Interim Response to the call for evidence from the

Independent Review of Criminal Legal Aid Panel

7th May 2021

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of criminal law; to provide professional education and training and assist 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.

3. The CBA is the largest specialist Bar association, with over 3,500 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. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners and is the shop window that drives the outside world's use of so many other areas of our judicial system. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a

fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Executive Summary

4. The sentiment of advocates working in the criminal courts is that another review is unnecessary when the problems with criminal legal aid, and the criminal justice system more generally, are so obviously apparent.

5. The Independent Review of Criminal Legal Aid ("IRCLA") will serve little purpose unless there is a clear understanding that increased funding is urgently required to support fee increases across the criminal legal aid scheme for advocates. Without a dramatic increase in funding, the haemorrhaging of talented barristers will continue, and all but the most advantaged will continue to find it harder to enter and remain in the profession. The end result will be barristers of insufficient number and quality to prosecute and defend criminal cases, and a system that ceases to have any semblance of a functioning public service for criminal justice.

6. The CBA makes clear that, as a foundation for its interim response, the current fee rates are wholly insufficient to sustain the profession, and the IRCLA needs to recommend significant increases across the board if there is to be any prospect of ensuring the continuation of an independent criminal bar which reflects the diverse society it serves.

7. The CBA, however, seeks to work with the IRCLA and, in this response, to summarise the most pressing issues relating to inadequate fee rates and other matters, and our proposals to resolve them.

8. We have had insufficient time to analyse the IRCLA Data Compendium in depth. However, the CBA has known (for too long) that rates payable under the AGFS are far too low.

9. The CBA submits that rates payable to criminal advocates have been subject to frequent and severe cuts so that now a career at the Criminal Bar is not viable, particularly for those with student debt, for women barristers or those with caring responsibilities, and for those from ethnic minorities.

10. Recent minor improvements failed to remedy this.

11. Rates payable for cases in the Magistrates' Court and Youth Court must be improved.

12. Rates payable to criminal advocates in the Crown Court must also be improved.

13. The current payment schemes will remain not fit for purpose unless and until there are significant increases made to the rates of pay. The following however, require addressing, in addition to overall pay increases, in order that payment schemes function sufficiently to allow for the survival of the profession:
    a. The index-linking of Criminal Legal Aid rates, or the introduction of some other form of annual review.
    b. The removal of unfair anomalies in the current payment schemes, which can be put right by frequent reviews of the scheme and relatively minor adjustments (e.g. to the banding of offences).
    c. Complex and high page-count cases: the fee payable to advocates should be more closely aligned with the fee payable to litigators in these cases.
    d. An increase to the limits on allowable expenses.
    e. A return to the Litigator's Certificate scheme should be considered.

f. Alternative means of funding: consideration should be given to widening the use of Directors and Officers Insurance, Household Insurance, and restrained funds.

g. There should be an overriding objective that advocates are paid for work properly undertaken to ensure there are no occasions when advocates are required to carry out work that is unpaid because it is said to fall outside a fee scheme. Accordingly, a clause needs to be inserted into the Regulations to allow for a review should anomalies arise with an appeal to a costs judge in the event of dispute.

14. These improvements are necessary to ensure that the Criminal Bar profession is accessible, diverse, viable, competitive, and efficient.

15. Without these improvements, alongside an increase in legal aid fee rates for criminal barristers, the existing profession will wither and it will become the preserve of the privileged few. We cannot allow a winding back of the clock on generations of endeavour by the Criminal Bar which has made this a diverse profession of talented criminal advocates fit to serve the public in the 21st century.

Criminal Legal Aid Schemes

16. Most criminal cases are dealt with in the Magistrates' Courts. Advocates in the Magistrates' Court are paid by the instructing solicitor from the fee payable to them by the LAA . The rates are low and have not increased since the 1990s. A typical trial fee for an advocate is between £50-150, to include all preparation; this fee is usually paid to the most junior advocates, but is many times lower than the rates paid in the 1980's and 90's to the same level of advocate.

17. A handful of Crown Court cases are dealt with by way of individual contracts under the "IFFO" scheme; the contracts are negotiated on a case by case basis and

are not considered in this response. The IFFO scheme superseded the VHCC scheme which fell away when advocates refused to accept a reduction in VHCC rates.

18. Crown Court cases are remunerated by way of the Advocates Graduated Fee Scheme ("AGFS") which provides funding for the vast majority of Crown Court criminal legal aid cases. An examination of the history of the AGFS and the manner in which the scheme has evolved over the years provides an insight into how the scheme might be improved in the future. Rather than provide the CBA's version, the history that follows is taken from the House of Commons Justice Committee's report on Criminal Legal Aid published in its Twelfth Report of Session 2017-2019. What follows is taken from that Report[1], and can be regarded as an independent account of the scheme's evolution and the issues arising from its inception to the present.

History of AGFS

19. AGFS was introduced in 1997 as a fixed fee model for legal aid remuneration for defence advocates in the Crown Court. It determined fees through a formula, taking into account the type of advocate; the nature of the offence; the length of trial; the number of pages of prosecution evidence (PPE); and the number of prosecution witnesses.

20. AGFS originally applied only to cases lasting between 1 and 10 days, but in 2001 it was extended to trials up to 25 days.

21. In 2004, the Government accepted that the 2001 restructure had led to an unintended cut, and increased AGFS rates, but not sufficiently to take account of

[1] https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/1069.pdf

inflation. At the same time, the AGFS was extended to include trials of up to 40 days.

22. In 2005, all rates for Queen's Counsel were reduced by 12.5%.

23. In 2007, following Lord Carter's review of legal aid procurement, fees were increased by 18% - 8% less than the rate of inflation since 1997, estimated to be 26%.

24. Following a 2009 consultation, the MoJ reduced the fees paid, with the aim of bringing them more in line with fees paid to advocates representing the Crown Prosecution Service. AGFS reduced by 4.5% per annum with effect from April 2010 for a three-year period— a 13.5% reduction in total.

25. The MoJ's 2013 Transforming Legal Aid consultation led to an initial decision to implement a new, simplified, version of the AGFS that would have further reduced fees by, on average, 6%. In response to this announcement, barristers introduced a "no returns"[2] policy and organised days of action. As the Chair of the Bar Council, Andrew Walker QC, explained to the Justice Committee, the cuts just from 2007 had been 21% in cash terms and 37% in real terms. For some cases, it was even more. For the mid-range dishonesty cases there were cuts of 60% in real terms over a six-year period.

26. Criminal barristers called off their action after the MoJ agreed to suspend cuts until after the general election in May 2015. This was viewed by the Bar only as a truce with the MoJ.

[2] A policy that means that no barrister would take on a case of any other barrister should he/she be unable to cover their own case due to other professional commitments. It is of note that within a month the system was under severe pressure because the criminal justice system relies heavily on the Criminal Bar to work out of hours and long days to ensure that cases are covered in this way.

27. In 2015, the Bar Council published proposals for a revised AGFS. The aim was to try to design a new scheme that the Ministry could be persuaded to put in place, which would persuade it that at the same time it needed to invest more money. Andrew Walker QC stated that the fundamental problem has been lack of money.

28. The MoJ set out its own proposals for AGFS in a consultation paper published on 5 January 2017. Signalling a move away from reliance on PPE (pages of prosecution evidence) the time spent in court would become a more important driver for the fee paid. The proposed scheme was designed to be cost neutral, even though the Bar's representatives maintained that more money had to go into the scheme to make it viable.

29. A key factor in determining the payment would be the category/band of the case, designed to reflect the average amount of work required in a typical case of that type; the other factor would be the category of advocate. The basic fee would cover the first day of the trial and three conferences and views, together with "standard appearances" (such as PTPH and Sentence Hearings) in excess of six. There would be an additional daily attendance fee for each trial day after the first day. In addition to the basic fee, there would be revised fixed fee payments for guilty pleas and "cracked trials", according to the circumstances and type of case and the category of advocate; and an enhanced daily fee for ineffective trials.

30. Departing from the existing AGFS scheme, which allowed special preparation for "very unusual" cases, special preparation would be reserved for "outlying cases" where there are novel points of law or fact, or where there is an exceptional amount of evidence—defined as PPE over 10,000.

