South Eastern Circuit response to the Criminal Legal Aid Review ("CLAR"): 'accelerated package' consultation.

1. The South Eastern Circuit represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. These are the written responses on behalf of the South Eastern Circuit ("the SEC") to the Ministry of Justice consultation entitled "Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes."[1]

3. This response addresses the three areas of AGFS reform that are addressed in the consultation: payment for (i) unused material, (ii) paper heavy cases, and (iii) cracked trials.

Response

4. The Bar Council submits that the 'consultation proposals set out a modest, stop-gap improvement in discrete and specific areas of criminal defence fees'. This is an apt description. The Government appears to have accepted that rates of pay for defence advocates and solicitors are far too low to maintain a functioning criminal justice system. This was so before Covid-19. The situation is now more perilous.

5. Covid-19 is putting the criminal bar under extraordinary financial pressure. It has exposed flaws in AGFS11 which must be quickly addressed by the wider CLAR process. In the meantime, even if the government implement these three accelerated amendments, the criminal Bar will continue to labour under the problems which Covid-19 will cause for a considerable time to come, and which pose an existential threat.

6. In summary:
   6.1. AGFS11 does not adequately reward advocates for their work. The pay an advocate receives is simply too low. The level of incomes advocates earned before Covid-19 has meant that the publicly funded Bar has no fat to help weather the winter we face.

[1] https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/

6.2. The capacity of the vast majority of self-employed advocates to earn is almost entirely dependent on trial income. For most this provides in excess of 90% of their income. The limited hearings that have been possible since lockdown have brutally exposed this position. Many advocates are facing a six month or more period with little or no income. Government "Recovery Planning" must take account of this financial reality and substantial increase in debt levels when setting future fee levels.

6.3. The failure to date of the Government to plan for alternative measures to address the exploding case backlog and the mere trickle of trials that has begun is further weakening the Bar. The Government has closed the trial courts. Unless this is reversed at scale the criminal justice system will suffer deep and lasting damage, including irreparable consequences for the self-employed Bar, which conducts the hardest and most complex casework.

6.4. We support the efforts made by the Bar Council and its key "asks" for support for individuals and chambers. But we note with dismay the fact that these pleas remain unanswered. The riposte is "borrow more". But for a number of reasons this is an inadequate response.

(i) We believe that no more than half the publicly funded Bar has business accounts at banks which offer Bounce Back Loans. The rest either have the wrong kind of account (personal) or are with a bank which does not offer BBLs. Those who have begun the process of opening accounts at banks which may ultimately provide loans report an endlessly frustrating process.

(ii) Many are frightened of borrowing with no knowledge of when the pipeline of work may restart. They will cling on (desperately) trying to avoid further debt until they have exhausted all other options. This is why we urgently need a date to reopen the courts and create additional capacity beyond the current estate, so that jury trials can be tried in volume. Then those who can, may feel more confident about borrowing.

(iii) The iniquities of this disease inevitably fall on the weakest and most vulnerable. The failure of the Government to make the self-employed scheme available to barristers at the very start of their careers is particularly damaging to the significant strides made in recent years to improve diversity at the Bar. After a decade or more of neglect, all this contributes to the general sense of abandonment and a degree of cynicism.

6.5. We are aware of, and support, the submissions made on behalf of the profession by the Bar Council and CBA on the detail of the proposals.

Question One: Do you agree with our proposed approach to paying for work associated with unused material? Please state yes/no and give reasons.

7. "Yes" to paying for unused material; "no" to the requirement of "assessment" by the LAA and "no" to the proposed rate.

(i) The proposal to pay for reading the unused material is an overdue and welcome change. Paying a fixed amount in every case for the first three hours, with the possibility to claim for additional hours is an acceptable balance.

(ii) Unused material is not "special preparation". It is wrong to describe it thus, and inconsistent with the statutory disclosure regime. The profession has long complained about the "special preparation" payment regime. To use this wording risks bringing into disrepute an otherwise welcome step in the right direction.

(iii) Paragraph 13 of the Consultation states that "For those cases where more than 3 hours is spent reviewing unused material, we propose payment should be at hourly rates [...] subject to the assessment of those claims by the LAA." The profession has not been told what "subject to assessment" means. No draft Statutory Instrument has been made available.

(iv) We object to the LAA adopting any method that resembles the procedure used to assess claims for special preparation. This model requires disproportionate amounts of evidence to be supplied by barristers in order to justify every claim. When, as often happens, evidence supplied is not to the LAA's satisfaction time-consuming and costly appeals (for both sides) arise.

