Response of the Criminal Bar Association of England & Wales
Consultation on Amending the Advocates' Graduated Fee Scheme

About the Criminal Bar Association

1. The Criminal Bar Association of England and Wales ("the CBA") represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education, training and assistance with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

2. The CBA is the largest specialist Bar association, with over 4,000 subscribing members, and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country.

3. This response to the Ministry of Justice's consultation on its proposed Amendment to the Advocates' Graduated Fee Scheme ("the AGFS") has been prepared and provided on behalf of the membership of the CBA.

Overview

4. Scheme 10 of the Advocates Graduated Fee Scheme ("AGFS") came into force on 1 April 2018 (S.I., 2018, No. 220).

5. Scheme 10 was not the scheme the Bar asked for. The Bar engaged in developing a new AGFS scheme; however as the Ministry of Justice made clear at the time, it was not the Bar's scheme but their own. There were both structural changes and an insistence on purported 'cost neutrality' based initially at the historically lowest level of annual spend.

6. The process that led eventually to the AGFS Scheme began life in response to a threat of a yet further cut of 8.5%. That would have resulted in a halving of fees since 2007. Even at that stage the fee levels vastly undervalued what is required of the Criminal Bar, and were causing real harm to its long-term future. The situation has got even worse. **AGFS spend has fallen by 40% since 2010**.

7. Many, on all sides, worked hard to devise a new structure to replace one that was, in so many respects, unfit for purpose. But the process was hamstrung by the requirement that was then insisted upon, at a political level, of 'cost-neutrality'; nor does the final scheme reflect all of the elements for which the Bar fought hard.

8. The scheme proposed by the Bar was different, in terms of both structure and anticipated fees at all levels. The Bar also sought some form of future proofing, to avoid the real term consequence of inflationary cuts.

9. At no time did the Bar accept that the proposed levels of funding were adequate - quite the contrary. The scheme required investment.

10. At no time did the Bar accept that fees should stay the same, year on year, becoming steadily eroded by inflation - quite the contrary.

11. The previous AGFS scheme, Scheme 9, had been the victim of repeated irrational cuts and changes. Examples of this were:

    - Abolition of separate payments for the second day of any trial,
    - Abolition of separate additional payments for sentence hearing,
    - After 40 days of a trial the day rate (refreshers) are reduced to a third of the standard refresher until day 50 when they are paid at about half the full rate, this is regardless of the original trial estimate (a number of years ago trials lasting beyond a certain length would be eligible for uplift payments),
    - Almost all non-trial hearing (mentions, ptrs, bail app)received no additional payment.
    - Cracked trial fees were cut by over 70% in certain categories of case.

12. The structure in Scheme 10 'pays' for the second day of all trials, 'pays' for sentence hearings, and 'pays' for all other hearings. However, this was achieved by'robbing Peter to pay Paul, not, as the Bar argued

vigorously for, by new investment. Brief fees in almost every category were reduced to shift money to the unpaid hearings.

13. What 'unbundling' the fees payable for criminal defence work has achieved, however, is to show the true level of payment, and it can clearly be seen that the fees are just inadequate. This leaves many of the most talented unwilling or unable to remain in practice at the Criminal Bar. Quite simply they can, and may need to, earn more for their skills and talents in other fields of practice or in other walks of life altogether. The criminal bar is in crisis.

14. The introduction of Scheme 10 was seen as an opportunity to reinstate a more realistic fee structure, which fairly and properly remunerated advocates for their commitment, learning and professional responsibility. This did not materialise.

15. The most junior were dismayed that they saw no prospect of meaningful career progression with only very modest benefits at entry/junior level (and cuts in some cases). The more senior juniors were demoralised and astounded that fees which had been cut so brutally since 2007 fell once again. Many modelled fee cuts of a third in their annual income.

16. As a result, the Bar unified and refused to undertake work under Scheme 10.

17. The predictions of the CBA and its members were proven to be correct with some reporting even more brutal cuts of up to 50% and importantly confirmed most recently in the release of the modelled 2017/2018 data by the Ministry. <u>The CBA was correct in its assessment that Scheme 10 was not cost neutral and justified in the action it took.</u>

18. The action was suspended following negotiations with the Ministry of Justice during which the Ministry accepted that the Scheme was underfunded and failed to provide adequate remuneration. The offer from the Ministry, accepted by narrow ballot of the membership consisted of:

    - £15 million (including VAT) investment from the Treasury (<u>new money, not to be taken from other areas of the Justice budget</u>).

    - The first £8 million to be targeted towards the categories of case that lost heavily under the abolition of PPE (fraud, drug and high page sex cases).

- Further £4.5 million targeted towards junior fees (not Silk) to reflect career progression and sustainability for juniors.

- A 1 per cent increase in April 2019 across all fees.

- A planned review of the scheme to take place within 18 months.

19. The CBA understood that the new funds and Scheme 11 would be laid by Statutory Instrument by October 2018. This has not happened, with the consultation only being launched on 31 August 2018 and the close date extended to 12 October 2018. It is noted that the consultation is narrow in scope and deals solely with the allocation of those funds.

20. The CBA is disappointed in the delayed implementation of a scheme, which the Government recognises is necessary to adequately remunerate advocates. At the present time, advocates continue to extend goodwill in working on Scheme 10 cases absent the investment of funds. This goodwill is hanging by a thread.

21. We wish to make it clear that we agree with the injection of funds, limited as they are, and the allocation of those funds into the various bandings of offence; however, Scheme 11 requires immediate implementation to address the inequity of the present scheme. The CBA and its membership will brook no further delay. In addition, the Ministry must recognise that the losses (on a conservative estimate based on cost-neutrality which is in doubt, amount to in excess of £1.25m per month) require compensation.

