal Advocacy" consultation[7] which included proposals for demonstrating transparency of client choice. For example page 23 of that consultation included the questions:

> "Q9: Do you agree that litigators should have to sign a declaration which makes clear that the client has been fully informed about the choice of advocate available to them? Do you consider that this will be effective?
> Q10: Do you agree that the Plea and Trial Preparation Hearing form would be the correct vehicle to manifest the obligation for transparency of client choice? [...]"

[7] https://consult.justice.gov.uk/digital-communications/enhancing-the-quality-of-criminal-advocacy/

The Bar Council's response[8] to the Consultation was submitted in November 2015. The outcome of that consultation is still urgently awaited and will play a key role in ensuring that the new fee scheme operates fairly.

Q6: Do you agree that this is the best way to capture complexity? Please state yes/no and give reasons.

24. Yes. For the reasons given in answer to Question 5.

Q7: Do you agree that a category of standard cases should be introduced? Please state yes/no and give reasons.

25. Yes. There are more than 1,500 offence categories (Annex 4 of the consultation). If each had a separately set fee, the scheme would be hugely and unnecessarily complex.

Q8: Do you agree with the categories proposed? Please state yes/no and give reasons.

26. We are answering Questions 8 and 9 together. The Bar Council agrees with the basic structure of the categories and bandings. Following feedback received and further analysis, the Bar Council proposes the following adjustments:

i.) Section 20 cases and Actual Bodily Harm cases

Page 63 of Annex 4, lists both "Inflicting Grievous Bodily Harm without intent" and "Malicious Wounding Offences", contrary to section 20 of the Offences against the Person Act 1861, to be Standard Category 16.1. The experience of practitioners is that the amount and the level of work required for these cases is greater than other Standard Category cases. For example Section 20 cases can involve catastrophic brain injury. They should therefore be classified as Band 3.4. The same should also be considered for Actual Bodily Harm.

ii.) Definition of Armed Robbery

Band 10.1 refers to robbery with a "firearm / imitation firearm". That definition needs to be amended to be for armed robbery, irrespective of whether the weapon is a firearm, knife or other weapon.

iii.) Affray and Violent Disorder

Firstly, page 67 of Annex 4, lists "Affray" to be Standard Category/Band 16.1. However, lengthy affray cases, such as football violence, can involve many witnesses and many pages of evidence, and would therefore be more appropriate at the bottom band of Category 14.

[8] http://www.barcouncil.org.uk/media/404222/preserving_and_enhancing_the_quality_of_advocacy_consultation_response_-_final_for_submission.pdf

Secondly, the current proposal has: Band 14.2 violent disorder; and Band 14.1 Riot and prison mutiny. However, in practise, prison riots are nearly always charged as violent disorder, because the police do not wish the Riot Act to be triggered. Prison mutiny is almost impossible to prove. The intention of Band 14.1 to reflect the increased work involved in this type of case will often not be available in practice.

Both these points can be addressed by an amendment to Category 14, by which violent disorder be a category with rates set at between those of 14.1 and 14.2, and Affray to be a category paid at 14.2 rates.

iv.) Sexual offences

Engaging with child witnesses, as well as historical allegations in which the complainant was a child, requires particular skills and training. The original Bar Council Working Group proposal[9] had two separate bands: one for child sexual offences and one for adult sexual offences, to properly reflect the additional seriousness and complexity of child sexual offence cases. The current AGFS scheme recognises this by categorising many sexual offences against children in the same higher category as the offence of rape (class J). However, the MoJ consultation proposal has a single Band 4, with three category levels: 4.1 rape; 4.2 sexual assault; 4.3 other (unless standard). This simplification has unintended consequences. For example, offences such as: incest by a man with a girl under 13 (Annex 4, page 7); and permitting a girl under 13 to use premises for intercourse (Annex 4 page 8), would inappropriately be Band 4.3 the lowest category.

Another point that has been made is that there can be certain types of sexual offence cases that would not be properly remunerated even under 4.1, and so a further enhanced category would be appropriate for such exceptional cases. These would be multiple complainant cases, multiple defendant child exploitation cases, and historical cases where there are significant problems investigating because of the age of the complainant(s).

