**CBA Response to Government Consultation**

**Criminal Legal Aid Independent Review (CLAIR)**

## 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 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 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. 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.

## Consultation

4. In May 2018 the Ministry of Justice agreed to a review of the Advocates Graduated Fee Scheme (AGFS) that would take place within 18 months. This followed years of protracted negotiations over an earlier iteration of AGFS which resulted in only very limited changes to the scheme. That proposed review was subsequently incorporated into a wider review of legal aid that the Government said would commence in January 2019.

5. Sir Christopher Bellamy submitted his independent review of criminal legal aid to the Secretary of State for Justice on 30th November 2021. It was subsequently published by Government on 15th December 2021. The main recommendations in the report for the Criminal Bar included:

i. A "minimum" 15% annual increase to all AGFS fees, to be introduced "as soon as possible" and with "no scope for further delay".
ii. Further reform of the AGFS without excluding the possibility that "further sums may be necessary".
iii. An independent criminal legal aid Advisory Board.

6. The government's proposals in response to Sir Christopher's recommendations are insufficient to meet the crisis facing the Criminal Bar and the wider criminal justice system.

7. The proposed changes to AGFS and the wider criminal legal aid reforms will be made by statutory instruments that are proposed to come into force some time in Autumn 2022. Those changes will only affect representation orders made after some specified period later in 2022. The changes proposed will not affect the 58,000 cases that form part of the existing backlog of Crown Court cases. The CBA considers it unacceptable that the Criminal Bar will be expected to continue working – including the types of hours normally remunerated as "overtime" or "shift work" in other professions - to clear this entire backlog at set rates fixed many years ago and which are now at wholly unsustainable levels.

8. This is in addition to criminal law barristers having been required to keep the court system operational during the entirety of the pandemic and having had no government assistance for loss of income during the pandemic other than the offer of applications to take on additional debt.

9. It should be noted that the Independent Review of Criminal Legal Aid did not take into account the substantial drop in average fee earnings from criminal legal aid of 23% between 2019/20 and 2020/21. Nor did the Review take into account the further contraction in the numbers of criminal barristers undertaking criminal legal aid work by 10% over the same period. The CBA regards these omissions as significant.

10. Further, the recent and substantial rise in inflation is a critical factor which Sir Christopher could not have appreciated when he published his report. The CPI (Consumer Prices Index) to December 2021 was 5.4%. The Bank of England recently predicted CPI for 2022 would be above 10%. The new fee rates proposed in the government response will not start to be paid until 2023, by which time the proposed 15% increase will have been wiped out by inflation. Further, Sir Christopher's recommendation of the 15% increase being a minimum, to be implemented "as soon as possible" and being annual will not have been followed, as nearly a year will have passed from the publication of his report.

11. The Criminal Bar Association maintains, as it stated in February 2022, that a minimum 25% increase in AGFS fees is needed to fund criminal legal aid in order to arrest and reverse the continuing recruitment and retention crisis at the criminal bar.

12. The Criminal Bar Association proposes that the immediate increase of 25%, at minimum, should be applied to all existing representation orders where the main

hearing has yet to take place. This will provide the necessary and urgent investment required to address the unfolding crisis in the criminal justice system. In addition, the CBA considers that further investigation is required as to whether a Statutory Instrument could apply retrospectively in this specific situation. If so, the CBA proposes that the increase commences from the date of publication of CLAIR.

13. Further reform and funding will be needed to legal aid even after an initial investment of 25%. The government cannot have failed to realise that funding of the criminal justice system has been the main cause of discontent at the Criminal Bar, with repeated and increasing disputes and protracted negotiations over the last 12 years. The Criminal Bar has no wish for these recurring clashes with the government.

14. The Criminal Bar Association agrees that there should be an independent Advisory Board to provide recommendations for reform to criminal legal aid. Sir Christopher Bellamy recognised that proper remuneration should be part of (though not necessarily the main) remit of the Board's role. The CBA considers that the proposed advisory board must be able to make recommendations to changes in fees and that this should include the ability to periodically review the effect of inflation on fee levels.

15. There must also be a streamlined mechanism for making changes to AGFS and LGFS (Litigators Graduated Fee Scheme). The present system of delayed and drawn-out reviews, consultations, a further wait until publication of the statutory instrument which will then only affect representation orders after some later date, results in it taking years for any increase in remuneration to be implemented. Without some mechanism for regular review, the present processes for amending the AGFS and LGFS are no longer fit for purpose.

16. The Criminal Bar Association has provided specific responses to the consultation questions below.

**<u>An Advisory Board</u>**

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

18. The CBA would welcome an independent Advisory Board but not the proposed "Engagement Forum" which would be unable to advise on "the uprating of criminal legal aid fees". (§35)

19. The level of legal aid fees is the single most important issue facing practitioners and those wishing to enter the profession; it is the low level of fees that creates obstacles in recruiting and retaining practitioners, and in maintaining a diverse profession. There has been a 28% decline in average real incomes over the last two decades, followed by a further collapse in average fee incomes by 23% in a single year of the pandemic.

20. When Sir Christopher Bellamy commenced his Review, it was extremely rare that a criminal trial could not proceed through lack of a barrister. Now it is commonplace. This was the position before the ongoing "no returns" action by the CBA.

21. The reason for the lack of barristers available to conduct trials is because so many have ceased practising in criminal law or chosen not to work in this area in the first place.

22. The CBA supports the Government's commitment to diversity at the Bar. However, a sustainable and diverse profession will only be possible through an immediate improvement to fee levels. Thereafter, legal aid rates and anomalies must be reviewed, and action taken on a frequent and regular basis. This is particularly so at a time when the Governor of the Bank of England forecasted soaring inflation and warned of "apocalyptic" food prices. In those circumstances, it is imperative that an Advisory Board should be able to advise on uprating criminal legal aid fees. There would be little or no purpose in an "engagement forum" that is nothing more than a discussion forum and is in reality another layer of bureaucracy and delay.

23. An Advisory Board that could respond rapidly to issues and concerns would lead to increased efficiencies. Importantly, it would support diversity. It also is a potential mechanism to improve morale in the profession and encourage those considering entry to it or reviewing their future in it.

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

25. The CBA agrees with the Bar Council that an Advisory Board should include representatives from the solicitor's profession, the Criminal Bar Association (CBA), the Bar Council, independent members with appropriate skills, representatives from MOJ, Legal Aid Agency (LAA) and potentially a judicial representative.

26. The CBA also considers that members of other representative bodies from the Junior and BAME Bar should be represented so as to ensure that a range of perspectives are incorporated into the work of the Advisory Board.

27. We also agree with the Bar Council that there must be specific provision for ongoing data-sharing.

28. As stated in our answer to Question 1, the most important task for an Advisory Board is the consideration of speedy adjustments to fees, if this is deemed necessary, by the Board. The RPI / CPI must be taken into account on at least an annual basis. Furthermore, an Advisory Board must have powers to act; recommendations should be implemented quickly and administratively without further consultation periods.

29. At the very least it is imperative that LGFS and AGFS should be uprated, annually, in line with the recommendations by the judicial pay review body, to ensure that fees

do not continue to decline in real terms. This will also have the benefit of future-proofing the system.

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

31. No. See answers to Question 1 and 2: the Board must be able to advise on fees.

**Unmet need and innovation**

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

33. The Criminal Bar Association agrees with the Bar Council that the solution to low fee levels is not to expand the PDS to fill the gaps, but to pay fees at a sustainable level so that providers do not exit the market in the first place.

34. The CBA also shares the Bar Council's concern that any PDS expansion would go against the fundamental principle that a person accused of a crime should be entitled to choose their legal representation.

35. The CBA are not privy to the figures, but doubt whether an expansion of the PDS would be considered a financially prudent step once the cost of any expansion is compared to the cost of funding independent advocates.

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

37. The CBA defers to our colleagues at the Law Society to answer.

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

39. The CBA agrees with the Bar Council that a situation where fees are so low that only the charity sector is able to provide legal services in criminal law defence is not the solution. The removal of a person's liberty is a significant interference with their rights and appropriate safeguards as to lawfulness include a high standard of representation. The CBA strives to support the profession in providing this high

standard. In terms of the rationale behind this question being further monetary savings; the CBA refers back to the Independent Review of Criminal Advocacy (2014) by Sir Bill Jeffrey commissioned by the Justice Secretary:

*"Effective advocacy is at the heart of our adversarial system of criminal justice. If prosecution and defence cases are not clearly made and skilfully challenged, injustice can and does result. Effective advocates simplify rather than complicate; can see the wood from the trees and enable others to do so; and thereby can contribute to just outcomes and save court time and public money."* (Introduction page)

And:

*"Inadequate preparation is the enemy of good advocacy. A combination of delay in assigning advocates (both prosecution and defence) and uncertainty over trial dates makes the system more hand to mouth than is conducive to good quality advocacy. What is badly needed is the timely assignment in as many cases as possible of an advocate who has a good prospect of actually conducting the trial."* (page 9)

40. It is a fact that the longer it takes to locate and instruct an appropriately qualified advocate, the less opportunity there will be for adequate preparation.