31. The Bar Council expressed support in principle for the new structure but pointed out that many barristers and chambers had undertaken calculations which led them to conclude that they would face fee cuts—raising doubts as to whether the scheme would in fact be cost neutral as the MoJ had promised. The Bar Council

noted that the "cost neutrality" calculation had been based on the AGFS case mix in 2014/15; however, the costings for the new scheme represented a reduction in funding when matched against the 2015–16 AGFS expenditure data that had subsequently become available, showing an increase in expenditure that year; this much had been accepted by the MoJ's January 2017 Impact Assessment.

32. Similar views had been expressed in the CBA's consultation response. Angela Rafferty QC (then Chair of the CBA) told the Committee that funding was inadequate for the entire budget. The CBA and Bar Council made clear the need for a review mechanism for the scheme, together with index linking to avoid further erosion of fees.

33. Although the CBA acknowledged that the principles underlying the proposals were rational, it took issue with the MOJ's focus on cost neutrality, the lack of new investment and the shift of money away from the basic graduated fees to allow for separate payments that had previously been part of the single, bundled fee.

34. The CBA expressed particular concerns about proposed fees for the junior Bar—a view potentially at odds with the Bar Council's insistence that the AGFS should have larger graduations to promote diversity and support career development, thus encouraging more senior barristers to remain part of the Criminal Bar rather than moving to better remunerated commercial work.

35. In February 2018, the MoJ published the Government response to the consultation. The final version of the scheme (AGFS 10) incorporated various amendments that had been suggested by the Bar Council and/or the CBA, including: increased standard appearance fees, with separate remuneration for each standard appearance (not limited to six in any one case); increased fees for PTPH and sentence hearings; and adjustments to the bandings/ categories for particular offences.

36. The MoJ conceded the revised AGFS "can no longer be considered 'cost neutral' against 2014–15 spend." The Final Stage Impact Assessment indicated that, when benchmarked against AGFS expenditure in 2014–15, expenditure under the new scheme would be £9 million higher. However, when benchmarked against expenditure for 2016/17, spend on the planned scheme was estimated to be £2 million less.

37. The CBA's written submission to the proposal explained that it considered three principal problems remained with the AGFS:
    - The MoJ should not have taken a "cost neutral" approach nor should it have used the 2014/15 expenditure on AGFS (£213 million) as its baseline for expenditure on the new scheme, as this represents the lowest level of spend to date.
    - The revised AGFS redistributes money from middle/senior junior barristers to the most junior barristers, and to a limited extent to QCs; however, benefits to junior barristers are modelled by the MoJ to be only 1% or 2% overall.
    - There are no adequate mechanisms to reflect the different levels of complexity within the same category.

38. The Bar Council's response referred to "*real and pressing concerns about the viability and sustainability of practice for many at the Criminal Bar, and about whether the Bar will be able to continue to recruit and retain the practitioners needed to do this vital work for the future*". It made clear there was no real increase in the money committed to AGFS.

39. The CBA suggested that barristers undertaking criminal work are poorly remunerated, and that these limited income prospects have led to a recruitment crisis, with prospective entrants already facing a high level of debt from university courses and from their professional training. The CBA also pointed to the uncertainty of a career at the Criminal Bar; for example, the unpredictability of criminal trials means that a barrister may prepare for a trial that does not go ahead,

or, may find themselves unavailable on the day when one of their cases is listed and thus lose the fee payable.

40. On 8 May 2018, the House of Commons debated a motion seeking to revoke the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018/94—the statutory vehicle through which the new AGFS would be introduced. In the debate, Members aired concerns about the AGFS scheme, as well as wider concerns about the criminal justice system. It was suggested by some Members that the new AGFS might disincentivise lawyers from taking on complex cases; that the new scheme failed to recognise the increasing amount of evidential and unused material; and that it amounted to a cut.

41. Following publication of the final version of the AGFS, there were extensive discussions between the Bar Council, the CBA, and Heads of Chambers. The CBA balloted its membership; 90% of those who voted said they wanted to take action "*to secure proper investment in the Criminal Justice System*." The CBA requested its members to consider refusing any work under new legal aid representation orders dated from 1 April 2018 onwards. The CBA also asked members to take part in targeted Days of Action to highlight the crisis in the criminal justice system. The CBA proposed:
    - Suspension of the new AGFS scheme pending more detailed consultation as to its impact on the criminal bar and the wider Criminal Justice System.
    - Greater investment in the more complex cases to allow remuneration for cases with a large volume of evidence ("paper heavy cases").
    - Commitment to a full, costed review of the scheme within 12 months against 2016/17 figures to ascertain whether it was under-funded.
    - Commitment to an index linked increase in AGFS fees.

42. On 9 May, the dispute was escalated by a further announcement by the CBA calling on barristers to consider stepping up their action by operating a "no

returns" policy on all criminal cases. The CBA argued that remuneration levels were only part of the general crisis in the criminal justice system.

43. On 24 May 2018, the CBA announced a breakthrough in negotiations with the MoJ, resulting in an offer of £15 million additional investment in the AGFS; as a result of this development, the 'no returns' policy would be suspended until 12 June 2018. The details of the MoJ's offer, on which the CBA would ballot its membership, were set by the Association thus:
    - The additional investment of £15 million into the AGFS will be new investment from the Treasury: "*[t]he money will not be reallocated from any other funding and no other agency will lose by our 'gain'*."
    - The first £8 million will be targeted towards the categories of case that lose heavily following the abolition of PPE as a proxy for calculating how much is paid to an advocate under the AGFS (fraud, drug and sex cases with high page counts).
    - £4.5 million will be targeted towards the fees of junior barristers. It is envisaged that these funds would be utilized in a negotiated way to reflect career progression and sustainability for juniors.
    - There will be a 1% increase in April 2019 across all fees.
    - The planned review of the scheme will then take place within 18 months.
    - The financial offer represents around 5.5% of the overall AGFS budget, plus 1% extra in April 2019.

44. The Criminal Bar very narrowly voted to accept the AGFS proposal made by the government, by 51.55% to 48.45%. The Committee noted that the anger and disillusionment of the Bar had not gone away; indeed, it was "*exceptionally strong*".

45. The CBA said "*the Criminal Bar has faced degradation and despair and it still does. This is a step forward. We must all ensure we do not take any more steps back*." At the oral evidence session immediately after the announcement had been made, Angela Rafferty QC told the Committee that the people at the middle of the Bar were

losing 30% of their income overnight in this scheme. Andrew Walker QC said that no one was voting on the basis of its being a permanent or long-term solution; it is a "*patch repair*." It was made clear to the Committee that the underlying concerns of the Bar had not gone away and that the narrow margin of the CBA members' ballot indicated that, if things did not move in the right direction, there would be renewed willingness to take action. Both Angela Rafferty QC and Andrew Walker QC confirmed they considered that unresolved issues remained within the AGFS; the need to provide proxies for the degree of case complexity and the barrister's level of skill was problematic; in particular, the current scheme made insufficient allowance for cases that were evidence-heavy or for more serious cases. Angela Rafferty QC said that an hourly paid model might be fairer for more complex cases.

46. The Committee said it understood the underlying reasons for the dispute between the MoJ and the Criminal Bar, including the failure to ensure that fees keep pace with inflation, the staged fee reductions from April 2010 onwards, unhappiness about aspects of the revised AGFS, and the Criminal Bar's genuine and heartfelt concerns about the future of their profession and under- funding of the criminal justice system. Furthermore, the Committee did not believe that ending the recent dispute resolved the underlying issues, and that it was clear that many barristers remain deeply unhappy about their situation and about the future of the criminal justice system.

47. The Committee also acknowledged the challenges facing the Ministry of Justice in reworking the AGFS so that it is fair to advocates at all levels of seniority, and in ensuring that it is future-proofed against inevitable changes in the profile of Crown Court cases.

Actions subsequent to the MoJ interim offer on AGFS 10

48. Following the acceptance (by narrow majority) of the interim offer of £15m, the CBA entered further negotiations with the MoJ. There were disagreements as to what the CBA had thought had been agreed as part of the interim offer, and the actual terms of the MOJ's actual offer. The CBA made clear that the original action remained suspended and could be resumed without a final agreement to remedy the deficiencies of the interim offer. Delivery of some of the revised payments as part of the £15m interim was also delayed past the original date set by MoJ for implementation.

