



The Bar Council

Bar Council response to the 'Government's response to the criminal legal aid independent review and consultation on policy proposals'

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 'Government's response to the criminal legal aid independent review and consultation on policy proposals'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.

Overview

4. On 15 December 2021, Sir Christopher Bellamy published his Report². The Chair of the Bar issued this Press Release the following day:³

¹ <https://consult.justice.gov.uk/digital-communications/criminal-legal-aid-independent-review-response/>

² <https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

³ <https://www.barcouncil.org.uk/resource/bar-council-reacts-to-publication-of-independent-review-of-criminal-legal-aid-report.html>

“The report contains a comprehensive analysis of the underfunding of the criminal justice system over decades and its dire consequences, not just for lawyers, but for defendants, victims of crime and witnesses. The conclusion could not be clearer; urgent additional funding is needed if the entire system is not to face collapse with the profound societal problems and loss of confidence in the justice system that this would cause.

The Bar Council welcomes the call for significant additional funding, a general uplift in fees and a restructuring of legal aid to ensure that work undertaken is remunerated appropriately and paid without delay. The report sets out minimum requirements for extra investment; more will be needed if the Government is to achieve its ambitious targets in relation to tackling serious crime and reducing the backlog.

We urge the Lord Chancellor to respond without delay and to make a commitment to additional funding and the establishment of an Advisory Board, as the report strongly recommends. We look forward to working with the Government to implement other recommendations in a way which will make a positive difference to all who work in or come before the criminal courts.”

5. The Bar Council considers the Response of the Government to this review as inadequate. In particular, Sir Christopher proposed an immediate 15% increase to legal aid fees and that “further sums may be necessary in the future to meet these public interest objectives”. Whereas the Government response is proposing 15% as a full and final sum, with an Advisory Board which would have terms of reference preventing it from recommending future investment.

6. Several of the proposals for changes to the fees scheme are proposed only on the basis that they are “cost neutral”. The Bar Council supports investment that is evidence-based. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

7. It should also be noted that any investment, if it were to be linked to the date of a Representation Order will only come to advocates many months or even years after Sir Christopher recommended it, with inflation having eroded the benefit of any increase.

8. The Government should take account of the consultation responses and adjust its proposals accordingly.

9. We now turn to answer the individual questions in the consultation.

An Advisory Board

Question 1. Do you agree with our proposal for an Advisory Board? Please give reasons for your answers.

ans.) The Bar Council gives a qualified welcome to the establishment of an Advisory Board. The Terms of Reference and membership are key. We are concerned that paragraph 33 refers to it simply as an “engagement forum”. The Advisory Board needs to be more than just a talking shop. We welcome that the Board would look at important areas which impact adversely on the diversity of those practising criminal law at the Bar. However, the consultation currently proposes that the Board should not advise on “the uprating of criminal legal aid fees” (para 35). If it is not to advise on fees, how is the sustainability of the criminal justice system going to be ensured, particularly given inflation? The Government has previously resisted index linking of legal aid fees. There needs to be some mechanism – such as index linking - to break the cycle of lurching from crisis to crisis every few years over fees, as fees fail to be uprated. The MOJ acknowledges (para 29) bilateral negotiations between the MOJ and provider groups are not the best way forward. If the MOJ are saying that the Advisory Board should not address fees, and it is not offering index linking, then what is left apart from bilateral negotiations?

Also, fee schemes need periodic adjustments with changes to the legal system. How can these be made if the Advisory Board is forbidden from addressing fees? And if the numbers of barristers specialising in criminal legal aid work continues to decline, which can only be reversed by paying advocates properly, the Advisory Board, which is supposed to be monitoring the system, should be permitted to point this out and make recommendations for addressing the problem.

Question 2. Do you have any views on what the Advisory Board’s Terms of Reference should cover?

ans.) The terms of reference should include:

1. That the Advisory Board should include representatives from the solicitor’s profession, the Criminal Bar Association (CBA), the Bar Council, independent members, representatives from MOJ, Legal Aid Agency (LAA) and potentially a judicial representative.
2. There must be specific provision for ongoing data-sharing. The MOJ, Bar Council, the LAA and Law Society have spent the last three years working closely together under a Data Sharing Agreement to develop a database of criminal legal aid practitioners, including such fields as payment schedules and amounts, case volumes, and personal characteristics of practitioners. This data formed the basis of the Data

Compendium, which was the primary evidential basis for Sir Christopher Bellamy's Independent Review.

Now the database has been created it could be updated annually with limited effort, and reports provided on the pool of criminal legal aid practitioners. It would seem to be an essential component of the information available to the Advisory Board to make decisions on the sustainability of the sector to maintain this data sharing relationship. The Bar Council is very happy to support this ongoing informational relationship and would strongly encourage this to be considered and resourced as a central part of the discussions around the formation of the Advisory Board.

3. A role involving review of the fees, to include an annual review of fees taking into account RPI / CPI. This will avoid the perpetual problem of gradual attrition of fees and ensure that the scheme is viable in the future without the risk of repeated attempts at reform every few years. Failure to include this element means that the whole system will end up failing.

4. The system must be designed so that there is a power that recommendations (such as fee increases and amendments to fee structures) can be implemented by the simple variation of details or figures within the fee schemes, without having to go through lengthy consultation periods.

Question 3. Do you believe existing criminal justice system governance structures (such as the National Criminal Justice Board) could be utilised so a new Advisory Board was not required? Please outline your reasons.

ans.) No. See answer to Question 1, the Board needs to be able to advise on fees.

Unmet need and innovation

Question 4. What are your views on our proposal to expand the Public Defender Service on a limited basis to provide additional capacity (and how much capacity) or where the criminal legal aid market has potential unmet need, risk of markets failing or being disrupted or could possibly provide greater value for money – for example to provide remote advice in police stations, particularly in rural areas and to have a presence in the market for in more Very High Cost Cases (VHCCs)?

ans.) Low legal aid fees have led to solicitor firms leaving the market and gaps in provision. The solution is not to expand the PDS to fill the gaps, but to pay fees at a sustainable level so that providers do not exit the market in the first place. The MOJ suggests (paragraph 49) that the PDS be “providing the defence in some VHCCs”. This would go against the fundamental principle that a person accused of a crime should be entitled to choose their legal representation.

Question 5. What are your views on the benefits and disadvantages of requiring a provider to have a physical office to be a member of a duty scheme?

ans.) The Bar Council defers to our colleagues at the Law Society to answer.

Question 6. Do you have any views on how non-traditional forms of provider and new ways of working such as holistic models and not-for-profit providers might best play a part in the criminal defence market?

ans.) Broadening the provider base may have merits, but a situation where fees are so low that only the charity sector is able to provide legal services is not the solution.

Training and accreditation grant programmes

Question 7. What are your views on a training and accreditation grant programme? How can it make it more attractive to pursue a career in criminal defence?

ans.) The Bar Council would support training grants for those beginning a career in criminal defence. The grants should be available to those starting as solicitors in legal aid firms and barristers beginning a legal aid focussed pupillage in chambers. However, as we indicate in our answer to Q.10., there is little point providing funding to enter a criminal legal aid career, if the legal aid rates are so low that such a career is unsustainable.

Question 8. How can the Government best support solicitors to gain higher rights of audience?

ans.) There would first need to be an equivalent level of training for solicitors and barristers gaining higher rights of audience. The Government should not promote only one side of the profession when there is not currently a level playing field. The Justice Secretary commissioned Sir Bill Jeffrey to undertake an “Independent criminal advocacy in England and Wales” review. In that Review, Sir Bill concluded:

“The disparity in mandatory training requirements expected of barristers and solicitor advocates reflects historic differences in the main focus of the two sides of the profession. But it is no reflection on the many highly capable solicitor advocates to observe that it is so marked as to be almost impossible to defend. To be called to the Bar, a barrister needs to have completed 120 days of specific advocacy training. A qualified solicitor can practise in the Crown Court (subject to accreditation) with as few as 22 hours such training. [...] As it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are

manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality". (Pages 5-7).

The MOJ have so far ignored the findings of its own review. Rather than address the disparity, they have left this issue in the 'too difficult box', not wishing to upset the solicitor profession. The playing field is not level now. The Government should address the unfairness rather than promote it and make it worse.

Disparity in barrister's income

Question 9. In your experience do you consider that it is the case that female barristers are more likely to be assigned lower fee cases, such as RASSO? Do you have any evidence to support this?

ans.) The Bar Council has carried out a detailed analysis of RASSO case volume by sex. Using source AGFS data RASSO cases were identified as those in AGFS groups D and J (old scheme) or types 4 and 5 (new scheme). Using the identifying flag and restricting attention to Trials, Cracks, Pleas and Committals for Sentence (to capture substantial work) the data were then processed in the usual way and matched to Bar Council records aggregating case numbers for each year. The figures below all relate to Implied Full Crime barristers as defined in the Data Compendium.

RASSO cases are a significant part of the case volume for both men and women. Over half of criminal barristers undertake some RASSO cases. However, these cases comprise a more substantial part of the total AGFS caseload for women than for men (typically they constitute 5 per cent more of the total for women than men). The proportion of cases that are RASSO has declined for both women and men in the last two years. We suspect this is in part because those cases are disproportionately stuck in the Crown Court backlog. For women, the proportion of cases that were RASSO has declined from 20-22 per cent in 2015/16 and 2016/17 to 15-16 per cent in 2019/20 and 2021/22. For men, the equivalent figures are 13-15 per cent to 11 per cent.

