Reforming the Advocates' Graduated Fee Scheme

Response to government consultation by Martin Murray and Associates solicitors

Introduction

1. We are a firm of criminal defence solicitors operating in West London and the Thames Valley region. We have a long history of providing criminal defence services across the full spectrum of alleged offences. We have what has been described as an "exceptional" reputation for the work that we do among the local judiciary.

2. As a firm we have a small in-house team of four advocates who appear in the Crown Court. One is an experienced junior barrister who is regularly instructed in cases of the utmost seriousness including murder, attempted murder, serious sexual offences (both historic and recent) and offences against children. He has had considerable success, and has been commended by judges he appears before. The remaining three advocates are solicitors with higher rights of audience who enjoy a similarly excellent reputation.

3. All of our employed advocates practice with the same level of independence, professionalism and integrity as those who are self-employed. They are fully trained and supported with professional administration, and enjoy an excellent reputation in local Courts. In addition to advocacy work, our advocates regularly attend meetings with the local judiciary and have been at the forefront of the introduction of local efficiency schemes, such as preliminary hearings and early guilty pleas.

4. In addition to our in-house team of advocates, we regularly brief chambers and maintain good professional relationships with the self-employed bar. The advocacy in our Crown Court cases is therefore conducted by a balance of self-employed and employed advocates, depending on the needs of the individual case.

5. Our interest in this issue is, therefore, two-fold:

    a. The proper remuneration of our professional advocates;

    b. Maintaining a healthy supply of junior self-employed advocates who are available to accept instructions in our cases.

Summary

6. We have carefully studied the proposed scheme, and re-calculated a number of our recent AGFS claims on the basis of it. We have drawn on our own experience of conducting these cases (whether by in-house of self-employed counsel), and have paid careful attention to the work that is actually done in the preparation and conduct of various cases. Our base of knowledge and experience is considerable.

7. We have come to the clear conclusion that the proposed scheme is a bad scheme that will have a substantially damaging effect on the profession as a whole. In particular, we believe that the scheme:

    a. Will further erode the already limited incomes of those new to practice;

    b. Will prove a significant disincentive to taking on more serious and complex cases;

    c. Will create greater uncertainty about income levels at the outset of a case;

    d. Does not address the fact that the time required to prepare cases in advance of a hearing is substantially increasing and is at present unremunerated;

    e. Runs contrary to the Leveson and Better Case Management principles by creating perverse incentives or perceived incentives that will give the public less confidence in the scheme;

f. Unjustifiably moves money within the scheme from those at the bottom to those at the top, in a complete reversal of what reform to the scheme should be doing which is to attract and retain talented junior advocates.

8. We do not accept that the proposed scheme is "cost-neutral". It may have been designed that way, but the differences between the existing scheme and the proposed scheme are such that this simply cannot be said with any certainty. Many re-calculations show a significant cut in fee income, and the abolition of pages of prosecution evidence as a proxy for payment is particularly striking in this regard as having the potential to reduce AGFS expenditure. We also note that there has been a significant and welcome drive to reduce interim hearings (standard appearances and PTPHs) in the criminal courts, and so the money set aside by the scheme to fund separate payments for these may not be fully utilised. Expenditure on these hearings is likely to decrease without any obvious means of the money being re-cycled back in to the system. Again, we believe that the effect will be to reduce AGFS expenditure.

9. One of the central proposals of the scheme is the abolition of pages of prosecution evidence and the number of witnesses as proxies for payment. We oppose this proposal, for reasons we give in the consultation response. However, we do acknowledge that the way in which material is served has changed, and that digital evidence is more frequently relied on (although this by no means accounts for all high PPE cases).

10. We note what is said at paragraphs 2, 3 and 4 of the executive summary of the consultation and also paragraph 1.4. We agree that there is these days a much greater reliance on digital evidence such as telephone, computer and electronic messaging evidence. However, we do not agree that the introduction of the digital case system has had a material effect on the work required. The obligation on lawyers to consider the evidence that has been served as material to be relied upon remains and has not been altered. It is a fundamental function of the defence in protecting the interests of their client to consider the entirety of the prosecution evidence. We fail to see how

the digital case system has altered the obligations or the work required of defence lawyers, even where material has been served digitally.

11. There is an uncomfortable feeling that the proposed scheme is designed in part to allow the Legal Aid Agency to avoid paying fees that have hitherto been payable for cases where there is a reliance on digital evidence. A number of recent costs decisions have led to the Legal Aid Agency having to make payment per page for digital evidence under the present scheme, on the basis that digital evidence remains evidence that the defence are required to consider (see, for example, the decision of Mr Justice Haddon-Cave in *R –v- Furniss*, and *R v Napper* in August 2014). This feeling is only exacerbated by the parallel consultation concerning changes to the Litigators' Graduated Fee Scheme.

12. It is vital to recognise that the increase in digital evidence, and therefore pages of prosecution evidence, is only one half of the story. The other half is that the defence have never been paid for reviewing unused material, which is a function of equal importance to reviewing the evidence. That work goes entirely unremunerated under the current scheme. Yet unused material can also run to thousands of pages which themselves may be served digitally through secure e-mail. Our experience is that volumes of unused material have also increased. In particular, it may often be the case that telephone material collected as part of the investigation will be served as unused material rather than evidence. In one case in which this firm is currently acting, there are just under 2,500 pages of prosecution evidence. The unused material, which must all be reviewed for no remuneration runs to approximately three times that.

13. A similar point arises in respect of CCTV evidence. CCTV is increasingly being relied on in criminal cases. The use of body-worn cameras by the police is such that there are frequently several DVDs of footage served during cases. Over the past five years, it is our experience that such material has substantially increased, and we believe it is likely to continue to do so. Whether they are used or unused material, there is no remuneration for viewing footage, which again is a central duty of the defence

advocate. It is a matter of regret that this substantial increase in advocacy work remains entirely unacknowledged under the proposed scheme.

14. Any scheme will involve an element of "swings and roundabouts". That is unavoidable. Under the current scheme, the increase in digital evidence will sometimes be reflected in pages of prosecution evidence, and sometimes it will be reflected in the unused material. The fact remains that defence advocates are duty bound to consider it whatever form it is in, whether evidence or unused, and the work required has gone up accordingly. The Government is only having to pay more for this work in the proportion of cases where the material is served evidence and not unused. Any argument for the abolition of pages of prosecution evidence as a proxy must be seen in this context.