49. There followed a revised MoJ consultation with the profession on AGFS 10 and a series of internal meetings within the profession on that consultation.

50. On 8th October 2018 the then chair of the CBA, Chris Henley QC, stated to members, and in public via the CBA Monday Message, that *"£15m is no more than a sticking plaster. The action was suspended in June, not ended."*

51. On 12 October 2018, as the CBA submitted its formal response to the revised AGFS Scheme 10, Chris Henley QC, stated that,
". . .the £15 million (including VAT), whilst it must be honoured in full, is inadequate to fix the many flaws in the new scheme. Substantial additional investment is urgently required. We are at crisis point."

52. On 25 October 2018 Chris Henley QC told members, as the CBA had made clear to the MoJ throughout the year, that "*The budget for Crown Court Advocacy has been cut but by more than £100m over the last 10 years. The £15million promised will mean only £8.6million on 2017/18 figures This is not remotely enough to fix the broken fee system."*

53. On 24 November 2018 the MOJ made the following announcement, as it revised its initial £15 million investment to £23 million:

"The Government will spend an additional £23 million on fees for criminal defence advocates following consultation with the Bar.

Announcing the move, Lord Chancellor David Gauke also today committed to bring forward a 1% increase on all fees to come into effect alongside the new scheme.

The announcement follows a consultation on proposals to increase spending on the revised Advocates Graduated Fee Scheme (AGFS) by £15 million, announced in August.

After carefully considering the responses, the government will now spend an additional £8 million, bringing the total increase to £23 million. The money will be specifically targeted at junior advocates to support continued investment in the profession".

Lord Chancellor, David Gauke said:

"Criminal defence advocates play a crucial role in upholding the rule of law, and it is vital that their pay adequately reflects the work they do in a fair and sustainable way.

We have acted on the views we have heard during our engagement with the Bar and will increase spending on criminal advocates' fees by £8 million, bringing the total increase to £23 million.

Alongside this, we are looking at how we can best enable people to resolve their problems in a modern justice system and are spending £1bn to modernise and reform our courts and tribunals system. This will make it more straightforward, accessible, and provide better value for the taxpayer."

The government is committed to working closely with the legal professions to ensure that criminal defence advocacy is fit for the modern age and open to all.

The revised scheme will be reviewed after 18 months."

54. Chris Henley QC, welcomed the revised MoJ investment in AGFS, but cautioned that:

"We have been relentlessly making the case that after years of deep cuts across the Criminal Justice System, significant investment is urgently required to address an increasing crisis, which is impacting profoundly on the retention and diversity of junior criminal barristers. Women, in particular, have been leaving the profession in large numbers.

The Secretary of State has listened to our concerns and this development is an important first step in turning things around. There remain serious, structural problems with the new scheme, which will require further investment. We look forward to having frank and honest conversations about what more needs to be done in the next few months but this is a very positive development."

<u>The Latest Scheme: AGFS 11 (with Accelerated Asks)</u>

55. The latest iteration of the scheme, AGFS 11 with Accelerated Asks, came into effect on 17th September 2020 as a stop-gap pending the IRCLA. As such, it inherited some of the faults of its predecessors, both in design and in rates payable.

56. The CBA and its membership have, for a long time now, viewed the legal aid rates payable to advocates as derisory, and firmly believe that an increase in rates payable would solve many of the problems encountered within the profession and within the wider criminal justice system: resilience/retention, diversity, training, efficiency, competitiveness, quality, and access to justice, would all improve were AGFS properly funded.

57. The CBA is not alone in its opinion of the AGFS fee levels. In 2003 the Bar Council decided that the remuneration rates were not reasonable so that, since then, barristers have not been obliged to accept instructions if they consider that the fee is not a proper one provided that they were prepared to justify their decision in

the event of a complaint. This effectively does away with the Cab Rank Rule for publicly funded work and undermines access to justice.

58. Most, if not all, criminal barristers will be able to give a long list of AGFS cases in which they could have refused to act for this reason. That they continue to work at ever decreasing levels of remuneration should be viewed as a gesture of goodwill rather than of naivety, but a failure to reverse cuts to legal aid will lead to more barristers refusing to accept some or all legal aid work. Numerous firms of solicitors have already ceased to undertake criminal legal aid work, and many legal aid firms have collapsed.

59. AGFS 11 was said to reward advocates for time spent in court. The reality of an advocates' life, however, is that much or most of the work takes place outside court, particularly with the introduction of the Criminal Procedure Rules with their requirements for written applications, and the now-standard requirement that applications are preceded by skeleton arguments. Most advocates will now work 50-70 hours per week, with little time taken as leave and with no sick pay, holiday pay or pension entitlement and with no practice to sell on retirement unlike in the solicitors' profession.

60. The effect is that many barristers have been forced to leave the Criminal Bar because it is not an economically viable career. Those with independent financial means find it easier, particularly in the early years, but the Bar has tried to ensure the profession is accessible to all. Our concern now is that the publicly funded criminal bar will decline and become accessible only to those of independent means. It goes without saying that economic viability is necessary for a profession that is diverse, competitive and representative of society.

61. The Covid-19 pandemic has exacerbated the problems. Many criminal barristers have endured a year in which incomes have fallen dramatically. The Bar Council called for emergency measures to assist the independent bar. Many barristers, for

various reasons, were ineligible for grants or other schemes designed to protect jobs and incomes, yet the Bar Council's pleas fell on deaf ears. So it was that a number of criminal sets folded during the pandemic. As the courts begin to re-open things will improve, but it will take many years to make good the shortfall of 2020 with rates as low as they are now.

62. The CBA has been unable to make an in-depth analysis of the data, and so submits this document as an interim response. The CBA has seen, however, the Bar Council's Interim Response to ICLAR, and strongly endorses the Bar Council's analysis of the data which makes several troubling conclusions which the Criminal Bar have been stating clearly and consistently for at least the last five years regarding the dire state of the profession after years of real-term cuts to fees.

63. The CBA agrees with the Bar Council that:
    - Retention of experienced barristers is a significant problem.
    - The full practice criminal Bar has an aging population that is not being replaced.
    - Remuneration for junior barristers is insufficient and unsustainable, and fees and profit flatline the more experienced a junior barrister becomes.
    - Barristers' fees and profits have failed to keep pace with inflation
    - Profit and fees between groups of barristers is not equitable, and women from ethnic minority backgrounds earn the least of all.

<u>1997 v 2020 Rates of Remuneration</u>

64. This response does not seek to analyse each and every category of offence and size of case. There is no need, because it is well documented - and accepted - that the AGFS rates have suffered from years of cuts, in both actual and real terms. By way of brief illustration, however, the table below sets out some of the rates payable

under the 1997 AGFS; it then shows those rates when adjusted using the Bank of England Inflation Calculator, and compares them to the 2020 rates[3]:

Fee Type	**Advocate Type**	**1997 Rate (£)**	**1997 adjusted for inflation to 2020 rate (£)**	**Actual 2020 rate (£)**
PDH / PTPH	QC	188	349	253
	Leading Junior	127	236	152
	Junior	75	139	101
Hourly rate	QC	62.50	116	74.74
	Leading Junior	47	87	56.56
	Junior	33.50	62	39.59
Trial not proceeded with	QC	275	530	380
	Leading Junior	187	348	380
	Junior	110	205	380
Noting brief per day	Junior	100	186	109
Half day / full day rate	QC	185/330	344/614	263/502
	Leading Junior	140/250	261/465	197/349
	Junior	99.50/178.25	185/331	131/240
Appeal Against Conviction	Junior	117	218	330

[3] https://www.legislation.gov.uk/uksi/1996/2655/schedule/made.

