



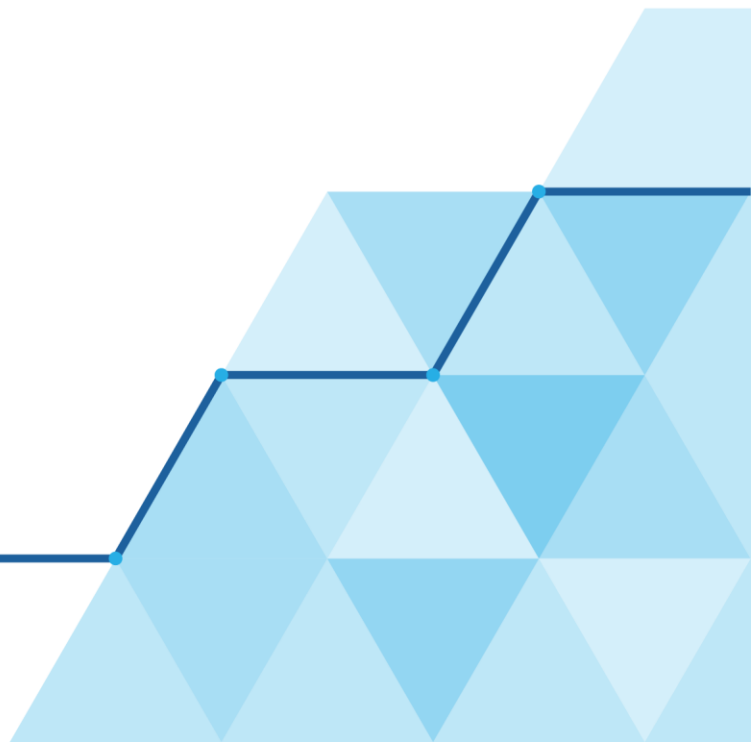
Ministry
of Justice

Criminal Legal Aid Review

**An accelerated package of measures
amending the criminal legal aid fee schemes**

This consultation begins on 28 February 2020

This consultation ends on 27 March 2020





Ministry
of Justice

Criminal Legal Aid Review

**An accelerated package of measures amending
the criminal legal aid fee schemes**

**A consultation produced by the Ministry of Justice. It is also available at
<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>**

About this consultation

- To:** This consultation is aimed at anyone with an interest in remuneration through criminal legal aid fees schemes in England and Wales. This will include, but is not limited to, members of the criminal defence profession and their representative bodies, members of the judiciary, court staff, defendants, academics and others involved in the criminal justice system.
- Duration:** From 28/02/2020 to 27/03/2020
- Enquiries (including requests for the paper in an alternative format) to:** Email: criminallegalaidreview@justice.gov.uk
Criminal Legal Aid Review team
Ministry of Justice
102 Petty France
London SW1H 9AJ
- How to respond:** Please send submit your response online at <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>
Email: criminallegalaidreview@justice.gov.uk
Criminal Legal Aid Review team
Legal Aid
Ministry of Justice
102 Petty France
London SW1H 9AJ
- Response paper:** A response to this consultation exercise is due to be published in due course at:
<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

A Welsh language summary is provided on the consultation page. An Impact Assessment indicates that Welsh language speakers are not likely to be particularly affected. A Welsh Language Impact test has been included as part of the Impact Assessment, which is attached to this document.

An Impact Assessment is available at: <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

An Equality Statement is available at: <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

Contents

Ministerial Foreword	5
Executive summary	7
Summaries of the proposals	9
Introduction	11
The Current Fee Schemes	12
Proposals for amending the fee schemes	16
Unused material (AGFS and LGFS)	16
Paper heavy cases (AGFS)	20
Cracked trials in the Crown Court (AGFS)	23
Sending cases to the Crown Court (LGFS)	25
Impact Assessment, Equality and Welsh Language	27
Impact Assessment	27
Equality	27
Welsh Language Impact Test	28
Questionnaire	29
About you	31
Contact details/How to respond	32
Complaints or comments	32
Extra copies	32
Publication of response	32
Representative groups	32
Confidentiality	33
Consultation principles	34

Ministerial Foreword

Criminal defence practitioners play a crucial role in upholding the rule of law. As a former criminal barrister, I greatly value the huge contribution the criminal defence profession makes to our society. I understand the pressures you are under and the need to ensure that you are paid fairly for the work you do.

At the beginning of 2019, the Ministry of Justice began a comprehensive review of criminal legal aid fee schemes. Our approach has been to listen carefully to the views and concerns of the criminal defence profession and gather evidence to make sure the proposals we make are based in fact and real experiences. In light of some pressing concerns identified early in the review, we took the decision to fast-track certain areas of the review:

- how litigators and advocates are paid for work on unused material;
- how advocates are paid for work on paper heavy cases;
- how advocates are paid for cracked trials in the Crown Court; and
- how litigators are paid for work on sending cases to the Crown Court.