22. It has become apparent very quickly that there are many flaws in the new scheme, caused by the absence of sufficient investment. The injection of £15m is no more than a 'patch repair' or 'sticking plaster' to begin to deal with some of the most significant problems but much more investment is required. The CBA expects the Ministry to honour the promise of £15m in full on the 17/18 level of expenditure. The 17/18 data reveals that scheme 10 implemented a cut to the AGFS budget. Without the £15m 'emergency' funding the fees in too many areas would be intolerably low. More very significant flaws have been identified which require immediate remedy. Many are set out in this response. There is money available as scheme 10 resulted in savings and year on year case volumes are falling, and falling significantly. Unless the areas identified in this response are addressed there will be an exodus of practitioners from some of the most demanding, and serious cases. This work may still be covered by some advocates but it is unlikely that defendants in these cases will be represented by

advocates of sufficient quality and experience. Justice will inevitably be compromised.

23. Therefore, we look forward to the Ministry returning with significant proposals to meet the serious funding problems we have identified. There remain too many examples of advocacy fees not remotely providing adequate remuneration for the work these cases require.

24. The CBA welcomes the proposed review of the AGFS 11 Scheme. It is clear from the recently released data that unsurprisingly the Ministry is able to analyse the application of both Scheme 10 and Scheme 11 on the last two years' case loads. By September 2019 at the latest, the Ministry will have three years' data. The impacts will clearly be seen. It is already apparent that Scheme 10 resulted in a significant cut on the 2017/2018 caseload.

25. The formal review must commence on 1 April 2019, a year after the introduction of Scheme 10 and when a full year's operational data is available (along with the additional years of applied comparative data) in order for a full review to be undertaken and concluded at the 18 month point.

26. We expect the Ministry to continue to engage with the CBA and other professional representative bodies throughout the period running up to the review and throughout the review. There remain serious issues with the Scheme, even with the additional funding.

27. The CBA makes plain that delay to any review, as has been seen with the LASPO review, will not be tolerated. The stakes are too high.

Questions and Responses

Q1: Do you agree with the proposed increases to basic fees in bands 4.2 and 4.3? Please state yes/no and give reasons.

4.2 (sexual assault on child): increase in basic trial fee: 1400 - 1550 + 500 refresher
4.3 (other offences): increase in basic trial fee: 1000 -1500 + 475 refresher

Yes/No

28. In previous consultation responses we highlighted the reduction in fees within these categories. We agree that the bands required increases to the basic fees and welcome such increases. These reflect to some degree the increased complexity and skill required in child sex offences.

29. We note however from Table 19 of the Impact Assessment, that in relation to band 4.3 the proposed increases will still result in an overall 6% cut from the fees in scheme 9. As set out in our previous response this cannot be justified. The fee increase in that regard does not deal with the concerns raised in our previous consultation responses.

30. The impact is such that very serious child sex cases will still be paid at lower rates than under scheme 9.

31. It is likely that this will have a disproportionate impact upon female counsel and more junior counsel.

32. The CBA understands that the last thing the scheme was intended to do was cut fees for child sex offences and as such the revised Band 4.3 proposals do not meet the recognised need or aims of the scheme as set out in the policy objectives of the Impact Assessment and also previously within the various consultation documents including the Government's earlier responses.

33. The CBA maintains its earlier submissions that the banding of child sex offences requires review and reconsideration. For example all child sexual exploitation offences are retained in Band 4.2 see e.g. controlling a child in relation to sexual exploitation and arranging or facilitating child sexual offences (s48, 49, 50 SOA 2003). These types of offences are those seen in the high profile child grooming and exploitation rings e.g. Rotherham. They are hugely complex cases with voluminous material and often multiple child complainants.

34. Turning to Band 4.3, this includes child sex offences committed by children. These are some of the most complex cases that come before the court and require highly specialist skills and expertise (including in addition, the different legal framework and sentencing disposals). It also still includes incest with a child under 13. These are examples of Band 4.3 child sex offences which ought to be re-categorised to Band 4.1, as cases of equivalent seriousness and complexity. There needs to be a review of Band 4.

35. The Ministry is invited to confirm the approach to the definition of child in Band 4. The CBA strongly contends that this should reflect both domestic and international legal definitions in that a child is defined as being under the age of 18. Consistency in approach is needed.

36. Within Band 4, we also raise the issue of child defendants in sex cases. In a case where a child is a defendant, the same issues of complexity and specialist skill arise. This is even more so when considering the levels of involvement within the criminal process by the defendant child. Where a sex case involves a child defendant in a non Band 4 case, the CBA view is that the applicable fee ought to transpose from Band 5 to Band 4. This would not result in any administrative difficulties or further resources. The test is an objective one and wholly dependent upon date of birth, a fact recorded within the charge sheet and on court records. The relevant date for establishing age ought to be, as in other situations, the date of the alleged offence. These considerations equally apply to historic cases, where the defendant is now an adult, because of the complex issues that arise in such cases and the differing legal frameworks.

Q2: Do you agree with the proposed increases to basic fees in bands 6.1, 6.2, and 6.3? Please state yes/no and give reasons.

	Scheme 10		*Scheme 11*	
6.1 (20k ppe or £10m)	*£8k*	*(525)*	*£8450*	*(525)*
6.2 (10k ppe or £1m)	*£5k*	*(500)*	*£7625*	*(500)*
6.3 (over £100k)	*£2k*	*(400)*	*£2825*	*(400)*
6.4 (under £100k)	*£750*	*(350)*	*£1000*	*(375)*
6.5 (under £30k)	*£650*	*(325)*	*£800*	*(360)*

Yes/No

37. The CBA identified that these cases were amongst the most disproportionately affected by scheme 10. This has proven correct from the figures in the most recent Impact Assessment. The proposed

increases mitigate to some degree the swingeing cuts identified in scheme 10; however they do not adequately compensate at the proposed levels. For example, in relation to some of the most complex and serious frauds across the country, cases falling into Band 6.1 will still, on the Impact Assessment, see cuts of 7%. The Impact Assessment makes plain that Bands 6.1, 6.2 and 6.3 all face reductions under the proposals as compared with Scheme 9. This is not in accordance with and does not meet the identified Policy Objectives. The abolition of special preparation, common within these categories, unless a PPE threshold of 30,000 is reached compounds the problem. The special preparation threshold of 10,000 pages should be restored.