**Training and accreditation grant programmes**

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

42. The CBA agrees with the Bar Council and would support training grants for those beginning a career in criminal defence. Grants should be available to those starting as solicitors in legal aid firms and barristers beginning a legal aid focussed pupillage in chambers. However, whilst grants for criminal pupils would, of course, be appreciated, this will not address the retention crisis. Resources which otherwise would be available for legal aid fees should not be diverted into such grants. The root cause needs to be tackled - we need higher fees for the work done, and fees for advocacy in the magistrates' court need to be paid to the advocate who undertakes the hearing.

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

44. The CBA considers that there should be a "level playing field" between the professions. This is particularly essential in terms of the necessary training each side of the profession has to engage in before qualification. The MOJ commissioned Sir Bill Jeffrey's review "Independent criminal advocacy in England and Wales" and his report was published in May 2014. In particular pages 5-7 of his report address this issue and the vastly differing levels of training necessary before each side of the profession is qualified to provide Crown Court advocacy:

*"The disparity in mandatory training requirements expected of barristers and solicitor advocates reflects historic differences in the main focus of the two sides of the profession. But it is no reflection on the many highly capable solicitor advocates to observe that it is so marked as to be almost impossible to defend. To be called to the Bar, a barrister needs to have completed 120 days of specific advocacy training. A qualified solicitor can practise in the Crown Court (subject to 1 MoJ/LAA Data – Defendants committed or sent for trial in the Crown Court in 2012 who were represented under legal aid. 2 MoJ/LAA Data 5 Independent criminal advocacy in England and Wales accreditation) with as few as 22 hours such training."*

45. The CBA has a justifiable concern that both Government and the professional regulators have not addressed the existing disparity in allowing the solicitors' profession rights of audience in the Crown Court unless accompanied by like levels of training before qualification. Nearly a decade has passed since the Jeffrey review.

46. The solution to the recruitment and retention crisis of advocates in the Crown Court is not to further lower the barrier to entry for one profession, but properly to fund advocacy in the Crown Court. The CBA also adopts the wording quoted above that this is not a reflection on the very able Solicitor Advocates who practise in the Crown Courts. Rather it is a point made by the CBA in its efforts to maintain high quality of representation for members of the public. The CBA strives to maintain a high quality of advocacy within the criminal justice system.

**Investigating disparity in barristers' income**

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

48. The gender pay gap is stark at the publicly funded criminal bar. Repeated efforts to analyse and address why, have resulted in no simple answer. Since 2006 there has been a real-term decrease in the income of all criminal barristers. In the last 20 years the proportion of women coming to the Criminal Bar as a profession has increased from around 25% to 50%, but that balance is not maintained, and there is a significant loss of females, and of fewer males from the period after 5 years call. The overall position is 34% female barristers (in crime). The single answer to the retention issue is increased funding.

49. Whether females are discriminated against in the allocation and acceptance of briefs is a complex issue. Allocation is fundamentally driven by clients and solicitors, and relatively few defence briefs are in the 'gift' of the clerks' room. Most Chambers have access to data which should mean equality and diversity are monitored in respect of allocation of 'unnamed' briefs. Allocation is essentially dependent upon experience and availability.

50. Experience: Those who have taken a career break may have the same number of call years but less experience, and possibly no recent experience of a particular issue, a

fact with which instructing solicitors and clerks are familiar. Any barrister who takes a career break will potentially be 'off the radar' of the solicitor, until relationships are formed or renewed; the longer the break the more difficult to return at the same level of instructions and therefore remuneration.

51. Availability: Those with caring responsibilities have less availability. They are less likely to be able to travel long distances, and not able to 'stay away', they will be unable to commit to 'warned list' cases, or hearings that occur in a period they are required to care – due to Extended Court hours or school holidays.

52. There is therefore a complex matrix of facts which may result in the gender pay gap which may be fuelled, in part by allocation of less remunerative cases. To characterise those as RASSO cases is misconceived. The sums payable for brief fees (guilty, cracked or trial) and refreshers are a poor reflection of the amount of work involved.

53. RASSO cases and cases involving child or other vulnerable witnesses by their nature are serious and complex, requiring additional skill sets to be acquired before instruction. However, the skill sets which are utilised in the preparation of these cases are not remunerated at the same real hourly rate as other cases. There is no fee allocated for reading, watching, and editing ABE interviews, no additional fee for pre-hearing preparation of all the cross-examination of any number of child witnesses (for Judicial approval), nor the editing of the recorded cross examination – all of which take many hours over and above other cases allocated to counsel of similar experience. The extra burden of time in preparation, inevitably reduces the availability of counsel conducting these cases, and reduces their earning capacity. Also having to be available for split hearings interrupts normal availability, in addition to all standard preliminary hearings. It is important for the MOJ to consider the structure of these cases:

> Hearing 1. The Ground Rules Hearing: by this stage the entire trial preparation (including all unused material) needs to be addressed. This is currently only paid as a 'legal argument' fee. Counsel are expected to make themselves available for this (although the Court does not require it).
>
> Hearing 2. s.28 Pre-Recorded Cross-Examination of Child Witnesses: the brief may be claimed for this hearing but often many months may pass before the trial is listed requiring the case to be prepared again without any further brief fee. If the same counsel is not able to cover the trial fresh counsel only receives refresher fees for the whole trial with the result that a de facto "no returns" policy is likely to occur as counsel vote with their feet and refuse to take on any returned work of this type because of the poor remuneration.

54. Please see out answer to Q74 & 75. It is vital that two brief fees and special preparation are available to be paid for this work so as properly to pay for the extra work required and to reflect the fact that this depresses the income of those engaged in it. It is important to note in this context that data obtained by the Bar Council and

the Data Compendium relied on by CLAIR shows that it is accurate that a greater proportion of a female barrister's income is generated from RASSO cases.

**Diversity**

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

56. Training grants for criminal legal aid chambers will not, it is believed, address the recruitment and retention issue, at the Criminal Bar. All criminal pupillages are funded by the existing tenants from their income. Thus, it is only with an increase in fees that it is likely that there will be better funding of pupillages/training. Obviously, removing the burden from barristers of paying for the training of future generations of barristers would be welcomed. However, it does not address the root cause.

57. Recruitment is impeded by the very high cost of tertiary education and the debt legacy before pupillage is commenced. This is emphasised for the socially and/or economically disadvantaged. Poor remuneration at the Criminal Bar discourages the number of socially disadvantaged applicants aware of their inability to address the amelioration of their educational debt.

58. The perception that there is an immediate increase in income upon achieving tenancy is not sustained by the data or experience. Earning capacity at the junior Bar is stymied. Accordingly, it is important that fees in the Magistrates' Court should be increased and paid directly to counsel.

59. The issue of retention after pupillage, and after tenancy can only predominantly be addressed by an increase in fees. It should be noted that the median income of criminal barristers in their first three years of practice is a mere £12,200 which is below the minimum wage.

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

61. Ensuring proper remuneration across the board for ALL publicly funded hearings both in the Magistrates' and Crown court is the only achievable solution. A lack of pay, poor working conditions, irregular/inconsistent hours, requirement to work weekends and late nights and lack of certainty for diary management, aggravated by the Covid back log, lead those most financially challenged to leave the Criminal Bar and often to leave the profession. The lack of remuneration for cases not used in 'warned lists' leaving counsel 'unemployed' and unremunerated is a particular problem at the younger end of the bar – causing them to review their value to the profession. How counsel can be expected fully to prepare and remain available for

cases they may not be called upon to appear in is contrary to any commercial sense and conscience.

62. The financial barriers are further compounded by the continuation of the threat of Flexible/Extended/Covid working hours in courts and its disproportionate impact on primary care givers (predominantly women).

63. The Government is encouraged to extend the use of remote hearings (where appropriate – always keeping fair trial rights of the defendant at the forefront) for a number of reasons:

    i. The reduction in travel costs.
    ii. Better use of professional time and ability to undertake more administrative hearings at disparate locations
    iii. Enables all who have trial commitments, care givers and those with disabilities to access a greater range and volume of work.

64. Education of Law Schools in tertiary education is vital. There remains a historic perception of stereotyping in relation to barristers leading to misinformation about paths to the Bar, accessibility to it as a career and the funding available, reducing the diversity of applicants to the Criminal Bar.

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

66. Unless remuneration is addressed there is little progress that can be made to improve diversity as the attraction of the profession in a diminished financial state is much reduced and often untenable. This coupled with an improvement in working conditions will ensure a greater diversity of applicants. The introduction of the wellbeing protocol at the Criminal Bar would assist in maintaining a better work life balance for practitioners.

67. Once remuneration had been addressed, education on the routes to the professions, access to scholarships and opportunities for work experience are vital measures to ensure that the profession's recruitment pool is as extensive and diverse as possible.

68. We note the data replied upon by the Bar Council from its surveys and support their analysis.

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

70. Remuneration remains the single biggest factor challenging access and continuation within the profession. The Criminal Bar of England and Wales is the only section of the Bar that has been subjected to a real terms decrease in income over the last 20

years. And this decrease is substantial - between 33% and 22% according to the "Barrister earnings data by sex and practice report 2021" (Bar Council September 2021).

71. Whilst recruitment may be equal across the sexes, the lower level of retention at 10 years call for female practitioners signals the lack of viability of a career as a criminal barrister for women. This in turn negatively impacts upon the availability of diverse senior barristers from which to recruit Recorders (part- time Crown Court judges) and full- time Judges.