We are also developing a proposal regarding remuneration of the defence for engagement with the prosecution at the pre-charge stage, in light of new guidelines on pre-charge engagement from the Attorney General. These are currently subject to a public consultation and publication is expected in Spring 2020. Following this, we will proceed at pace to consult separately on our proposal at the earliest opportunity.

The Criminal Legal Aid Review team have been working hard, listening to the experiences of criminal defence practitioners across the country. I am confident that the proposals delivered in this consultation document offer a fair settlement to the defence profession on these particular issues. To that end, I would like to extend my heartfelt thanks to all those who have offered their support providing useful evidence and sharing their views.

However, the issues addressed in this consultation are just one part of the criminal legal aid system and I recognise that there is much more for us to do. These discrete areas represent a first step towards the fuller Criminal Legal Aid Review which will focus on the structural reform of the whole criminal legal aid system to improve its transparency, efficiency and outcomes.

I am committed to making sure that our review places the criminal legal aid market on a more sustainable long-term footing to ensure we deliver an effective Criminal Justice System that works for you as a profession and for those people who need access to legal aid-funded practitioners. I look forward to continuing to work with you as the review

progresses and appreciate your ongoing participation and support throughout the rest of the review.

Robert Buckland

The Rt. Hon. Robert Buckland QC MP
Lord Chancellor

Executive summary

1. In December 2018, we announced a comprehensive review of the criminal legal aid system including all fee schemes and the wider market.¹ The then government recognised that the nature of the criminal justice system had changed in recent years. While the number of cases coming through the system had reduced, the cases had become more complex and time consuming for all involved in the criminal justice process, including police, prosecutors, defence practitioners and the courts. Looking forward, the landscape of the criminal justice system will continue to evolve as part of the Government's focus on law and order, including plans to recruit an additional 20,000 police officers. Against this backdrop, it is important we do what is necessary to ensure there is an efficient and effective criminal legal aid system that is sustainable for the long term.
2. The aims of the Criminal Legal Aid Review ("the review") are:
 - To reform the criminal legal aid fee schemes so that they:
 - fairly reflect, and pay for, work done;
 - support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce;
 - support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer;
 - are consistent with and, where appropriate, enable wider reforms;
 - are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies;
 - ensure cases are dealt with by practitioners with the right skills and experience.
 - To reform the wider criminal legal aid market to ensure that the provider market:
 - responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer;
 - operates to ensure that legal aid services are delivered by practitioners with the right skills and experience;
 - operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

¹ For more information about the Criminal Legal Aid Review please refer to the website: <https://www.gov.uk/guidance/criminal-legal-aid-review>

3. To support these outcomes, a robust and wide-ranging evidence base is required. To that end we have engaged widely with front line practitioners and agreed to share data extensively between the professional representative bodies, the LAA and the Crown Prosecution Service (CPS) to build a detailed picture of the criminal legal aid system.
4. This consultation sets out proposals to address key issues that the criminal defence professions told us were of immediate concern. Taken together, these proposals represent an additional £32m-£50m for criminal legal aid. We estimate that this new spend will be split broadly evenly between solicitor firms and barristers.
5. These discrete areas represent a first step towards the fuller review which will focus on the sustainability of the whole criminal legal aid system and ensure we pay fairly for work undertaken by criminal defence practitioners, especially in light of wider reforms to the criminal justice system.
6. In collaboration with professional representative bodies including the Law Society, the Bar Council, the Young Barristers' Committee and the Criminal Bar Association, we agreed to bring forward consideration of the following areas:
 - how litigators and advocates are paid for work on unused material;²
 - how advocates are paid for work on paper heavy cases;
 - how advocates are paid for cracked trials in the Crown Court;
 - how litigators are paid for work on sending cases to the Crown Court; and
 - how litigators are paid for pre-charge engagement.³
7. We will formalise and consult on a proposal for remuneration for pre-charge engagement following the issue of new disclosure guidelines by the Attorney General, which are currently subject to public consultation.⁴
8. Through these proposals, and using the available evidence, we aim to ensure the fee schemes are aligned with changing trends in the nature of evidence and unused material supporting the review's aim of paying fairly for work done. We have sought to

² "Litigators" refers to solicitors and legal executives who are carrying out litigation work. "Advocates" refers to both solicitor advocates and barristers.

³ These areas will collectively be referred to as the "accelerated areas" throughout this document, and through the accompanying Impact Assessment Equality Statement.