15. The proposed scheme does not address this issue at all. Indeed, it makes no recognition whatsoever to the hours and hours of preparation work that are often required out of court to ensure the smooth and efficient running of cases in court. Failure to prepare properly results in delay and wasted expenditure. Yet rather than encouraging and rewarding proper preparation, the proposed scheme ignores it altogether.

16. On the contrary, the proposed scheme makes the position worse, and not better. Rather than maintaining the existing mechanism of pages of prosecution evidence for additional payment where there is a high volume of evidence, thus increasing the payment in **some** cases where the overall volume of material is high, or extending the mechanism in some way to unused material so as to reflect (perhaps to a lesser extent) all cases where the overall volume of material is high, the proposed scheme abolishes reference to the volume of material entirely. Within the same banding (with the exception of dishonesty and drugs cases) a case involving 50 pages of evidence and no disclosed material pays the same as 10,000 pages of evidence and twice that in unused material are remunerated at exactly the same rate. If the intention behind the new scheme is to create a fairer system of payment for work done (as stated in the foreword by the Minister, and variously by certain representative bodies) then the

proposed scheme manifestly fails at achieving this objective. The roundabouts are gone, and all that are left are swings.

17. We do not accept that the Government should change the rules of the scheme simply to avoid paying defence lawyers for considering different forms of evidence against their client. It may be that a new approach to digital evidence is required which is clearer and fairer to all concerned. Constructive engagement on this issue is a matter we would encourage. But the abolition of pages of prosecution evidence in its entirety is neither a fair nor proportionate response to this issue and would have the effect of substantially devaluing many serious cases with significant volumes of evidence that are NOT digital evidence.

18. We appreciate that pages of prosecution evidence is often a matter of debate between the Legal Aid Agency and defence practitioners. We also acknowledge what the representative bodies have identified as the problem of arguing with the prosecution authorities over what amounts to served evidence. But the reality is, in our view, that absent a wholly unworkable number of bandings within the scheme to reflect as many scenarios as possible, the present proxies represent the best way of distinguishing between each case on an individual basis. All cases are different to some degree or another. For a payment scheme to be effective and fair that must be recognised. The proposed scheme does not do so.

19. The reality that must be appreciated by the Government is that the work required for the conduct of many criminal cases has increased massively over recent years and will continue to do so. That work should be paid for. If the Government does not wish to go back to paying advocates a proper hourly rate for work done on cases, then there must be some mechanism built in to the scheme to reflect the increased work that is often required across a whole range of cases. It is not a fair or appropriate response to pretend that this is not the case and abolish proxies altogether. Whilst such an approach may insulate the Government from having to pay for a modern criminal justice system which uses more modern evidence as it develops over time, it will simply exacerbate the problems already inherent in the existing scheme.

The position of the Bar's representative bodies

20. We have taken note, with some concern, that various representative bodies have publicly endorsed the proposed scheme. We have read and taken note of public statements from the Bar Council, the Young Barristers' Committee, the leader of the Criminal Bar Association (who, we understand, have modified their position to one of neutrality in light of widespread opposition to the scheme) and the past and present leaders of the Circuits.

21. We acknowledge the work that those involved in devising the proposed scheme, and the representative bodies have undertaken. We further acknowledge several laudable aims of the proposed scheme, which would, absent the factors we mention below, be undeniable improvements on the current scheme. The restoration of separate fees for sentencing hearings and standard appearances and payment for the second day of trials would otherwise be welcome proposals.

22. However, as part of our preparation of this response, we have spoken to and taken the views of many colleagues across the profession, both self-employed and employed. What we have seen is a significant groundswell of opposition to the scheme, particularly by junior practitioners. Moreover, our analysis of the scheme itself reveals substantial disadvantages for junior advocates and those new to the profession.

23. We therefore must caution the Government against accepting the position of the representative bodies as being the views of the profession as a whole. There are undoubtedly some practitioners who view the proposals positively. But it must be born in mind that the proposed scheme was designed entirely in secret, without the input of a wide range of practitioners. The purported support for the scheme was expressed without consultation of the membership of those bodies. The alteration in the position of the Criminal Bar Association in this respect is particularly striking. We have seen, and would suggest that the Government should take note of, a substantial

body of opposition to the new scheme, particularly by those who have undertaken re-calculations of fees over a period of time and found a significant cut.

24. Nobody must doubt the motives of the leaders of the professions and the representative bodies as being anything other than entirely honourable. This was not designed as a "stich-up". However, it is apparent that there are a large number of glaring difficulties with the proposals which, taken together, make the proposed scheme unarguably worse than the existing one overall. The nature and extent of these difficulties and their effects may not have been fully appreciated by the representative bodies when they publicly gave the proposals their support.

25. As to those who may suggest that, as a solicitor's firm, we do not have truly have the interests of junior advocates (and the junior bar in particular) at heart and are part of the problem; or that we, the Law Society and other solicitors' organisations are somehow less entitled to a view on these matters, we say only this. We have offered and awarded pupillages. We have employed junior barristers who have both come from self-employed practice and returned to self-employed practice after leaving us. We have built strong relationships with several sets of chambers who we always treat fairly. We have sent advocates on training courses run by the Bar's representative bodies (including the South East Circuit's annual course at Keble College, Oxford).Our advocates have continued to achieve great success, both whilst employed by us and after leaving us.

26. Employed practice is an entirely legitimate and understandable career choice for an increasing number of high-quality barristers who have the same training and qualifications as self-employed barristers. They are bound by the Bar Standards Board's handbook's principles of independence and integrity. That applies to all of our advocates equally. High-handed swipes from a small minority of the Bar who do not know us, our advocates or the quality of work that we do, and who operate on the basis of some sense of entitlement because of their self-employed status are not only unhelpful, they are simply wrong.

Funding

27. Finally, before our response proper, we cannot fail to observe that most of the perceived problems with the existing scheme are not born of the scheme itself, but are born of continual and relentless cuts inflicted by governments of both parties over the years.