72. The available data is revealing. We refer to the Barrister Earnings and Barristers working Lives statistics.

73. The Bar Council addresses key statistics, and their response is self-explanatory.

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

75. The relates to the solicitors' duty scheme and so the CBA defers to the Law Society who are best placed to answer.

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

77. Please see our answer to Q.13

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

79. The only way to make the criminal law professions more attractive and diverse is to ensure fair remuneration - a failure to address this leads to a decision not to apply in the first place - leaving the only applicants being those with an independent income or significant parental support - these are barriers to application and the reduced diversity issue perpetuates.

**Quality Issues**

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

81. The CBA, like the Bar Council, would support a reduction in overbearing and unnecessary bureaucracy. However, we defer to our colleagues at the Law Society to answer.

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

83. There is a lack of detail to this question as to what is meant by "qualification criteria" and "Lord Chancellor's lists of criminal defence advocates". The only criteria referred to in the Government response is an application to "independent advocates".

84. Presuming this means self-employed barristers, the Bar Standards Board (BSB) has a statutory duty to ensure that criminal Barristers attain and maintain high professional standards through specialist advocacy training in qualification and pupillage including high quality advocacy training provided by the Inns of Court and within the New Practitioner programme. Thereafter the Regulator maintains quality control through targeted Continuous Professional Development overseen by the BSB's supervision department.

85. In relation to areas of criminal law which have been recognised as requiring specialist training such as youth crime and vulnerable witnesses, the Criminal Bar Association provides Criminal Barristers with training. Barristers fund their own training. Government support for the funding of that training would be a low-cost step for Government and might incentivise practitioners to ensure that their training is up to date. However, CBA experience is that high quality practitioners are conscientious but undoubtedly would welcome financial assistance in their engagement of the various courses that they attend.

86. It is important to pay attention to the operation of the specialist professionals that make up the Criminal Bar. The Criminal Bar is a specialist referral profession. This means that its membership survives and continues to advance to the more complex and serious work through high quality of work. Practitioners who do not deliver to this high standard generally find that their services are no longer required. However, the current context is that due to low pay, the number of barristers who are prepared to make themselves available for criminal defence work has diminished. Criminal barristers are forced by the nature of case demands -constantly increased by procedural and government reforms in the criminal justice system which are not accompanied by remuneration -and low pay to accept that their personal lives and

family and caring responsibilities must be negatively impacted and severely restricted. This is limiting those barristers who are prepared to continue taking criminal law cases.

87. As to ensuring "consistent availability" for work, the remedy is proper remuneration. Currently, 'consistent availability' is negatively impacted by low pay as barristers often take whatever work is available in order to maintain a basic income stream and this means that their overall availability and capacity to follow through on a case is reduced.

88. Currently, the crisis in legal aid forces barristers to undertake too much work in adverse conditions with low pay. These adverse working conditions are hostile to the recruitment of barristers from diverse backgrounds and those with family or caring responsibilities.

89. The result is a failure to retain talented practitioners, disproportionately women, into the senior ranks of the bar and into judicial and Queen's Counsel positions. This undermines equality, client and solicitor choice and the development of a profession reflecting society.

90. The "Lord Chancellor's lists"- if founded on a proposed increase in fees of the baseline of 15%- would militate against high quality; and would promote inadequate remuneration for long hours at times usually worked by other professions as paid "shift work" and in poor working conditions.

91. Incentivisation will be provided by an immediate increase of 25% across all fees.

92. In addition, incentivisation of criminal law barristers can be reinforced by government regularly and publicly recognising their work. It is welcomed that the Response recognises barristers' work during the pandemic:
*"We owe our whole legal profession – solicitors, barristers, court staff and judiciary – a debt of gratitude for keeping the wheels of justice turning over the last two years. Thanks to their efforts, we are making headway in tackling the court backlog, and getting back to a more normal way of working – in the interests of victims, witnesses and the wider public".*

93. However, the sincerity of statements like "debt of gratitude" is undermined by repeated and publicised government attacks on the legal profession, particularly over the last decade. This has further driven down the morale of criminal barristers and the wider legal profession.

**Technology**

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

95. Technology has enormous potential to support efficient and effective ways of working. It has already done so by removing the need to serve all the material in a criminal trial as paper and instead served evidence is served and "uploaded" digitally (Crown Court Digital Case System). Recently, uploading also has been extended to unused material.

96. The Covid pandemic had the unexpected benefit of accelerating the use of remote technology to allow the more routine court appearances by counsel to be done remotely (Cloud Video Platform – CVP). This has the enormous advantage that instructed counsel can be in two places at once - or three, or four - and deal with the more administrative aspects of trial preparation in a time efficient manner with the added advantage of not incurring travel costs and thus saving the taxpayer money. In addition, less use of transport to travel reduces the carbon footprint of practitioners. As fees continue to lose value through the failure over decades to improve rates for publicly funded work, as well as the effects of inflation, this benefit cannot be overstated. It can mean the difference between earning money for an attendance rather than making a loss by paying more in travel expenses than the fee for the appearance. Such a loss was a depressing norm for barristers, particularly junior barristers.

97. Remote attendance cannot and should not replace oral advocacy entirely. The interests of the client must remain at the forefront of considerations when remote hearings are granted. However, they have operated effectively in other jurisdictions in England and Wales and with appropriate protocols they provide advantages for the swift and efficient disposal of procedural hearings and, where appropriate, sentencing hearings. However, criminal barristers experience many examples of the technology not working as it should. As ever, appropriate investment and training of court staff is required. Further the CBA suggests that close communication between listing offices in courts and barristers' clerks promote a symbiotic system of efficient case management through the use of CVP.

98. Thirdly, the electronic presentation of evidence can improve the jury's comprehension of a case. However, a significant drawback is in the failure to invest properly in hardware in courtrooms. At present criminal barristers are all too often reliant upon one 'large' screen for the jury to peer at across a courtroom. This means that fine detail is impossible to see, and documents cannot be presented that way. Because the technology is inadequate, in more serious cases the prosecution hire equipment from independent contractors at great cost. This is a very good example of the lack of joined-up thinking in the criminal justice system. This expense does not come out of the budget of HMCTS who do not want to incur the cost of equipping enough courtrooms with monitors for the jury and barristers; however, it does come out of the CPS budget. The net result is that the taxpayer is not getting value for money. It also means that the prosecution has the benefit of the

technology and the defence do not, which is unfair and contrary to the principle of equality of arms which should apply in our adversarial system of justice.

99. There has been a lack of investment in people to manage and run the technology which has been installed, instead relying upon advocates, court ushers and clerks to do the job. Many are very capable, but this is a "make do and mend" approach and is symptomatic of the approach to managing the criminal justice system which is to load more and more work onto the shoulders of people who are neither trained nor paid to carry out functions which should be done by properly trained and paid staff. Instead, advantage is taken of the goodwill of the people working in the CJS who are prepared to step in and make up for lack of proper investment.

100. We are aware of barristers lending their own screens for use by the court and introducing work arounds to keep trials progressing when the court equipment fails. On occasions jurors have sent notes advising what equipment is needed. The hardware fails on a regular basis. It is rare for a case which utilises technology to progress without issues. These issues often result in the loss of much court time and cause stress to witnesses and frustration to jurors.

101. Finally, the CBA has received information that the Common Platform has worked badly for court staff, barristers, and staff. Significant improvements are required before it continues to be rolled out.

**Pre-charge engagement: preparatory work**

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

103. The CBA defers to the Law Society who are best placed to answer.

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

105. The CBA defers to the Law Society who are best placed to answer.

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

107. The CBA defers to the Law Society who are best placed to answer.

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

109. The CBA defers to the Law Society who are best placed to answer.

**Pre-charge engagement: sufficient benefits test**

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

111. The CBA defers to the Law Society who are best placed to answer.

112. **Question 25. Do you have alternative proposals for amending the 'Sufficient Benefits Test' under scenario 2?**

113. The CBA defers to the Law Society who are best placed to answer.

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

115. The CBA defers to the Law Society who are best placed to answer.

116. **Question 27. Are there any other types of preparatory work that you think should be funded prior to the PCE agreement?**

117. The CBA defers to the Law Society who are best placed to answer.

**Investment in police station fees**

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

119. The CBA defers to the Law Society who are best placed to answer.

**Standardised police station fees**

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

121. The CBA defers to the Law Society who are best placed to answer.

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

123. The CBA defers to the Law Society who are best placed to answer.

**Both options for police station structural reform**

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

125. The CBA defers to the Law Society who are best placed to answer.

126. **Question 32. If you agree we should explore this reform, which option (1 or 2) do you think would better achieve the aims of better remunerating work done by differentiating case complexity, while reducing administrative burden? Why? Do you have any other ideas for reform?**

127. The CBA defers to the Law Society who are best placed to answer.

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

129. The CBA defers to the Law Society who are best placed to answer.

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

131. The CBA defers to the Law Society who are best placed to answer.

**Practitioner seniority and harmonisation of fees at police stations**

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

133. The CBA defers to the Law Society who are best placed to answer.

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

135. The CBA defers to the Law Society who are best placed to answer.

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

137. The CBA defers to the Law Society who are best placed to answer.

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

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

139. The CBA defers to the Law Society who are best placed to answer.

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

141. The CBA defers to the Law Society who are best placed to answer.

**Improving the uptake of legal advice in custody**

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

143. The CBA defers to the Law Society who are best placed to answer.

**CILEX members as duty solicitors**

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

145. Like the Bar Council, the CBA does not have sufficient direct experience of the operation of the accreditation scheme to give a fully informed opinion and we defer to our colleagues at CILEX and the Law Society.