Q3: Do you agree with the proposed increases to basic fees in bands 9.1 and 9.4? Please state yes/no and give reasons.

Class A	*Scheme 10*	*Scheme 11*
9.1 (import/5000ppe/5kg)	*£5000 (525)*	*£5800 (525)*
9.4 (1000ppe/1kg)	*£2000 (450)*	*£2625 (450)*

Yes/No

38. As with Band 6, the CBA identified that these cases also amongst the most disproportionately affected by scheme 10. This has proven correct from the figures in the most recent Impact Assessment. The proposed increases mitigate to some degree the swingeing cuts identified. The categories however are crude and the CBA notes that special preparation is not available until the case involves in excess of 15,000ppe. This creates a huge void resulting in the inadequate remuneration for the work undertaken in such cases. This is particularly acute when considering the difference in fees for such cases between Scheme 9 and Scheme 11 (resulting in 50% or more cuts).

39. The CBA considers that at a minimum the threshold for special preparation in drugs cases should be reduced. The void is too great.

Q4: Do you agree with the proposed increases to fees in the standard cases category? Please state yes/no and give reasons.

	Scheme 10	*Scheme 11*
Standard	*£550 (300)*	*£650 (350)*

Yes/No

40. The CBA welcomes the increase in fees to standard cases. Some offences within this category are those which the most junior undertake.

41. It should however be noted that many cases are categorised into the Standard Case Band (17.1), which are complex, highly specialist and of the utmost seriousness. The CBA considers that the following offences should at a minimum be re-categorised and placed into more appropriate bands:

    - Threatening with an article with blade/point/Offensive weapon
    - Possession of an offensive weapon on school premises
    - Harassment/Stalking involving fear of violence (often involves mentally ill defendants and voluminous background material and legal issues)
    - The more serious identity document offences e.g. Possession of identity documents with improper intent/making false documents (often involve issues of modern slvery)
    - Some regulatory offences
    - Some Computer Misuse offences
    - Conveyance of List A Articles into prison (weapons, class A drugs etc)
    - All sexual offences
    - Breaches of Court orders e.g. Sexual offences notification requirements, Sexual Harm Prevention Orders etc.
    - Burglary

42. For example, burglary should be removed from standard Band and placed into Dishonesty (Band 6) and categorised by value/complexity. The Hatton Garden case is but one example of a complex and serious case of burglary. Cases arising from the riots across the country were often prosecuted as burglaries. The high profile smash and grab moped thefts from high value West End and Mayfair jewellers and shops are burglaries which involve voluminous amounts of evidence, often of the most complex type. These cases involve significant cell site, mobile telephone and social media data, piecing together of CCTV and forensic evidence and multiple defendants. There is no principled reason for burglary being separated from other analogous cases in Band 6 (Dishonesty).

43. At present the fee scheme results in these Hatton Garden type serious and high value burglary cases, with large volumes of complex material and lasting for several weeks being paid a lower fee (£750 brief fee) than other offences of dishonesty at the lowest level e.g. shoplifting a bottle of whisky (brief fee of £800). This is obviously absurd and surely

unintended. A similar result is produced if fees for conspiracy to rob are compared to fees for high value conspiracy to steal. The Millenium Dome 'robbery' would be remunerated at a significantly lower rate than a comparable value conspiracy to steal case. Once again this is impossible to justify on any rational basis.

44. The concept that such cases should remain in the standard fee banding is contrary to the Policy Objective that advocates are adequately remunerated for work done. The offence allocation within the Standard Cases Band (17.1) requires re-consideration.

Q5: Do you agree with the proposed increases to basic fees in bands 6.4, 6.5, 11.2, 12.1, 12.2, 12.3, 13.1, 14.1, 15.1, 15.2, and 15.3? Please state yes/no and give reasons.

Yes/No

45. The CBA welcomes the increase in basic fees in the various bands as set out below; albeit as with other bands, it considers that the increases ameliorate cuts to varying degrees. Specific observations in addition to these are outlined below:

	Scheme 10		*Scheme 11*	
6.4 (dishonesty under £100k)	*£750*	*(350)*	*£1000*	*(375)*
6.5 (dishonesty under £30k)	*£650*	*(325)*	*£800*	*(360)*

46. The CBA notes that value is a crude proxy for complexity and that many offences of dishonesty involve complex frauds or encompass unusual or serious offending. The proposed remuneration for these categories is at the lowest levels and does not therefore achieve the stated policy aims.

11.2 (Robbery/Indictable Burglary)	*£675*	*(360)*	*£750*	*(360)*

47. These are serious offences involving violence or the fear thereof and/or offences deemed so serious that they carry mandatory minimum custodial sentences and in respect of robbery the possibility of life or "dangerousness" sentences. The affect on the victims of these offences is often (as with other offences of serious violence) particularly profound and potentially life changing. The observations made in respect to burglary above in response to Q4 are repeated.

48. This banding concerns robberies without weapons. It is also of note that the DAF was cut from that payable under scheme 9 and remains so. Also, whilst other lower refreshers have been increased between Scheme 10 and 11, e.g. Band 9.7 (standard drugs cases increase from £350-£375), this refresher remains excluded from such increases. This needs to be rectified. Despite the modest but welcome increase, levels of remuneration remain far too low for this type of case.