28. Lord Carter's review of the Advocates' Graduated Fee scheme in 2006 proposed rates of funding that were agreed by government at the time to be both fair and sustainable. There has been no index-linking of fees, and none is proposed by this scheme. To the contrary, fees have been continually eroded from the rates set by Lord Carter, with a first reduction of 13.5% in the dying days of the Labour government, and then swingeing cuts under the new Conservative government which included the removal of sentencing fees and the introduction of fixed flat-rate fees for elected cases. The cumulative effect of the cuts has been enormous and damaging. Rates are presently at rock bottom, and could not possibly sustain any further reduction. No other area of public expenditure has been cut proportionally as hard and as fast as legal aid.

29. If the Government is serious about reforming the AGF scheme and improving its operation so as to be fit for practice in today's society, then it must begin by looking at the overall level of funding. There is a clear and compelling case for an increase in funding, and a general restoration of the cuts that have come before. The inadequacies of the existing scheme on their own demonstrate this clearly. Whilst an increase in funding may be politically unpopular, the reality is that it is essential if any meaningful improvement of the scheme is to be achieved. Simply moving money from one part of the scheme to another, as the consultation proposes, is not and could never be a proper and effective answer to the problems that exist.

30. We also note with dismay that there is no proposal within the scheme for a yearly review of rates, or any form of index-linked increases. The effect will be that advocates will continue to see a real terms cut to their fees year on year. We do not believe that the Government would consider it acceptable to inflict that on any other public sector

worker, and we do not see why advocates performing what the Minister acknowledges is an essential public service, should not be afforded the same.

Question 1: Q1: Do you agree with the proposed contents of the bundle? Please state yes/no and give reasons.

31. No.

32. We disagree with the contents of the proposed bundle, in that:

    a. We disagree with the removal of pages of prosecution evidence and the number of witnesses as proxies for payment;

    b. We do not accept that **in the context of the proposed scheme** separate payment for standard appearances, PTPHs and sentences is a fair and appropriate substitute for the removal of pages of prosecution evidence and the number of witnesses as payment proxies.

33. Our reasons on each of these areas are fully set out in answer to the specific questions posed later in the consultation. However, for ease of reference, we summarise them here.

34. Firstly, we believe that pages of prosecution evidence and number of witnesses are the only indices which can reasonably reflect the variation in complexity, seriousness and work done on a case by case basis. We do not accept that a scheme that simply lumps all cases of a particular category together for payment purposes would fairly and adequately reflect the varying degrees of work required for each particular case.

35. To draw on examples we have given elsewhere in the consultation response, such an approach would lead to exactly the same fee being payable in widely differing cases, such as:

a. A simple dwelling burglary and a conspiracy to burgle involving one hundred substantive offences;

b. A single-complainant rape case with one ABE interview, and a multi-complainant, multi-defendant, multi-count rape case with many ABE interviews;

c. A single importation of 5kg of class A drugs, and a conspiracy involving many importations of 5kg of class A drugs (up to the 5,000 page limit);

d. A simple section 18 wounding with intent offence in the context of a pub fight, and a complex 'baby-shaking' section 18 grievous bodily harm offence;

e. A fraud involving a single dishonest transaction of £101,000, and a conspiracy to defraud involving 50 dishonest transactions of £2,000 over the period of a year.

36. The above list is not exhaustive, but it demonstrates across a range of categories the huge potential for injustice inherent in the proposed bundle. To suggest that all cases within particular categories or bands are the same in terms of complexity and the amount of work required is entirely ill-founded. It is extraordinary that anyone devising the scheme could possibly have proceeded on that basis. At present the differences between these cases IS properly captured by pages of prosecution evidence and the number of witnesses (for example by reason of multiple ABE interviews, pages of medical reports, bank records and the like). The proposed bundle is unquestionably worse and more unfair than the existing scheme.

37. We note that, contrary to what has been said by others, such inconsistencies in the payment for work actually done between these varying cases may act as a significant disincentive to junior advocates to take on more complex and challenging work, and may therefore act as a significant barrier to career progression.

38. In respect of the 'bolt-on' fees for PTPHs, standard appearances and sentencing hearings, we recognise the good intentions behind these proposals. However, in the context of a supposedly cost-neutral scheme we disagree that they should be introduced at the cost of enormous reductions elsewhere in the work undertaken by juniors.

39. The separate fees proposed by the scheme, particularly for standard appearances, in actual fact represent a significant cut in fees for those undertaking these hearings from the existing arrangement whereby they are paid £87 out of the overall brief fee. Whilst this may be of benefit to the instructed advocate (who typically may be a more senior advocate) it is of no benefit to the junior advocate, and thus operates against what it is trying to achieve.

40. We believe that the current bundle is appropriate and entirely adequate.

Q2: Do you agree that the first six standard appearances should be paid separately? Please state yes/no and give reasons.

41. No.

42. Whilst we believe that each hearing should be remunerated separately to properly reflect the work done, we believe that this suggestion in the context of the proposed scheme is fundamentally flawed in that it:

    a. Amounts to a significant cut in fees for junior advocates; and,

    b. Operates contrary to the Better Case Management principles and the prevailing attempts by the courts to reduce the number of hearings per case. In other words, the effect of this proposal might be to cost HMCTS and the CPS more than is presently the case.

43. The life of a junior barrister in the Crown Court invariably begins covering mentions or other hearings for more senior colleagues, or conducting simple cases such as guilty pleas, sentences and the like. Even when junior practitioners do begin doing jury trials, their case mix is inevitably weighted more towards mentions, pleas and the like, and it takes some time before their practice will consist of a majority of trials.

44. Under the present scheme, standard appearances are included as part of the brief fee. There is a universally adopted protocol whereby a barrister covering a hearing for a colleague will be remunerated out of that fee at approximately the rate for a standard appearance fee under the regulations, which is £87. That fee comes out of the brief fee of the instructed advocate (up to a maximum of four per case), but none the less is paid to whoever covered the particular hearing.

45. We do not see, therefore, how the payment of a separate fee of £60 improves the position of the very junior advocates whom are the purported beneficiaries of this change. To those junior advocates the new scheme represents a cut of almost 30% per hearing. That is unacceptable.

46. Moreover, we do not see how it can benefit junior advocates that the money to fund this proposal has been drawn from significant reductions in the remuneration of other junior work. Elsewhere in the proposed scheme other work that is likely to make up the bulk of a junior advocate's practice is vastly reduced. Fees for guilty pleas, cracked trials and most within the "standard category" are subject to substantial cuts.