In terms of fees, RASSO cases are a more important differentiator of earnings for women than for men. Whereas men who do RASSO cases have 50-70 per cent higher fee earnings than those who do not, women who do RASSO cases have 100-200 per cent higher fees than those who do not. The majority of implied full crime barristers (around two thirds) do some RASSO cases, and this is very similar for women and men. Overall, it appears therefore that women are more dependent on RASSO cases both in terms of volume of work and the fees those cases generate. Hence, any decline in RASSO cases due to the pandemic, or inadequacy of fees relative to other case types will impact women more than men. This evidence from the data suggests that the assumption in the question is wrong, but that if the government wishes to equalise

remuneration for women at the criminal Bar, a focus on RASSO cases including a review of s28 workload and payments would appear a sensible place to start.

Other things (experience, age, seniority) equal, women are 5 per cent more likely to do RASSO cases than their male counterparts and 3 per cent less likely to do Murder cases than their male counterparts. Considering the equalities impact of the structure of the fee schemes, particularly in regard to the relative value of different case types, should therefore be highly relevant. We note that paragraph 63 of the consultation proposes that the Advisory Board look into the disparities of income due to the fee schemes. This contradicts paragraph 35 of the consultation that the Advisory Board should not recommend fee increases. If the gender disparity is at least partly related to the lower fees for RASSO cases, the Advisory Board should be able to recommend fee increases to such cases.

Diversity

Question 10. Would training grants for criminal legal aid chambers in your view help with recruitment and retention issues? If yes, how could such an initiative best be targeted to support diversity?

ans.) Such proposals deflect from the fundamental problem which is not to do with access to the profession, as we recently identified in our *'Race at the Bar: A Snapshot Report'*.⁴ Retention problems are caused in large part by poor remuneration and working conditions within the profession.

Whilst grants for criminal pupils would, of course, be appreciated by some, this will not address the retention crisis. We fear that such grants would ultimately simply be an expensive gesture and consider that resources which otherwise would be available for legal aid fees should not be diverted into such grants. The root cause needs to be tackled - we need higher fees for the work done, and fees for advocacy in the magistrates' court need to be paid to the advocate who undertakes the hearing. (See also our answer to question 48).

Question 11. What do you think the Government can do to improve diversity within the independent professions?

ans.) The biggest impact that the Government can have on improving diversity within the independent professions, is to ensure that the legally aided work is properly paid. Women and barristers from ethnic minority backgrounds practicing in crime are

⁴ <https://www.barcouncil.org.uk/uploads/assets/d821c952-ec38-41b2-a41ebee362b28e5/Race-at-the-Bar-Report-2021.pdf>

increasingly unable to sustain their practice and either move into other areas, or leave the Bar entirely, thereby effecting the overall diversity of the profession.

Therefore, it is critical that fees are raised so that those without independent means can afford to sustain a career doing publicly funded work, enabling access to justice.

There are variations of advantage within the Bar. If, for example, we take private education as an indication of social privilege we know that more male barristers report having been educated at independent schools than female barristers (43 per cent and 29 per cent respectively).⁵ We also know that more white barristers than black barristers report having been educated at independent schools. Family background then intersects with other factors such as caring responsibility and spousal income to influence an adults' financial security. We know that women and barristers from ethnic minority communities/backgrounds are more likely to have caring responsibilities.

Those at the self-employed Bar with less financial security, who are more likely to be female and/or from ethnic minority communities / backgrounds, find it more difficult to sustain precarious and poorly paid self-employment, particularly when times are hard. This can be seen in analysis of data on the criminal Bar from the pandemic, when we saw that the number of black/black British barristers practising full time in criminal work was down by 18 per cent; the number of Asian/Asian British barristers was down by 17 per cent. The number of white barristers was down by 10 per cent.

Financial hardship is compounded by certain working practices. The practice of Warned Lists is particularly damaging to those for whom caring responsibilities mean they have less flexibility, which particularly impacts women. Four in ten female barristers (41 per cent) were the main carer for children under the age of 18, compared with one in four male barristers (25 per cent). In addition, despite more male barristers being of an age that might suggest they are more likely to have elderly relatives to care for, more female barristers report having regular caring responsibilities for elderly relatives or other adults with care needs (17 per cent, compared with 13 per cent of male barristers). Warned Lists mean that a barrister must block out diary time in the event of court time becoming available to try a case, turning down other work to do so. In the event that a case is not heard during the diarised time, a barrister may then not be able to source other work at short notice. It often also results in duplicated/wasted preparation time that is unpaid.

Another issue around working practices that recurs is Extended/Flexible/Covid Operating Hours, as they have variously been known. 94 per cent of criminal

⁵ <https://www.barcouncil.org.uk/uploads/assets/9a8ceb20-ba5e-44f8-9b3f765be564ea15/e3cd5fe0-6fe2-405e-8f5a9996ebbd7c01/Barristers-Working-Lives-report-2021.pdf>

barristers are opposed to Extended Operating Hours in any form.⁶ Significant concerns have been raised about the disproportionate impact of EOH on those with caring responsibilities.

On the other hand, where it is in the interests of justice, barristers are generally positive about remote hearings, which support reasonable working conditions and fair access to work. 64 per cent of barristers tell us they want more remote working in the future.⁷ There should be a continued emphasis on remote hearings in the criminal courts according to the new Protocol.⁸ This position should be evaluated and reviewed in the interests of allowing equal access to work opportunities, particularly for those barristers with disabilities.

The government can also look at its own briefing practices, for example those instructing the Crown Prosecution Service, Serious Fraud Office, Treasury Solicitors and Attorney General's Panel work, should ensure that women and barristers from ethnic minority communities, get equal access to quality and higher remunerated work. Detailed analysis by HHJ Emma Nott revealed systemic under-briefing of female counsel, with gender disparity on briefing by top firms ranging from 0-27 % of briefings going to women.⁹

Question 12. What do you think the professional bodies can do to improve diversity within the independent professions?

ans.) There is a limit to what these initiatives can achieve if structural pay and conditions remain poor.

In the Bar Council's most recent survey of the profession, only four percent of barristers told us that they would like us to do more than we are currently doing to offer support on diversity issues.¹⁰

We continue to develop policy and practice, and to run an extensive range of programmes to support Equality Diversity and Inclusion (EDI). Activity focuses on identified challenges with respect to Access to the Bar (where the focus is on aspiring

⁶ <https://www.barcouncil.org.uk/uploads/assets/9a8ceb20-ba5e-44f8-9b3f765be564ea15/e3cd5fe0-6fe2-405e-8f5a9996ebbd7c01/Barristers-Working-Lives-report-2021.pdf>

⁷ <https://www.barcouncil.org.uk/uploads/assets/f9c5bf66-98f1-429d-ad7b94046e1f5213/f343f7f3-cf5f-44d9-8dda60d82a97e517/Bar-Survey-Summary-Findings-December-2020.pdf>

⁸ <https://www.judiciary.uk/announcements/message-from-the-lord-chief-justice-remote-attendance-by-advocates-in-the-crown-court/>

⁹ [https://www.counselmagazine.co.uk/articles/gender-at-the-bar-fair-access-to-work-\(4\)](https://www.counselmagazine.co.uk/articles/gender-at-the-bar-fair-access-to-work-(4))

¹⁰ <https://www.barcouncil.org.uk/uploads/assets/9a8ceb20-ba5e-44f8-9b3f765be564ea15/e3cd5fe0-6fe2-405e-8f5a9996ebbd7c01/Barristers-Working-Lives-report-2021.pdf>

barristers from ethnic minority and intermediate and working class¹¹ backgrounds), Retention and Progression (where the focus is on women and barristers from an ethnic minority background). Specific interventions introduced by the Bar Council to tackle income disparity include practical support for chambers to conduct their own internal income monitoring and training for chambers on ensuring fair distribution of work and monitoring income. (In May 2022 we set out our current and planned activities in more detail to the Justice Select Committee.¹²) More generally, the Bar Council continues to promote an inclusive culture, and the modernisation of working practices which support diversity.

But criminal barristers do consistently tell us that they are dissatisfied with their poor remuneration and working conditions. Barristers working in the criminal Bar report significantly lower overall wellbeing than all other practice areas at the Bar, with just under 50 per cent reporting they feel down or in low spirits and only 40 per cent reporting they find their workload manageable.¹³

In our last survey, 89 per cent of criminal barristers wanted to make changes to their working practices. It should be of real concern to the sustainability of the sector that – after more remote and flexible working - doing less legal aid work was the third most mentioned desired change by criminal barristers (mentioned by 36 per cent of those who wanted to make changes).¹⁴

Question 13. What evidence do you have of barriers different groups face in forging careers in criminal defence work generally?

ans.) The clearest and starkest metric is remuneration, and the evidence on this is incontrovertible.

As we stated in our 2021 consultation response, analysis of the Data Compendium dataset revealed, “Profit and fees between groups of barristers is not equitable, and women from ethnic minority backgrounds earn the least of all”.¹⁵

The key findings from that multiple regression analysis are worth repeating:

¹¹ Based on the [Social Mobility Commission’s scorecard](#)

¹² Letter from the Bar Council to Laura Farris and the Justice Select Committee, 24 May 2022 <https://committees.parliament.uk/publications/22437/documents/165437/default/>

¹³ The Bar Council (November 2021) “Working Lives 2021 wellbeing analysis” <https://www.barcouncil.org.uk/resource/working-lives-2021-wellbeing-analysis.html>.