**Defence Solicitor Call Centre**

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

147. The CBA defers to the Law Society who are best placed to answer.

**Post-charge engagement**

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

149. The CBA defers to the Law Society who are best placed to answer.

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

151. The CBA defers to the Law Society who are best placed to answer.

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

153. The CBA defers to the Law Society who are best placed to answer.

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

155. The CBA defers to the Law Society who are best placed to answer.

**Investment in Magistrates' Court Fees**

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

157. Magistrates' Court work is important. It is the first entry point into the court system. The fees currently paid in the magistrates' court are uneconomic, with many firms relying on other fees to cross subsidise this important work. The recommendation of 15% by the Bellamy Report is as a bare minimum first step. It is plain from the evidence that greater sums are required.

158. The parlous state of magistrates' court fees is seen from the fees payable to counsel for magistrates' court trials, with the fees often falling far below minimum wage levels. The protocol in place for Greater London demonstrates this with payments of

£75 for a half day trial (9am -1.30pm - 4.5 hours) and £150 for a full day (9am-5pm - 8 hours)[1]. These rates are also inclusive of all preparation for trial, which often runs to several hours with multiple witnesses and the recent proliferation of body worn video evidence. These cases can also be legally complex and/or engage the most vulnerable with specific needs. The situation is even more bleak when it is appreciated that these rates also apply to youth court trials.

159. These rates compare poorly to prosecution fees of £150 (half day) and £300 (full day) in the Magistrates' Court, and £200 (half day) and £400 (Full day for the Youth Court, with an additional daily bolt-on payment of £100 for trials over 1 day. These fees are considered to be too low, however, as a minimum equality of arms demands parity.

160. The impact of such low fees on the junior bar can be seen in the analysis contained with the Bellamy report. The junior bar are reliant on this work in the initial stages of their career. The impact of such fees on those without independent wealth means that there is a significant attrition. The impact on diversity is clear. The situation is compounded by the frequent inability to actually recover the fees owed for work done in the magistrates' court (see answer to q.48).

**Structural Reform of the Magistrates' Court Fee Scheme**

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

162. The CBA agrees, save for one important issue: the payment of fees to counsel. The scheme should enable direct payment from the LAA to counsel for work done. At present fees to counsel are treated as a disbursement and fall to be paid by solicitors. This has unfortunately led to abuse by some firms, with the result that many junior barristers at the criminal bar never receive even those meagre fees set out above. This can run into thousands of pounds when considering the volume of work undertaken at that level. There is no effective recourse for criminal barristers when this happens.

163. It is appreciated that the Bellamy Report recommended governance by the LAA through audit; however as set out in the Bar Council response to this question the LAA are unable to do so. The Chief Executive of the LAA has confirmed this: "the LAA's ability to intervene, even where the regulations are breached is limited, given that the contractual relationship regarding payment of fees exists between the barrister and instructing solicitor. [...] Where fees are in dispute, or where firms dispute that payment that has not be made, there is little the LAA can do". It is self-evident that this is an unfair and unacceptable situation.

[1] See, the Revised Protocol for the Instruction and Payment of Counsel in Magistrates' Courts Cases within the Greater London Area, 2019 'at https://www.barcouncilethics.co.uk/documents/protocol- instruction-counsel/

**Investment in criminal legal aid fee schemes**

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

165. Whilst the CBA welcomes the injection of a further 15%, paragraph 144 of the consultation envisages that after the 15% fee increase, any subsequent restructuring of AGFS would be "cost neutral". The CBA fundamentally disagrees with this proposal. It is important that it is recognised that at paragraphs 1.37-1.39 of his report on CLAIR Sir Christopher Bellamy made his central recommendation which does not support cost neutrality. We set it out below for ease of reference:

*"Central Recommendation*
*1.37 My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike* ***as soon as possible*** *to* ***an annual level,*** *in steady state,* ***of at least 15% above present levels****, which would in broad terms represent additional annual funding of some £135 million per annum…*
*1.38 I would emphasise that the sum of* ***£135 million is in my view the minimum necessary*** *as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so****, I do not see that sum as "an opening bid" but rather what is needed, as soon as practicable, to enable*** *the defence side, and thus* ***the whole CJS to function effectively****, to respond to forecast increased demand, and to reduce the back-log.* ***I by no means exclude that further sums may be necessary in the future*** *to meet these public interest objectives.*
*1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that.* ***There is in my view no scope for further delay.***
***(Our Emphasis)***

166. It is clear that he was recommending a minimum increase of 15% annually until the criminal justice system was balanced and functioning properly again. Since the publication of the Criminal Legal Aid Review (CLAIR) and since its earlier fact finding, there has been a cost of living crisis and near double digit inflation. In addition, CLAIR was commissioned before the pandemic and before the additional loss of specialist criminal law practitioners which took place during the pandemic. Criminal law barristers had little government assistance during the pandemic; the only option has been to incur more debt which now requires repaying (for example "bounce back" loans).

167. The cost of living and inflation hikes alone have resulted in significant increases in remuneration for non-legally aided practitioners meaning that the retention crisis for those providing publicly funded criminal work is now still more acute than when Sir Christopher Bellamy published his report.

168. It should also be borne in mind that if the statutory instrument isn't in force and operational until October 2022 and only applies to representation orders granted after that date, the increase in fees will not make any effective difference to incomes

for advocates until late 2023 at the earliest. Accordingly, the present proposal means the entire existing backlog will be paid at rates set years ago.

169. It has been the consistent view of the CBA that an immediate increase of a minimum of 25% is essential if the criminal bar is to have any prospect of surviving as a cadre of specialist advocates from whom the QCs and Judges of the future are to be drawn. Moreover, it would be a fundamental abandonment of Sir Christopher's key recommendation for the government to suggest that future injections of funding after the initial *minimum* 15% proposed would be cost neutral. Accordingly, additional funds are urgently required. Further, any increase needs to be immediate, as he recommended.

170. Additional delay to the 6/7 months that already has passed since the publication of CLAIR should not be supported. It is not an option and contradicts the recommendations of the government's own independent review

171. Therefore, the urgent increase to legal aid needs to apply to any bill where the main hearing has not yet taken place at the time the statutory instrument is laid.

172. Further, where it is legally possible, legal aid increase should apply retrospectively to all claims from the date of the publication of CLAIR. Finally, the CBA urges immediacy in relation to the increase of barristers' fees. This means that a statutory instrument should be laid in advance of October. The CBA suggests that by July 2022 at the latest is a reasonable timeline for the government to consider this further consultation – which is in addition to the consultation in 2019 and in addition to CLAIR and to constant data and feedback from the relevant legal professionals – and for the Statutory Instrument to be brought into force and be operational by the Legal Aid Agency.

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

174. In principle the CBA defers to the Law Society as this affects them directly. However, we agree that a flat increase is required but it should be a minimum of 25% and it should, at minimum, apply to all representation orders in existence where the main hearing has not occurred by the date that the proposed statutory instrument is laid.

175. The CBA is not satisfied that a Statutory Instrument could not apply retrospectively. Primarily, its position is that the increase in fees should commence from the time of the publication of CLAIR.

176. In addition, there should be parity between the professions. We note that an increase to hourly rates is proposed to LGFS. We agree with this but note that no similar increase is proposed to AGFS (see below). Further, that the increase that is proposed to AGFS is limited <u>to the basic payment</u> for unused material. It is essential that

increases to the hourly rate for special preparation, wasted preparation and consideration of unused material should be included in the proposals for AGFS for the reasons already adumbrated in our answer to Q.49 and at the rates set out there, namely a minimum of 25%. Moreover, the present hourly rates represent only approximately 10-20% of the rates for the Summary Assessment of Costs published by the Senior Courts Costs Office for private work; the higher percentage only being achieved when comparison is made with the rates paid to Queen's Counsel. Please see the CBA's response to Sir Christopher Bellamy at **paragraphs 64-72 of our Interim Response dated 7th May 2021**.[2] It is essential that the connection between the two not be lost completely if recruitment and retention are not to be further damaged.

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

178. Please see the answer to Questions 49-50 above which the CBA maintains in answer to this question as well. In addition, in the CBA's response to Sir Christopher Bellamy's committee the CBA provided detailed proposals as to where, over and above the suggested 25% flat rate increase, increases in fees are necessary e.g. to the remuneration of murder generally and to the page count criteria for special preparation under the accelerated asks which urgently needs to be reduced in cases of murder, fraud and serious drugs. Again, our responses of 07.05.21 and 07.07.21 to Sir Christopher set this out.[3]

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

180. The CBA agrees that this is essential. Firstly, because in the overwhelming majority of cases the barrister will have no previous input into the case and will not have been in a position to influence the lay client's choice (certainly not prior to election). The barrister should not be penalised for the client's choice.

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

182. Thirdly, it presently results in rates of payment that are often below the minimum wage. These cases are carried out by the very youngest practitioners or the most

[2] CBA.IRCLA-Response-7.5.21.pdf
[3] CBA.IRCLA-Response-7.5.21.pdf; and Microsoft Word - CBA Submission to CLAR 07.07.21.docx (criminalbar.com)

disadvantaged, yet they are having to complete as much work as for any other Crown Court case. Accordingly, this is exactly the sort of change that must be made if there are to be good rates of retention. In short, the payment scheme that presently exists discriminates against the young and those forced to take on such work.