49. As stated above, there is also a troubling and unjustifiable contrast to be drawn between fees for high value robberies and burglaries, and fees for comparable value theft cases, which will often have less voluminous material, be less challenging evidentially and have less serious sentencing consequences. An illustration of the irrationality of the current structure of the fee scheme in this regard is demonstrated if one considers a case involving an allegation of high value conspiracy to rob. If the defence advocate is able to persuade the prosecution to accept a plea to the lesser offence of conspiracy to steal (ie no plan to use violence in order to steal), the advocate would be entitled to a significantly higher fee. A straightforward and practical solution to this anomaly would be to allow the advocate to elect payment in robbery and burglary cases at the relevant rate for a Category 6 dishonesty case if the relevant financial value of the robbery/burglary (or inchoate offence) would attract a higher fee at category 6 rates. The CBA urges this solution be adopted when the final version of scheme 11 is published, in order to avoid potentially serious unfairness in remuneration levels, and to bring greater rationality to the scheme.

12.1 (Firearms w/i)	*£2000 (500)*	*£2100 (500)*
12.2 (Mand. Min. Firearm)	*£1200 (500)*	*£1300 (500)*
12.3 (Other Firearms)	*£800 (500)*	*£900 (500)*

50. The CBA welcomes the modest increases in this category; however there are flaws within the categorisation.

51. For example, there is no principled reason why the importation and onward distribution of Firearms into England and Wales and the trafficking of such weapons is treated differently from cases involving drugs (Band 9). It is accepted that these cases are unusual however when they arise they are complex and involve substantial amounts of evidence (including cross border). These are serious offences carrying lengthy sentences. A modification to achieve this improvement should be implemented.

13.1 (Kidnap/FI)	*£1300 (500)*	*£1460 (500)*

52. The increases are welcome; however even with the increases the Impact Assessment envisages a modest but not insignificant cut of 4% for a particularly serious category of cases which often involve multiple defendants and complex and voluminous evidence. It is notable that there is a specialist Metropolitan police team deployed in such cases and that they involve highly specialised investigative techniques. A further enhancement to the brief fee of at least £200 should be implemented to make good the shortfall.

14.1 (Trafficking)	*£1500 (550)*	*£2300 (550)*

53. As with Band 13.1, the increases are very much welcomed and are significant in the context of the scheme proposals. The proposals go some way towards addressing the concerns raised by the CBA and we note that on the Impact Assessment the envisaged cuts have been halved. Even with these increases, there remains a projected 11% cut in remuneration for these important and complicated cases. As such, it does not fully address the demands inherent within these cases involving often seriously vulnerable complainants and witnesses and specific defence complexities. A further increase in the brief fee to £2500 would go some way to meeting these issues.

15.1 (Riot)	*£1400 (500)*	*£1600 (500)*
15.2 (Violent Disorder)	*£750 (400)*	*£850 (400)*
15.3 (Affray)	*£600 (325)*	*£700 (360)*

54. As previously identified in the CBA and Bar Council earlier responses, the increase in fees for Riot (Band 15.1) are academic with no offences known to have been charged in recent years.

55. Violent Disorder is particularly poorly remunerated even under the Scheme 11 proposals. Under scheme 9 the trial brief fees for Violent Disorder and Riot were the same; both were category B and the brief fee was £1305, refreshers £469. Cases that would be properly charged as riots are charged as violent disorder. Examples include football hooliganism, the 'London Riots', Extreme Political Party Protests etc. There is no material legal difference between the two offences, other than the numbers of people involved: at least 3 for violent disorder, and at least 12 for riot. As was recognised under scheme 9 there is no rational justification to draw a distinction in terms of fee levels.

56. Affray presents similar considerations with cases of violent disorder often charged as affray and a similar evidential matrix. Affray, under

scheme 9, attracted a brief fee of £816, and refreshers of £408. The CBA reiterates the proposal that the fees are, as a minimum requirement, adjusted so that Violent Disorder attracts a higher fee, at the very least falling between Bands 15.1 and 15.2, but more rationally at the 15.1 level, and that Affray attracts the category 15.2 basic fee.

Q6: Do you agree with the proposed re-banding of several offences – harbouring an escaped prisoner, the intimidation of witnesses, the intimidation of witnesses, jurors and others, and assisting offenders – from the standard cases category to the offences against the public interest category? Please state yes/no and give reasons.

Yes

57. These were cases identified previously as being unsuitable for the standard cases category. The CBA endorses the re-banding proposals; however as mentioned in Q4 there are a significant number of other cases which should also be the subject of a re-banding exercise. It is noted that many offences against the public interest are often ancillary to more serious offences committed by co-defendants such as murder and as such, the proposed basic fees are unlikely to represent adequate remuneration for work done.

Q7: Do you agree with the proposed increase to fees for ineffective trials? Please state yes/no and give reasons.

Yes/No

Scheme 9: *£130*
Scheme 10: *£300*
Scheme 11: *£350*

58. The increase in ineffective trials fees is welcomed. The previous scheme's failure to pay anything but a nominal fee was extremely unfair and this goes some way to correct the iniquity in that scheme.

59. The CBA considers and repeats its view that the level of fee should however be no less than the daily attendance fee/refresher for the relevant offence, reflecting seriousness of the case and the fact that the work has been done (wasted preparation) and time allocated for the case (lost income).

60. This would lead to reduced administration costs for the LAA. It would also have the benefit of avoiding the difficulties encountered with the LAA in relation to payment for days at the start of a trial. Such issues

are typically resolved in favour of counsel but represent a significant diversion of finite resources and energy.

61. This is a step that would assist in improving the morale of the profession.

Q8: Do you agree with the proposed increase to fees for appeals against conviction? Please state yes/no and give reasons

Yes/No

Scheme 9: *£130*
Scheme 10: *£250*
Scheme 11: *£300*

62. This is an increase actively sought by the CBA which considers it an important investment to fees at the most junior end of the profession. The CBA does not, as with other fees within Scheme 11 however consider it to have yet attained an adequate level of remuneration. At a minimum it should be paid at as a standard refresher rate.