The Bar Council offers to work with the MoJ to review the proposed sexual offences category in order to address these points.

v.) Bands 5.3 and 5.4 Refresher (Daily Attendance Fee)

The refresher for lower level fraud offences (page 42 of the consultation paper) would be £400 for Band 5.3 and £350 for Band 5.4 for a Junior. The Bar Council proposes that these should be amended to match the refresher for Bands 5.2, i.e. £500. These cases can attract lengthy sentences. At the refresher rates proposed in the consultation, the longer the trial goes on, the worse the advocate would be remunerated in comparison with the current scheme.

[9] page 13, "Bar Council's Advocates' Graduated Fee Scheme (AGFS) Working Group Draft proposal for a new Scheme" October 2015 http://www.barcouncil.org.uk/media/393156/bc_agfs_working_group_summary_150110.pdf

vi.) Category 8: Drugs offences

Class A drugs cases where there are over 5,000 pages of evidence would pay as Band 8.1. However, if there are over 5,000 pages of evidence and the drugs are either Class B or C, they would be in Bands 8.2 and 8.3 respectively. On reflection, the amount of work involved in such paper heavy cases means that they should be remunerated in Band 8.1.

Class A drugs cases where there is over 1,000 pages of evidence would pay as Band 8.4. However, if there is over 1,000 pages of evidence and the drugs are either Class B or C, they would be in Bands 8.5 and 8.6 respectively. As above, the amount of work involved in such paper heavy cases means that they should be remunerated in Band 8.4.

The refresher for low level drugs offences is (page 43 of the consultation paper) proposed as £400 for Band 8.6 and £350 for Band 8.7 for a Junior. The Bar Council proposes that these should be amended to match the refresher for Bands 8.2-8.5, i.e. £450. As above, these cases can also attract lengthy sentences, and at the refresher rates proposed in the consultation, the longer the trial goes on, the worse the advocate would be remunerated in comparison with the current scheme.

All of the above amendments could be made by simplifying Category 8 into only three bands - 8.1, 8.4, and 8.7.

Pages 61 and 62 of Annex 4, the various offences of "Permitting premises to be used for unlawful purposes" under the Misuse of Drugs Act, are, under the current scheme paid as Category B. Under the proposed scheme they would be paid as a standard category 16.1. On reflection these offences should be included within Band 8.7 given that it is a serious offence that can attract lengthy sentences.

vii.) High value burglaries

Burglary when an indictable offence (Annex 4, page 27) would, under the proposal be Band 10.2, and 'either way' burglary offences as standard category 16.1 (Annex 4, page 82). However, a case such as the Hatton Garden safe deposit burglary is an example of a case that would be more appropriately remunerated as Band 10.1. The Bar Council Working Group's original 2015 draft scheme proposed[10] that a burglary over a value of £500,000 should go into the highest burglary category. Band 10.1 could therefore be amended accordingly.

viii.) Elected cases not proceeded

[10] page 14, "Bar Council's Advocates' Graduated Fee Scheme (AGFS) Working Group Draft proposal for a new Scheme" October 2015 http://www.barcouncil.org.uk/media/393156/bc_agfs_working_group_summary_150110.pdf

The Ancillary Fees table on page 44 of the consultation proposes to pay these cases a fixed fee of £194. This goes entirely against the principle of paying for the amount of work required. Whether a case is 'sent' by the magistrates court, or is one in which the lay client 'elects' Crown Court trial, the advocate still has to prepare the case for trial, and should not be penalised in terms of fee because of the choice of the lay client for a Crown Court hearing. Neither should advocates be penalised when the prosecution accepts pleas to lesser offences or cases are dropped or for some other reason outside the advocate's control. This proposed remuneration flies in the face of the objective that remuneration should reflect the work required. The "elected cases not proceeded" fixed fee should be abolished and such cases should be paid as a guilty plea or cracked trial in the normal way.

ix.) Ground Rules Hearings

The Ancillary Fees table on page 44 lists the fee for Disclosure Hearings and Admissibility of Evidence Hearings. To those titles should be added Ground Rules Hearings, which should be paid in the same way and at the same rate - dealing as they do with the admissibility of evidence.

x.) Newton Hearings

The consultation document does not mention how Newton Hearings will be paid. These could be paid in the following way. The main fee would be defined by the stage at which the plea was entered, i.e. guilty plea or cracked trial fee. The date of the trial of issue would be paid at the appropriate refresher for that class of case, irrespective of whether or not the trial of issue was effective.

xi.) Criminal behaviour orders

Criminal behaviour orders are a new criminal disposal not specifically catered for in the 2013 Regulations. The new Scheme should cater for these hearings by paying them as a miscellaneous brief fee on the basis that they are analogous to Newton hearings.