**Enhancing the LGFS' effectiveness in remunerating substantive matters**

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

184. The CBA defers to the Law Society who are best placed to answer.

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

186. The CBA defers to the Law Society who are best placed to answer.

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

188. The CBA defers to the Law Society who are best placed to answer.

**Improving the service and assessment of PPE**

189. **Question 56. What improvements would you like to see made in relation to the way in which evidence (especially electronic) is:**
**a) Served on the defence?**
**b) Defined in Regulations?**
**c) Quantified at assessment?**

190. The CBA defers to the Law Society who are best placed to answer. However, if any proposal was to be made relating to AGFS we would wish to be consulted.

**Confiscation Proceedings**

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

192. The CBA agrees that an increase in fees is required but it has been the consistent view of the CBA that an immediate increase of a minimum of 25% is essential, for the same reasons as given in our answers to question 49 and 51.

**Standard fees for appeals to Crown Court and committals for sentence**

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

194. The CBA defers to the Law Society who are best placed to answer.

**Understanding Crown Court litigator work**

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

196. The CBA defers to the Law Society who are best placed to answer.

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

198. The same factors exist as with all Crown Court cases. There should be proper remuneration for both litigators and advocates for all cases committed to the Crown Court, or subject to appeal at the Crown Court. Appeals are fresh trials and should be paid the same as trials for those offences that are committed for trial in Crown.

**Fundamental AGFS structure**

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

200. The CBA agrees with the MOJ in paragraph 163 of the consultation that the task is to make improvements to the AGFS rather than replacing it with an entirely new scheme. Criminal barristers are familiar with how the present scheme operates. They are in agreement with CLAIR that it needs to be kept as the basic template, albeit it requires significant amendment.

201. The AGFS would benefit from some reform in the following ways:

i. Review of brief fees within specific categories.
ii. Greater use of escape mechanisms for cases which require more preparation than would normally be anticipated by AGFS.
iii. Substantial increase in hourly rates, substantially higher than 25%, for so-called "special preparation" and "wasted preparation".
iv. Payment for written work typically undertaken for Crown Court cases.
v. The mechanism for making such claims should be simplified and done so on the basis that the LAA will view such claims with a "presumption of

payment". In the CBA's opinion this will require a culture change within the LAA. Please see Sir Christopher's observations and recommendations at paragraphs 15.56-15.66 of his report.

202. Specifically, fees need to be increased generally in line with our comments set out at Question 49 above. However, in particular, fees need to be increased for certain classes of case and hearing, specifically the basic fees for murder, fraud and sex cases and for important pre-trial hearings, legal arguments and extra documents that counsel is now required to draft. We have addressed all of this in detail in our two responses to the Bellamy Review. In particular, we would draw attention to paragraphs 20-60 of our second submission to Sir Christopher Bellamy, dated 7th July 2021[4] which provides almost a complete template for the necessary improvements. We are happy to engage with the MOJ to make the system better along these lines, provided genuine improvements and fee increases result. We are disappointed that we are having to repeat the same responses we made to the Bellamy Review, nearly a year later in the circumstances of crisis that engulfs the criminal justice system and criminal barristers.

203. We fundamentally disagree with paragraph 161 of the consultation that any changes must "*be within the same cost envelope*." We repeat paragraphs 137-139 of Sir Christopher Bellamy's report, which it seems to us is the very antithesis of the proposal at paragraph 161:

> *1.37 My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike* ***as soon as possible*** *to* ***an annual level,*** *in steady state,* ***of at least 15% above present levels****, which would in broad terms represent additional annual funding of some £135 million per annum…*
> *1.38 I would emphasise that the sum of* ***£135 million is in my view the minimum necessary*** *as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so,* ***I do not see that sum as "an opening bid" but rather what is needed, as soon as practicable, to enable*** *the defence side, and thus* ***the whole CJS to function effectively****, to respond to forecast increased demand, and to reduce the back-log.* ***I by no means exclude that further sums may be necessary in the future*** *to meet these public interest objectives.*
> *1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that.* ***There is in my view no scope for further delay.***
> ***("Our Emphasis)***

204. Any proposed reforms should be assessed using an evidence-based approach to determine what is required to ensure the sustainability of the criminal justice system, promotes diversity, and does not create adverse incentives.

[4] Microsoft Word - CBA Submission to CLAR 07.07.21.docx (criminalbar.com)

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

206. Please see the answer to Q.61

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

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

208. The CBA agrees with Sir Christopher's findings, that a large amount of necessary work undertaken by advocates is not currently remunerated by the AGFS. Therefore, broadening the Special Preparation mechanism is one remedy. The CBA agrees with paragraph 166 that there is a risk that "increasing the availability of Special Preparation payments would create a significant administrative burden for both practitioners and the LAA, and a proliferation of billing disputes." The solution would be that this work should no longer be called "special" preparation because it is work that is necessarily required in many cases, and the bureaucratic burden that currently surrounds the claiming of that fee should be removed. For example, rather than being required to justify to the LAA the number of hours worked, there may be an opportunity in some areas for a set fee to be paid for particular work without the need to supply work logs on a basis similar to the unused material set fee system but with the option to claim more if the case merits it and the claim is supported by appropriate supporting evidence. However, it is imperative that there is a change of culture at the LAA to have some level of trust in its providers, with for example dip sampling, rather than detailed assessment of every claim. The CBA would be happy to engage with the MOJ to work out the details. As stated above, these changes must not be on a 'cost neutral' basis. We have already made detailed proposals in our response to the Bellamy review dated 7th July 2021 at paragraphs 20-60.[5]

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

210. The CBA supports this proposal as long as any enhanced fee does not require extensive bureaucratic justification to the LAA by the advocate, and the fee increase is not on a "cost neutral" basis.

211. In our 7th July 2021 response to the Bellamy Review at paragraph 23 we have suggested an alternative mechanism based on use of the existing banding system

[5] Microsoft Word - CBA Submission to CLAR 07.07.21.docx (criminalbar.com)

which we commend for its relative simplicity and the ease with which it could be administered. We repeat this response.

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

213. The CBA would be willing to discuss this but suggests that the model ought to be increasing the basic fee and then paying for the additional work as well as rather than reducing the basic fee. Please see our paragraphs 20-60 of our Response to the Bellamy Review dated 7th July 2021. Once again, any suggestion that this be dealt with within the existing cost envelope or with cost neutrality is opposed and is the very antithesis of the recommendations of the Bellamy Review namely:

*1.37 My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike* ***as soon as possible*** *to* ***an annual level,*** *in steady state,* ***of at least 15% above present levels****, which would in broad terms represent additional annual funding of some £135 million per annum…*
*1.38 I would emphasise that the sum of* ***£135 million is in my view the minimum necessary*** *as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so****, I do not see that sum as "an opening bid" but rather what is needed, as soon as practicable, to enable*** *the defence side, and thus* ***the whole CJS to function effectively****, to respond to forecast increased demand, and to reduce the back-log.* ***I by no means exclude that further sums may be necessary in the future*** *to meet these public interest objectives.*
*1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that.* ***There is in my view no scope for further delay.***
***(Our Emphasis)***

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

215. Once again, the CBA commends the model set out in our reply to the Bellamy Review dated 7th July 2021 at paragraphs 20-60 thereof.[6]

[6] Microsoft Word - CBA Submission to CLAR 07.07.21.docx (criminalbar.com)

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

217. The CBA repeats the answer to Q. 66. In addition, there needs to be an urgent review of expenses in terms of cost per mile which has not increased since 1992 and indeed was then £0.45 per mile, a rate that is almost never paid by the LAA, who instead insist on paying just the £0.25 per mile rate. Likewise, hotel expense levels have not kept pace with reality and the allowances are insufficient bearing in mind the need to have accommodation in which barristers can work in the evenings. Barristers therefore are required to subsidise the cost. This makes the case itself even less affordable as a source of income.

218. Train travel to courts (particularly remoter courts) needs to be refundable within 28 days of it being incurred and all of these types of costs must be recoverable for all hearings, not just the main hearing. Given the very low rates recoverable for interlocutory hearings, the Bar is often either paying to conduct these hearings when travel costs are greater than the hearing fee or subsidising these hearings to a considerable extent. We also are aware of examples of the LAA rejecting train tickets as adequate evidence of travel; requiring a receipt and being inflexible with barristers who can prove their attendance but no longer possess the train receipt or ticket. There is never reimbursement for first class train travel. Barristers often need to work on trains. This is not possible without an appropriately private space. First class train fares should at least be an option considered, particularly as this always used to be the default position. Barristers may not stay in accommodation as often if first class train travel were to be funded.

**Further data and research**

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

220. Like the Bar Council, the CBA does not have a separate source of data that is not already in the hands of the MOJ.

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

222. The CBA worked with the Bar Council, MOJ, LAA and the solicitor's profession to revise AGFS to properly reflect the complexities in Crown Court work within the last few years.

223. The main factors that increase complexity are:

i. Different types of case, which can be categorised under the existing scheme.
ii. Pages of prosecution evidence.
iii. The volume of digital evidence.
iv. The volume of unused material either in page or digital form.