47. These are also the sort of cases undertaken by junior advocates. We fail to see how removing money from one aspect of junior work and shifting it to another (as well as the substantial increases in Silks rates) is fair or of any benefit to the junior advocates.

48. We further believe that this proposal runs contrary to the Better Case Management principles and the prevailing attitude of the courts. For some time now there has been a significant focus on reducing the number of pre-trial hearings. In some courts (particularly Reading Crown Court) pre-trial hearings are conducted by telephone

early in the day, meaning that the instructed advocate can attend from a different Court centre entirely. Many cases now proceed directly from PTPH to trial without any interim hearings at all.

49. In our view the number of standard appearances is falling and will continue to do so. We believe that this is a trend to be encouraged. As a result, we believe that the benefits from remunerating standard appearances separately will be much more limited than the consultation anticipates. Under the current arrangements the funding of standard appearances is a problem that is likely to occur with decreasing regularity, to the extent that it does not require addressing in the way proposed.

50. There is also the question of the incentives, or alternatively the perceived incentives, that this proposal might create. It is open to any advocate to request that his case is listed before the court to deal with any point that arises, even if it is one that might be dealt with through direct engagement or another means. Is it the intention that the trend towards fewer hearings is to be reversed so that advocates can maximise their income from each case by claiming the separate fees for up to six standard appearances? We suggest not. That would increase the cost to the prosecution and the Court.

51. It is our clear view that the current scheme of remunerating standard appearances from the basic brief fee acts as a significant incentive to reduce the number of hearings. The principle is obvious: to maximise the profit from each case an advocate strives to complete the case with as few hearings as possible, thus reducing the time and disbursements such as travel having to be spent on each case. Thus the current system acts in harmony with the Better Case Management regime and the overall move towards greater efficiency in the Courts. The proposed scheme has the exact opposite effect.

<u>Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle? Please state yes/no and give reasons.</u>

52. No.

53. We have made clear our objections to the proposals to separately remunerating the first six standard appearances in the way suggested above.

54. This proposal appears to be a complete reversal of the current system. Under the current scheme the first four standard appearances are remunerated as part of the bundle. Subsequent hearings are remunerated separately, to reflect that the number of hearings is outside of the norm. That, we suggest, is a logical approach which as we have noted above encourages the efficient resolution and conduct of cases.

55. The proposal that the first six standard appearances are remunerated separately, but every hearing after that is included in the bundle is utterly illogical. We simply do not understand how a case with seven standard appearances can fairly be treated in the same way as one with many more, up to an unlimited number. Applying the proposed figures the maximum proposed uplift for standard appearances would be 6 x £60, amounting to £360. We fail to see how that figure would be an adequate reflection of a complex case which has, for example, twice that number of hearings or more prior to trial.

56. This proposal amounts to an arbitrary cap on the fee payable for any particular case regardless of the number of hearings. The existing scheme remunerates each case at a standard rate unless the circumstances take it outside of the normal circumstances, at which case the remuneration is increased by virtue of the number of necessary hearings.

57. For these reasons, we believe that the existing scheme is by far the preferable and more logical scheme.

Q4: Do you agree that the second day of trial advocacy should be paid for separately? Please state yes/no and give reasons.

58. Yes, but subject to our reservations about the proposed scheme as a whole.

59. It is unarguable that the second day of trial advocacy should be paid for separately. It is extraordinary that it is not currently paid separately, and that a one-day trial is paid the same as a two-day trial.

60. That having been said, we repeat the observations we make elsewhere in this response about how this should be funded. We strongly disagree that this proposal should be met by moving money from elsewhere in the system, and in particular by making reductions to the rates paid for other work commonly undertaken by juniors. We believe that is this proposal is to be enacted it should be met by additional funding to the system.

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed? Please state yes/no and give reasons.

61. No.

62. It is apparent that the more "complex and nuanced" category/offence system is proposed as a direct alternative to the existing scheme whereby the proxies are the pages of prosecution evidence and, for trials, the number of witnesses.

63. For the reasons we have given in our answer to question 1, we strongly oppose the removal of PPE and number of witnesses as proxies for payment. If it was a case of retaining those proxies as well as the more "complex and nuanced" category/offence system then there may be some merit in the proposal. However, in the context of what is proposed we believe that the current arrangements are adequate.

Q6: Do you agree that this is the best way to capture complexity? Please state yes/no and give reasons.

64. No.

65. We believe that the existing scheme is a better and fairer way of reflecting the complexity of a case and the work required both in the preparation and presentation of a case. The proposed scheme, whilst increasing the range of categories and introducing the bandings within those categories, introduces a number of blunt absolutes that would fail to distinguish between cases within the same banding and categories. It is our experience that there can be a substantial difference between, for example, one burglary case and another or one rape and another, which would be entirely unremunerated under the new scheme.

66. To take an example, a trial involving an allegation of assault by penetration (new category 4.1) may involve a single count in respect of a single complainant who has provided a single ABE interview. Alternatively, it may involve multiple counts in respect of multiple complainants who have provided many hundreds of pages of ABE interviews (at present this firm is acting in a case involving no fewer than 56 counts in respect of six complainants who have provided in excess of 400 pages of ABE interviews).

67. It is absolutely unarguable that the second case is far more serious and far more complex than the first. Under the existing scheme the difference in seriousness, complexity and work required is reflected by the uplifts for pages of prosecution evidence and the number of witnesses. Under the proposed scheme there would be no difference in remuneration between the two. The single-complainant, single-count case would be paid at exactly the same basic rate as the multi-complainant, multi-count case.

68. The only way in which these two cases might be distinguished from each other would be by reason of the length of the trial, and the number of daily attendance fees. However, the length of a trial is a matter that is specifically being addressed with a view to reducing trial length through the Better Case Management and Leveson principles. If it is to be suggested that these principles and this progress is to be abandoned so as to compensate for the removal of pages of prosecution evidence and

witness uplift as proxies through the payment of additional daily attendance fees, that is not a suggestion with which we could agree. There would be a substantial increase in cost to HMCTS and the CPS from such a step, not to mention substantially more inconvenience to witnesses, defendants, jurors and the like.