¹⁴ <https://www.barcouncil.org.uk/uploads/assets/9a8ceb20-ba5e-44f8-9b3f765be564ea15/e3cd5fe0-6fe2-405e-8f5a9996ebbd7c01/Barristers-Working-Lives-report-2021.pdf>

¹⁵ “Bar Council Response to the Criminal Legal Aid Review Call for Evidence” May 2021, page 5. <https://www.barcouncil.org.uk/uploads/assets/7bb32f9d-ffce-4ce0-aa50239091e2713f/CLAR-Bar-Council-submission-final.pdf>

The starting point used was a junior White male barrister at 13-17 years of practice. By changing the sex to female, we observe a lowering of pre-tax profit of £12,600. This is the pure effect that being a White woman has on a barrister's profit, keeping all other factors constant.

This reduction in pre-tax profit according to sex cannot be accounted for by differing work volumes. The 'volume adjusted' difference in pre-tax profit between White men and White women is £11,400 rather than £12,600, so volume adjustment accounts for only 10.5% of the total difference in pre-tax profit.

Making the comparison by ethnicity instead of sex, we observe a £15,300 lower pre-tax profit for Black men relative to White men, and a £9,000 lower pre-tax profit for men of Mixed/Multiple Ethnicity. There is no differential for Asian men relative to White men, whilst men from other ethnicities have £5,100 lower pre-tax profit than their White counterparts.

By altering both race and sex, we observe a lower pre-tax profit of £18,700 for a Black woman relative to a White man, and a lower pre-tax profit of £15,200 for a woman of Mixed/Multiple Ethnicity. Asian women (in contrast to Asian men) have lower pre-tax profit relative to their White counterparts so that they have £16,400 lower pre-tax profit compared to a White man.

Crime is also an outlier at the Bar. It is the only area of practice at the Bar of England and Wales in which there has been a real terms decrease in income in the last 20 years. Adjusted for inflation, male criminal barristers have experienced a 33 per cent decrease in earnings since their peak in 2006. Women have experienced a 22 per cent decrease since their peak in 2005.¹⁶

Criminal barristers are all paid under the same government-set fee schemes, so we consider that these stark disparities indicate there are systemic issues with the fee schemes, with panel selection (which provides lucrative and regular work) and briefing practices within government departments that would fall within the responsibility of this Review to review and address, in addition to the Bar's own internal and ongoing responsibility around improving briefing practices within chambers.

¹⁶ The Bar Council (September 2021) "Barrister earnings data by sex and practice area report 2021" <https://www.barcouncil.org.uk/uploads/assets/814f8208-6eab-4564-b6da9f85d49a1ce9/c39f111a-0a40-4781-a3bea6a8ac961241/earnings-data-report-2021-appendix.pdf>. These figures are guideline amounts only, as they simply account for the total fee income from an area of practice by the total number of barristers working in that area of practice. As such, they do not allow us to look at factors such work volume.

Question 14. What evidence do you have of other barriers women face in working within duty schemes beyond those identified? How much of a difference would an increase in remote provision of advice make to improving the sex balance? Is there anything else we should be trialling to address this?

ans.) We defer to our colleagues at the Law Society to answer this question.

Question 15. What do you think might be driving the disparities in income in the criminal Bar noted by the review? What evidence do you have to support this?

ans.) See answer to Q.13.

Question 16. What more in your view could solicitor firms and chambers do to support those from diverse backgrounds embarking on careers in criminal defence?

ans.) See answer to Q.12. The fundamental issue is that legal aid fees need to be at a level that enables someone to have a financially sustainable career in law regardless of their background and personal circumstances.

Quality Issues

Question 17. How can the Government assist the professions to review the balance between the various quality measures to minimise the administrative cost while ensuring quality is not compromised? Do you have any views on this?

ans.) Our colleagues at the Law Society are best placed to answer with examples of the unnecessary administrative burdens placed on law firms by the LAA. The Bar Council would support a reduction in overbearing and unnecessary bureaucracy.

Question 18. How can the Government best design the qualification criteria for any Lord Chancellor's lists of criminal defence advocates to ensure that listed advocates are incentivised toward quality control, professional development and consistent availability for work?

ans.) No detail is given regarding the idea of "Lord Chancellor's lists", other than that it would only apply to "independent advocates" (pages 22-23). The proposal appears to be an additional system of quality control on self-employed barristers, but not on employed barristers or on solicitor advocates (who themselves of course provide independent legal advice irrespective of their employment status). This would not be a level playing field. We are not aware of any evidence that there is any problem with the quality of advocacy of barristers (self-employed or otherwise) that might be usefully addressed by such a proposal.

Technology

Question 19. How and to what extent does technology, including remote technology, support efficient and effective ways of working in the criminal justice system?

ans.) Technological innovation can, when properly used, significantly enhance the efficiency of the Criminal Justice System. In particular, the use of Cloud Video Platform (CVP) for administrative hearings and prison visits greatly increases the likelihood of continuity of representation and case ownership. The Crown Court Digital Case System (CCDCS) has undoubtedly made the service of case papers and other documents far more straightforward. However, the direction of travel is not one way. Early signs were that the Common Platform was slow, cumbersome and represented a step backwards from the CCDCS for all users, from court staff to both barristers and clerks. If rolled out without significant improvements, there is every chance any efficiency savings made thus far will be lost.

Pre-charge engagement: preparatory work

Question 20. Do you agree that the proposal under scenario 1 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.

ans.) The Bar Council supports investment in the fee schemes to enable early advice and engagement. With regards to this specific question we defer to our colleagues at the Law Society who are better placed to answer.

Question 21. Do you agree that the proposal under scenario 2 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.

ans.) See answer to Q.20.

Question 22. Are there any other factors, beside remuneration that limit practitioners from carrying out PCE? Please explain the reasons for your answer.

ans.) See answer to Q.20.

Question 23. In our Impact Assessment we have indicatively assumed that preparatory work would be paid at an average of two hours per case with an uptake of up to 6% (or up to 32k cases). Do you agree that these are reasonable assumptions? Please explain the reasons for your answer.

ans.) See answer to Q.20.

Pre-charge engagement: sufficient benefits test

Question 24. Do you agree with the proposed amendments to the ‘Sufficient Benefits Test’? Please explain the reasons for your answer.

ans.) The Bar Council supports proper remuneration for quality pre-charge engagement advice. We do not support excessive bureaucracy by the LAA, where so much unpaid time is spent providing evidence of work done and answering queries, that it becomes financially unviable to undertake the work itself. As to the details of this particular question, we defer to our colleagues at the Law Society who are best placed to answer.

Question 25. Do you have alternative proposals for amending the ‘Sufficient Benefits Test’ under scenario 2?

ans.) See answer to Q.24.

Question 26. Do you think paragraph 4 of Annex B of the Attorney General’s ‘Guidelines on Disclosure’ also reflects the type of preparatory work likely to be undertaken ahead of a PCE agreement?

ans.) We defer to the Law Society who are best placed to answer.

Question 27. Are there any other type

ans.) We defer to the Law Society who are best placed to answer.

Investment in police station fees

Question 28. Do you have any views on our proposal to increase police station fees by 15%?

ans.) The Bar Council welcomes the proposed fee increase of 15%, but more investment is urgently needed. Sir Christopher Bellamy’s report states:

“1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.”

We support investment that is evidence-based. Sir Christopher recommended that the 15% was to be the first step. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

Standardised police station fees

Question 29. If we were to pursue option 1, what features of a case do you think should be used as an indicator of complexity: (a) time spent; (b) case type – e.g. theft, murder; (c) case type – e.g. summary only, either way; indictable; (d) anomalous complexities – e.g. vulnerable client, drugs problems; (e) a combination of the prior; (f) other? Why?

ans.) We defer to the Law Society who are best placed to answer.

Question 30. Would you need to change your current recording and billing processes in order to claim for standardised fees which are determined by reaching a threshold of ‘time spent’ on a case?

ans.) We defer to the Law Society who are best placed to answer.

Both options for police station structural reform

Question 31. Do you agree we should explore the types of structural reform proposed above, within the same cost envelope, in order to more accurately remunerate work done in the police station?

ans.) No. We repeat that Sir Christopher Bellamy’s report states:

“1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.”

We support investment that is evidence-based. Sir Christopher recommended that the 15% was to be the first step. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

Question 32. If you agree we should explore this reform, which option (1 or 2) do you think would better achieve the aims of better remunerating work done by

differentiating case complexity, while reducing administrative burden? Why? Do you have any other ideas for reform?

ans.) We defer to the Law Society who are best placed to answer.

Question 33. To enable any structural reforms, we would need to collect a substantial amount of information from providers about time spent and other case features. As a provider, would you be able to provide this information from your existing systems, or by adapting your record keeping? Are there any particular barriers you foresee in providing this information reliably?

ans.) We defer to the Law Society who are best placed to answer.

Question 34. Do you think that the lower fee (under either option 1 or 2, either the lower standard fee or the fixed fee respectively) should account for 80% of cases? Why?

ans.) We defer to the Law Society who are best placed to answer. The Bar Council does however have experience of undue bureaucratic burdens imposed by the LAA when it comes to demanding evidence to support a claim above a set threshold. Therefore, there is a benefit to having a high proportion of cases that can be simply approved. The fees in those cases need to be set at a level to sustain a high-quality criminal practice.