27. It is likely that after the new Scheme is implemented practical experience will highlight where further adjustments or improvements to the categories are required. It is therefore important to have a regular and effective review mechanism. Constructive engagement should therefore continue.

28. A further point worth considering is the need to be able to cater for exceptional cases. There is always the possibility that, however well designed the categorisation scheme is, there can be exceptional cases within a class whereby the fee in the band is, on any judgment, inadequate. Examples have been given of Band 13.1 human trafficking. There can be cases of organised trafficking of huge numbers of people where the amount of work required is out of all proportion to other cases in its type. There is a risk that there could be cases of exceptional nature which no advocate is prepared to undertake for the fee offered. This would be highly undesirable. The Scheme should thereby include a mechanism whereby an individual case could be notionally placed, by the LAA, into a higher category, or could be remunerated by

way of an exceptional fee agreed in advance, or by way of special preparation. The experience of the National Taxing Team could be used in such rare cases for agreeing what would be reasonable remuneration.

Q9: Do you agree with the bandings proposed? Please state yes/no and give reasons.

29. See answer to Q8.

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4? Please state yes/no and give reasons.

30. Yes. It is fundamental to the scheme that the difficulty, complexity and seriousness of the work for different offences should be a major element in the graduation. It is therefore important that each offence is allocated to a category and band. Amendments are proposed in answer to Q8. It is also important that when Parliament introduces a new offence that there should be a standing body - to include representation from the Bar Council and Law Society - to assign the new offence to the appropriate band.

Q11: Do you agree with the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

31. No for the reasons set out in paragraph 15 of this response. That said, the proportionality between different cases is generally right, subject to some amendments set out in answer to Question 8.

Q12: Do you agree with the relativities between the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

32. Broadly yes, subject to the amendments proposed set out in answer to Question 8. See paragraphs 9-13 of this response where we supported the rebalancing based on the amount of work required and the complexity, difficulty and seriousness.

Q13: Do you agree with the relativities proposed to decide fees between types of advocate? Please state yes/no and give reasons.

33. Yes. Whilst members of the Bar are unlikely to ever be of one mind over the fee relativities between QCs and Juniors, there is not a groundswell majority calling to change the relativities.

Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases? Please state yes/no and give reasons.

34. Yes. For the reasons given in paragraph 5.11 of the consultation document.

Q15: Do you agree that the relative fees for guilty pleas, cracks and full trials are correct? Please state yes/no and give reasons.

35. Yes. For the reasons given in paragraphs 12-13 of this response.

Q16: Do you agree that the point at which the defence files a certificate of trial readiness should trigger the payment of the cracked trial fee? Please state yes/no and give reasons.

36. No. Whilst the principle is correct that a cracked trial fee be a higher fee than a guilty plea fee in order to remunerate the advocate for the additional work required in preparing for trial; the proposal to amend the method of calculation has, on reflection, not found favour for justifiable reasons. The date at which the certificate of trial readiness is supplied is in the hands of the litigator, who may not always be efficient in their administration. It would be unfair on the advocate if the lower fee is payable simply because the instructing solicitor has been tardy in submitting the form. Furthermore, there can be occasions where the litigator is duty bound not to submit the form, such as where the advocate has prepared for trial, but there is an ongoing dispute over whether the prosecution has made full disclosure. A suggestion has been made that the date could be taken as the date which is recorded at the PTPH as the date at which the certificate of trial readiness should be supplied. However, these dates are not uniformly set at the same time across all courts, and so could not necessarily be relied upon. The Bar Council proposes therefore either:

> a.) Retain the current method of calculation of 'thirds'.
> or:
> b.) A cracked trial could be triggered by the Stage 3 date under Better Case Management regime, which is after the defence statement (Stage 2) and therefore after the advocate will have properly reviewed the case and worked on the basis that the trial would be effective.

On balance it is probably best to retain the current system, rather than go to the administrative expense and potential difficulty of introducing a change.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document? Please state yes/no and give reasons.