224. Proper funding of the system by using these proxies to augment the fee with reasonable hourly rates for the extra work required in cases that do not fit easily into the standard AGFS structure is the best way to pay advocates for the work that is required to prepare and conduct Crown Court proceedings at an acceptable professional standard.

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

226. See our answer to Q.64. The CBA, like the Bar Council (and subject to our answers to Questions 1 – 3), would be happy to work with the Advisory Board to explore this matter further.

**Enhanced payment for "Effective" PTPHs/FCMHs**

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

228. Please see our answer to Q.64 and, in particular, our Response to the Bellamy Review dated 07.07.21 at paragraph 23.[7]

**Wasted Preparation Payments**

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

230. The Criminal Bar Association agrees with Sir Christopher Bellamy's proposal that Wasted Preparation should be properly remunerated. It should also be remunerated in each and every instance; the proposal that barristers should be remunerated for work they are required to carry out should not be contentious.

231. Over recent years – before the pandemic – the listing of trials had become more and more uncertain. It is now routine for trials to be stood out on or before the day of trial

[7] Microsoft Word - CBA Submission to CLAR 07.07.21.docx (criminalbar.com)

through lack of either court, judge, or advocate. Those trials are then often re-fixed with either no regard to the instructed advocate's availability, or on a date when the instructed advocate is unavailable. The advocate will lose the brief fee when this happens. That is unsustainable for advocates who liken the system to working on zero-hours contracts.

232. It is noted that there has been some improvement in co-operation since the CBA's "no returns" action.

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

234. The essence of the current scheme is acceptable to the CBA because it is designed to remunerate advocates for their "wasted preparation" when a trial does not proceed through no fault of barrister and the barrister is consequently prevented from claiming a fee for the work they have carried out.

235. The duration of any trial is irrelevant because it is often the case that the length of a trial is reduced by the pre-trial preparation carried out by the advocate. There have been many examples of cases involving 1000s of pages of evidence being dealt with in reduced time because of the (unpaid) work of the barristers. For example, barristers are expert at reducing substantial volumes of material into Agreed Facts. This avoids the requirement for the prosecution to call numerous witnesses to prove their case. There is avoidance of calling of police officers as evidence within unused material is reduced by barristers into Agreed Facts. Similarly, a lower page-count does not necessarily mean a simple case and little preparation.

236. A scheme similar to that in place for the reading of Unused Material is proposed: 1-3 hours of wasted preparation could be claimed as a standard fee where the advocate is prevented from claiming the brief fee through no fault of their own. Wasted preparation in excess of 3 hours would be claimed by the submission of work logs in the same way the more substantial claims for reading Unused Material are claimed.

237. This scheme cannot be cost-neutral. It must remunerate advocates for the work they are required to do. In a properly funded and resourced criminal justice system, there would be no lack of judges or courts and wasted preparation would be reduced. In the meantime, advocates must be remunerated for their work.

**<u>Consultation Questions- Section 28 pre-recorded cross-examination</u>**

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

239. Yes. However, there is already available a great deal of data and information which should preclude the necessity for further delay to address this important,

underfunded area. The CBA already has provided evidence to the Public Accounts Select Committee (oral and written).

240. Section 28 Youth Justice and Criminal Evidence Act 1999 cases, involve pre-recorded cross-examination of vulnerable witnesses and children at an early stage which means criminal barristers are expected to read and prepare the case, submit proposed questions to the court and conduct the cross-examination of witnesses some time before a jury trial occurs. The Process is dictated by the CPR, which has recently been updated and came into force 25th March 2022.

241. The present scheme is insufficiently remunerated and requires adjustment. Counsel are required to commit to the case early, prepare it early and retain the case on an open-ended basis until the whole trial is concluded. The section 28 scheme effectively requires full preparation of the case for trial twice. These cases are generally more complex than cases not involving pre-recorded cross-examination.

242. If witnesses in a trial are identified as being within the s28 'umbrella', they must have provided a video recorded interview. At an early stage, often before all of the evidence is known, the video(s) must be viewed, and edits considered, and possibly argued, before cross-examination can be prepared. All other available evidence including all witness statements and interviews, and unused material must be considered, often including medical records, social services files, intermediary reports and any family proceedings, along with full instructions from the Defendant, which is effectively preparation for the trial - but many months in advance – and may not necessarily be conducted by the ultimate trial counsel if the trial is fixed when counsel is already booked on a case elsewhere, something which occurs ever more frequently given the huge backlog in cases. This is now recognised by the brief fee being paid on the first day of the s28 hearing.

243. A Ground Rules Hearing (GRH) will be ordered, before which counsel must complete the relevant form, and at which the Judge may require counsel to submit a complete list of questions for consideration and comment by the Court and Intermediary. As the Ground Rules hearing usually takes place in the week before the s28 hearing there is usually little time, and much pressure, to make/contest/explain required amendments. This is paid at the rate of a full or half day legal argument £240/£131, much less than a basic refresher @£530. Under recent changes to CPR, it is no longer mandatory for the same counsel to appear at the GRH and the s28 hearing.

244. At the s28 hearing the (approved) questions are asked and any additional material submitted. This can include matters arising, not anticipated, which have to be the subject of submission and approval before they can be asked, so a compendious knowledge of all of the material is crucial. Subsequently, and in short compass the recording is required to be viewed and reviewed and proposals submitted for editing based on the video. This all takes significant time both before and after the hearing. As this hearing is deemed the 'first day of trial' any credit for a guilty plea thereafter is lost – so all discussion re plea realistically has to have occurred before the s28

hearing. The first day of the s28 hearings is paid as a brief fee, subsequent days as a refresher. There is no additional remuneration for the excessive work over and above that one would ordinarily expect in case preparation for trial. If new counsel is instructed for the actual trial, that advocate receives only the daily refresher and no brief fee.

245. We suggest that viewing and editing of ABE & cross-examination videos should be claimable by way of Special Preparation.

246. There may be a significant delay before the trial, which would require even the same counsel to review the entire case again before trial, particularly in the light of any additional material that may have come to light. There is no requirement for the counsel who has undertaken the ground rules hearing and the s. 28 hearing to be available for the trial date, the rules having been relaxed under the recent CPR. A fair reflection of the work would require a second brief fee to be paid.

247. Late service of relevant evidence or disclosure results in an application to repeat the entire process if the criteria under section 28(6) YJCE Act are satisfied and the judge makes a further special measures direction under section 28(5) YJCE Act. The CBA continues to submit that such a process should again be remunerated as at minimum a refresher fee for a further GRH, and refresher, if required, for a further s28 hearing.

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

249. Please see our comments on Q.74 above. There needs to be a remodelling of the AGFS scheme properly to reflect the substantial additional work required in these cases. The GRH should be paid as a minimum as a refresher (rather than legal argument). The S28 hearing should be remunerated by a Brief Fee but should be subject to permissible supplementation via Special Preparation for viewing of ABE interviews and reviewing and editing the s28 recordings. Brief fees for both the s.28 and the listed trial should be payable. Further, if the s28 is not conducted by counsel who prepared and conducted the GRH, provision should be made to enable special preparation to be claimed by GRH counsel.

250. The notion (as in para 173 of the consultation document) that this should be on a cost neutral basis is to deny the necessity for a fundamental increase in remuneration. An evidence-based assessment is the only proper approach when deciding whether to fund s.28 work.

**Youth Court Fees**

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

252. All youth court work is by definition both serious and complex. Diversion is a cornerstone of the justice system with regard to children and young people. It follows therefore that the less serious and less complex cases in general terms should have been filtered out (or require specialist representation to ensure that they are). In general terms this is reflected in the decreasing number of cases coming before the Youth Court. The cases in the youth court will either be serious, complex, or by definition involve representation of the most vulnerable cohort of children. This is compounded by the demographic profile of such children. The majority will present with significant communication needs, cognitive functioning impairment or mental health needs alongside a history of adverse childhood experiences.

253. This was recognised within CLAIR. It is unclear why the fee proposals do not mirror those recommendations set out in CLAIR, which considered the evidence and data in detail and proposed that all fees should be at a minimum the equivalent of that which would apply in the Crown Court for an adult. This could be accommodated by enhanced fees in the Youth Court however this does not seem to be what is suggested by the proposal.

254. CLAIR also recommended that cases in the Youth Court that would otherwise be triable in the Crown Court should, save in exceptional circumstances, qualify for a certificate for counsel. This should be adopted.

255. It is unconscionable that a child in the Youth Court is not entitled to a litigator and specialist advocate as standard in circumstances where were they an adult (including an adult facing a less serious offence) it would be automatic. This cannot as a matter of principle be justified.

256. In terms of public expenditure, the number of cases is low and the sums involved are minuscule. Evidence suggests that children are over criminalized and many children entering the Youth Court should have been diverted. In the long term, there are likely to be both direct cost savings and indirect cost savings, by improving the quality of representation children's underlying needs should be properly understood and addressed by the court ensuring they receive the most appropriate sanction and reducing the risk of reoffending.

257. Similarly, an enhanced fee scheme should be extended to all youth court cases. The fees are abysmally low and do not attract the most skilled and specialist advocates.

258. The CBA notes the aim of attracting specialised advocates. Fees play an important role in this regard. Most Youth Court cases are comprised of short pre-trial hearings, short contested trials, typically lasting a day or less (exceptionally longer), and short

albeit significant sentencing hearings (again lasting less than a day). At present it is simply uneconomic to expect counsel to keep their diaries free for such short matters which attract such low fees in circumstances where they can be instructed in simpler but more lucrative Crown Court work.

