Lincoln House Chambers
Response to AGFS Consultation

1. Any response to this Consultation must commence with the observation that the AGFS has been cut on many occasions in the past and do not represent adequate remuneration for any advocate. As a result, the Bar as a whole has become top heavy (see The CBA Chairman's article in The Times, "Why the Bar is withering from the bottom up", 2nd February 2017) and not enough young people are entering the profession.

2. The most fundamental misconception of this Consultation is that the overall budget for legal aid will remain at the same or even at similar level. An in depth analysis of Lincoln House Chambers fees - both Junior and Silk fees over a given period - demonstrates that the new Scheme proposed represents a savage, unprincipled and unjustified cut in fee income for barristers of all seniority. The drop in fee income for Lincoln House Chambers over the period analysed is a fraction short of a fifth – 19.99% [Annex 1]. This explodes the argument that there will be a visible 'career progression' as a result of the new fees and the myth that this Consultation is not an attempt to cut advocates fees further.

3. Lincoln House Chambers has provided at Annex 1 a series of one hundred and twenty nine (129) worked examples from real cases - these worked examples were produced between May/June 2016 for the working group. Lincoln House Chambers emphasizes that this is a sample collection of cases and we invite others in the profession to do their own calculations and send them to the Bar Council and CBA. These examples set out the fee earned under old Scheme and the fee earned new Scheme. We have provided this analysis due to the Bar Council's desire that: "It is essential that the draft scheme is robustly tested against real cases to ensure that it does not produce unforeseen outcomes" (Bar Council, "Advocates' Graduated Fee Scheme (AGFS) Working Group Draft proposal for a new Scheme" at para. 32).

4. The results of the Lincoln House Chambers work examples analysis are startling:

(i) The total fee income under the old Scheme is £447,435.13.
(ii) The total fee income under the new Scheme is £358,344.00.

5. The reduction in fees is £89,091.12 or a reduction in fee income of almost exactly 20%.

6. A separate analysis of 13 QC cases undertaken by Chambers in the last year show a less marked decrease, but a decrease none the less:

(i) The total fee income under the old Scheme is £360,163.64.
(ii) The total fee income under the new Scheme is £342,968.

7. The reduction is £17,195.64 or a reduction of just under 5%. 7 out of the 13 QC cases show a reduction.

8. The new bandings for murder in the new Scheme represent a reduction in the basic fee of over 50% for substantial high PPE joint enterprise cases. Furthermore, the basis for determining the level of basic fee seems irrational. There is no reason why a firearm murder should be remunerated at a much higher level than a knife murder. The band 1

murders are uncommon. There are very few murders of police officers, patients and police officers in the criminal courts. The distinction that the victim is aged 16 or less makes no sense. The defence of a 17 year old accused of murdering a 16 year old with a knife will produce a basic fee almost three times that of a case in
which a 16 year old is accused of murdering a 17 year old. We believe that there is no justification for more than one murder band.

9. The reduction in fees for fraud cases are savage. It is often the case that high value frauds may involve only a small number of extremely high value transactions. There can be far more complex frauds in the middle range in which there are a large number of complex transactions

10. There can be no justification for these reductions in order to remunerate terrorism cases at the highest fee level in the new Scheme. We fail to see how it can be justified that simple terrorism cases, which involve little more than preparatory acts such as downloading material or failed travel to the Middle East, should be remunerated at a massively higher level than a complex and difficult cut-throat murder trial. The diversion of money from other cases to these will only benefit a small number of London sets.

11. Such reductions are alarmingly far removed from the comments of The Chairman of the Young Barristers' Committee who said: "There are modest drops in the base amounts for payments for some cases" (Bar Council, Press Release, "New AGFS plan will mean fairer pay for advocates" 5th January 2017).

12. The work examples from Lincoln House Chambers do not include the further reductions in special preparation that would be introduced by the thresholds of 15,000 and 30,000 pages for drugs and dishonesty offences, respectively. The worked examples do not include the further reductions caused by the proposed definition of a cracked trial after service of the certificate of readiness.