Q9: Do you agree that fees across the scheme should be increased by 1% on cases with a Representation Order dated on or after 1 April 2019? Please state yes/no and give reasons.

Yes/No

63. The CBA welcomes the 1% increase as the first step towards annual increases to the AGFS scheme and its aim of achieving an index linked rise in accordance, at a minimum, with inflation. The 1% is below both RPI and the Consumer Price Inflation Measure. It also falls below the 1.8% pay rise for Members of Parliament (effective from April 2018). Moreover, the CBA notes that the Public Sector Pay cap has been lifted and the Prime Minister, Theresa May, has announced the end of the austerity policy. Put simply, even with a 1% increase in April 2019, the impact is to mitigate a real term cut to AGFS fees.

64. The CBA also disagrees with the date of implementation. The proposed increases set out in Scheme 11 are not anticipated to be enacted following the laying of the Statutory Instrument until at least December 2018. There have been significant delays, which have resulted in advocates working on Scheme 10 rates for longer than was agreed, rates which the Ministry has accepted are inadequate. The 1% should be increased in line with inflation and brought forward immediately. It should apply to all cases, regardless of the date of the representation order. All main hearings post the commencement date, with existing representation orders, should benefit from the enhanced

rates, in addition to cases with a representation order post the commencement date.

65. The CBA seeks a commitment to an annual pay review.

Q10: Do you agree with the overall package of scheme amendments we have set out in this consultation document? Please state yes/no and give reasons. If you have alternative proposals, we would welcome case studies and examples to illustrate these.

Yes/No

66. The CBA agrees with the amendments in that they comprise proposed increases in fees. In allocating the relatively small sums of money, the CBA considers that to a large extent, within the very tight constraints, it has been directed to the correct areas; however overall it is simply too little and does not begin to address the years of chronic underfunding and the parlous state of the profession and more broadly, the criminal justice system.

67. The situation is such, that in many cases, funds are being robbed from Peter to pay Paul. The CBA maintains that the various schemes, even with the proposed amendments, have exposed the serious underfunding of AGFS. Many cases under the new scheme are financially unviable. Greater investment is urgently needed.

68. Specific observations are noted below.

Daily Attendance Fee/ Refresher Fee

69. The CBA welcomes the increase in DAF/RF for some bands of case. The CBA maintains that as a minimum the lowest DAF/RF should be set at £400, with an ambition to raise this to £500 as soon as possible.

70. It is noted that notwithstanding the increases in some fees proposed in Scheme 11, there have been cuts in DAF/RF as compared to Scheme 9.

71. The CBA continues to oppose any cut in DAF/RF fee. These fees represent a full day of work in court (and the significant amount of out of court work undertaken daily).

72. It is noted that reductions are seen in the criminal work most likely to be undertaken by the most junior members of the Bar:

    - S.20 GBH/ABH:

- Scheme 9 (Category C) £408
- Scheme 10 (Band 3.5) £325
- Proposed Scheme 11 (Band 3.5) £360 (-12%)

- Threats to kill:
  - Scheme 9 (Category B) £469
  - Scheme 10 (Band 3.5) £325
  - Proposed Scheme 11 (Band 3.5) £360 (-23%)

- Standard class A drugs offences:
  - Scheme 9 (Category B) £469
  - Scheme 10 (Band 9.7) £350
  - Proposed Scheme 11 (Band 3.5) £375 (-20%)

73. The cuts in the daily rates will inevitably have a disproportionate impact representing up to a 23% daily fee cut. Owing to the levels of fees, this will be felt acutely at the junior end of the profession as the section of the profession least able to absorb such a cut.

Basic Fees

General: Conferences

74. The CBA considers that conferences should be separately remunerated from the basic fee and not bundled. Additional funding should be made available to allow for individual bolt on fees. The basic fees are too low to accommodate and include up to three conferences.

Category 3: (Serious Violence including GBH/Wounding with intent (s.18 OAPA), GBH/Wounding (s.20 OAPA) and ABH (s.47 OAPA)

75. The CBA considers that the fees continue to represent inadequate remuneration for work done.

76. Section 18, wounding with intent, is the most serious offence of violence short of murder. The same mental element applies to both offences. It unsurprisingly follows that these are complex cases which attract sentences including life imprisonment. They encompass serious stabbings, life changing injuries falling short of death, acid attacks etc. The proposed fees for these offences are historically woefully low and in the CBA view inadequate. These are complex cases.

77. Section 20 (GBH/Wounding) similarly often results in life changing injuries.

78. ABH forms a significant proportion of the work at the junior end of the profession. As such the cuts to the DAF for example, have a disproportionate impact upon entry level advocates and junior advocates, which is in direct conflict with the policy aims.

Category 3.4: Child Cruelty and Offences of Violence against Children

79. Child cruelty and cases involving violence against children pay poorly under Scheme 10 and the proposed Scheme 11. Such cases raise separate specialised issues.

80. As a matter of principle, when concerned with a child complainant or child witness, the same skills are often required as those recognised to be necessary in child sex offences including the use of "Special Measures" during cross-examination. Practitioners are required to undertake specialist training in order to be able to cross-examine vulnerable witnesses at a cost borne by them. This needs to be reflected in fees where vulnerable witnesses are likely to be questioned.

81. Baby shaking is an example of a case which is significantly undervalued within the scheme. The cases, whilst few in number, are particularly serious involving allegations against, often, very young babies. They are particularly sensitive as often the defendant is a parent of the child. Multiple defendants (primary carers, mother and father) are common. The sensitivities and complexities will be obvious.