Practitioner seniority and harmonisation of fees at police stations

Question 35. How could the police station fee scheme be reformed to ensure complex cases get the right level of input by an adequately experienced practitioner?

ans.) We defer to the Law Society who are best placed to answer.

Question 36. Should there be more incentives for a senior practitioner to undertake complex cases in the police station? Why? What impacts would this have?

ans.) We defer to the Law Society who are best placed to answer.

Question 37. Do you agree that the reformed scheme should be designed at harmonised rates, rather than existing local rates? This may be at national level or London/non-London rates. Please also provide reasons why.

ans.) We defer to the Law Society who are best placed to answer.

Longer-term reform for early engagement - Subsuming PCE into the Police Station Fee Scheme

Question 38. Do you agree that in the longer-term, PCE should be remunerated under the police station fee scheme as a specific element of police station work? Please explain the reasons for your answer.

ans.) We defer to the Law Society who are best placed to answer.

Question 39. How do you think PCE could best function within the police station fee scheme for example as an in-built or separate fee, and based on hours spent or not, noting our options for broader reform?

ans.) We defer to the Law Society who are best placed to answer.

Improving the uptake of legal advice in custody

Question 40. Which cohorts of users would benefit most from being part of an extended roll out of the trial / what should we prioritise?

ans.) The Bar Council welcomes the statement in paragraph 114 that *“We will work with the LAA, Law Society, BC, and others to ensure the defence community fully engage with the development of this work.”* The Bar Council looks forward to that engagement. We do not currently have sufficient information to respond to this particular question.

CILEX members as duty solicitors

Question 41. Do you agree CILEX professionals should be able to participate in the duty solicitor scheme without the need to obtain Law Society accreditation? If not, why not? If yes, what, if any, accreditation should they require to act as a duty solicitor?

ans.) The Bar Council does not have sufficient direct experience of the operation of the accreditation scheme to give a fully informed opinion. We defer to our colleagues at CILEX and the Law Society.

Defence Solicitor Call Centre

Question 42. How else could we improve the DSCC, for example would greater digitisation and automation of LAA processes increase the quality of service?

ans.) The Bar Council is represented on the LAA’s Criminal Contracts Consultative Group at which we heard of the many problems that solicitors were experiencing from

the DSCC, particularly with the change in the contract, where new staff were struggling with unfamiliar computer systems with the consequence that they were, for example, sending duty solicitors to the wrong police stations. The solution is not just in IT improvements, but for the staff who operate the IT to be properly paid and well trained.

Post-charge engagement

Question 43. Do you think changes need to be made to the way work is remunerated between the period after charge and the first hearing at the Magistrates' Court? Please explain the reasons for your answer.

ans.) We defer to the Law Society who are best placed to answer.

Question 44. Do you routinely carry out post-charge engagement? Do you record this work in order to claim for a fee under the Magistrates' Court scheme?

ans.) We defer to the Law Society who are best placed to answer.

Question 45. Do you face any issues which limit you from carrying out post-charge engagement ahead of the first hearing at the Magistrates' Court? Please elaborate on the kind of issues.

ans.) We defer to the Law Society who are best placed to answer.

Question 46. If you have experienced issues with PCE, what kind of solutions do you think could be put in place? What changes do you think needs to be made and by whom?

ans.) We defer to the Law Society who are best placed to answer.

Investment in Magistrates' Courts fees

Question 47. We are proposing to increase Magistrates' Court fees by 15%. Do you have any views?

ans.) We repeat that the Bar Council welcomes the 15% fee increase, but more investment is urgently needed. Sir Christopher Bellamy's report states:

"1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as "an opening bid" but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole

CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives."

We support investment that is evidence-based. Sir Christopher recommended that the 15% was to be the first step. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

Furthermore, there is presently a service-level fee agreement between barristers and solicitors¹⁷ by which counsel are to be paid, as a minimum, £75 for half-day trials and £150 for full-day trials in the magistrates' court. In practice, these are generally the fees paid, rather than merely representing a minimum, and are not commensurate with the work required properly to prepare for and conduct a magistrates' court trial. The present CPS agent (counsel) rates for the magistrates' (and youth) courts are £150 and £300 for a half-day and full-day trial list respectively, having been increased from £125 and £200 in February 2020.¹⁸ There should at the very least be parity between prosecution and defence fees for magistrates' court work – an increase of well over the minimum 15% recommended by Sir Christopher Bellamy QC. Although the work conducted by the advocates is different, it is not right for defence counsel to be remunerated on the basis, in effect, that they are doing half as much work.

Structural reform of Magistrates' Court fee scheme

Question 48. Do you agree that the Magistrates' Court fee scheme does not require structural reform at the current time? Please give reasons for your answer.

ans.) The Bar Council recommends one amendment to the fee scheme, the payment of an advocacy fee direct to the advocate who undertook the hearing. Sir Christopher considered the non-payment of junior barristers by solicitors in the magistrates' court in paragraphs 10.8 – 10.16 of his report. He recommended that, rather than address the problem by direct payment by the LAA to the advocate, that instead "audit by the LAA to reveal that [non payment] and appropriate action to be taken under the SCC" (Standard Crime Contract). The Bar Council have recently explored this with the LAA at the highest level, and it has proved to be impossible in practice.

The background is that in 2017 the Bar Council's Young Barristers Committee (YBC) undertook a survey of its members (barristers under seven years of practise). Half of the respondents had undertaken magistrates' court cases in which they had not been

¹⁷ '2019 Revised Protocol for the Instruction and Payment of Counsel in Magistrates' Courts Cases within the Greater London Area' <https://www.barcouncilethics.co.uk/documents/protocol-instruction-counsel/>

¹⁸ <https://www.cps.gov.uk/cps/cps-counsel-fee-review>; see Annex A

paid by the instructing solicitor. Of those who were paid, most had to wait more than 3 months, and 10% had to wait more than a year to receive payment. Representatives of the YBC and the Bar Council's Remuneration Committee met the LAA to discuss the problem. The response from the LAA was that solicitors were under a contractual requirement from the LAA to pay disbursements. The minutes of the meeting record that "the first step would be to consider what could be done to enforce the current contract, and only if that was not achievable to then consider other options." Bar representatives said that junior barristers were in a weak position to report their instructing solicitor to the LAA, particularly if that solicitor instructs other members of chambers. Nevertheless, in subsequent meetings between the Bar Council and the LAA, the LAA confirmed that they would take action on non-payment if it was reported to them. Last year a situation arose with a chambers where the instructing solicitor firm had not paid any member of chambers for the advocacy that its members had done in the magistrates' court, and all representations from chambers to the firm had failed. The chambers therefore reported the matter to the LAA in June 2021. The LAA Contract Manager for that region contacted the firm in question and was told by the firm that no fees were owed (but provided no evidence of payments). The Contract Manager replied to chambers that the LAA could not get involved in a dispute between the firm and chambers. The chambers escalated this matter within the LAA, and provided detailed evidence of the non-payments. The LAA issued a contract notice to the firm, warning that further action may ensue, but took no further action. The chambers, with the assistance of the Bar Council, raised the matter again, the LAA replied in November 2021 that "the provider disputes how much money (if any) is actually owed [...] it wouldn't be for the LAA to adjudicate". In January 2022 the Bar Council made representations to the Chief Executive of the LAA, quoting from Sir Christopher's report that the LAA should audit the firm and take action under the LAA contract for breach of that contract. The Chief Executive of the LAA replied in February 2022, "the LAA's ability to intervene, even where the regulations are breached is limited, given that the contractual relationship regarding payment of fees exists between the barrister and instructing solicitor. [...] Where fees are in dispute, or where firms dispute that payment that has not be made, there is little the LAA can do".

As can be seen, the contract route has been tried and failed. The solution therefore is for there to be an advocacy element to the fee, paid direct to the advocate.

Investment in criminal legal aid fee schemes

Question 49. Do you agree with our proposed approach of short-term investment in the LGFS and AGFS as they currently stand, followed by further consideration of longer-term reform options? Please give reasons for your answer.

ans.) Paragraph 144 of the consultation envisages that after the 15% fee increase, any subsequent restructuring of AGFS would be “cost neutral”. We repeat that the Bar Council welcomes the 15% fee increase, but more investment is urgently needed. Sir Christopher Bellamy’s report states:

“1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.”

We support investment that is evidence-based. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence. The Bar Council is of the view that 15% is insufficient as a first step, and that additional funds are urgently required.

The fee increases should apply to all work done after the date of the Statutory Instrument. If the common practice of applying the increase only to cases with a Representation Order dated after the date of the S.I. is followed, any investment will only come to advocates many months or even years after Sir Christopher recommended it, with inflation having eroded the benefit of any increase. (See also our answer to Q.57).

Question 50. Do you agree with our proposed 15% uplift to LGFS basic fees, fixed fees, and hourly rates, noting the further funding for LGFS reform? Please outline your reasons.

ans.) We defer to the Law Society who are best placed to answer. Alongside Law Society colleagues we have suggested that pending LGFS reform, money must be injected into other areas (including a national police station scheme, crime lower and standard contracts) as a matter of urgency.