Listening to/viewing recorded evidence	QC	162.50	302	0
	Leading Junior	111	207	0
	Junior	65.40	121	0
PTR/FCMH	QC	188	350	202
	Leading Junior	127	236	152
	Junior	75	140	101
Deferred sentence	QC	300	558	327
	Leading Junior	204	380	240
	Junior	120	223	175

65. One of the main issues in terms of resilience against the background of the rates of attrition at the Criminal Bar is profitability. There can be no doubt having seen the analysis above relating to the cuts to fee income since the 1997 and the 2007 Carter Review, that fees for conducting Criminal work have been left to wither on the vine making this sort of skilled work less and less profitable and leading to attrition as able younger barristers see that with their skill set they can be paid more for working elsewhere. It is important that it be recognised too that criminal barristers receive no payment for illness, maternity/paternity leave, holiday or pension – all of which have to be funded from the heavily depressed, current legal aid rates. In our submission, no profession could survive the level of cuts to remuneration to which the Criminal Bar has been subject over the last 20 years. It is important therefore to try to see how this might be addressed within the existing system.

66. Some improvement has occurred as a result of the accelerated asks brought in for Legal Aid cases where the grant of Legal aid occurred after 17th September 2020, in that there are now payments for considering unused material and also in some cases where the page count exceeds a certain level, although this too needs to be reviewed in a number of cases, particularly murder and other cases we have specified elsewhere in this submission.

67. In the case of R v Evans [2015] EWHC 1525 (QB)[4], Mr Justice Higginbottom, as he then was, gave detailed guidance on the appropriate hourly rate for privately paid cases involving "*top end"* criminal work albeit being paid by the SFO pursuant to s.19 of the Prosecution of Offences Act 1985[5]. At paragraph 29 of the judgment, in relation to fees incurred on or before 18th February 2014 he expressed the view that an hourly rate of £480.00 + VAT per hour for Queen's Counsel and £240.00 + VAT per hour for junior counsel was recoverable on taxation out of central funds. These figures now equate to £544 and £272 respectively in 2020[6].

68. Whilst he said at paragraph 25(i) of the above judgment that "*in the assessment of publicly funded work, it is not appropriate to use privately funded comparators: because privately funded work is essentially market driven, whilst publicly funded work is closely regulated…"* the committee does have the benefit of a number of taxing masters decisions in cases where this decision has been considered when looking at the rates allowed for legal aid for work done in advising on appeal, drafting grounds of appeal and preparation generally post-conviction when considering an appeal to the court of appeal against conviction or sentence. Recent examples of 5 of these cases including two from the senior costs judge, Master Gordon-Saker.[7] show that

[4] http://www.bailii.org/ew/cases/EWHC/QB/2015/1525.html
[5] I.e. where the Crown had to pay costs because of its unnecessary or improper acts or omissions in bringing the proceedings
[6] Using the Bank of England Inflation Calculator
[7] R v Rafiq SCCO Ref 100/17; R v Chiko SCCO ref 60/18;
R v Day SCCO Ref: 190/19; R v Hale SCCO Ref: 191/19; and R v Paffey SCCO Ref: SC-2020-CRI-000186 (NB the appellant in each of the first and 5th cases was leading counsel and junior counsel at the time of the work in the other cases

rates of between £120-£160 per hour have been allowed in respect of junior counsel and up to £250 per hour for leading counsel. When one then reflects on these rates within the wider context of hourly rates allowed for work that is financed from publicly funded bodies there is thus a huge disconnect between the hourly rates allowed under the graduated fee regulations and other forms of legally aided/publicly funded work, necessitating significant intervention in an upward direction. What is clear is that whilst privately funded work is remunerated at a far higher level than publicly funded work there needs to be some sort of relationship between the two, without which, a complete disconnect occurs, and we submit, leads to the attrition in retention levels that is occurring and effecting the whole criminal bar so adversely, but particularly those from diverse backgrounds.

69. By way of a useful cross check we invite the committee to consider the Guideline Hourly Rates for Summary Assessment of costs for Solicitors (see below)

Pay band	**Fee earner**	**London grade 1**	**London grade 2**	**London grade 3**	**National grade 1**	**National grade 2**	**National grade 3**
A	Solicitors and legal executives with over 8 years' experience	£409	£317	£229–£267	£217	£201	£201

Pay band	Fee earner	London grade 1	London grade 2	London grade 3	National grade 1	National grade 2	National grade 3
B	Solicitors and legal executives with over 4 years' experience	£296	£242	£172–£229	£192	£177	£177
C	Other solicitors or legal executives and fee earners of equivalent experience	£226	£196	£165	£161	£146	£146
D	Trainee solicitors, paralegals and other fee earners	£138	£126	£121	£118	£111	£111

70. These are the guideline rates which have remained static since 2010 although the rates are often increased on assessment as a result. They are currently the subject

of review with the recommendation that the rates should be uprated[8] by between 6.5-34.8%. Importantly the rates are designed to reflect the cost of practice i.e. maintaining an office and incurring other expenses just as the Bar experiences.

71. Whilst it is recognised that these are for private fees, what they do mean is that a Band D, unqualified paralegal/trainee in a National Grade 3 firm (i.e. the lowest level in the country as whole) is worth 281% more than a qualified junior criminal barrister and 149% more than Queen's Counsel who practices in criminal work under the existing AGFS. When compared with a Band A London Grade 1 solicitor, the rates are 1038% and 547% respectively.

72. It is worth bearing in mind that these are the rates for the summary assessment of costs i.e. those hourly rates which should be allowed at the end of a hearing without question, subject only to the number of hours expended being deemed reasonable as well.

Criminal Legal Aid fees in Northern Ireland

73. The Legal Aid for Crown Court Proceedings (Costs) (Amendment No.2) Rules (Northern Ireland) 2016 provide for fees for Solicitors and Counsel in cases where an hourly rate is payable. The provisions operate in a similar fashion to the 'Special preparation' provisions in the England/Wales regulations. The rates have been in force since 16th April 2016 and are set out in the table below:

[8] See 20210108-GHR-Report-for-consultation-FINAL.pdf (judiciary.uk) at p.30 thereof

TABLES OF PRESCRIBED HOURLY RATES FOR EXCEPTIONAL PREPARATION WORK

SOLICITOR

	Senior Solicitor	Solicitor	An apprentice or fee earner of equivalent experience
Hourly rate	£130	£90	£50

COUNSEL

	Queen's Counsel	Leading Junior Counsel	Led Junior Counsel	Sole Junior Counsel
Hourly rate	£130	£105	£80	£90

SOLICITOR – conducting trial or hearing under rule 4A

	Solicitor with at least three years' standing	Solicitor with less than three years' standing
Hourly rate	£90	£45

74. The lowest hourly rate for Counsel is £80 for a led Junior. This compares with the £39 rate for a similar junior in England and Wales. Similarly, an apprentice solicitor in Northern Ireland is remunerated at a rate £11 per hour more than a junior barrister in a murder case in England and Wales .

75. The rates payable in Northern Ireland are not excessive. Their criminal justice system is very similar to ours, and there can be no sensible answer as to why there is such a discrepancy when compared to England and Wales.

Comparable CPS and PDS salaries

76. The published[9] April 2019 pay ranges for Crown Advocates employed by the Crown Prosecution Service show the rates to be as follows:

[9] https://www.cps.gov.uk/sites/default/files/documents/publications/foi/2019/2019-foi-disclosure-24-attachment-A.pdf

	London and St Albans	National
Crown Advocate	£54,283 - £68,404	£49,943 – £63,550
Senior Crown Advocate	£67,933 - £73,553	£65,108 - £70,672
Principal Crown Advocate	£79,076 - £86,726	£74,727 – £82,336
Principal Crown Advocate (Central Casework Divisions)		£97,825 – £120,758

77. Additionally, Crown Prosecutors receive the following benefits which are not available to barristers in independent practice:
    - Working hours of 37 hours per week, with overtime for excess hours.
    - 25 days annual leave, plus 8 bank holidays and 1 privilege day.
    - Civil Service Pension; some benefit from a final salary scheme, with more recent appointees join the Alpha Scheme (2.32% employers contribution of gross salaries).
    - Employee Wellbeing Support, such as Mental Health First Aiders & Allies, Free Health Checks, Workplace Wellness Courses, and Healthcare access.
    - Volunteering Leave.
    - Cycle2Work scheme, Parking, Season Ticket Loans .
    - Access to CPS Reward Schemes.
    - Flexible Working.
    - Childcare vouchers outside and in addition to Government Tax Free Childcare Scheme.
    - Generous maternity leave/ paternity leave provisions.