69. Where cases do not proceed to trial the failure to distinguish between different cases within the same banding is thrown in to even sharper focus. Aside from a significant overall reduction in fees for cracked trials and guilty pleas, the removal of the proxies for payment fundamentally ignores the work involved in preparing these cases up until that point. It can be that a case will require thorough preparation and many hours of work simply to get it to the point where it can be an effective guilty plea leading to an expeditious resolution of the case.

70. We can provide the following example of a case recently conducted by one of our advocates:

    a. The client was charged with conspiracy to steal in excess of £100,000. The case involved an organised gang committing non-dwelling burglaries across the southeast of England stealing garden equipment, tools and bicycles often, but not exclusively from garages and outbuildings. There were in excess of 100 substantive offences. The evidence against the defendants was telephone contact, including many thousands of messages, cell-site evidence and ANPR. The case had 4,434 pages of served evidence (by which we mean served on paper, and not including any discs of raw data).

    b. All of this material had to be read and meticulously gone through, before counsel met and advised the client in conference. A basis of plea was drafted which was consistent with the evidence and eventually accepted by the Court and the prosecution. The client was sentenced to two years' imprisonment with full credit for an early guilty plea. The Court was able to resolve the case with only three hearings, which provided a considerable benefit in terms of Court time and expenditure. On the other hand, the case required, two

conferences and approximately two full days of out-of-court work to progress it in that way.

c. The eventual graduated fee for this case was £3,750. Under the new scheme it would amount to £1,200. The reduction is £2,500.

71. As can be seen, not only does the proposed scheme provide for such a substantial cut, but it would operate so that the fee would be exactly the same as if the case had involved a dishonest bank manager transferring £101,000 to his account in a single transaction. Such a case could be proven by way of two witness statements and a page of banking material, probably less than 50 pages in total. Yet the fee is precisely the same.

72. We ask rhetorically: Where is the incentive for a junior barrister to take on the more complex and difficult case? What reward is there for the vast amount of out of court work that is absolutely necessary for advising and representing the client properly and in his best interests, not to mention the best interests of the court, the victims and the witnesses in resolving the case expeditiously? It is manifestly absent.

73. Contrary to what has been asserted variously by the Bar Council and various representative bodies, the absence of any proxy outside the new offence bandings proves a substantial disincentive to take on the more serious and complex case, and a barrier to career progression. It will undoubtedly harm the junior bar. That would be a backwards step and is not one that the Government should contemplate

74. As we have made clear, we believe that there remains a strong role for pages of prosecution evidence and number of witnesses as proxies for payment. It may be that there is a case that these should be reformed in some way or another. By way of example, thresholds could be introduced across the board where the rates paid would increase, rather than payment per page. Alternatively, it may be that some distinction could be drawn between digital evidence (telephone data e.t.c.) and standard evidence that would see them paid in a different way. An example might be a payment

for each day of data (so a case focused on a single day of activity would be paid differently to a case spanning some six months' worth of activity).

75. We do not agree that the abolition of these proxies altogether would create a fair and proportionate scheme of remuneration, or would adequately capture the varying complexity of the cases. We further do not accept that the money saved by this proposal has been appropriately re-distributed elsewhere in the scheme.

Q7: Do you agree that a category of standard cases should be introduced? Please state yes/no and give reasons.

76. No.

77. With the increased list of offence categories, we cannot see why the standard cases cannot be included within this increased list. By way of example, assault occasioning actual bodily harm and unlawful wounding/grievous bodily harm could readily be included within category 3 (serious violence).

Q8: Do you agree with the categories proposed? Please state yes/no and give reasons.

78. Yes, subject to our reservations about the bandings and where specific offences are placed within those categories (as to which see our answers to questions 9 and 10).

79. We can see the merit in expending the existing categories of offences, and some of the new categories are welcome. For example, we endorse the approach of creating a separate category for death/serious injury by driving cases (category 9), criminal damage offences (category 6), drugs offences (category 8) and regulatory offences (category 15).

Q9: Do you agree with the bandings proposed? Please state yes/no and give reasons.

80. No.

81. We believe that the proposed bandings are entirely artificial and bear little relation to the realities of how complex and difficult a case may be. In particular, we believe there are significant problems with:

    a. Category 1 (murder);
    b. Category 4 (sexual offences);
    c. Category 8 (drugs offences);
    d. Category 10 (burglary and robbery offences).

Category 1: Murder

82. We do not believe there should be any distinction between types of murder. Our experience of such cases is that there is considerable variation between all cases of murder such that they cannot realistically be captured by the proposed bandings.

83. For example, we do not see why there should be a significant uplift where the alleged killing is of a child. Under this proposal, an advocate acting for an 18 year-old who is accused of murdering a 15-year old would be paid at approximately twice the rate he would be paid for representing a 15-year old accused of murdering an 18-year old. It is undeniable that representing the 15-year old is more complex and challenging, and yet it is paid at approximately 30% of the rate for representing the 18-year old.

84. We do not see why am knife murder should be paid at such a significantly lower rate as a firearm murder. Knife murders carry a starting-point of a 25-year minimum term. Firearms murders carry a starting point of a 30-year minimum term. Yet the consultation allows for payment of almost twice the rate for a firearm murder. The effect would be that a simple firearm murder involving a single adult defendant would pay substantially more that an 8-handed joint-enterprise knife murder by teenagers. Again, we fail to see how such a distinction can be justified.

85. It is impossible to provide an exhaustive list of examples. But to put it simply, there is no justification for saying that all cases of killings of police officers or public servants are more complex and difficult than the killing of civilians, or that all murders of children are more complex or difficult than all murders by children, or that all murders where the body is missing are more complex and difficult than all murders where the body has been dismembered.

Category 4: Sexual offences

86. We believe it is a serious mistake to equate adult offences and child offences in the way that the consultation proposes. Under the proposed scheme, a straightforward offence of assault by penetration (band 4.1) by an adult on another adult would pay significantly more than an offence of sexual assault of a child under 13 (band 4.2). We cannot see the justification for this when the child case may involve complicating factors such as the cross-examination of a child witness, paediatric medical examinations and the like. It is unarguable that a case involving a child complainant is likely to be more complex and serious than a case involving an adult complainant, and yet the child complainant case is paid less. That is a structure that we do not believe can be properly justified.