82. Such cases also, for example, often involve preparation far beyond the usual preparation in a case of, for example, s18 OAPA or other types of assaults, because they often involve:

    1. Voluminous medical records;
    2. Voluminous social work records;
    3. Health visitor records;
    4. Voluminous family court records (sometimes years of proceedings and transcripts of full trials involving expert evidence etc);
    5. Complex issues re inter-relationship with family court proceedings.
    6. Complex and often multiple highly specialised experts. This is often at the cutting edge of scientific developments and involves including consideration of highly specialised medical research and articles covering multiple areas of discipline. Experts are typically leading Consultants within their fields and include:
        1. paediatricians,

2. radiologists,
3. neuro-radiologist,
4. neuro-surgeon,
5. ophthalmologists,
6. haematologists;
7. micro-biologists;
8. histopathologist;
9. neuro-pathologist

83. It is not unusual for these cases to involve more than 100 hours of preparation.

84. These cases have always been underfunded within the AGFS schemes. Under Scheme 9 the cases were poorly paid however it was possible to at least claim a modest (and by no means adequate) amount of further remuneration as special preparation. The cases often met the test for unusual and complex facts. Under the new regime it would be banded as 3.4 (£750 basic fee and £500 DAF) or if allocated the highest possible banding as a s18 OAPA (3.3), a £1000 basic fee (£500 if a guilty plea). Either would have no scope, under the new limited test for special preparation, for claiming any additional remuneration.

85. The CBA has already heard of counsel specialising in these areas refusing such work under the new scheme. This is unsurprising given the fees involved. At present the work is primarily undertaken by senior juniors with considerable experience in the area. Such cases are unlikely to attract counsel of sufficient skill and experience in the future.

86. With regard to impact, there is a potential impact on senior women advocates, who anecdotally appear to the CBA to conduct the majority of work in this area.

87. The CBA considers that a new Band ought to be created encompassing all offences of violence/cruelty against children with a seriousness clause in the uppermost band for cases such as baby shaking to allow for additional payments in the event of unusual and complex facts (as under the former special preparation category). This is one of the most significant anomalies within the Scheme. A short-term immediate alternative, pending a thorough review, would be to place any case involving violence against a child aged under five years into category 3.2, and against any child under two years into category 3.1. This would have minimal cost implications but would in a very modest way address the very real problem with remuneration levels for these cases.

Category 5.1: Rape (Adult Complainant)

88. Fees for rape and the most serious sexual offences are still too low. The CBA believes that the basic fee for 5.1 offences should be increased to at a minimum £2000. This work is extremely challenging, requiring experience and skill. Recently in a high volume multiple defendant case comprising 15000 pages of evidence, the advice given was to plead guilty. On the current structure of the scheme the fee payable was £900. This is completely inadequate, not remotely meeting the demands of the case.

Child Defendants/Witnesses/Victims

89. The complexities inherent in cases involving children and the need for specialist skill has been recognised with regard to child sex cases. The principle is no different with regard to the representation of child defendants in criminal cases.

90. In R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt [2017] EWCA 1228, the former Lord Chief Justice, Thomas, LJ confirmed:

> *"if confirmation is needed, that the principles in R v Lubemba [2014] EWCA Crim 2064 (in which the court highlighted best practice for vulnerable witnesses) apply to child defendants as witnesses in the same way as they apply to other vulnerable witnesses."* (§226).

91. In addition, onerous duties are placed upon the advocate to ensure that the child effectively participates. This inevitably results in higher workload and the need for specialist advocacy skills. The Court in Grant-Murray emphasised '*that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training*'.

92. These are some of the most vulnerable defendants before the Courts. Research demonstrates that 60-90% of children in the CJS have recognised communication difficulties (the comparable figure within the general population is 1-7%). Approximately 30% children who have 'persistent offending histories' in custody have IQs of less than 70, signifying a learning disability. Much higher rates of mental illness, autism spectrum disorder (ASD), post-traumatic stress disorder, attention deficit hyperactivity disorder (ADHD) and other psychiatric disorder, notably conduct disorder.

93. As the Carlile Parliamentary Inquiry Report concluded:

> "The evidence suggests that child defendants are 'doubly vulnerable' because of their young age and developmental immaturity in addition to their experience of other needs, including learning disabilities, mental health problems and communication difficulties."

94. Advocacy in relation to cases involving child defendants is an area recognised by the Ministry to require specialist skill and attention. Charlie Taylor is currently engaged on in heading up the Youth Work Quality of Advocacy Working Group on which the CBA is a represented.

95. As recognised in the banding of child sex cases and other offences such as murder of child, there ought to be an enhanced fee for the fact that case involves a child defendant. This could be achieved by placement in the analogous category or a bolt on fee as a proxy to reflect complexity.

96. This would have the benefit of raising standards in such cases and achieve the policy aim of remuneration for work done. It would attract more senior practitioners for what can only be described as complex work which has historically been overlooked within the AGFS schemes.

97. The CBA considers the definition of a child to be any person under the age of 18. This is in accordance with both international[1] and domestic[2] law and standards. It is also consistent with the approach of the the Sentencing Council in their Definitive Guide on Sentencing Children and Young People. The Ministry will also be aware of the different legal framework that applies to children under the age of 18.

98. This would not result in any administrative difficulties or further resources. The test is an objective one and wholly dependent upon date of birth, a fact recorded within the charge sheet and on court records. The relevant date for establishing age ought to be, as in other situations, the date of the alleged offence.

Mentally Unwell and Vulnerable

[1] Article 1 UN Convention on the Rights of the Child

[2] Section 107(1) Children and Young Persons Act 1933; A child is defined as a person under the age of 18 in Legal Aid, Sentencing & Punishment of OffendersAct 2013, s91(6)). See also, arrested juveniles are under 18 year olds (Police and Criminal Evidence Act 1984, s37(15) & PACE Code C para 1.5

99. The same considerations as those outlined in respect of children apply to cases involving persons with mental illness or disability and the 'vulnerable'. These cases are often complex, require instruction and consideration of multiple expert reports and careful witness or defendant handling.