(v) We invite the LAA to engage with the professions to agree a sensible approach. We offer the following preliminary suggestions which we consider relevant.

a. All of the unused material needs to be read in every case where it has been served by the prosecution having met the statutory test laid down in the Act. There is no justification whatsoever in the LAA seeking to assess the advocate's approach.

b. Unused material should be paid at a rate per page. As the Bar Council suggests, a minimum of 4 minutes per page would probably be a fair balance to strike. This is because excel spreadsheets, phone downloads and the like may require far more than 4 minutes per page to digest and analyse.

c. Audio or visual material must be paid for the number of minutes taken to view and digest. CCTV may require painstaking review and repeat watching. Un-transcribed ABE interviews that must be watched and noted fall into this category.

d. "Unused material" which is paid, must allow for reading the unused MG6c schedule, which is of critical importance in the disclosure process. Analysing the schedule is often more important than reading the material volunteered by the Crown as it informs the understanding of how well the Crown has discharged its obligations and it determines what other material the advocate may seek by way of section 8 application. For similar reasons, the 'Disclosure Management Document' prepared by the Crown to explain its approach to the MG6c must be included within the page count.

e. The CPS/ Police could (and should) produce an index to the unused material that is disclosed (paper and volume of digital material) that would significantly assist the LAA in determining claims in a straightforward way.

f. It would of course be open to the LAA to spot-check claims made. If any suggestion of fraudulent conduct is made, this should be reported to the regulator (Bar Standards Board if a barrister; or Solicitors Regulatory Authority if a solicitor advocate).

(vi) We are told that the level of hourly rates will be reviewed as part of the wider (CLAR), when considering the sustainability of the profession. We repeat what we have said before - an hourly rate of £39.39 per hour, out of which the barrister has to pay their staff (clerk) and office (chambers) costs etc is wholly inadequate to the point of being an insult. In 2007, the "special preparation" hourly rate was £45 per hour - which was too low even then - and would be £63 when adjusted for inflation today. Also, the MoJ does not explain why in paragraph 67 it is proposed that the hourly rate for a barrister for this work (£39.39) is to be less than that for a legal executive (£41.06 or £43.12).

Question Two: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.

8. See above: the description of "special preparation" should be changed to something like "unused material rate". The Statutory Instrument needs to be worded to remove the concept of "assessment." The hourly rate needs to be increased.

Question Three: Do you agree with our proposed approach to paying for paper heavy cases? Please state yes/no and give reasons.

9. No. The consultation document correctly reports the problem that paper heavy cases that are under the 10,000 page threshold are insufficiently paid (Impact Assessment, Annex C, pages 4, 15 and 16).

10. We have seen and adopt the analysis made by the Bar Council in its proposed approach to murder cases.

Question Four: If you do not agree with our proposed approach to paying for paper heavy cases, please suggest an alternative and provide supporting evidence.

11. We endorse the Bar Council suggestion based on Table 22 on page 33 of the Impact Assessment. As the Bar Council argues, a '*fairer approach would be to set the threshold at the top 7% of cases in each category that fall below the 10,000 threshold*.'

Question Five: Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.

12. "Yes" to the approach, "No" to the rates.

13. We agree with the approach to remove the "thirds" distinction, such that a cracked trial fee will be payable when it occurs at any time between the Plea and Trial Preparation Hearing (PTPH) and the date on which the case is listed for trial.

14. We welcome that it is proposed to increase the cracked trial fee. However, we do not consider a rate of 100% of the brief fee to be sufficient.

Question Six: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.

15. The proposal to pay the full trial brief fee is inadequate and does not reflect the lost work when trials do not go ahead. For the reasons set out by the Criminal Bar Association and the Bar Council, we think the figure should be higher. We would prefer the CBA approach that the advocate would be paid 150% of the brief fee. Alternatively, as the Bar Council says, it used to be the case that the brief fee covered the first two days of trial. Today, the brief fee only covers the first day of trial. Therefore, an alternative adjustment would be for the cracked trial fee to be the equivalent of 100% of the brief fee plus one daily attendance fee. In the context of the Covid-19 era and the likely increased pressure on defendants to compromise cases in order to earn credit and diminish the backlog, the importance of this change is increased.

Question Seven: Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.

16. We do not express a view, but would not dissent from any argument advanced by the Law Society.

Question Eight: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.

17. Not applicable.

Question Nine: 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.

18. We note the response of the Bar Council to this question and endorse its approach.
‘*The MoJ and the Bar Council have each entered into a Data Sharing Agreement with Professor Martin Chalkley, whereby Prof Chalkley receives LAA fee payment data and Bar Council data on the characteristics of the barristers who received those fees. The process of data matching is currently underway. Once that is completed it may be possible to model the effects of different fee change scenarios on different characteristics within the profession. Any results that come out of that analysis, the Bar Council will share with the MoJ. This is likely to be particularly valuable at the next stage of the Criminal Legal Aid Review work on the sustainability of the profession*.’

Question Ten: 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.

19. See answer to Question 9.

Question Eleven: 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.

20. See answer to Question 9

South Eastern Circuit

12th June 2020