87. The distinction between the bandings appears to have been drawn solely on the basis of whether there was penetration or not, or whether there was contact or not. We address the specific offences in more detail below, but we are of the clear view that this is an overly simplistic view of sexual offences that ignores the real differences in complexity and difficulty that may exist from case to case, particularly where the bandings make no distinction between child and adult complainants.

Category 8: Drugs offences

88. This category is something of a curiosity in that, to some extent, it retains pages of prosecution evidence as a proxy for payment. However, even then there are some notable irregularities.

89. In respect of class A drugs, it appears that all importation offences are to be treated as band 8:1 offences. However, supply offences (including conspiracy to supply) are only treated as band 8:1 where the weight of drugs or pages of evidence is over a certain level. So a simple drugs mule who is stopped in an airport having swallowed a number of packages of drugs would be paid in category 8:1, whereas a conspiracy to supply drugs over a period of time and a wide geographical area where the drugs seized are between 1kg and 5kg would be category 8.4. The reduction is more than 50%.

90. Likewise, if the aim of the scheme is to capture and reward complexity and difficulty then we do not see why there should be different rates for each class of drugs. The class of a particular drug affects the seriousness of the case, and the eventual sentence to be imposed but it does not necessarily impact on how complicated or difficult a case is. A nation-wide conspiracy to supply cannabis might end up in band 8.5, lower still than the class A conspiracy. The more complex and difficult case would pay substantially less than the straightforward importation.

91. It is not clear how the question of weight it to be assessed by the Legal Aid Agency. This is a matter of uncertainty that needs to be clarified urgently. It is often the case in a conspiracy to supply drugs that the weight of drugs actually seized represents a mere fraction of the drugs that were actually involved, and were found to be involved by inference. For example, it may be that only the last package in a series of 20 is seized and examined. Whilst there may be a clear inference that the previous packages contained drugs, is the LAA going to assess and pay a claim based on that inference, or purely buy what was seized? Or will payment be confined to an assessment of what was actually seized? This is a point that requires a clear resolution if the weight of drug involved is to be a factor in the payment for such cases.

Category 10: Burglary and robbery offences

92. The categorisation of robberies has changed significantly. The current scheme allows for payment at a higher rate for all cases of "armed robbery", which has been defined as robbery with any weapon. Under the new scheme, armed robbery is only robbery with a firearm or imitation firearm. We do not see the justification for this change. Is it being suggested that a street robbery with a water pistol is more serious or more complex than a street robbery with a machete where serious injury is caused to the victim?

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4? Please state yes/no and give reasons.

93. No.

94. There are numerous difficulties with the individual mapping of offences to categories and banding. It is impossible to provide a comprehensive and exhaustive list here, but the following are what we believe to be some of the clearest examples:

    a. Attempted murder should not be in category 3. It should be in the same category as murder. Whilst they do not involve a death, these cases frequently involve very serious injuries and very serious criminality, attracting life sentences. It is often simply a matter of fortune whether the victim lives or dies. The intention required is, in fact, a GREATER intention than is required for murder, in that the defendant must intend to kill and not simply cause really serious harm. We also note that there does not appear to be any distinction elsewhere in the scheme between attempts to commit substantive offences and the substantive offences themselves, and do not see the justification for drawing such a distinction in cases of murder alone.

    b. We do not see why section 18 offences should feature in category 3, but section 20 offences are treated as "standard cases" when the level of injury may be exactly the same.

c. Sexual activity with a child (both penetrative and non-penetrative) is currently paid as category J, in the same category as rape and other serious sexual offences. This is appropriate as it may involve the cross-examination of child witnesses. Under the new scheme it is category 4.2, so a lower category than rape. Thus, even where the allegation involves some evidence of an absence of consent (consent not being a factor in the offence at all) that the prosecution decide not to pursue, it is paid at a lesser rate. The inherent complexities and difficulties of cross-examining children are entirely ignored by the banding.

d. A similar point arises in respect of sexual assault of a child under 13, which under the new scheme would be down-graded from category J to category 4.2.

e. There are many other sexual offences which, in our view, are wrongly categorised/banded. We believe that category 4 needs to be re-visited and re-designed from scratch.

Q11: Do you agree with the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

95. No.

96. We believe that the existing structure of fees with the various proxies is adequate and preferable to the proposed scheme. For the reasons we have set out elsewhere in this response we do not believe the proposed scheme is fair or proportionate to the work required.

97. We do not agree with the abolition of pages of prosecution evidence or witness uplifts as proxies. The differences between current fees and the proposed fees would have to be assessed on a case by case basis, but the blunt 'one size fits all' approach adopted in Annex 2 will result in some cases being paid substantially more than they should be, and some being paid substantially less than they should be.

98. We do not agree with the significant cuts to the fees for guilty pleas and cracked trials for the reasons we have given elsewhere in this response. We believe such cuts grossly underestimate the work required to ensure that a case can proceed smoothly and efficiently to a guilty plea or cracked trial.

Q12: Do you agree with the relativities between the individual fees proposed in Annex 2 (Indicative Fee Table)? Please state yes/no and give reasons.

99. No.

100. For reasons we have set out elsewhere, we do not agree with the relativities between the fees for various bandings and categories, principally because we do not believe that the bandings and categories adequately reflect the varying complexities of a case. To take the example of category 1, the differentials between the different bandings of murder are vast. Yet they fail to recognise that each individual case may have its own level of seriousness and complexity. Not every band 1 case will be more difficult or complex than every band 3 case. The same might apply in almost every category.

101. The relativities between the individual fees should be determined on a case-by-case basis, depending on the work actually done or required. We do not see that there is a better way of doing this than by assessing the pages of prosecution evidence and the number of witnesses.

Q13: Do you agree with the relativities proposed to decide fees between types of advocate? Please state yes/no and give reasons.

102. No.

103. We cannot see what justification there is for a relative increase of QCs' fees to double the rate of junior advocates. We note that table 6 at paragraph 50 of the Impact Assessment indicates a 10% increase in expenditure on QCs' fees. Whilst we recognise that this does not necessarily equate to a 10% increase in every QC fee for every case, it still represents a significant increase in expenditure on QCs fees which, in the context of a cost-neutral consultation, must be reflected by a reduction in expenditure for junior advocates. To put it simply, this amounts to redistributing money from those at the bottom to those at the top. We cannot see how this is fair or productive.