100. The CBA considers that the current Scheme, along with historical AGFS schemes, has failed to adequately remunerate such cases. An enhancement ought to be available in such cases (sub-bands). An additional DAF/refresher fee would be a start.

101. Again, this ought not result in undue administration or be resource intensive for the LAA. There will either be medical evidence or the trial Judge could be asked to certify the appropriate category for an enhancement/bolt on fee as in family law cases.

Multiple Complainants

102. At the present time, the scheme makes no allowance for the situation where a case involves multiple complainants. This was often represented within the total PPE. There has been no adequate proxy replacement for such cases in the present scheme nor are there any proposals to deal with these types of cases.

103. To put it bluntly, a single complainant, single defendant single incident rape case where the evidence turns on that of the complainant and defendant with no complicating factors, attracts the same fee as a multiple defendant/complainant case such as the "Rotherham" or "Oxford" trafficking cases. The failure to incorporate adequate payment in these cases, is exacerbated by the considerable amount of unpaid disclosure which arises e.g. social services, medical, police records etc.

104. These cases demand proper investment. The CBA proposes as a starting point, sub-bands akin to those incorporated in dishonesty and drugs cases.

105. These are the types of cases senior juniors (often female) undertake but are unlikely to continue to do under Scheme 10/11. They are akin to those cases of child cruelty and baby shaking. They are time intensive, hugely demanding, stressful and psychologically difficult.

Elected Either Way Cases Resulting in Guilty Pleas

106. Elected either way cases remain remunerated separately with a £196 basic fee (assuming immediate implementation of the 1% increase). The CBA maintains its position that there should be no distinction between cases in which a defendant elects and then pleads guilty and those cases in which the Magistrates Court commits an either-way matter. The sole determining factor in such cases is wholly outside of the control of the advocate and has no bearing whatsoever on the work done.

107. The category should be abolished and the cases subsumed into their offence band as appropriate. The proposals continue to embed the inequity into the Scheme. It is irrational and lacks any principled reason, and penalises very heavily an advocate who gives proper advice to a client who may have previously not taken it. Advising the guilty to plead guilty at whatever stage is always a positive outcome.

108. This also directly undermines the purported policy objectives, in that it is the most junior advocates who are likely to undertake such work and remain inadequately remunerated for work done.

Cracked Trial Fees and Guilty Pleas

109. The CBA considers that the Scheme 10 and proposed Scheme 11 cracked trial fees are too low. Cracked trials should be paid at 150% of the fee, in accordance with the approach taken in previous iterations of AGFS schemes. There is a strong underlying rationale for fees to be set at this level including:

a. Loss of work/income/payment (e.g. trial which does not proceed but for which time has been allocated);
b. It would accord with the policy objective of payment for work done;
c. Paying less than the trial brief fee for a case that is for example resolved on the day of trial, either by plea negotiation or as a result of the prosecution offering no evidence, does not pay for work done or recognise the fact that the advocate will have committed to a significant trial and not been available for other work;
d. Refresher rates were increased and brief fees were reduced when AGFS was first introduced so that the fees were not front loaded so heavily. Therefore paying only 85% of the brief fee for cracks heavily penalises counsel and fails to pay remuneration for very significant preparation. Often it is as a direct result of thorough and time consuming preparation that cases are resolved on or close to the trial date.

110. Such considerations are particularly acute in Bands 4 and 5 (sexual offending), and heavy fraud (6) and drugs cases (9).

111. Fees for guilty pleas should be enhanced at least to 85% of the brief fee for the same reasons.

Wasted Preparation

112. The current definition of wasted preparation limits fees to those trials lasting 5 days or more **and** where preparation time has exceeded 8 hours. The CBA considers this to be unduly restrictive and arbitrary. The 5 day trial requirement is not a good or fair proxy. Defendants may plead at trial. Trials can be shorter or longer for a number of reasons – a defendant might not give evidence, a submission of no case at the close of the prosecution case might succeed, a juror might be ill etc. Payment for conscientious and beneficial preparation should not depend on such vagaries, wholly outside of the control of counsel, and without rational merit. A 'hours of preparation' threshold is potentially rational, a length of trial condition is absolutely not. Counsel was recently refused a wasted preparation claim well in excess of 8 hours in a demanding rape trial on the basis that the trial had only lasted 4 days because the defendant had not given evidence. The requirement for the trial to last 5 days should be removed.

113. The criminal bar and advocates facilitate the efficient running of the criminal justice system and the listings in court centres in a variety of ways. These include:

a. Instructions in warned list cases. These cases have no fixed date for trial but could come in on any day (typically listed after 4pm the day before) over a time period of up to 3 weeks. Advocates are instructed in such cases and conduct all of the relevant work for preparation of the trial. This can include skeleton arguments, legal arguments and significant work. The instructed advocate may not be able to undertake the trial for a variety of reasons. It will be appreciated that it is not possible for advocates to allocate the whole of a warned list period in the hope (rather than expectation) that a short 2-4 day trial is listed. The advocate is entirely at the mercy of the court listings system and trials may not reach a date in the warned list but be adjourned further to another date. Alternatively, other cases in which the advocate is instructed may overrun for reasons entirely outside their control. Advocates return such cases to colleagues who pick them up at the last minute and facilitate the smooth operation of

the Court listings system. This in turn may mean that the new advocate is then unavailable if they have a case over that period and the cycle continues.

b. Instructions in cases in which for various reasons the advocate is unable to conduct the trial. Trial dates may change for a variety of reasons – lack of court availability, witness availability, issues with disclosure or outstanding evidence etc. Similarly advocates may find themselves unavailable for fixed cases owing to cases overrunning or the case being moved to a trial date for which they are unavailable.