Question 51. Do you agree with Government proposals to apply a flat 15% increase to all remuneration elements covered by the AGFS? Please outline your reasons.

ans.) See our answer to Q.49. In addition, the proportionalities within the AGFS need adjustment in some areas and the Bar Council is willing to work with the MOJ on this. Any adjustment must be on the basis of additional funding, not a cost neutral ‘robbing Peter to pay Paul’ situation of reducing some fees in order to increase other fees.

The fee increase to “all remuneration elements” should be comprehensive. For example, as well as all the AGFS fees (such as guilty pleas, cracked trials, daily attendance fees, ancillary hearings, fixed fees, sentencing hearings, confiscation hearings, special and wasted preparation etc) there should also be uplifts to associated fees. For example, travel and subsistence costs.¹⁹

Question 52. Do you agree that the fixed fee payable for “Elected not proceeded” cases under the LGFS and AGFS should be abolished, with the result that these cases will attract the relevant guilty plea or cracked trial payment? Please outline your reasons.

ans.) Yes. Firstly, because in the overwhelming majority of cases the barrister will have had no previous input into the case and will not have had any impact on the lay client’s choice (certainly not prior to election). The barrister should not be penalised for the client’s choice.

Secondly, any case sent following election will require preparing in just the same way as any other case that comes to the Crown Court. The level of work required is no different and should be paid for.

Enhancing LGFS’s effectiveness in remunerating substantive matters

Question 53. Do you consider replacement of basic fees within the LGFS with a standard fee structure, akin to the Magistrate’s Court scheme, to be, in principle, a better way to reflect litigators’ preparatory work and reduce reliance on the PPE proxy? Please outline the reasons for your answer.

ans.) We defer to our colleagues in the Law Society as best placed to answer regarding the structuring of the LGFS. We do however observe that, given that the LGFS and AGFS are fee payment schemes for the same cases in the Crown Court, it would be helpful if the proxies on which the fees are calculated are in harmony, or at least not in opposition with each other.

We believe there is common ground between the professions that reform of LGFS needs to encourage and fairly reward front loading of case preparation.

Question 54. Do you consider that PPE requires reform and should be considered further once we have established an evidence base? Please outline your reasons.

ans.) We defer to the Law Society who are best placed to answer.

¹⁹ <https://www.gov.uk/government/publications/marine-licensing-fees/travel-and-subsistence-costs>

Question 55. In your view, how should the LGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?

ans.) We defer to the Law Society who are best placed to answer.

Improving the service and assessment of PPE

Question 56. What improvements would you like to see made in relation to the way in which evidence (especially electronic) is:

- a) Served on the defence?**
- b) Defined in Regulations?**
- c) Quantified at assessment?**

ans.) This question is within the section dealing with the LGFS, so we defer to the Law Society who are best placed to answer. If, however the MOJ also intends to address PPE in relation to the AGFS, the Bar Council would want to be involved in detailed discussions on that subject.

Confiscation work

Question 57. Do you agree with our proposal to increase confiscation fees by 15%?

ans.) We repeat that the Bar Council welcomes the proposed fee increase of 15%, but more investment is urgently needed. Sir Christopher Bellamy's report states:

"1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as "an opening bid" but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives."

We support investment that is evidence-based. Sir Christopher recommended that the 15% was to be the first step. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

We repeat that the fee increase should apply to work done after the date of the Statutory Instrument that brings in the new rate, rather than only to cases with a legal aid Representation Order from that date. In the matter of confiscation hearings, the Government has precedence for doing this. The Criminal Defence Service (Funding) (Amendment No. 2) Order 2009. S.I. 2009 No. 2086 was laid on 29 July 2009 and came

into force on 21 August 2009. It increased fees for Crown Court confiscation hearings. The fee increase was not to Representation Orders made from the date of the S.I., it applied to all cases where the confiscation hearing took place from the date of the S.I. Clause 1(3) states: "This Order applies to hearings to which paragraph 11 of Schedule 1 to the 2007 Order applies and which are concluded on or after 21st August 2009."

Standard fees for appeals to Crown Court and committals for sentence

Question 58. Would you welcome replacement of LGFS fixed fees for appeals to the Crown Court and committals for sentence with a standard fee arrangement, akin to the Magistrates' Court scheme? Please give your reasons.

ans.) We defer to the Law Society who are best placed to answer.

Understanding Crown Court litigator work

Question 59. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of litigators in preparing Crown Court cases and facilitate refinement of the LGFS? Do you record this data, and would you be willing to share it with us?

ans.) We defer to the Law Society who are best placed to answer.

Question 60. Which factors influence the time you spend preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence?

ans.) For committals for sentence there is usually the same level of work required as for a sentence following a guilty plea in the Crown Court. This should be reflected in the fee paid.

For appeals these are fresh trials and should be paid the same as trials for those offences that are committed for trial in the Crown Court.

Fundamental AGFS structure

Question 61. Do you consider the current AGFS model to be optimal for remunerating Crown Court advocacy? What changes would you like to see? Please outline your reasons.

ans.) Sir Christopher's report identified in AGFS "Structural issues that need correction" (paras 13.80 onwards) and the Bar Council are willing to work with the MOJ to work through the details to make amendments to the AGFS. We agree with

the MOJ in paragraph 163 of the consultation that the task is to make improvements to the AGFS rather than replacing it with an entirely new scheme. Such improvements must involve, but not be limited to, detailed consideration of the proposals made by the Bellamy Review in relation to written work, special preparation and wasted preparation.

We fundamentally disagree with paragraph 161 of the consultation that any changes must “be within the same cost envelope.” We repeat that, Sir Christopher Bellamy’s report states:

“1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.”

We support investment that is evidence-based. Sir Christopher recommended that the 15% was to be the first step. For the Government to state that further changes must be cost-neutral is saying that the Government will ignore the evidence.

Question 62. We propose to deliver reform within the existing cost envelope. To ensure we achieve our objectives, we would welcome views on which elements or tasks within Crown Court advocacy should be prioritised for funding.

ans.) See answer to Q.61.

Supplementing the basic or hearing fee where preparatory work required exceeds the norm

Question 63. Do you consider broadening the availability of Special Preparation payments to be the best method of remunerating cases (or hearings within cases) where preparation required of the advocate exceeds the norm? Please tell us the reasons for your answer.

ans.) The Bar Council agrees with Sir Christopher’s findings, that a lot of necessary work undertaken by advocates is not currently remunerated by the AGFS. Therefore, broadening the Special Preparation mechanism is one way to capture that. We agree with paragraph 166 that there is a risk that “increasing the availability of Special Preparation payments would create a significant administrative burden for both practitioners and the LAA, and a proliferation of billing disputes.” The solution would be that this work should no longer be called “special” preparation because it is work

that is necessarily required in many cases, and the bureaucratic burden that currently surrounds the claiming of that fee should be removed. For example, rather than be required to justify to the LAA the number of hours worked, there may be an opportunity in some areas for a fixed fee to be paid for particular work without the need to supply work logs. There also needs to be a change of culture at the LAA to have some level of trust in its providers, with for example dip sampling, rather than detailed assessment of every claim. The Bar Council would be happy to engage with the MOJ to work out the details. As stated above, these changes must not be on a 'cost neutral' basis.

Question 64. Do you agree with the recommendation that fixed fee payments for interlocutory hearings should benefit from the possibility of enhancement? If so, under what circumstances should an enhancement be applicable?

ans.) It is not clear precisely what is being envisaged. Sir Christopher's report states:

"13.85 [...] The PTPH fee itself at £126 per day does not vary, whether what is achieved is little more than some box-ticking and a further adjournment to another day, while in other cases the PTPH may involve serious consideration of the real issues and bringing the parties together to consider seriously pre-trial resolution. In my view the AGFS should incentivise pre-trial resolution in appropriate cases. [...] 13.101 To encourage better preparation for trial, and case ownership, I would recommend a review of the fixed fee of £126 per day for the PTPH set out in paragraph 24 of Schedule 1 to the Regulations. In order to incentivise better engagement and pre-trial disposal, I would recommend an enhanced fee for a substantive PTPH, or a further case management hearing, which deals in detail with the issues in the case, and its possible disposal. Again, this would need further definition – and possibly a certificate by the judge, but I trust the underlying idea is clear enough."

The Bar Council supports this proposal on the basis that any enhanced fee does not require a lot of bureaucratic justification to the LAA by the advocate, and the fee increase is not on a "cost neutral" basis. Such a proposal would be consistent with the consensus that early case preparation must be better rewarded.

Question 65. Would you welcome introduction of a fee scheme for advocacy which reduces the weighting accorded to basic fees in favour of remuneration where complexity criteria are satisfied and/or discrete procedural tasks have been completed? Please outline your reasons.

ans.) The restructuring of AGFS in 2018 largely replaced the complexity proxy of page count with a more detailed banding of cases based upon objective elements in the case. Identifying those complexity criteria in order to produce the bandings was no easy task. Additional complexity factors are likely to be difficult to quantify: for example,

leaving aside the technical complexities of their cases, some clients require greater time and care owing to their individual vulnerabilities and needs. Unfortunately, the existing scheme does not place much value on client care and the time that that involves. The system of remuneration for legal aid work should not be pegged according to the lowest common denominator, but should assume a degree of complexity above the minimum of the single defendant/simple legal and factual scenario as the standard. The Bar Council would be willing to explore this with the MOJ, on the understanding that any changes would be on the basis of additional investment, rather than “cost neutral”.