104. Whilst it is true that QCs received a cut in their fees (certainly for murders) when it was determined to remunerate category A cases at the same rates category J, the fact remains that QCs are well remunerated for the work that they do. They are paid substantially more than juniors. That, of course, is a proper recognition of their seniority and status. But we cannot see how increasing the differential between junior fees and QCs fees is justified in the context of a cost neutral consultation.

105. At its simplest, this could be looked at as an economic argument. There is no shortage of those applying to become QCs with rates as they are at present. In January 2017 there were 33 new QC appointments practicing in crime. The level of appointments and applications has, as we understand it, remained consistent over the years. By contrast, there has been a tightening of the rules as to the circumstances in which certificates for QCs are granted so that there are fewer cases where QCs are required.

106. The effect of the steady number of QC appointments and the reduction in QC cases is that there is and remains rich and plentiful supply of senior QC advocates who are willing to conduct QC trials at the present rates. There is simply no question of not being able to secure QCs to conduct serious cases. It is not the case that increased rates are required to attract or retain advocates at this level. The current system is working well.

107. However, the argument is not simply an economic one. There is a compelling practical argument too. The real risk to the viability of the profession is at the bottom, and not at the top. The number of junior barristers has drastically shrunk over the years. It has become more and more difficult to attract and retain talented people to the Bar. Many junior advocates have left the profession to pursue more lucrative careers. One of the authors of this response completed pupillage in 2007 with seven contemporaries. Of them, only two (including the author) remains practicing in publicly-funded crime. That is a picture that is widely replicated.

108. As the Solicitor General notes in the foreword to the consultation: "*The rule of law is the basis on which a fair and just society thrives. That is underpinned by an independent judiciary, and expert advocates defending those accused of a crime in open court.*" It is essential, therefore, that talented advocates see criminal defence as a viable and attractive career choice. The proposed differentials will do nothing to assist this problem. To the contrary they will make it worse.

109. Where the scheme could be improving the life and income of junior advocates by re-distributing money from those at the top of the scheme to those at the bottom of the scheme, it has not. As can be seen from table 6 at paragraph 50 of the impact assessment, the money to fund this increase in differentials between QCs and juniors has been drawn from cuts to other junior work. That approach, we suggest, is quite simply wrong and unfair.

110. It may be that QCs feel that they deserve an increase in their rates. But that is a feeling that applies (with considerable justification) across ALL advocates. It cannot be argued that QCs are somehow more deserving of an increase than juniors, or are disadvantage or impoverished by the existing scheme.

111. If funds are to be re-distributed then the focus should be on assisting those on the lowest incomes who are struggling to survive on a publicly-funded criminal practice. As has been observed by another member of the self-employed bar, the

proposed scheme as a whole, and the proposed differentials between QCs and juniors in particular, will not see the end of the £13,000-a-year barrister, but may see the return of the £500,000+-a-year barrister.

Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases? Please state yes/no and give reasons.

112. We believe that Pages of Prosecution Evidence should be retained across the board in all types of cases as a proxy for the fee, for the reasons given elsewhere in this response.

113. We note that the way in which PPE affects the fees in these cases is by introducing a threshold over which payment increases. Assuming that the rates were appropriately set, this may be an approach that could be applied to all offences as a way of reducing reliance on PPE, and the administrative burden that goes with it.

Q15: Do you agree that the relative fees for guilty pleas, cracks and full trials are correct? Please state yes/no and give reasons.

114. No.

115. It is apparent that whilst the fees for **some** trials have increased (subject to the removal of pages of prosecution evidence and witness uplift as proxies), it is equally the case that the fees for cracked trials and guilty pleas have been drastically cut.

116. This proposal fails to reflect the work that is required to prepare for cases that are resolved as guilty pleas, and in particular cracked trials. A case may crack on the day it is listed for trial for any number of reasons. These may include witnesses not attending, the prosecution accepting pleas to lesser offences, a defendant changing his instructions on the morning of trial or even simply new prosecuting counsel taking a different view of the case. Whatever the reason, by this stage the case will usually

have been fully prepared for trial and significant work will have been undertaken. The proposed scheme completely ignores this pre-trial work.

117. We illustrate the problem with an example of a case one of our advocates conducted recently:

a. The client was charged with sexual activity with a child. He initially denied the offence and pleaded not guilty at PTPH. The case was set down for trial. The case depended largely on messages exchanged between the defendant and the complainant which made clear what the nature of the relationship was.

b. None the less, the client (having received robust advice about the evidence) was not persuaded by the obvious strength of the case against him to plead guilty, and so the matter was prepared as a trial. This involved no fewer than 5 standard appearance fees to deal with various disclosure failures by the prosecution. It involved substantial work out of court reviewing unused material and the like.

c. Then, eventually, a week before the trial the defendant decided to plead guilty to a set of lesser offences which were acceptable to the prosecution. The effect of this was that that the complainants were spared having to travel to court to give evidence, the client received some credit for his plea and the case did not proceed on the more serious charges.

d. As a cracked trial in the final third, the fee was £3,561 which barely represented the amount of work undertaken to get the case to that point. Under the new scheme the fee would have been £1,690, a reduction of almost £2,000 which would mean that a huge amount of work went unremunerated.

118. In this respect we would also refer to the case example we provided in answer to question 6, which demonstrates a similar and more pronounced unfairness in respect of guilty pleas.

119. We believe that the relative fees between trials, cracked trials and guilty pleas will have the effect of increasing the uncertainty about the advocate's remuneration at the outset of the case, rather than reducing uncertainty as the consultation suggests. On the one hand, the advocate might receive a trial fee that is enhanced from current levels. On the other hand, for reasons that are entirely outside of his control, the advocate might receive a cracked trial fee or even a guilty plea fee after having done significant work on the case which is greatly reduced from current levels.

120. We believe that the differentials between the fees for trials, cracked trials and guilty pleas under the new scheme are unwarranted and unjustified. We believe that the existing scheme is fairer and entirely adequate in this respect.

Q16: Do you agree that the point at which the defence files a certificate of trial readiness should trigger the payment of the cracked trial fee? Please state yes/no and give reasons.