13. The Consultation itself is based upon a fundamentally false premise, namely that (paragraph 4): "The time spent in court, conducting the advocacy upon which our justice system relies, would also become a more important driver for the fee paid." The reality, as any advocate and Judge knows, that preparation for advocacy is equally as important as the advocacy itself. First class advocacy cannot exist without preparation. This is why defence advocates are paid according to the amount of evidence served by the Prosecution.

14. Any attempt at redistribution of wealth is always to be commended. However, the redistribution of this Consultation pays the highest earning barristers more than the lowest paid barristers. If the Government were to undertake the same exercise with the taxation system, they would find themselves out of office and power rather swiftly. It simply cannot be right in any walk of life for the lowest paid workers to accept a cut whilst the highest paid workers enjoy an increase and dress this up as 'career progression'. The argument that the new fees would (paragraph 6) "increase certainty for all advocates about incomes" ignores the plain fact that advocates never have income certainty or security. What the Consultation in fact means is that the level of fees will have more certainty because they are fixed - income certainty/security is an entirely separate concept. All this said, even the recipient of the highest level of fixed fees under the new Scheme will receive savage cuts in many cases.

15. Another misconception within the Consultation is cases are somehow becoming less complex than before because of the fact that evidence is served electronically. The digitalisation of evidence (and we do not mean the placing of papers/files on the Digital Case System) due to the increasing use of smart phones, tablets and computers in the commission of crime has made the advocates role more onerous.

16. The volume of evidence has increased in the traditionally complex cases - drugs conspiracies and fraud cases - not because of the way in which evidence served but due to the evolution in the manner in which these crimes are committed. To argue that (paragraph 1.4) "the volume of evidence is no longer necessarily reflective of the amount of work an advocate has to undertake on an individual case" is an extraordinary statement. Despite being sceptical of the volume of evidence being a vital indication of the complexity of the case, the Consultation however is strangely content to cite the weight and quantity of drugs in determining the level of complexity of drugs trials (paragraph 5.10). Furthermore, a rape trial involving 5 complainants who have all communicated with each other on smart phones regarding their abuse by a single Defendant will be more complex than a rape trial involving one complainant and one ABE interview. Many other examples should have been obvious to the Working Group. We fundamentally disagree with the concept propounded at paragraph 1.12: "We consider that it is right that "work done" is accounted for as fully as possible in the proposed scheme. At its core, that "work done" is the advocacy conducted in the Crown Court." The reality for many advocates is that the work done in preparation for even the most straight forward case has not been remunerated for many years. At its core the work done includes the many hours of underpaid preparation of cross-examination, examination in chief, editing interviews, scheduling evidence in agreed facts, responding to Bad Character and Hearsay Notices, skeleton arguments, preparation of Jury Bundles, drafting disclosure requests based upon an unpaid trawl of large Unused Schedules and drafting Defence Statements. All have been unpaid tasks for many years now. Without the advocates' good will and professionalism in agreeing to take on the burden of complying with Court Orders and drafting, unpaid, the documents that provide the essential glue to keep a Crown Court trial on track, the system would not function and fail fundamentally.

17. The large category of standard case will reduce the fees of junior advocates. Standard cases are undertaken by the most junior of advocates. We are told by the Consultation that standard cases will encompass "around a quarter of all AGFS cases billed for in volume terms" (paragraph 5.4). Such an approach, as already noted above, does not provide any "certainty" (paragraph 5.4) for advocates. The only certainty is the level of the fee, not the income.

18. It is wholly unfortunate that the Circuit Leaders and the Chairman of the CBA have chosen not to consult with their paying members about this Consultation before giving it their full endorsement. Given the level of healthy and constructive engagement between the CBA and its members in very recent times, this is surprising.

Q1: Do you agree with proposed contents of the bundle?

19. No. In context of this Consultation, the existing scheme is adequate. The new Graduated Fee Bundle, when one compares a number of cases for junior barristers under the Old Scheme with the New Scheme, does not result in an increase for junior barristers. It in fact result in a pay cut. Furthermore, as the Consultation acknowledges,

the BCM scheme envisages that ancillary hearings will decrease and ultimately become obsolete as engagement between the Court and the parties increases. The fewer ancillary hearings held then the better the old Scheme is for advocates' fees. The new Scheme seeks to deprive advocates of this benefit.