Question 66. Do you think that fairer remuneration of outlier cases could be achieved by way of amendments to the existing AGFS, e.g. adjustment to PPE thresholds beyond which Special Preparation can be claimed or the relative level of basic fees? If so, for which offence classes do you consider current provisions to be anomalous?

ans.) There was some amendment to the PPE thresholds as part of the “Accelerated Areas” changes. The Bar Council would be willing to explore this further with the MOJ, on the understanding that any changes would be funded by additional investment rather than from cuts elsewhere in the Scheme.

Question 67. Are there any models for Crown Court advocate remuneration you feel we have not yet considered? Please give details.

ans.) The Bar Council has explored this area for many years and worked co-operatively with the MOJ on the design of fee schemes. We do not have an entirely new scheme to recommend. The fundamental problem is not the structure of the AGFS, it is the underfunding of it.

Moreover, some difficulties experienced within the existing structure could be ameliorated by payment of fixed fees immediately after they are accrued, rather than awaiting the conclusion of the proceedings overall. Prompt payment of these fees would assist practitioners to maintain consistent cash flow without placing any additional quantitative burden on the system.

Timely payment of fixed fees is a particular concern to those in their early years of practice, much of whose Crown Court work involves covering early hearings for more senior members of their chambers, rather than conducting a significant number of trials themselves. There is an uneasy balance between paying for train fares to far-flung courts out of one’s own pocket and not receiving payment for those hearings until a year or more later. Much of the diversity that has been gained at the criminal Bar in recent years has been at the junior end; this progress is likely to be lost if junior practitioners are not able to finance the work they undertake. A general review of

travelling and accommodation expenses should be undertaken as these have become increasingly unrealistic in recent years.

Further data and research

Question 68. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of advocates in preparing Crown Court cases, and facilitate reform of the AGFS? Do you record this data, and would you be willing to share it with us?

ans.) The Bar Council does not have a separate source of data that is not already in the hands of the MOJ.

Prior to 1997 all advocates criminal legal aid fee claims were individually assessed and paid on an hourly rates basis. The assessment of the number of hours claimed on each case was administratively expensive. In 1997 a Graduated Fees Scheme was introduced for cases where the trial was expected to last between 1-10 days. The AGFS has over the years been expanded to now cover all cases where the trial is expected to last under 60 days. The payment of these cases by mathematical formula has saved a lot of administrative burden for the LAA in assessing claims, and to advocates in not having to record hours worked (unless when making a claim for Special Preparation). The disadvantage is that the data no longer exists on hours worked on different types of claim. Attempts have been made over the years to ask advocates to fill in survey forms to gather additional data, but busy barristers have not been enthusiastic to spend lots of time filling in forms for which there is no remuneration, and where there is little faith that such effort will result in meaningful change. What has been more effective is when the Bar Council has had small focus groups of barristers to discuss from their direct experience the relativities of cases – which types of case require more work than others – rather than the precise number of hours taken on each case. This has been used to assist in the design of fee schemes. This sort of work on the appropriate relativities between case types could be suitably taken forward by the proposed Advisory Board.

Question 69. Which factors increase the complexity of the advocate's work in Crown Court proceedings?

ans.) Much of this complexity is already identifiable in the current fee scheme, such as the different categorisation of cases within the bands, and more traditional proxies such as Pages of Prosecution Evidence (PPE). As indicated in the previous answer, the Bar Council would be happy to work with the Advisory Board to explore this matter further.

Question 70. In your view, how should the AGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?

ans.) See answer to Q.64. The Bar Council would be happy to work with the Advisory Board to explore this matter further.

Enhanced payment for “Substantive” PTPHs/FCMHs

Question 71. Do you think advocates should be able to claim a higher fee for attendance at a PTPH or FCMH where meaningful case progression has been achieved? If so, what criteria, in your view, should be satisfied for this type of hearing to be considered effective? Please outline your reasons.

ans.) All PTPH and FCMH hearings involve work and should be properly paid. The CPS should make it a high priority to serve all the material in the case at an early stage, thereby enabling the defence advocate to fully advise their client and prepare the case for PTPH. When that work is done, the inadequacy of the current PTPH fee is stark. We acknowledge the practical difficulties identified in paragraph 168 of the consultation to identify those hearings that require more work than others. There could be an ‘escape’ mechanism for cases that involve an exceptional amount of work, but the key is to serve the material on time, prepare the cases early and pay properly for all PTPHs. We are willing to discuss this matter further with the MOJ or Advisory Board.

Wasted Preparation Payments

Question 72. Do you support the principle of making Wasted Preparation available in more instances? If so, under what circumstances should it be claimable? Please provide reasons.

ans.) Yes. The Bar Council agrees with Sir Christopher when he wrote in his report:

“13.99 [...] the present system whereby an advocate does not generally get paid for preparation work that is reasonably done in anticipation of a trial that does not take place through no fault of the advocate, does not incentivise proper preparation. [...] In my view claims for wasted preparation should be properly remunerated. That will also support the principles of case ownership and early preparation. I recommend that paragraph 18 of Schedule 1 of the Regulations should be amended by deleting paragraph 18(2) and in paragraph 18(3) replacing the word “eight” by (say) “two”, with the intention that wasted preparation in excess of two hours should normally be remunerated.”

We disagree with paragraph 169 of the consultation that any changes should be “within the same cost envelope”.

We note the concern as to “the volume of claims which could be triggered and the risk of paying twice for the same work.” That problem may largely be addressed in paragraphs 177-178 of the consultation. The Bar Council welcomes the development of the “List Assist” software. The key however is for Listing Officers to place a higher priority on the availability of the advocate when listing a case. It is not so much a computer issue, as the insufficient priority given to counsel’s availability. The situation has recently been made worse by the backlog of cases where Listing Officers have been ‘over listing’ cases in the hope of addressing the backlog, but the over listing means cases are listed that have little or no prospect of being called, with the result that the advocate prepares the case, reserves the time in their diary and is then unpaid because the case is not called.

Question 73. In your view, which case criteria should be satisfied for a Wasted Preparation claim to be allowable (e.g. duration of trial, volume of PPE, hours of preparation conducted)?

ans.) The principle should be that “preparation work that is reasonably done in anticipation of a trial that does not take place through no fault of the advocate” should be paid for. It should not be restricted to cases where the trial is more than a set number of days, or the PPE is over a set number.

Section 28 pre-recorded cross-examination

Question 74. Would you be willing to help us gather data on the additional work involved in a case with a s.28 hearing?

ans.) Yes.

Question 75. How do you think the fee scheme should be remodelled to reflect s.28 work?

ans.) An additional brief fee should be paid for the s.28 hearing. We disagree with paragraph 173 of the consultation that this fee should be “on a cost neutral basis”. There must be sufficient scope / flexibility within any scheme to reflect what can be exceptional levels of work done, particularly where there are multiple “s28 witnesses” being cross examined prior to trial.

Anecdotal evidence received from barristers by the Bar Council strongly suggests that, in many s28 cases the additional amount of work required by counsel is not adequately reflected in the current fee. We would be very pleased to work with the

MoJ to undertake a formal evidence-gathering exercise around remuneration of s28 cases. We understand that inadequate remuneration is already resulting in counsel declining to accept instructions in such cases, with an obvious damaging impact on complainants.

Considering our answer at Q9 of this consultation, in which we establish that RASSO work is a far more important part of the overall fee income of women barristers than of men, we are concerned that an expansion of s28 without adequate consideration of the additional time involved in these cases could have a disproportionate impact on women at the criminal Bar, who are already at a financial disadvantage compared to male colleagues.

Youth Court fees

Question 76. Considering the fee proposals above in paragraphs 186 to 187, which do you think would better reflect the seriousness and complexity of some Youth Court work and deliver improvements to legal advice for children, whilst ensuring good value for taxpayers?

ans.) The Bar Council agrees with paragraph 186 that certificate for counsel should be automatically available for all indictable only offences heard in the Youth Court. We also agree with paragraph 187 that Youth Court fees should be increased.

Question 77. Which proposal do you think would provide better quality legal representation for children before the Youth Court?

ans.) Both proposals should be introduced.

Question 78. If you oppose the outlined options or want to propose an alternative, please explain your proposal, the rationale and evidence behind it, and include any unintended consequences which you think could arise.

ans.) Not applicable.

Youth work accreditation

Question 79. Do you agree that accreditation should not be made a formal condition of lawyers receiving increased fees for youth work? Please explain.

ans.) The Bar Standards Board Handbook has the following code of conduct obligation upon barristers: "*rC21. You must not accept instructions to act in a particular matter if: [...] .8 you are not competent to handle the particular matter or otherwise do not have enough*

experience to handle the matter". Therefore, for barristers, this matter regulates itself without requiring a separate scheme.

We are not aware of any evidence that any problem has arisen such as to justify a further accreditation scheme as a proportionate or appropriate response.

Investment in VHCCs

Question 80. We propose increasing fees for litigators conducting VHCCs by 15%. Do you have views? Please explain your reasons.

ans.) We defer to the Law Society who are best placed to answer.