78. On the basis of a 37-hour week and 226 working days per year, Crown Advocates work 1,665 hours per year for their basic pay before overtime. That corresponds with hourly as set out in the table below:

	London and St Albans	National
Crown Advocate	£32.60 – £41.08 (£54,283 - £68,404 p.a)	£29.99 – £38.16 (£49,943 – £63,550)
Senior Crown Advocate	£40.80 – £44.18 (£67,933 - £73,553)	£39.10 - £42.44 £65,108 - £70,672
Principal Crown Advocate	£47.49 - £52.08 (£79,076 - £86,726)	£44.88 – £49.45 £74,727 – £82,336
Principal Crown Advocate (Central Casework Divisions)		£58.75 – £72.53 (£97,825 – £120,758)

79. Information about salaries within the Public Defender Service is difficult to locate, but were advertised[10] in a 2018 recruitment drive as being between £49,309 and £79,956 for juniors. PDS hours will doubtless compare very favourably with those in private practice.

80. It must be remembered that those CPS and PDS salaries are the basic rates, and take no account of overtime. Furthermore, Crown Advocates and public defenders have no professional expenses and are provided with legal and administrative support; they are also given all the technical and computer equipment needed. On the other hand, with the digitisation of Crown Courts, independent advocates have been required to provide all equipment needed to

[10] https://www.lawgazette.co.uk/practice/moj-goes-on-hiring-spree-to-strengthen-public-defender-service/5067311.article

present electronic evidence, which led to many independent advocates having to purchase additional computers or tablet devices to enable them to present evidence and simultaneously use their computer to access the evidence and case notes.

Comparable Rates: Experts

81. AGFS rates do not fare well when compared to the rates payable to others employed in the criminal justice system. The hourly rates payable to expert witnesses, for example, are fixed by Government as part of the Criminal Legal Aid (Remuneration) Regulations 2013. The rates are set out in Guidance issued by the Legal Aid Agency but these rates are subject to increase if the LAA deems it reasonable to do so as a result of the exceptional circumstances of the case.

82. Below are some of the rates applied to London experts in contrast to the hourly rates applied to barristers undertaking criminal legal aid for which an hourly rate is payable:

A+E Consultant	£135
Accountant	£50-144
Architect	£90
Cell site analyst	£90
Computer expert	£90
Dentist	£90
Dr (GP)	£90
Handwriting expert	£90
Interpreter	£25
Midwife	£90
Physiotherapist	£81
Radiologist	£90

Surveyor	£50
Vet	£90

83. With very few exceptions, the rates payable to experts are significantly higher than those paid to advocates. It is also worthy of note that the LAA employs individual lawyers to determine the reasonableness or otherwise of applications for prior authority for expert fees, which are subject to appeal. An independent Costs adjudicator is paid an hourly rate of £52 to determine those appeals, over £12 hr more than the junior Barrister who would have prepared the advice sanctioning the use of the expert (albeit there is no separate fee payable for that advice) and who will have to master the expert evidence and call the witness.

84. Of course, even these expert rates do not represent fair and appropriate market rates: they are driven down by Government. Nowadays it is often very difficult - and sometimes impossible - to secure the services of an expert at the permitted rates.

Comparable Public Sector Rates

85. AGFS hourly rates also compare unfavourably with the rates payable to advocates conducting other publicly funded work[11]:

Department	**Level of Counsel**	**Hourly Rate (when payable)**
Department for Business Innovation & Skills	QC Standing Counsel	£185 £125

[11] Information obtained from clerks to chambers.

	4 3 1 and 2	£95 £80 £70
DVSA Departments of Transport (rates for preparation, advocacy and travel)		£89-95
Equality and Human Rights Commission	QC A list B list C list	£240 £180 £160 £120
General Dental Council	Band C Band B Band A	£150 £125 £100
General Medical Council		£100
Health and Safety Executive	A list B list C list	£125 £95 £80
Local Authorities (Criminal Litigation)	QC 11+ years call 6 - 10 years call 1 - 5 years call 0 – 1 years call	£250 £125 £100 £85 £65
Local Authority (Police work):	QC 11+ years call 6 - 10 years call 1 - 5 years call 0 – 1 years call	£350 £175 £150 £100 £75
Police Federation (London, maximum rates)	QC 13 + years call 6 – 12 years call	£300 £180 £140

	1 – 5 years call	£125
Police Federation (Regional, maximum rates)	QC 13 + years call 6 – 12 years call 1 – 5 years call	£200 £150 £100 £70
Attorney General's Panel (London)	QC Band A Band B Band C > 5 years call Band C < 5 years call	£180 £120 £100 £80 £60
Attorney General's Panel (Regional)	QC Band A Band B Band C	£180 £110 £90 £60

Hourly Rates Outside the Criminal Justice System

86. There is a joke about a criminal barrister complaining about the rate charged by a plumber. The plumber acknowledges the rate is high and explains it is the reason he left his job as a criminal barrister. Whilst our submission is no place for humour generally, the fact that the joke exists and is a sentiment with which many at the criminal bar identify especially after 6 years of training, tells its own story. It is not only plumbers whose hourly rates exceed AGFS, as this table of rates shows[12]:

[12] https://www.pimlicoplumbers.com/rates

Our Services	Monday–Friday 7am–6pm	6pm–12am
Plumbing	£105.00	£150.00
Heating & Gas	£110.00	£160.00
Commercial Heating & Gas	£160.00	£200.00
Electrics	£100.00	£140.00
Commercial Electrics	£100.00	£140.00
Air Conditioning	£120.00	£150.00
Appliances	£110.00	£140.00
Fridge/Freezers	£120.00	£160.00
Carpentry & Locksmiths	£95.00	£130.00
Building & Plastering	£95.00	£130.00
Drains, Jetting & CCTV	£140.00	£200.00
Roofing	£95.00	£130.00
Combined Boiler Service & Gas Safety Certificate**	£180.00*	£240.00*
Boiler Service or Gas Safety Certificate**	£100.00*	£130.00*
Appliance Disposal (per item)	£80.00*	£80.00*

*Fixed price **Excludes Commercial Heating & Gas

87. Comparing the rates payable to criminal advocates with another profession is not straightforward. However, it is fair to say that the Criminal Bar must recruit high-calibre candidates, and must offer an accessible, sustainable, and profitable, career to those who enter. Accordingly, the CBA submits that significant upward movement within the graduated fee hourly rates is essential to ensure profitability and thus resilience for the future. We would further observe that this was always contemplated when the criminal bar agreed to defer industrial action on receipt of the accelerated asks.

88. To be clear: under the current AGFS, barristers are too frequently paid at rates below the minimum wage, and at worst they end up losing money after their unavoidable expenses are deducted. This is intolerable.

Additional Work Not Covered by AGFS

89. When the basic structure of AGFS was designed in 1997, advocates were required to prepare very little written work; the emphasis was on oral advocacy. Adjustments to Criminal Procedure since then, including the introduction of the Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003 have seen the introduction of a significant body of extra work that defence lawyers, typically advocates, are required to perform. That often begins in the current system with the requirement to draft a Defence Statement (by s.5 CPIA 1996). This document is required at an early stage in the case, 4 weeks after the service of the Prosecution evidence. The document is required to meet the terms of s.5-6 CPIA 1996 and to set out the defence case, in general terms. The work involved in preparing this document is substantial and requires the advocate to read the entirety of the case papers and to identify which witnesses will be required to give evidence. The Litigator fee incorporates the work for drafting this document but in practice, that rarely occurs. There is no fee for this and the brief fee does not incorporate payment for the work.

90. Responses to bad character and hearsay were introduced in the Criminal Justice Act 2003. Until that time, the general rule was that bad character and hearsay was not introduced, unless exceptions applied. The sea change that came in 2003 was that hearsay was generally admitted and bad character was permissible on application by the Crown. These changes meant that in many cases, the defence advocate, best placed to make any objections, has been required to complete a response to such applications. That will include, in a bad character application, having to read the material in support of the Prosecution application , which is not separately remunerable.