259. With regard to diversity, the CBA notes the over-representation of black, brown and minority ethnic children within the Youth Court. It is in the interests of those children and the public interest that they are properly represented by a diverse pool of specialist advocates and litigators, in part to address and challenge racial disparity, ensure the legitimacy of the system, and engender public confidence.

260. It is further noted that women advocates are over-represented in this area generally.

261. The MOJ's attention is drawn to the economic disparities of fee income in both this regard and with regard to black, brown and minority ethnic advocates.

262. In short, both fee proposals should be adopted but certificate for counsel should be extended automatically to encompass all either way and indictable only offences. As noted above, some summary offences, for example involving very young children/ children with specific vulnerabilities or matters of complexity may also warrant such representation. As such the provision ought to be extended to those cases in exceptional circumstances on application as proposed by CLAIR or an additional uplift payable.

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

264. Both proposals should be introduced; however even then it will not adequately address the quality of legal advice for all children.

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

266. See above.

**<u>Youth court accreditation</u>**

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

268. All barristers undertaking youth court work have to be competent to do such work. It is a condition of instruction in accordance with the rules of professional conduct. The Bar Standards Board Handbook has the following code of conduct obligation upon barristers:

269. "*rC21. You must not accept instructions to act in a particular matter if: […] you are not competent to handle the particular matter or otherwise do not have enough experience to handle the matter".*

270. The BSB has further addressed this issue with barristers having to declare competency in such proceedings if they intend to practice in the Youth Court as part of their practice certificate renewal. There is therefore no justification for a further accreditation scheme as a proportionate or appropriate response.

271. The CBA are aware that in addition, the ICCA has developed a course for national roll out: 'Advocacy for Children in Conflict with the Law' building on the successful Advocacy and the Vulnerable training. This will be a voluntary training court and is likely to be recognised by at Bar Council Quality Mark. Practitioners should be incentivised to undertake professional training and CPD in this specialist area by the increasing fees for such work.

**Investment in VHCCs**

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

273. It is manifestly obvious that the hourly rates for litigators need to be increased. The CBA defers to the Law Society about the extent of the increase that is necessary.

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

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

275. This question is opaque and does not specify what is meant by clarification.

276. The definition of cases which qualify for IFFO status is already sufficiently clear; it is cases whose time estimate is expected to exceed 12 weeks. These are exceptional cases which represent a tiny percentage of legally aided trials. No greater clarity is needed for this definition.

277. The Excel calculator which generates the initial offer is downloadable and sufficiently explains the basis of the calculation of the first offer. It includes notes on the relevant tabs. Additionally, the separate guidance note document also sufficiently explains why there might be variation from the calculator.

278. It may be that "clarification" is intended as a euphemism for bringing in cuts to the present fee offers made. Any such proposed cuts are unjustified and unjustifiable. The calculator is based on VHCC rates which are less than the VHCC rates when the

first VHCC scheme was introduced twenty years ago.[8] Thereafter the internal comparison and adjustment with uncapped AGFS is again not based on the higher AGFS rates that applied in the late 1990s, but on the substantially reduced more recent ones. Therefore, structurally the calculator is based on two proxies which are lower than each of their first iterations twenty years ago.

279. The first staged payment is intended to represent the payment in advance of approximately half of the trial preparation. It is not uncommon for such preparation to take place for a number of years. Counsel frequently have to decline other work so that these huge cases can be made trial ready. Substantial periods of time are spent out of court in order to conduct the preparation.

280. The second stage payment is paid when the trial starts. For cases which do not begin timeously, half of this can be paid in advance too. Nevertheless, these payments are the only way that counsel can afford to take the time to prepare such preparation heavy cases.

281. Additionally, there is a substantial risk with cases of this nature. Counsel have to book out months of their diary, sometimes six to eight months. The experience of the last few years has been that these cases can be taken out close to the trial date due to lack of courtroom provision or disclosure failings. If counsel were not paid these stage payments, then the case would be utterly economic. Adjournments cause financial hardship to those engaged in these cases because the time suddenly made available cannot be easily filled with alternative work.

282. Further, the third staged payment which is paid largely pro rata to the length of the trial amounts in effect to refreshers. These can be less than AGFS refreshers, especially because they are never uplifted to account for the service of extra material. There is no basis for cutting these. Moreover, it should be borne in mind that these are the cases which require the most preparation on a daily basis after the court day. Many hours of preparation take place at anti-social hours during the trial. This is not separately remunerated. The third stage is in no way excessive.

283. The CBA recognises that the proxy-based system cannot be a completely accurate predictor of the amount of work required. However, it is undoubtedly the best predictor, even when it underestimates the degree of work required by counsel. In these cases, it is essential that counsel are able to consider all the served evidence and unused material. Moreover, the electronic material is often very rich in useful material. It is frequently the most important material in the case, whether used or unused. The structure of an alleged fraud can be based largely on electronic material. Electronic material is already scrutinised by the IFFO manager so that it is only data in the sense of storge of information that is counted. System files are not included in any calculation. We strongly oppose any attack upon the principle of thorough preparation.

[8] Originally £100-180 p/h for QCs and £ £60-100 p/h for juniors when the system was first implemented in 2001.

284. It must not be forgotten that the staged payments are not just a proxy for hourly work. They also represent fair payment to very experienced, specialised, and skilled counsel. They therefore represent payment for the expertise of those counsel. These features have always been a component of remuneration at the Bar. If this is not reflected in the fees, counsel will not undertake this work.

285. Moreover, the calculations that are produced for cases of this nature are generally less than those that were awarded ex post facto on the regulation 9(5)(b) system. It is wrong to consider that there has been inflation of counsels' fees on these cases. There has been significant deflation of fees on these cases since the 1990s.

286. In short, the current IFFO scheme is working well and represents fair remuneration for the exceptional demands and practice risks placed on counsel in these cases. We do consider, however, that the proposed uplifts in the VHCC rates for litigators should be matched by equal increases to the notional hourly rates for counsel in the calculator as per paragraphs 49-51 above.

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

288. Yes. The current system has the advantage of being based on algorithms in the calculator. As long as this is utilised, it has a high degree of objectivity both at the time that the contract is signed and thereafter if further material is served or disclosed. This is based on an agreed formula and bands. Additionally, any negotiations after the first offer has been made (generated by the algorithms in the calculator) are generally resolved satisfactorily and amicably with a mutually agreed fair offer being arrived at.

289. The Dispute Resolution process should be focussed on:

i. What can and cannot be included in the calculation. There are instances where the first offer is less than the calculator-based offer. There should be a mechanism for reviewing this. This would resolve disputes that relate to the nature of electronic evidence, i.e., what are stored documents, emails, messages, accounting systems and what are merely system files. There are sometimes difficulties with specialist accounting systems for example. Additionally, it would provide a mechanism for the inclusion of defence material where this is voluminous (e.g., business records not seized by the police, HMRC, SFO etc.)
ii. Whether any proposed uplift in a second or third offer to the calculator-generated first offer, is sufficient to recompense for the particularly unusual, case specific, difficulties that apply to the case.
iii. When the LAA have not made a final offer within three months of counsel making representations.

iv. Any applications for an IFFO in a case in which the trial is expected to last less than 12 weeks, for example, the trial of a single defendant in a large fraud where the demands are comparable to a fraud with more than one defendant. There are very occasionally wholly exceptional cases that would not usually meet the criteria (e.g., the Westminster paedophile ring perverting the course of justice trial) which quite rightly resulted in IFFO status to recognise the need to consider all the public enquiry material.

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

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

291. No, the CBA would strongly oppose reverting to the former scheme.

292. The VHCC scheme was opposed and disliked by counsel for nearly twenty years. There were a number of boycotts to the scheme. The IFFO system resolved these issues and difficulties.

293. The principal problems with the old system were:

i. The preparation rates were derisory and substantially less than in other publicly funded work, sometimes half of other legally aided rates in comparable fields such as family and public law. Insufficient experienced and skilled counsel were prepared to undertake these cases. This led to insufficient and inadequate preparation, and trials overrunning or being adjourned as a result. Time often had to be allowed in the trial for preparation which added to their length.
ii. The negotiations for time allowances were protracted and frustrating. The time allowed was often inadequate which again led to cases being adjourned, and Crown Court judges becoming forced to intervene with the LAA.
iii. The assessment of what was reasonable time to consider material was being made by LAA officers who had no experience in trial preparation and were not qualified. This would lead to appeals and delays to trials.
iv. The categorisation system was arbitrary and at times irrational. For example, the "public interest" was defined as the degree to which a case might capture the interest of the public. Therefore, the mere fact that a case had some connection to a minor celebrity would increase payment. A more difficult case would pay less.
v. The IFFO system was created when all independent counsel were no longer prepared to undertake VHCC cases. Reverting to it would undoubtedly lead to independent counsel deciding that they did not wish to undertake this work anymore.

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

295. No, quite the opposite, as set out in the answer to question 83. The previous system led to sclerotic preparation as set out above. It led to able counsel who should be undertaking these cases declining to accept instructions.

296. There would be a repeat of judges having to case manage contract managers as opposed to the effective case management of cases by contract managers.