Individual Fixed Fee Offers (IFFOs): CLAIR'S Recommendation

Question 81. Do you support the further clarification of IFFOs in Regulations? Why?

ans.) First, the Bar Council does not recognise or accept the quote that "substantial fees paid to counsel under the existing IFFO arrangements" is a fair reflection of the present IFFO system. The fees paid under the IFFO arrangement are neither disproportionate nor wrong in principle. On the contrary, the number of cases and the fees paid represent a very small (and diminishing) percentage of the existing overall legal aid spend, and they are for the most complex and lengthy criminal cases which the criminal justice system has to deal with. Furthermore, the fees reflect not only payment for work done at trial but also for the advocates significant period of preparation that the case will demand before trial. Preparation periods for these cases are now frequently at least a year between initial charge and trial, and invariably longer. At present there are serious fraud cases that have taken four to five years between charge and trial, and this has been further exacerbated by the pandemic. During that substantial period of time the advocate is frequently committed to the case and cannot be instructed in other day to day court work (or such work is seriously curtailed). Thus, the IFFO fee often represents the totality of an advocate's income for a year or longer. Furthermore, the agreed IFFO fees, subject to specific additional prosecution material being served and the length of trial, remain fixed no matter how much work the advocate is required to undertake. This provides fiscal certainty to the advocate and the government.

Against that backdrop we agree that while the IFFO scheme could be further clarified within the regulations, these exceptional cases are likely to benefit from a degree of flexibility in the regulations to enable the Ministry and Counsel to agree fees that are reasonable given the extraordinary levels of work required. We would also stress:

(a) that clarification must not mean a return to the former VHCC scheme of the allocation of specific tasks and hours. The utility of the IFFO scheme to both the advocate and the LAA is that, once agreement is achieved, the administration is minimal to both parties, thereby saving significant administrative burden and costs to the government; and,

(b) we would strongly oppose any amendment to or erosion of the scheme which will not properly and adequately remunerate the advocate to read (i) all the served prosecution material (in all its formats) where it is served and relied on by the prosecution against a defendant and/or (ii) unused material disclosed by the prosecution under the CPIA 1996 and which is therefore recognised as either undermining the prosecution's case or assisting the accused's case.

Although these cases have high levels of digital material which can entail, for example, accounting material, documentation and emails, the scheme must properly recognise and pay for the work that this material generates. This type of material – specifically in fraud cases – is often the key evidence. As such the advocate must read it to prepare for trial. Digital material should not be seen as being additional evidence to the case (as often it presently is). The present proxy used for digital material remains its page count. Whilst that proxy has issues associated with it, we continue to regard it as being the fairest way to assess the weight and level of work that the advocate will be required to undertake. We are concerned by reference to the way the consultation is phrased that a departure away from that proxy, for example by an estimate of time or data size, might be adopted. Such an approach frequently results in a significant under estimation of the level of work that is required on the digital material in question, which leads in turn to an under remuneration for the advocate for the work that they will be required to undertake.

Question 82. Would you find a dispute resolution mechanism, prior to signing a contract, useful? If so, what form do you consider such a mechanism could take? Why?

ans.) Yes. There is force in establishing a binding dispute resolution scheme that will allow an advocate to resolve any dispute about an IFFO fee before a contract is signed. This process should include the advocate being able to make representations about what can and or should be taken into account prior to the fee being determined. In addition to our response to Q81 above, the process should allow an advocate to address any specific complexity in the case as a whole, if and where there is a dispute about that matter as between the advocate and the LAA.

The present system results in advocates who are instructed in a case having to deal with the professional burdens of that case, including substantial preparation for trial and meeting court directions, all of which can be onerous, where before an IFFO

agreement can be reached they remain at risk of receiving no payment at all for the work they have done. That is neither fair nor proportionate, as advocates are still working on the case and aiding its progression.

We suggest an independent appeal panel is appointed, similar to the panel used in VHCC cases for specific task assessments. The panel can consider and determine the merits of any dispute between an advocate and the LAA at any stage. Panel members can be drawn from the professions and LAA, but it should be impartial and objective.

Individual Fixed Fee Offers (IFFOs): Reverting to the Contractual Provision

Question 83. Would you support reverting to the individual case contract provision for VHCCs, instead of the IFFO scheme? Why?

ans.) No. The previous scheme was overly bureaucratic, with LAA members of staff reducing the numbers of hours they would allow advocates to undertake particular pieces of work. It was galling for expert barristers dealing with the details of a case to be told by non-practitioner members of staff, not dealing with the case, that the barrister could prepare the case in less time.

Question 84. Would returning to the contractual provision benefit the conduct and effective case management of these cases? Why?

ans.) No. 'Case management' in this context in practice meant seeking ways to cut fees.

Question 85. Would you consider any changes to be required to the individual case contract provision before reverting back? If so, which changes?

ans.) Not applicable, because the individual case contract scheme should not be reintroduced.

Individual Fixed Fee Offers (IFFOs): Adapting the Scheme

Question 86. What principles need to be changed under the current provision in order to fairly reflect the work done?

ans.) See answer to Question 81.

Question 87. If the IFFO provision is to be retained, what do you consider a reasonable approach to the negotiation and payment of fixed fees?

ans.) As stated above, we do not accept the premise in the consultation that a departure away from the page count proxy results in payment for work that is not

being done or value for money. On the contrary, whilst page count as a proxy to determine a fee has issues, it also has significant benefits. It provides an objective identifiable and verifiable data point for fee calculation which is certain to both sides. Any alternative means of fee calculation invariably leads to a significant underestimation of the work a case will entail, and therefore under remuneration for the advocate.

The present IFFO arrangement can work provided there is some amendment to it.

(a) As set out above in response to Q82, there should be a proper, objective and fair dispute resolution mechanism between the advocate and the LAA where any dispute arises. This should not be limited to the overall fee in the IFFO contract, but a panel could, for example, consider the implication of the service of additional evidence in the life of a case (see below) where the advocate and LAA cannot reach agreement about it.

(b) The contract should be amended to allow for greater flexibility to remunerate an advocate for the service of additional material (used and unused). The present contract sets the threshold for the payment of additional material at too high a level:

“Clause 14.8E “If following the date of this Contract but prior to the full trial of the Case concluding there is an increase in the total volume of material served in relation to the Case which is equal to or exceeds thirty percent (30%) of the total volume of material which has previously been served in relation to the Case as at the date of this Contract, then an additional sum shall be payable to you in order to reflect the additional work undertaken in relation to such material (the “Additional Material Payment”).”

Where the case is initially served the IFFO contract is agreed by reference to that page count, however that can mean that the present contractual threshold becomes illusory. For example, where the case is initially 500,000 pages the 30% uplift presently required under the contract means that a further 150,001 pages would have to be served before any additional payment falls due. Whereas if there was 149,999 additional pages served, that increased page count would result in a significantly more onerous obligation on the advocate to prepare that case for no additional remuneration. For that reason, we would support an amendment to the contract so that a threshold is reduced to 10%. This will allow for a more graduated level of remuneration in cases where page count increases.

Subsuming VHCCs into fee schemes

Question 88. Would you support VHCCs being subsumed into the LGFS/ AGFS once reformed if based on proxies that better reflect work done in order to pay for it more fairly? Why?

ans.) In December 2009 the Legal Services Commission (LSC) published *“Very High Cost (Crime) Cases 2010. A Consultation Paper”*. At that time, VHCCs were for cases where the trial was likely to last more than 40 days, and there were a considerable number of such cases. The Bar Council’s proposal was reproduced as Annex 1 of that consultation, called *“GFS Plus”*. It proposed *“a matrix of two criteria to arrive at the appropriate category: Case Seriousness and Defendant’s Role. These will be used to arrive at the appropriate Uplift Factor”*. The LSC ignored the Bar Council’s proposal and instead expanded the VHCC scheme to cases likely to last more than 60 days.

The Bar Council’s GFS Plus proposal stated, *“47. [...] certain exceptional cases will always fall outside the fixed fee scheme we are designing.”* Now that the AGFS covers cases up to 60 days and there are only a very few cases each year that fall outside it,²⁰ we are in the position of those cases that remain, being truly exceptional, and unsuitable for incorporation into a graduated fee scheme.

Question 89. Are there specific considerations regarding VHCCs which are needed when reforming the LGFS/AGFS? Which ones?

ans.) Not applicable given the answer to Q.88.

Investment in Fees for CRRC Work

Question 90. We propose increasing fees for litigators conducting CCRC work by 15%. Do you have views?

ans.) We defer to the Law Society who are best placed to answer.

Structural Reform of Fees for CRRC Work

Question 91. Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why?

ans.) We generally defer to the Law Society who are best placed to answer for the larger part of the scheme. However, we do note that access to expert legal advice from counsel to assess the merits of a prospective application, and to provide advice that supports and informs a meritorious application being presented to the CCRC for its investigation, has been undermined by the restriction on legal aid under the legal help

²⁰ LAA published statistics show that in 2009-10 there were 447 defendants represented under a VHCC contract. By 2021-22 this had dropped to 55 defendants.

<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2021>
Table 4.4.

scheme to remunerate counsel at a fair and sustainable rate for this complex and expert work.