91. As a result of the Criminal Procedure Rules and Practice Directions that have developed since their introduction in 2015 have meant a steady flow of

amendments requiring more work by Counsel. Typically, a skeleton argument will now be required in advance of many arguments. By way of example:

Ground Rules hearing	Criminal Procedure Rule 3.9
Dismissal applications	CPR 3.20
Readiness for trial	CPR 3.12
Preparatory hearing	CPR 3.22
Abuse of Process	CPR 3.28
Joinder/severance	CPR 3.29
Advance indication of sentence	CPR 3.31
Defence special measures	CPR 18.3/10
Defendants evidence direction	CPR 18.15
Witness anonymity Response	CPR 18.22
Live Link application/response	CPR 18.24/26
Introducing defendants own character	CPR 21.4
Hearsay	CPR 20.1/5
Bad character	CPR 21.1/6
Application to permit cross examination	CPR 22.4
Application for a ruling on law etc	CPR 25.3
Application to vacate plea	CPR 25.5
Admissions	CPR 25.13

92. In addition, it is also now commonplace for the Court to require counsel to produce skeleton arguments in advance of trial for any application to require disclosure (by s.8 CPIA 1996), for the purpose of exclusion of evidence (s.76/78 PACE 1984), and a sentencing note following trial. In practice by the time Counsel has undertaken a trial, they would have been required to spend many hours reading the case itself and will have produced a vast array of skeletons. These additional duties have increased the burden on counsel in almost every single criminal case that goes to trial.

93. It is worthy of note that from 1997 until the Carter Review, work such as listening to audio tapes or watching video tapes was paid separately: £27.15 per 10 mins for a QC, £18.50 for a leading junior and £10.90 for a junior alone. With inflation, these figures would be £36.65, £24.97, and £14.72 respectively. Under the current fee scheme, this work is not additionally remunerated at all. Indeed, even in cases with vast quantities of CCTV or audio (including probes), the existing fee scheme does not remunerate the work done. Only in truly exceptional circumstances would counsel be able to claim for this work as 'special preparation'. In the vast majority of cases, this work would go unpaid, even though it is now standard for footage recorded by police body-worn cameras to be served as evidence (often in place of a detailed witness statement).

94. While pre-Lord Carter, the Brief fee may typically have involved a full consideration of the papers, a conference with the lay client and even an advice on evidence, the requirements now imposed on Counsel are substantial and far in excess of the obligations that the brief fee would have covered before the introduction of the AGFS.

95. As is recognised by the current AGFS and the accelerated asks in CLAR, the brief fee alone is insufficient to meet the obligations of work necessarily conducted by Counsel defending in the majority of cases. The current regime allows for an hourly rate for the consideration of 'used' and 'unused' evidence in circumstances where the regulations are met. All other hearings are now 'bolt-ons'. An hourly rate could also accommodate the extra work now undertaken by Counsel or alternatively, additional bolt on fees could be applied at fixed rates for this additional work. The current provisions for the payment of a Brief Fee would need no significant adjustment. The simple method of remunerating for this extra work would be to detail what the Brief fee covers. That might incorporate the following:
    (a) Reading the papers;
    (b) Advice on evidence/experts;
    (c) The first conference;

(d) First day of trial.

96. All additional written work would be covered by the bolt on provisions (hourly rate subject to reasonableness in each case or a fixed fee for each type of written work). Given the amount of administration involved in the LAA having to assess such cases on an hourly rate basis, the preferred method would be fixed fees as long as proper rates are provided. An alternative system might be to adopt the same approach as is currently employed with unused material for post 17th September 2020 legal aid orders, namely a fixed fee for basic work up to 3 hours with hourly rates being allowed for work that could be demonstrated to be more complicated or involved.

97. These suggestions very much meet the stated objective of remunerating 'work done' and would sit comfortably with the adjustments already made to the scheme to remunerate for additional work (such as hearings which have now been taken out of the brief fee). These changes would also see greater efficiency in that the tasks would be pre-designated as the responsibility of trial Counsel (the instructed advocate). The Court would have certainty in managing the case and knowing where responsibility fell.

Complex and High PPE Cases

98. Complex and High page-count (PPE) cases are problematic and require special consideration. At present they attract the same fee as a case involving the same offence but with few pages. So it is that it is that a burglary case with 10 pages of evidence would attract the same basic fee (£859 for a junior) as a burglary case with 29,999 pages of evidence: that fee covers all preparation, drafting, conferences, and first day of trial.

99. Generally, complex, evidence-heavy cases are not adequately remunerated under AGFS11. Practitioners calculate these cases - which are mostly undertaken by senior advocates - have in recent years seen rates cut by about 35%. The CBA's position has been consistently stated. Whilst there have been some improvements in fees for mainstream cases, those conducting complex, high PPE cases have unfairly paid the price for the improvements (for pleas and cracks as well as for trials). Flat, inflexible brief fees, regardless of volumes of material or length of trial, or numbers of co-defendants or complainants, don't work. This issue has not been addressed but must be.

100. The new scheme has serious, unacceptable structural flaws. Brief fees in the most complex and demanding cases must reflect the work, skill and responsibility these cases require. Currently, there is a disincentive to accept instructions in a complex case with a large page count when more may be earned by doing much simpler but better paid work. This flaw will mean that more and more senior advocates will take work from those more junior, leaving the more complex work for those not best qualified to do it.

101. Fees for cracked trials remain inadequate, particularly in the larger cases where a plea on the first day of trial might leave the advocate with an empty diary for weeks or months.

102. Special Preparation claims do not provide a solution to this problem. Firstly, the page thresholds for special preparation claims are too high, particularly for drugs, murder and fraud. Secondly, if claiming special preparation under the 'very unusual factual issue' criteria the advocate has no way of knowing in advance whether their claim for the necessary extra work they have to undertake will be successful. The advocate therefore bears a very substantial financial risk when taking such a case on, and the history of 'very unusual' claims tells advocates that their claim is likely to be refused. Third, there is a huge amount of extra administration and bureaucracy in submitting such a claim, then challenging and

formally appealing the refusal; what is needed is certainty of the full and appropriate fee at the outset. Fourth, the hourly rate for special preparation, £39.39, is in any case derisory. It must be remembered that this amount is, in any event, a turnover figure and is reduced by approximately 30-35% by Chambers' expenses.

103. Brief fees for larger, serious and complex cases must be restored to more realistic levels to protect for the future a high quality, diverse and independent Bar.

104. Setting thresholds at 500 pages, with 100, 250 or 500-page incremental increases is a simple and workable solution.

Diversity Concerns

105. The numbers of criminal practitioners at the bar is declining. The data contained in the data compendium assimilated for CLAR demonstrates this at table 5.3, page 61. The data in the compendium identifies three groups that may represent criminal practitioners, all practitioners that have received some public funding in criminal cases (AC), those for whom it can be implied have practised in crime for at least 80% of their income (IFP) and those that have declared to the BSB a practice in crime in excess of 80% (SFP). SFP data is only available for 2018/19 and 19/20.

106. Looking at table 5.3 those who are SFP practitioners have declined in number by 3.3% from one data set to the next. This is consistent with the other identified cohorts as IFP has declined 9.9% since its highest figure in 2016/17 and the AC group has declined by 6.4%. Tables 5.100 and 5.101 show a steady increase in leavers compared to joiners or rejoiners over the last four years.

107. The data in tables 5.6, 5.7 and 5.9 give the percentage of practitioners in the three different datasets in bands of years of experience. Common to all three sets of data is the fact that the most significant contraction in numbers of practitioners for periods where reliable data is available is in the ranges of 8 to 12 years and 13 to 17 years. The rate of attrition is at its highest in these "mid" years.

108. The "Back to the Bar" survey for the Western Circuit Women's Forum[13] found that, over a six year period, 2/3 of leavers from the Bar on that Circuit were women. The report stated that the survey showed "*many working mothers seek part time work, shorter trials or not to stay away from home*."

109. The current AGFS places an emphasis on refreshers as a significant proportion of fee income. If those with caring responsibilities (a role which mainly falls to women) have to seek part time return to work or seek to undertake shorter trials this creates the obvious risk that their fee income will be reduced compared to their (male) counterparts without such primary caring responsibilities. Importantly this inequality will feed through to careers as a whole, not just reducing income but also the ability to develop career experience that will enable those affected to take on heavier more complex cases and to take silk or become members of the judiciary in due course.