121. No.

122. We strongly disagree with this proposal. It entirely ignores the amount of work that is now required by the courts at much earlier stages under the Better Case Management principles. It is our experience that certificates of trial readiness are typically required by the Courts between 28 days prior to trial.

123. Under the proposed scheme a guilty plea fee would be payable for a defendant who pleads guilty at the first hearing. The exact same fee would be payable in a case where the defendant pleads guilty to a lesser charge which the prosecution belatedly indicate is acceptable, AFTER the preparation of a defence statement, the filing of various legal arguments and requests for disclosure. It may be that in some cases it is the defence statement and the filing of those legal applications that persuades the prosecution to accept a lesser plea. Yet none of that work is reflected under the new scheme.

124. We suggest that a better approach would be to link the payment of the cracked trial fee to the service of the defence statement, rather than the trial readiness form. That is the point at which it can be said that preparation for the trial proper has begun in terms of taking the client's instructions, advising as to available defences, requesting disclosure and identifying legal issues. Typically the defence statement is the first formal document that is served in anticipation of a contested trial, and we believe that that is the obvious natural trigger point at which a case truly becomes a cracked trial as opposed to a guilty ples.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document? Please state yes/no and give reasons.

125. No.

126. We believe that the existing arrangements of PPE as a proxy for payment, and special preparation as an exceptional means of remuneration in defined cases is fairer and preferable to the proposed scheme, for the reasons we have set out above.

127. To suggest, as the consultation does, that there should be no difference in remuneration between a case with 50 pages of evidence and 9,999 pages of evidence is, with respect, perverse. It absolutely fails to reflect the amount of work actually required in the preparation and presentation of a case.

128. The special preparation provisions are a poor mitigation of the gaping divisions between work done and remuneration that would be created in some cases by this scheme. To put it still further out of reach in cases involving drugs or dishonesty exacerbates the problem.

Q18: Do you agree that the wasted preparation provisions should remain unchanged? Please state yes/no and give reasons.

129. Yes.

130. In our experience the wasted preparation provisions are rarely used, and should not be a priority for reform.

Q19: Do you agree with the proposed approach on ineffective trials? Please state yes/no and give reasons.

131. No.

132. We recognise from personal experience the frustrations of trials being ineffective on the day that they are listed. We also recognise that these cases can result in the loss of a day's work, which at present is poorly remunerated.

133. That having been said, we consider that this is a problem that is already vastly reduced from what it has historically been. The robust enforcement of the Criminal Procedure Rules, the effect of Better Case Management and general changes to listing practices mean that the circumstances in which trials are ineffective on the day listed are becoming rarer, and are likely to become more so over time.

134. We believe that the substantially decreasing frequency with which trials are being ineffective on the day listed means that the benefits of these proposals will be much more limited than the consultation anticipates. We believe that this is an area where, if there is felt to be a problem with the existing arrangements, it is of such a level that it does not require addressing in the context of the consultation. We are strongly of the view that the modest increase proposed for ineffective trials can in no way offset the drastic cuts in other areas.

135. A further point arises in respect of the incentives created by the proposed scheme. This is a proposal which in our view operates in a manner which is directly contrary to the Better Case Management principles. Whilst no competent and honest lawyer will conduct a case or advise their client on the sole or main basis of their own remuneration, it is important that any proposed scheme does not create the

impression of perverse incentives. Such an impression is created by this proposal. To put the matter shortly, the general public may ask themselves why a lawyer acting in a case with outstanding disclosure issues which are fundamental to the case would ask the Court to list the matter for a standard appearance (remunerated at £60) when they could wait until the day of trial and then apply for an adjournment (remunerated at £300).

136. Any proposed scheme must not reward deviation from the Better Case Management principles, and the overall drive to efficiency in the Courts. This proposal does exactly that. Where those principles have not been complied with and a trial is ineffective as a result, there is a substantially increased benefit to the advocate in the increased ineffective trial fee. That in and of itself would be a perverse outcome, setting aside the impression it might give the general public, witnesses and defendants about how the justice system operates.

Q20: Do you agree with the proposed approach on sentencing hearings? Please state yes/no and give reasons.

137. No, in the context of this consultation.

138. We believe that sentencing hearings should be remunerated separately. It is difficult to see how it can be justified that a hearing which may or may not take place in any given case, depending on the outcome and matters which are substantially outside the control of the advocate, should form part of the basic fee.

139. That having been said, our view that the sentencing hearing should be remunerated separately must be seen in the context of our view that the proposed scheme as a whole is a bad scheme and should not be introduced. In the context of a consultation with cost-neutrality as its core principle, our clear preference is for the existing arrangements.

Q21: Do you agree with the proposed approach on Section 28 proceedings? Please state yes/no and give reasons.

140. Yes.

141. Section 28 cross-examination is plainly part of the trial process and must be undertaken by the trial advocate. It should be remunerated as part of the trial.

Q22: Do you agree with the design as set out in Annex 1 (proposed scheme design)? Please state yes/no and give reasons.

142. No.

143. We have set out our objections the proposed scheme in considerable details elsewhere in this response, and do not propose to repeat them. We would simply re-iterate that in our view the proposed scheme is a bad scheme for all but a small handful of advocates, and is particularly bad for junior advocates who stand to receive a substantial cut in their fee income.

144. We maintain the view that the existing scheme is preferable to the new scheme and is entirely adequate in the context of a cost-neutral consultation.

Q23: Do you agree that we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper? Please state yes/no and give reasons.

145. We do not have the necessary date to comment.

146. We simply observe that, in our view these proposals are likely to have a substantial negative impact on:

a. Junior advocates;

b. Advocates with child care responsibilities (typically women) who cannot conduct trials and may only conduct single-day hearings such as guilty pleas and the like.

Q24: Have we correctly identified the extent of the impacts of the proposals, and forms of mitigation? Please state yes/no and give reasons.

147. As per question 23, we believe that these proposals will have a severe and unjustified negative effect on:

a. Junior advocates;

b. Advocates with child care responsibilities (typically women) who cannot conduct trials and may only conduct single-day hearings such as guilty pleas and the like.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh? Please state yes/no and give reasons.

148. We express no view either way as it is beyond our knowledge and experience.

MARTIN MURRAY AND ASSOCIATES

17TH FEBRUARY 2017