20. As a general principle, the new standard appearance fee of £60.00 will represent a cut for any junior advocate who undertakes another advocates Standard Appearance. The current payment is £87.00, whilst the Bar Council's depleted fee calculation sometimes results in a fee less than £87.00, it is rarely less than £60.00. Given the advent of BCM and its focus on reducing hearings as a rule, it will be a rare Standard Appearance fee that results in a payment of less than £60.00.

21. The new Scheme's PTPH fee of £100 represents a cut to the junior bar. Although this is paid on top of the new (in many cases reduced) brief fee, it will represent a reduction for those junior barristers covering a senior advocates' PTPH and who rarely deal with PTPHs under their own 'case ownership'. For example, under the Bar Council's current depleted fee scheme, only a Category E PTPH pays less than £100 as a starting point. All other categories of case provide for a PTPH fee in excess of £100. The reduction on a Category A, K and J PTPH is £144.80 - the new Scheme's fee being only 40% of the old Scheme's fee. The reduction on a B is £95.75, a C £34.70, D £68.75 and F & G £4.10. Such reductions will make the long journeys to cover other people's ancillary hearings, particularly Mentions and PTPHs, even less attractive for the junior bar.

Q2: Do you agree that the first six standard appearances should be paid separately?

22. In context of this Consultation, the existing scheme is adequate. However, as a general principle - yes - each ancillary hearing should attract a stand alone fee.

23. It is also noted that, due to the aspirations of BCM, the number of ancillary hearings will in future be kept to a minimum.

Q3: Do you agree that hearings in excess of six should be remunerated as part of the bundle?

24. In context of this Consultation, the existing scheme is adequate. However, as a general principle each ancillary hearing should attract a stand alone fee. This is because - as is acknowledged by the Consultation - every piece of advocacy is "work done". As such, any hearing in excess of six should be remunerated.

25. It is also noted that, due to the aspirations of BCM, the number of ancillary hearings will in future be kept to a minimum.

Q4: Do you agree that the second day of trial advocacy should be paid for separately?

26. In the context of this Consultation, the existing scheme is adequate. However, as a general principle - yes - each day of trial advocacy should attract a stand alone fee. This is because - as is acknowledged by the Consultation - every piece of advocacy is "work done".

Q5: Do you agree that we should introduce the more complex and nuanced category/offence system proposed?

27. In context of this Consultation, the existing scheme is adequate. However, as a general principle - yes - a more complex and nuanced category/offence system is to be welcomed but not the system proposed by this Consultation. The best way to determine the complexity of any case is through an assessment of the number of hours that the advocate will have to work on any individual case, which in and of itself is determined by the volume of evidence and the complexity of the legal issues in the case.

Q6: Do you agree that this is the best way to capture complexity?

28. No. For the reasons set out in answer to Q5.

Q7: Do you agree that a category of standard cases should be introduced?

29. No. This is due to the decrease in the level of fees for junior barristers that is inherent in such a proposal.

Q8: Do you agree with the categories proposed?

30. No. This is due to the decrease in the level of fees for junior barristers that is inherent in such a proposal.

Q9: Do you agree with the bandings proposed?

31. No. This is due to the decrease in the level of fees for junior barristers that is inherent in such a proposal.

Q10: Do you agree with the individual mapping of offences to categories and bandings as set out in Annex 4?
Q11: Do you agree with individual fees proposed in Annex 2 (Indicative Fee Table)? Q12: Do you agree with the relativities between the individual fees proposed in Annex 2?
Q13: Do you agree with the relativities proposed to decide fees between types of advocate?
Q14: Do you agree that we should retain Pages of Prosecution Evidence as a factor for measuring complexity in drugs and dishonesty cases?

32. Q10-14. No. The proposed mapping of offences, the individual fees, the relativities are all entirely designed to cut advocates fees. PPE should be retained for all offences.