110. Table 5.10 in the compendium demonstrates that 69% of practitioners in the SFP group are men, 30% are women. Table 5.48 demonstrates that for the same group over the same period, the fee income is split as 76% being earned by men and 24% by women. In table 5.56 the lower quartile, the median and the upper quartile of total individual fee income is lower for women than for men.

111. By each measure in the compendium it is possible to observe that women earn less than their male counterparts in crime. When the necessity for those with

[13] https://westerncircuit.co.uk/wp-content/uploads/2018/11/WCWF-Back-to-the-Bar-Final-version.pdf

caring responsibilities to undertake shorter trials is appreciated, it is possible to see one of the causes of this disparity.

112. It is also evident that the attrition rate is disproportionately women leavers. At table 5.18 it is possible to see that the balance between male and female advocates is broadly stable up to 8 years call but the proportion of female barristers in the SFP group significantly drops off in the 8 to 12 year range and does not significantly recover. It is of great concern that this cohort, 8 to 12 years, represents the smallest cohort of the SFP data. This is a real sign that the criminal justice system is already going to struggle to find counsel of sufficient seniority and experience to prosecute and defend serious cases in the future. This represents a retention crisis which is most starkly fuelled by a failure to retain women.

113. Across the bar as a whole, the 2020 BSB survey into income and gender/ethnic diversity[14] found that women earned less than their male counterparts and that gap was exacerbated when ethnicity was taken into account. BAME women were the lowest earners.

114. This is replicated in the data compendium in table 5.38 where the income for BAME barristers in the SFP cohort is less than their white counterparts in each measure.

Improving Efficiency

115. In 2015 the Rt Hon Sir Brian Leveson, President of the Queen's Bench Division, reported on his Review of Efficiency in Criminal Proceedings[15]. His

[14] (https://www.barstandardsboard.org.uk/uploads/assets/1ee64764-cd34-4817-80174ca6304f1ac0/Income-at-the-Bar-by-Gender-and-Ethnicity-Final.pdf)

[15] https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf.

recommendations have, in the main, been implemented. Recent times have shown, however, that there is some room for improvement.

116. The use of CVP in courts and prisons: there should be a presumption that all interlocutory hearings except the PTPH are to be heard remotely. This would have a number of benefits:

- Claims for travel expenses would be reduced;
- Reduced environmental impact;
- Reduced prison costs (prisoners can appear remotely);
- A courtroom need not be used for these hearings, freeing up courts for trials;
- Less travel time for advocates;
- Improved well-being for advocates, especially for those with childcare responsibilities.

117. It requires investment, but a dramatic increase in remote access to clients in prison would save time and improve efficiency. At present, the prisons are a pinch-point in the criminal justice system; too often lawyers are unable to secure prison visits (in person or by CVP), and prisoners have no access to their case papers. It is a waste of resources that, when the criminal justice system has been digitised, lawyers are still required to print the case papers and take them to clients in prison. It can be nigh on impossible to take instructions on the larger cases with thousands of pages of evidence, and to agree call records and schedules that are served in Excel and other digital formats that do not lend themselves to printing.

118. Similarly, too often the prisons do not produce a client for a remote hearing or conference, citing difficulties on a prison wing, or lack of staff, or any number of other reasons. Most of these obstacles would fall away were each prison wing to have a number of CVP booths available for conferences throughout the day, ideally with a means of accessing the digital case papers.

119. The Crown Court Digital Case System (CCDCS) has, in the round, been a success. The system is still clunky and in the process of being reviewed. It is not, however, available to everyone involved in the Criminal Justice System, including the police and LAA.

120. There could be a considerable saving if there was a proper, functional process by which applications (for time extensions / bail variations / orders to be made etc) could be uploaded, responded to and ruled on without the need for a hearing and / or for the court to initiate that process if there was something that they identified a being needed / not having been done. This is done well on an ad hoc basis by some court centres and some judges. But far more often, matters end up being listed for mention to rubber stamp decisions that nobody ever disputed because one party or another doesn't respond or doesn't see a response that is made. The development of such a process that was actually fit for purpose, combined with a mentality shift to a point where mentions were listed as a last resort rather than a default position, would (i) cut down on the cost of lots of hearings and (ii) allow trials to proceed more efficiently as they would not be constantly delayed by mention lists at 10am. It is not yet clear how the forthcoming platform may assist in this respect.

121. Indictable only cases do not need to start in the Magistrates' Court as they presently do: they could go straight to the Crown Court.

122. Restoring appropriate fees for police station attendance – think of the cases that may well be weeded out of the system as a result of skilled representation at an early stage – particularly if coupled with appropriate use of ;

- Proper fixed trial fees in the Magistrates Court but weighted so that the more efficient the conduct of the proceedings the better the remuneration;
- A very basic graduated fee scheme for Magistrates Cases that incentivises pleas;

- Re-gearing fees so that a committal for sentence and a plea in the Crown Court places the litigator in the same financial position;
- Re-considering Better Case Management so that in either way cases the directions are made by the lower court on sending, and the first appearance in the Crown Court is post Stage 2 at a time when real progress might be made.
- Re-gearing LGFS so that the litigator fee (at whatever rate) in the Crown Court is payable in full at the PTPH regardless of whether the case is then a plea, trial or crack. Cases should be trial ready at PTPH and an outline proof of evidence and defence statement should have been prepared by then, allowing for more efficiency by weeding out cases that ought to plead earlier in time. This might require a longer period between sending and the PTPH, but if a fee is payable at PTPH the work will be front-loaded to reflect this.. At present it is often the case that, that counsel has no or only limited instructions at the PTPH.

Concerns and Proposals

123. Police Station fees and Magistrates Court fees are even lower than in the Crown Court, this results in a de-skilling in that area, and an incentive in either-way cases to push up a case to the Crown Court where the fees are a little higher. Protocols suggest that advocates are paid £150 for a Magistrates' Court trial. The reality is that the daily rates are closer to £80- 100, and as low as £45 - £65 if the client pleads guilty. Increasing Magistrates' Courts fees could also be the opportunity to have a separate fee for advocacy that a barrister or solicitor advocate could bill direct. This would allow more work to be retained by solicitors in the magistrates' court and promote efficiency and retention of cases in that court whilst at the same time promoting fairer remuneration for the most junior at the Bar who are currently often remunerated at less than the minimum wage but not

protected by that legislation. This in turn should help to promote a diverse and sustainable profession.

124. Youth Court fees are also similarly low, particularly as they often involve serious allegations and vulnerable defendants.

125. It is not an ideal scheme, but we take the view that now AGFS has been tried and tested, it could be fit for purpose if improved. The creation of a replacement scheme would create too many uncertainties and is not a desirable course.

126. All Crown Court fees are far too low. Brief fees and daily attendance fees are, in general, much lower in real terms than they were in 1997 and 2007. It used to be the case that solicitors' costs of practice were much greater than those of barristers. That is not so true nowadays. Although the criminal bar has sought to reduce costs as much as possible, it is a fact that the digital era has led to a more complex and expensive business infrastructure; computers for staff, and software subscriptions often charged in the tens of thousands of pounds and have led to ever increasing expenses. Many costs, such as travel and living expenses, cannot be reduced.

127. The AGFS must be index-linked or subject regular scrutiny in the same way that salaries of MPs, the judiciary, military, civil service, police, NHS and others are reviewed. A suitable mechanism might be for the AGFS to be tied to the judicial pay review body's recommended annual increase.

128. Complex and High PPE case must be better remunerated. The current remuneration system for litigators in complex work heavily favours work where the page count is high whereas the AGFS has done away with this proxy. The effect is that the litigator fee for a 10,000-page case is likely to be significantly greater than the fee of Queen's Counsel and/or junior counsel, who acts in the same

case and appears at court for perhaps 30 days, and often in such cases there is no litigator present at court for any stage of the case.