37. Yes. We support the balance achieved in paragraphs 7.1 - 7.6 of the consultation.

Q18: Do you agree that the wasted preparation provisions should remain unchanged? Please state yes/no and give reasons.

38. No. paragraph 18 of Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013 state:

> "18.— Fees for wasted preparation
> (1) A wasted preparation fee may be claimed where a trial advocate in any case to which this paragraph applies is prevented from representing the assisted person in the main hearing by any of the following circumstances—
> [...] (c) the trial advocate has withdrawn from the case with the leave of the court because of the trial advocate's professional code of conduct or to avoid embarrassment in the exercise of the trial advocate's profession;

> [...] (2) This paragraph applies to every case on indictment to which this Schedule applies provided that—
> (a) the case goes to trial, and the trial lasts for five days or more; [...]"

39. On the occasions counsel is required by their code of conduct to withdraw from a case mid-trial, this tended to precipitate a new trial with new counsel. New counsel would be entitled to their own brief fee for the new trial. The more recent trend, however, is for judges to press on with the current trial, giving new counsel time to read-in to the case. In those circumstances, the current regulations only permit the payment of one brief fee, to be shared between the two advocates, with one advocate able to claim wasted preparation (though even here the LAA have started to refuse to pay wasted preparation in some of these cases, and the Bar Council is aware that one such case is in the process of being appealed to a Costs Judge).

40. For the new Scheme the regulations need to ensure that both the counsel who is required to withdraw, and the incoming counsel, each receive a brief fee, to cover their work on the case. Basic fairness to each advocate requires this and this is consistent with the principle that remuneration should reflect work done. It should also be noted that this approach will be more cost effective than discharging the jury and commencing a fresh trial with new counsel, which may be the only option once it becomes more generally known that an incoming advocate would have to share the single brief fee rendering it likely that replacement advocates would refuse to take on those cases. The scheme should therefore be amended so that any counsel who has conduct of the trial is entitled to be paid a brief fee.

Q19: Do you agree with the proposed approach on ineffective trials? Please state yes/no and give reasons.

41. Yes. For the reasons given in paragraph 8.2 of the consultation. However, we also suggest additional consideration be given to how to address the following situation reported to us by a barrister:

> "In a number of Court Centres, the lack of available Court rooms for trials means that trials are withdrawn from the list at the last minute the night before the trial has been listed. Chambers are notified regularly from 16:00 hrs that a trial has been pulled due to a lack of Court time. However, Counsel will have ensured they are available to conduct that trial, maybe they have returned other work to ensure they are free, and have been preparing for the trial. When a case is pulled at the last minute like this Counsel is penalised financially to the extent that they earned nothing for the days they had set aside for the trial. To add insult to injury, it is also commonly my experience that when the trial is re-fixed, Counsel's availability to continue with the trial is overlooked for the earliest available date. Not only have I prepared the case for trial and not been paid for this, I then have to return the case to another and so will never get any remuneration for the work I have done."

Q20: Do you agree with the proposed approach on sentencing hearings? Please state yes/no and give reasons.

42. Yes. For the reasons given in paragraph 8.3 of the consultation.

Q21: Do you agree with the proposed approach on Section 28 proceedings? Please state yes/no and give reasons.

43. Yes. For the reasons given in paragraph 8.4 of the consultation.

Q22: Do you agree with the design as set out in Annex 1 (proposed scheme design)? Please state yes/no and give reasons.

44. Yes. For the reasons given in paragraphs 7-14 of this response.

Q23: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

45. The impacts will only be properly known in the light of experience of the operation of the Scheme. This is why it is imperative that a mechanism be established for regular review, which includes representation from the profession. The Bar Council is committed to encouraging the diversity of the profession. Retention of women at the Bar remains a particular issue that the Bar Council continues to work to address. As stated in paragraph 14 of this response, the current AGFS is not as graduated as intended and does not enable career development, with the result that many barristers reach a stage where they either move to better remunerated commercial work, or leave the Bar. A more graduated scheme could help with retention and therefore diversity, given that almost equal numbers of men and women start at the Bar[11], but the number of women barristers declines over time[12].

Q24: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

46. See answer to Q23.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

47. No.

Bar Council
2 March 2017

For further information please contact
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[11] https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/
[12] https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/

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