33. An analysis of Lincoln House Chambers' defence legal aid fee income over a specified period is attached at Annex 1. The decrease in fees for advocates of all seniority is plainly apparent. As noted in the Preamble to this response, the new Scheme represents a further cut to all advocates. Given that the clear aim and purpose of the LGFS Consultation announced this month, it is clear that Government is seeking to reduce fee income for all practitioners in criminal legal aid defence work.

Q15: Do you agree that the relative fees for guilty pleas, cracks and full trials are correct?
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?

34. No Q14-15. In the context of this Consultation, the existing scheme is adequate. The Consultation wholly ignores all the work undertaken by advocates prior to trial.

35. In terms of guilty pleas and cracked trial fees, the Consultation again fails to appreciate the changing landscape created by BCM. Preparation is now front loaded such that it is wholly wrong to assert (paragraph 6.2) that "A significant amount of case preparation will often take place in the immediate run up to the trial". Prior to the 'run up' (an undefined term), much work takes place - correspondence with solicitors, the drafting of the Defence Statement, Bad Character/Hearsay Responses, ROTI and ABE edits, drafting prior authority for expert reports and disclosure requests. All these are now designed to have been completed prior to the 'run up' to the trial. The Consultation proposes that none of this work is to be rewarded and presupposes all advocates do everything at the last minute. Furthermore, such work and engagement (encouraged by the BCM) results in more defendants pleading guilty earlier. This proposal fails to recognise that the service of the certificate of trial readiness is out of the control of the advocate, particularly, in the case of junior barristers who receive a trial as a late return and do not have the opportunity to ensure a trial readiness certificate is served.

Q17: Do you agree that special preparation should be retained in the circumstances set out in Section 7 of the consultation document?

36. No. In the context of this Consultation, the existing scheme is adequate.

37. It is wholly artificial and an obvious attempt to reduce the Legal Aid budget to distinguish drugs and dishonesty cases in the manner suggested in paragraph 7.5.

Q18: Do you agree that the wasted preparation provisions should remain unchanged?

38. Yes.

Q19: Do you agree with the proposed approach on ineffective trials?

39. In the context of this Consultation, the existing scheme is adequate. However, as a general principle - yes - an ineffective trial should attract an increased stand alone fee. This is because - as is acknowledged by the Consultation - every piece of advocacy is "work done".

Q20: Do you agree with the proposed approach on sentence hearing?

40. In the context of this Consultation, the existing scheme is adequate. However, as a general principle - yes - sentencing hearing should attract a stand alone fee. This is because - as is acknowledged by the Consultation - every piece of advocacy is "work done". However, it is noted that previous iterations of the AGFS valued a sentence at £125.00. No reason is given for the decreased sentence hearing fee in the Consultation.

Q21: Do you agree with the proposed approach on Section 28 proceedings?

41. Yes.

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Q22: Do you agree with the design as set out in Annex 1?

42. No. For all the reasons cited in this Response.

Q23: Do you agree we have correctly identified the range of impacts of the proposals as currently drafted in this consultation paper?

43. No. The new Scheme discriminates against junior advocates.

Q24: Have we correctly identified the extent of the impacts of the proposals and form of mitigation?

44. Not qualified to comment.

Q25: Do you consider that the proposals will impact on the delivery of publicly funded criminal advocacy through the medium of Welsh?

45. Not qualified to comment.

Travel

46. There has been no attempt to improve, or even address, the advocate's position with regards to travel. The existing scheme - wholly unjustly - permits payment for travel, hotel and subsistence (under the Prior Authority system) for the Main Hearing only. As such, none of the Standard Appearances or POCA Hearings attract travel expenses. The failure to address this issue is a further example of how the Working Group have not applied themselves to task in hand adequately.

Elected Cases

47. The proposed new scheme unjustifiably retains a fixed fee for elected cases in which the Defendant ultimately pleads guilty. The Consultation proposes that 'work done' is to be rewarded but at the same time accepts that less work is one in the defence of such cases. The decision to elect Crown Court trial is made by the Defendant as is the decision to ultimately plead guilty. Advocates should not be penalised for decisions that are out of their control. This cost saving device should be abolished once and for all.