129. Conversely, counsel's AGFS scheme remunerates the advocate in a way that does not reflect the high page count of such cases. This system needs to be addressed urgently. It has led to huge resentment amongst senior advocates who are left to deal with vast swathes of evidence with no remuneration: litigators need to be incentivised to do the work and the structure of the litigator fee should reflect that.

130. The high page count cases are commonly undertaken by the more senior advocates. Improvements in the remuneration for these cases would go some way to prevent the flat-lining of income and provide an incentive to conduct these complex cases as well as providing necessary career progression.

131. There are too many anomalies in AGFS. Too many cases attract higher rates than more serious, complex and time-consuming ones. These iniquities could be partly resolved by a review of the banding system.

132. Hourly rates for special and wasted preparation, and reading unused material, are derisory and need to be increased dramatically just to catch up with inflation. The rates also need to increase in accordance with the seriousness of the case.

133. Bad character applications and hearsay applications and any other court-ordered written applications: if these were given a separate fee it would identify the work required; the Litigators' Graduated Fee Scheme fee pays for the litigator to draft defence statements or witness statements, but in reality, the barrister often does it and there is no fee in the AGFS for this.

134. Those cases where a defendant elects Crown Court trial and then pleads guilty continue to attract a punitive set fee of £365, which includes all preparation, conferences, pre-trial hearings, trial and written applications. Too many advocates receive wholly inadequate sums for these cases. For example, a junior London barrister received £39 for three days in Northampton. This cannot be justified and serves only to exploit the junior bar. In another case a senior barrister was required for a case involving possession of a large quantity of Class A drugs - an offence attracting a lengthy custodial sentence. The barrister attended the PTPH, a PTR, conferences, spent 10 hours preparing for trial, before a guilty plea on the day of trial - all for £365.

135. Allowable hotel expenses have been set at £55.25 for everywhere save London, Birmingham, Manchester, Leeds, Liverpool, or Newcastle-upon- Tyne city centres where £85.25 may be claimed. It is nigh on impossible find suitable hotel accommodation at those rates, and the variation in rates is illogical. By contrast, in 2013, civil servants with HM Treasury Group were permitted £125 a night for London and £100 elsewhere[16]. Furthermore, when expenses are allowed (which is rare), they are payable in respect of the "main hearing only", which can lead to travel expenses outweighing a brief fee if a case requires a large number of hearings pre and post-trial: if there is a good reason for expenses to be recoverable, then they should be recoverable for each and every hearing the advocate is required to attend.

136. Committals for sentence have been underpaid for too long. These are Crown Court cases and require a rate commensurate with their seriousness.

137. Re-introducing the concept of a certificate for litigation support at trial should be considered. If it merits a solicitor attending, they must apply and sign

16 https://www.google.com/search?q=civil+service+hotel+rates&rlz=1C5CHFA_enGB896GB897&oq=civil+service+hotel+&aqs=chrome.0.35i39i457j69i57j0j46i175i199j0i22i30l3.9670j0j7&sourceid=chrome&ie=UTF-8).

in each day to receive the appropriate fee. Presently, the LGFS includes a fee for attending court, but it is rare for a solicitor to attend. This leads to more work for the advocate who, in the absence of a solicitor, is required to write up a report of proceedings. The AGFS once allowed a bolt-on fee for a non-attended hearing to cover the extra work involved. This should be restored if counsel is required to undertake the task.

138. The AGFS11 (with Accelerated Asks) requires claims for reading more than 3 hours of unused material to be assessed. The MoJ has acknowledged that all unused material needs to be read in every case where it has been served by the prosecution having met the statutory test for disclosure. This process increases the administrative burden on advocates and on those assessing claims. A streamlined system of permitting 4 minutes per page should be allocated to advocates to read unused material.

139. Likewise, a similar allowance should be provided for in respect of pages over any designated page count limit as brought in by the changes as part of the Accelerated Asks. This too would enable a streamlining of the process and save on administration as well.

140. Court sitting hours have been extended. When the AGFS scheme was implemented trials would generally start at 1030 am. They now often start at 1000 am. This means an advocate may work an extra half court-day each week, which was not anticipated when the scheme was proposed. In several of the large London Crown Courts, including the Central London Criminal Court, Snaresbrook and Inner London, in person hearings now routinely commence at 09.30 am.

141. The AGFS page thresholds are set at too high a level across the board. We note in particular the threshold for sexual offences. These cases typically do not have a high page count; however, these cases are complex evidentially and as such

this ought to be reflected in an appropriate page threshold. For example, a multi complainant case is unlikely to reach the threshold and will continue to result in the same payment as a single complainant/defendant case, which is necessarily an undervalue of the advocate's work.

142. Wasted preparation may be claimed where, amongst other things, a trial lasts 5 days or more. This is an indiscriminate threshold, and rewards those who do not prepare and shorten the length of their trials. The 5 day threshold should be removed.

143. Noting briefs are paid at £108 per day are damaging to the pupil and junior advocates who are mostly instructed as noters, often for an extended period. The rates have barely changed since 1997.

144. To more properly reflect work done in cracked trial cases, a payment of 150% of the brief fee should be made. Additionally, one daily attendance fee should be paid for each week the trial was estimated to last where the estimate is more than 5 days.

145. Too often advocates work for no payment. There should be a safety-net to catch any work that falls outside the AGFS and/or special preparation regulations. This would rarely be needed but there should be an over-riding objective that advocates are paid for work that is properly undertaken. The LAA would thereby have a discretion to remunerate advocates in those cases that required work not anticipated by the AGFS or which arose exceptionally. The introduction of a policy of frequent review to weed out any unfairness as it arises would mean the safety net would rarely need to be used.

146. The use of Directors & Officers insurance to cover legal fees in fraud cases could be increased to reduce the burden on the taxpayer. Insurance companies already have this product in place, so that if it were a mandatory requirement for

those who earn over a certain amount to take insurance, the burden on legal aid would be reduced. Household insurance policies could also be required to extend legal protection cover for criminal allegations.

147. Frequently, those accused of crime find their bank accounts are restrained, so that they are unable to fund legal expenses. In Canada, the legal system permits such use of restrained funds so long as those funds are controlled, and specifically utilised for legal costs.

Concluding Remarks

148. The CBA has been warning for a long time that the profession is no longer a viable profession for many, and consequently has a high attrition rate resulting in an ageing cohort that lacks the diversity required to represent those it serves with credibility.

149. The improvements outlined in this response are necessary to ensure that the Criminal Bar as a profession is accessible, diverse, viable, competitive, and efficient.

150. Regrettably the current situation for the Criminal Bar has changed little since the CBA made its response to AGFS 10 in 2017. On 23rd February 2018, in an announcement relating to AGFS 10, Angela Rafferty QC and Chris Henley QC, (CBA Chair and Vice-Chair respectively), told CBA members that,

"Financial viability is a major concern at all levels for all members of the Bar undertaking publicly funded work. All work of this type is of high importance. As has recently been reported by the House of Commons Public Accounts Select Committee, the Criminal Justice system is in crisis. The system relies too often on the goodwill and professional commitment of barristers working for no or very little money. This cannot

continue. We wish to make it clear at the outset of this response that the overall budget for criminal advocacy is far too low. This remains the case after this consultation."

151. Three years on, and despite the small interim investment made at the end of 2018, little has changed as regards the outlook for the Criminal Bar as a profession. As current CBA Chair, James Mulholland QC, stated to members,

"*Without pay increases to legal aid rates and the improvements as identified in this interim review, the profession will not survive save, perhaps, an elite minority whose preserve would be to protect a minority of the privileged few, rather than allowing those who join the Bar as a vocation to fulfil their calling to serve all members of the public, without fear or favour.*"

152. In November 2018, when delivering the MOJ's last, revised, interim offer on AGFS, the then Lord Chancellor, David Gauke, stated,

"Criminal defence advocates play a crucial role in upholding the rule of law, and it is vital that their pay adequately reflects the work they do in a fair and sustainable way." Furthermore, the MoJ concluded that,

"The government is committed to working closely with the legal professions to ensure that criminal defence advocacy is fit for the modern age and open to all."

153. We would welcome an opportunity to provide more detailed input on the mechanics of the changes to the existing system that we think are required in order properly to achieve these ends and look forward to Government's previously stated commitment to work closely with us as part of this ongoing process.