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

298. No, the VHCC scheme should not be reintroduced for counsel; it would be disastrous to do so.

**Individual Fixed Fee Offers (IFFOs): Adapting the Scheme**

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

300. The CBA do not think that the principles need to be changed. The current system works well. The calculator algorithmic system was negotiated by the MOJ, LAA, Bar Council and the CBA, following the decision by counsel that they would no longer accept instructions in VHCC cases. The principles have stood the test of time and do not need to be changed.

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

302. It does not need to be changed from its present structure. The algorithmic calculation of the first offer, followed by submissions and constructive discussion, generally resolves all disputes.

303. The CBA have suggested a limited structure for defined issues only.

304. We suggest that the notional VHCC hourly rates for counsel should be increased pro rata with those that will be applied to litigators.

305. There should be greater flexibility with evidence and unused material served after the contract is signed. We would suggest that there should be ten percentiles (each 10% increase) for pro-rata increases to stages 1 and 2 as opposed to the current four at (30%, 50%, 75% and 100%.) The present system means that being a few pages short of the higher band results in compensation at the lower more distant band. This would not create any greater administrative burden.

**Subsuming VHCCs into Fee Schemes**

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

307. No, the CBA is strongly opposed to any such proposal. The history of VHCCs has been to capture exceptional cases that are unsuitable for AGFS. This has resulted in the criterion of trial length having been for cases estimated to exceed: 5 weeks, 8 weeks and more latterly 12 weeks. It therefore follows that the current cases are not just exceptional but truly exceptional. It would be irrational for there to be a change of course when both the LAA and the CBA have previously accepted that AGFS is unsuitable for these handful of cases.

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

309. No, as has been argued above, the two schemes should remain separate and distinct from each other.

**Investment in Fees for CRRC Work**

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

311. The CBA defers to the Law Society who are best placed to answer.

**Structural Reform of Fees for CCRC Work**

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

313. Criminal barristers regularly undertake applications to the CCRC. They often work unpaid. One example is in the case of Wang Yam which was a successful referral to the Court of Appeal after years of work. The barrister received no remuneration.

314. The CBA also refers to the APPG Westminster Commission on Miscarriages of Justice report (2021- our members also gave evidence to this Commission) which reflects the dire lack of funding for CCRC applications:

*Those who are eligible struggle to find law practices willing to represent them, we heard, because the legal aid rates make the work "effectively a loss leader". In fact, CALA pointed out that the rate paid to lawyers under the scheme has not just failed to increase for over two decades, but was in fact cut by 8.75% in 2014 to £45.35.117 This means, CALA explained, that legal aid appeal lawyers are paid less for this work than they were in 1996.*
(page 29 – CALA is Criminal Appeal Lawyers Association).

315. The consultation [207] appears to be premised on a misunderstanding as to the process. Counsel are required at the initial stage to advise upon grounds of application to the CCRC. Sometimes this involves examination of large amounts of disclosure material or seeking further disclosure or obtaining statements from new witnesses. It usually requires a visit to prison for a conference with the potential applicant. This advice, therefore, goes beyond "initial screening". Counsel can also be required to work alongside the CCRC case review manager, who may not be a lawyer, in assisting in direction of the investigation. Currently, there is no remuneration for barristers for this work.

316. Criminal barristers increasingly are not undertaking CCRC work. Goodwill has become exhausted.

317. A structured payment scheme is required as recommended by Sir Christopher Bellamy (§14.18).

318. The CBA also suggests that there should be specialist funding for youth justice cases in order to enable the swifter identification of children who have been wrongly convicted.

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

320. The CBA defers to the Law Society who are best placed to answer.

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

322. The CBA defers to the Law Society who are best placed to answer.

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

324. The CBA defers to the Law Society who are best placed to answer.

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

326. The CBA defers to the Law Society who are best placed to answer.

**CLAIR's recommendation on CCRC reform**

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

328. The CBA defers to the Law Society who are best placed to answer.

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

330. The CBA defers to the Law Society who are best placed to answer.

**Retain the Existing CCRC Provision with Uplifted Fees**

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

332. The CBA refers to the evidence gathered in the Westminster Commission on Miscarriages of Justice report referred to question 91. The CBA supports a structured payment scheme for solicitors and barristers.

333. The CBA also highlights that CCRC work is time-consuming, complex, and often requires a high degree of experience and expertise. The work requires specialist lawyers with appellate experience.

334. The written evidence of the CCRC submitted to the Independent Review of Criminal Legal Aid ('CLAIR') underlined an important issue with the current fee structure: *"The current structure has led to a marked decline in the number of practitioners who are able and willing to assist with applications to the CCRC."*

335. The CBA agrees with the contention. Indeed, its Vice-Chair gave evidence about this issue in July 2019 to the APPG Westminster Commission. The current fee structure is not reflective of the hours worked by counsel on any given case. Furthermore, the current fee structure does not reflect the varying levels of complexity and the expertise/seniority that those cases require. Many CCRC cases are relate to the most serious crimes. Within these cases, the most serious miscarriages of justice have occurred.

336. A new fee structure should be designed to account for counsel's level of experience, the complexity and volume of the case and time spent working. This, we suggest, are baseline criteria for adequate renumeration for CCRC applications. Indeed, often counsel is required to undertake part of the investigation themselves in order to make up for lack of resources within the CCRC. The drain of practitioners from undertaking CCRC work has occurred alongside choices being made by practitioners over how to no longer practise in criminal law due to low pay in other case work.

337. The CBA emphasises the importance of maintaining high level expertise and that incentivising the engagement of these barristers through adequate renumeration results in savings long-term.

**Investment in Prison Law Fees**

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

339. The choice presented is a false one. There is no need to choose between focus on early stages or prison law. Both require significant investment. There is no justification for rejecting the CLAIR proposals. As with criminal legal aid fees, the current rates available in prison law are unsustainable for practitioners. The cuts to fees over the last 20 years, combined with removal of areas from scope of funding have resulted in a decimation of prison law practices. There has been a 70% reduction in prison law providers between 2011/12 to 2021. The MOJ is invited to consider the conclusions of the Westminster Commission on legal Aid which make for bleak reading. The situation however has further declined with LAA data reporting a drop from 146 providers in 2019/20 to 110 in 2021. The situation as regards the current and future supply base of prison specialists is even bleaker than that regarding the ageing demographic of duty solicitors and the rate of attrition from the criminal bar. Specialist providers, in this complex field are scarce. Advice deserts are real.

340. The consequence is that specialist barristers are in scant supply. The fixed fee regime renders instruction of specialist litigators and counsel in adjudications and parole board hearings unsustainable. The fixed fee regime, with the very high level for reaching the escape fee threshold, frequently results in a large amount of unrecoverable work having to be done without remuneration.

341. The decision essentially to ignore the CLAIR recommendations on prison law also fails to take into account the myriad legislative and policy changes to the sentencing and parole board regimes in recent years. This includes the introduction of the review mechanism, complex terror, extended sentences, release provisions and move towards opening up Parole Board hearings. Representation is already a problem at such hearings and vital in order to ensure the making of representations and that lawful procedure and decision-making is followed. Litigants in person ultimately result in greater costs, complications, and inefficiency.

342. All of this in turn impacts upon public confidence in the Parole Board process, about which there has been significant public and political concern.

343. The current system fails vulnerable clients and does not enable complex cases to be properly and fairly dealt with.

344. Prison law accounts for a very small part of the budget with an annual spend of approximately £17 million previously with further reductions at present. It follows that a 15% increase is negligible in terms of public finances. Much more is required.

**Prison Law Work**

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

346. Access is a problem in two ways - firstly in clients being able to instruct and have access to lawyers and secondly for those lawyers to have access to clients. The first is profoundly affected by the lack of prison and criminal law practitioners. As set out above advice deserts are real.

347. In terms of access the following additional facilities need to be provided for the system to work properly:

- National roll out of CVP/remote links and increased availability
- Free private phone facilities
- Private and confidential spaces for legal and expert visits in every prison - not a large visit hall in which matters of sensitivity cannot be properly discussed:
- Easier and standard booking systems should be available online
- More efficient use of postal facilities - communications often take weeks to arrive - this includes legal papers central to their case
- Online access to case papers
- Confidential email

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

349. Urgent reform is required however this cannot be within the existing cost envelope or on a cost neutral basis. The sector needs investment and needs it now.

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

351. See the answers to questions 99-101 above.

**Other Criminal Legal Aid Fees**

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

353. An immediate increase of 25% in this area is the bare minimum needed to keep the system running at all. This applies equally to other criminal legal aid fees as well as those that concern the membership of the CBA.

**Impact Assessment**

354. **Question 104. Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please state yes/no and give reasons. Please provide any empirical evidence relating to the proposals in this document.**

355. The CBA has seen the Bar Council response to this question, in particular the concerns raised about modelling which does not take account of the pandemic and the MOJ's plan to reduce the backlog.

356. The CBA shares the Bar Council's concerns that there should be further research into whether there will be enough suitably experienced advocates who are willing to service the increased caseload required for such a substantial increase in Crown Court sitting days (20-29 percent).

**Equalities**

357. **Question 105. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.**

358. Fair remuneration for work undertaken, irrespective of the type of case, will ensure that barriers to entry and continuation in practice will be reduced. This will be particularly so for those with caring responsibilities.

359. **Question 106. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.**

360. Once appropriate data has been provided and considered a response can be given.