114. Each of these examples are uneconomic and result in significant pressures of work with advocates constantly preparing cases they will not necessarily appear in and having to pick up and prepare late into the evenings for returned trial work. There remains no adequate payment for the wasted preparation or work done in preparation for the trial by the original advocate which facilitates the listing and effective use of Court resources. This is but one example of the goodwill extended by the Bar and advocates. Serious consideration is being given by many members of the CBA to the withdrawal of such goodwill. The proposals do nothing to alleviate those issues or concerns or to meet the policy objectives of remuneration for work done.

Enhanced Basic Fees for high volume evidence cases (all categories)

115. 'Flat' or 'uniform' brief fees regardless of volumes of evidence served fails to remunerate adequately outlying cases in all categories. **This is an extremely serious and urgent problem. It must be addressed.**

116. There may be relatively small numbers of cases, in some categories very small numbers, for which a flat brief fee leads to wholly inadequate levels of remuneration but the number of such cases are not insignificant. The Hatton Garden Burglary case exemplifies the problem very well. This trial lasted two months, featured 7 defendants, and the value of the stolen goods was £14million. Under schemes 10 and 11 the case would be treated as standard (17.1) and the brief fee would currently be £550 and refreshers £300 (scheme 10). The proposed scheme 11 rates would increase these fees to £650 and £350, respectively. This was a serious case with large volumes of material. The defendants in that case were sentenced to up to 7 years imprisonment.

117. The brief fee alone payable under scheme 9 for this case - a 10,000 page burglary - to a junior advocate would have been more than £10,000.

118. Fees for high volume evidence cases, in too many categories, have collapsed to derisory levels. Serious, challenging and preparation heavy cases must be remunerated fairly. They arise in all categories and not simply dishonesty and drugs cases. There is a serious risk, perhaps worse, that these cases will not be covered by advocates of sufficient skill and experience, the cases will not be conducted efficiently, matters of law will not be identified correctly and the correct legal advice will not be given. Justice will not be done.

119. Already practitioners are refusing to accept instructions in the sorts of cases which they have previously regularly undertaken. These outlying cases do not remunerate advocates for work done, quite the reverse. They remunerate at levels frequently lower than the minimum wage.

120. In a recent case of the utmost seriousness, junior counsel advised his client charged with rape and grooming of adolescent girls to plead guilty. It was a multiple complainant, multiple defendant case. There were 15,000 pages of evidence. The fee payable on a guilty plea was £900 (the scheme 9 guilty plea fee would have been £7479). This fee would be barely adequate for a single complainant case with 50 pages, given the seriousness of the case and responsibility on the advocate. This category of preparation heavy case, which requires early engagement by the advocate, is wholly unsuited to a flat, inflexible brief fee system. The system will breakdown rapidly, with wholly undesirable consequences, for complainants, witnesses, defendants and the public generally.

121. There must be a PPE threshold, or series of thresholds, calibrated carefully, category to category, which trigger enhanced fees at a level significantly higher than the standard rate. This might apply to fewer than 2 or 3% of cases; an analysis of the data will reveal the number of cases to which such enhancements would apply. The CPS fee structure builds in such enhancements for very obvious, principled reasons, and the practical reason that the most experienced and skilled advocates should be prosecuting and defending the more demanding cases.

122. This is not a call for a return to a slavish fee per page system. It is a recognition that within all categories there will be cases that the flat brief fee system cannot adequately or fairly remunerate.

123. The CBA calls for there to be an immediate commitment to address this issue. It is a serious flaw in the scheme, and if not addressed there will be very serious consequences.

Unused Material

124. There is unlikely to be a quick solution to the issue of proper remuneration for the consideration of unused material. The current levels of brief fees in too many categories are fixed at levels that mean that it cannot be suggested that built into that fee is any element to deal with unused material. Increasing numbers of cases involve high volumes of unused material that it would be professionally negligent not to consider.

125. The only immediate solution would be to allow unused material to be claimed under the special preparation category. The CBA commends this as an interim solution.

Q11: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

No

126. The CBA considers the Impact Assessment to be flawed. It is premised on the 2016/2017 data set. More recent data for 2017/2018 and a full modelling of both years under Schemes 9, 10 and the proposed Scheme 11 has been subsequently released. This is not the subject of consideration within the Impact Assessment. It is plain from the data that the impacts are significantly different in relation to case type, volume and spend.

127. The 2017/2018 data reports a cut to expenditure in real terms when modelled against Scheme 10. <u>It was not cost-neutral</u>.

128. When the proposed Scheme 11 fees are modelled against the 2017/18 data total expenditure increases but not to the extent of the agreed £15m, because almost one third of the benefit of the £15m first serves to offset the cut caused by Scheme 10 fee levels.

129. The CBA remains concerned that women and ethnic minorities are adversely and disproportionately impacted by the reformed AGFS scheme. The Criminal Bar faces a recruitment and retention crisis. With regard to the most junior and new entrants, whilst the fee

increases are welcome at that level, the overall impact of the fees is that they remain inadequate. All fees and impacts are modelled against the immediate past. It is completely overlooked that scheme 9 fee levels are at levels already very substantially cut from previous iterations of the AGFS scheme, some by more than 70% compared to previous levels. Any further reductions are completely unacceptable and unsustainable.

130. The CBA also notes that the most recent data summaries and tables identify significant cuts to leading juniors and led juniors. This is work often undertaken by practitioners at the mid career point. This coincides with the time when many women, primary carers and those with caring responsibilities leave the profession owing to various factors, including child care costs, decrease in income and lack of flexibility. The CBA is concerned that these cuts will disproportionately impact in this area; however the impact assessment, consultation paper and equalities assessment all appear to fail to identify or engage with this issue.

Q12: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

No

See above answer to Q11.

Q13: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

The CBA is not aware of any particular impacts in this area.