We draw attention to the written evidence of the CCRC, dated 10 June 2021, submitted to the Independent Review of Criminal Legal Aid ('CLAIR'), that records particular observations that we agree with and support, that:

- (1) The current structure has led to a marked decline in the number of practitioners who are able and willing to assist with applications to the CCRC [14].
- (2) The CCRC is concerned that the scarcity of practitioners to assist applicants may prevent meritorious cases being brought to its attention [12].
- (3) Payment based on time and professional experience would seem more appropriate than a fixed fee [22].
- (4) The CCRC has seen a marked and very concerning decline in the number of applicants from England and Wales who receive legally aided representation (dropping from 34% of applicants to just 10% per annum over the past 15 years). Likewise, the number of professionals who are willing and able to undertake CCRC work has also decreased. Both trends appear linked to a decline in funding and changes to criminal legal aid [7].

We challenge the premise of the consultation that legal aid should be more restricted in accessing justice via the CCRC than would be the case for a private client to seek expert legal advice. We also question whether such an intention has been subjected to an analysis for compliance with the Public Sector Equality Duty and impact on potential CCRC applicants from ethnic minorities, or those with learning disabilities or mental disorders. The consultation refers at [207] to "Legal aid for applications to the CCRC is administered by the LAA. Advice and assistance on applications to the CCRC is intended to be an "initial screening process", primarily to screen out weak claims that do not meet the CCRC criteria. The CCRC will then determine the merits of the matter". This ignores the fact that the only time that an expert counsel may be engaged in the process is at the advice stage – thereafter a CCRC case review manager, who is not required to be a qualified lawyer, may investigate a case, if it is actually referred. Many wrongful convictions result from (i) errors of law, such as incorrect direction on the law, which has, by its nature, been misunderstood or overlooked by a trial judge and legal representatives at trial, or (ii) from an evaluation of fresh evidence in the context of serious or complex jury trials, the experience and understanding of which is greatest amongst practitioners at the Bar. These are matters that require experienced and expert counsel to evaluate or identify error or merit, and restricting legal aid so as to inhibit or preclude such expert advice is contrary to the interests of justice.

We agree with Sir Christopher's report (paragraph 14.18) that "the general interest is likely to be better served by funding a structured submission to the CCRC in an appropriate case, rather than limiting legal aid to an 'initial screening'".

Remuneration rates for advisory work provided by counsel to consider CCRC applications should be increased.

Question 92. If you already undertake CCRC applications work, what are some of the challenges with this work?

ans.) We defer to the Law Society who are best placed to answer.

Question 93. Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones?

ans.) We defer to the Law Society who are best placed to answer.

Question 94. Is there a clear demarcation of work which should be done by the provider of legally aided services and that which should be done by the CCRC?

ans.) We defer to the Law Society who are best placed to answer. We refer also to our answer at Question 91 above.

Question 95. Do you routinely and accurately record time spent on this work?

ans.) We defer to the Law Society who are best placed to answer.

CLAIR's recommendation on CRRC reform

Question 96. Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why?

ans.) We defer to the Law Society who are best placed to answer.

Question 97. Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why?

ans.) We defer to the Law Society who are best placed to answer. We refer also to our answer at Question 91 above.

Retain the Existing CRRC Provision with Uplifted Fees

Question 98. Do you consider that retaining the existing fee scheme once the fees have been uplifted would incentivise providers to take on this work? Why?

ans.) We defer to the Law Society who are best placed to answer. We refer also to our answer at Question 91 above.

Investment in prison law fees

Question 99. Should the Government focus on the early stages of the criminal process and not uplift prison law at this stage? Please explain your reasons.

ans.) No. The Government should be able to do two things at once. Addressing the early stages of the criminal process should not be an excuse for failing to input investment that is urgently needed. There are three important ways in which barristers provide services under the prison law legal aid scheme:

- i. Representation at adjudications before Independent Adjudicators (usually retired District Judges) who have power to impose loss of liberty for any offence found proved to the criminal standard in the proceedings;
- ii. Representation at parole hearings where the liberty of the individual, and safety of the public, is at the heart of the proceeding;
- iii. Advice which can be on matters of sentence calculation, appeal prospects, or treatment that may contravene the law including fundamental rights and protections.

Each of these is of real importance, and frequently counsel is sought out to deal with the most challenging and complex cases and clients, many of whom have significant vulnerabilities. As a result of the previous change from hourly rates, paid at a fixed specified level for the work provided, to the current fixed fees system, experienced counsel have not been able to accept instruction in attending parole hearings and adjudications. Problems have also been created that adjournments are not catered for, so that the fixed fees payable often cannot stretch to cover the work done, and a very substantial amount of unpaid work must be completed by the solicitor before a case 'escapes' and can claim the higher fee. In most cases the legal representatives are simply left unremunerated for the work as the 'dead' area between the fees is so significant. The loss of practitioners willing to undertake legally aided criminal work is matched or exceeded by those lost to prison law work, and this also needs to be addressed by significant improvements to the remuneration levels.

We also question whether compliance with the Public Sector Equality Duty is achievable without redressing this problem and its impact on those from ethnic minorities, or those with learning disabilities or mental disorders, accessing adequate, or any, legal representation under the current scheme (see our answer to Question 101 below).

Prison law work

Question 100. What more could be done by the Government to address problems around access to clients in prison?

ans.) The Bar Council would be happy to engage with the MOJ on detailed work in this area.

Question 101. Do you agree with the proposal to restructure the fee scheme for advice and assistance in prison law cases?

ans.) The Bar Council would be happy to engage with the MOJ on detailed work in this area. However, the levels of remuneration are inadequate to incentivise work acceptance in this field, and the proposal to look at “cost neutral basis” reform (at paragraph 219) is inadequate to remedy the fundamental problem that the work is not remunerated at a rate that is sustainable for practitioners in this field to be retained. Furthermore, we agree with the concerns that the current system fails vulnerable clients and complex cases. We draw attention to the evidence taken by the CLAIR that “According to LAA figures, the number of providers doing prison law dropped by 70% between 2012/13 and 2019/20. In addition, one effect of LASPO has been to remove advice on sentencing planning and access to offending behaviour programmes from the scope of legal aid; restoring that at modest cost would have a wide public benefit, bearing in mind that the average cost of a prison place is around £44,000 and £101,000 in a young offender institution” [14.39].

We entirely agree with Sir Christopher’s report that an urgent reform needed is to alter the scheme to as to enable “work that properly needed to be done to be carried out without the penalty of working for nothing in more difficult cases as the present escape fee mechanism requires” [14.41]. This is a major disincentive to the professions and restricts access to the services of a barrister even in complex and difficult cases, with the attendant costs to the public interest, and public purse, through poorer outcomes in the rehabilitation progression and reintegration of the prison population.

Question 102. What data would need to be taken to implement this reform?

ans.) The Bar Council would be happy to engage with the MOJ on detailed work in this area.

Other criminal legal aid fees

Question 103. Do you agree with our proposal to increase the fees for these other areas by 15%?

ans.) As stated in previous answers, 15% is a welcome first step, but more investment is needed.

Impact Assessment

Question 104. 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.

ans.) Not fully – it could be improved.

The Impact Assessment modelling is based on 2019-20 data and, as such, does not take account of the impact of the pandemic. That data on barristers is available to the MOJ and it would seem advisable to take it into consideration. The MOJ is aware that the data for the year 2020-21 suggested a worsening picture and a decrease in those willing or able to do full time criminal work.²¹ This data only reinforces the need to inject the funds recommended by Sir Christopher Bellamy as a matter of urgency and that all future investment must be evidence based.

There are additional questions about modelling. The IA states,

“Crown and magistrates’ sitting days are projected to increase beyond 2019-20 levels up to 2024-25 (by 20-29% and 7% respectively) along with legal aid police station volumes (10%), due to court recovery measures to reduce backlogs in the court and from expected increases in police officers.”

However, the National Audit Office questioned the MOJ’s modelling of the recovery measures to reduce backlogs in the courts, identifying that the availability of judges and legal professionals had not been scoped by the MOJ in its modelling.²²

It would seem prudent, given what we know of the impact of the pandemic on the criminal Bar, and the NAO’s criticism of MOJ’s modelling, to conduct some additional empirical research on the sustainability of the criminal Bar before making assumptions about the availability and willingness of the self-employed Bar to service a 20-29 per cent increase in case volume in the next three years.

Equalities

Question 105. 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.

²¹ <https://www.barcouncil.org.uk/resource/bar-council-data-analysis-criminal-bar-april-2022.html>

²² <https://www.nao.org.uk/report/reducing-the-backlog-in-criminal-courts/>

ans.) The Equality Assessment states, “When taken as an overall package, it is our view that the consultation proposals would benefit providers across criminal legal aid by ensuring that we pay more fairly for work done. According to the CLAIR focus groups poor pay affected minority groups and women in particular. Therefore, increasing fees might go some way to address these issues.”²³

We would like to see some modelling based on the Data Compendium data and the case mix for 2019 to demonstrate the impact of the proposals on different groups. In particular, we would like to see a granular analysis on the impact on the intersection of sex and race, as previous analysis demonstrated that black and Asian women were the poorest paid groups at the Bar. Given the data we hold (see Answer Q13) we would expect such modelling to demonstrate a continued discrepancy in projected income, and would like to work collaboratively with the MOJ, the Law Society, the LAA and other stakeholders to monitor, investigate and address such inequalities of outcome.

This analysis would certainly be possible for sex, race and age, although likely not for any other protected characteristics due to data limitations, using the data that MOJ currently holds.

Question 106. 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

ans.) It will be possible for us to propose mitigations once we have seen the modelling.

**Bar Council
1 June 2022**

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²³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060349/clair-equalities-statement.pdf