⁴ The consultation on the Attorney General's Guidelines on Disclosure opened on Wednesday 26 February and is due to close on Wednesday 22 April. Guidelines on pre-charge engagement can be found in Annex B – Pre-charge engagement. The full consultation document can be found here: <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

reflect current and emerging approaches to case management to support just, efficient, and effective case progression.

9. We are grateful for the engagement we have received from defence practitioners who have helped us build an evidence base to underpin these proposals. As we move on to the fuller review, we will continue to engage practitioners widely and directly on the future of the criminal legal aid system. As part of this current consultation we welcome evidence on both the proposals in this document as well as those relating to broader sustainability issues and wider market reform which we will consider as part of the fuller review.

Summaries of the proposals

Unused material (Advocates' Graduated Fee Scheme (AGFS) and Litigators' Graduated Fee Scheme (LGFS))⁵

10. Unused material is material that is relevant to a case (material that is capable of undermining the prosecution case and/or assisting the defence), but not used as part of the prosecution evidence presented in court.
11. This proposal applies to cracked trials and trials and excludes guilty pleas because it is rare that unused material would need to be reviewed in these cases. A cracked trial is a case that does not proceed to trial as anticipated either on or before the first day of trial.
12. We propose that for reviewing unused material in cracked trials and trials, solicitors and advocates would be paid the equivalent of 1.5 hours' work for 0-3 hours spent reviewing unused material disclosed to the defence.
13. For those cases where more than 3 hours is spent reviewing unused material, we propose payment should be at hourly rates equivalent to the existing AGFS or LGFS special preparation hourly rates, subject to the assessment of those claims by the LAA.⁶ We have chosen to introduce fees equivalent to special preparation rates because they are currently used to remunerate similar work reviewing evidence.

⁵ The AGFS is the fee scheme for most Crown Court advocacy work undertaken by both self-employed barristers and Higher Court Advocates employed by solicitor firms. The LGFS is the fee scheme for Crown Court litigation work undertaken by solicitors.

⁶ All references to hourly rates in the Unused Material section are the same rates as those prescribed in Criminal Legal Aid (Remuneration) Regulations 2013 for "special preparation" under each scheme. Special preparation rates can be at Table B for AGFS and Table C for LGFS.

Paper heavy cases (AGFS)

14. We propose that advocates will be able to claim payments in addition to the current AGFS fee in cases involving an unusually high amount of served evidence at the relevant hourly special preparation rate, subject to the assessment of those claims by the LAA. We are proposing new thresholds based on pages of prosecution evidence (PPE) across the offence bands to capture those cases that will be eligible to claim additional payment for work considering pages in excess of those thresholds. These thresholds are set out in the main document, Table D, p.21.

Cracked trials in the Crown Court (AGFS)

15. We propose to expand the applicability of cracked trial fees to all cases that crack after the first Crown Court hearing (at which a plea is entered), usually the Plea and Trial Preparation Hearing (PTPH), removing the thirds distinction from the AGFS. Currently, only cases that crack in the final third of the time between the PTPH and the date on which the case is listed for trial are eligible for a cracked trial fee.

16. We also propose to increase the cracked trial basic fees from 85% to 100% of the brief fee.

17. At this stage, we are consulting on changes to the AGFS only in relation to cracked trials. Due to structural differences between the two schemes, the way cracked trials are paid under the AGFS does not apply in the same way to payments for cracked trials under the LGFS. We will consider cracked trial payments under the LGFS as part of the fuller review.

Sending cases to the Crown Court (LGFS)

18. Under this proposal, we would pay an increase in LGFS fees equivalent to 2 hours' worth of work in the magistrates' court to better pay for the work done ahead of cases being sent to the Crown Court under the Better Case Management (BCM) initiative and the Criminal Procedure Rules.

Pre-charge engagement (crime lower)

19. As detailed above, we will formalise and consult on a proposal for remuneration of litigators for pre-charge engagement separately following the issue of new disclosure guidelines by the Attorney General, which are currently subject to public consultation. The Attorney General's Office (AGO) are intending to change their guidelines to encourage increased early engagement to facilitate the early resolution of evidential issues. Once the guidelines have been published, we will consult on proposals to pay litigators for work done engaging with the police or prosecution ahead of a decision to charge.

Introduction

20. This document sets out proposals for four of the five accelerated areas of the review:

- how litigators and advocates are paid for work on unused material (AGFS and LGFS);
- how advocates are paid for work on paper heavy cases (AGFS);
- how advocates are paid for cracked trials in the Crown Court (AGFS);
- how litigators are paid for work on sending cases to the Crown Court (LGFS); and
- how litigators are paid for pre-charge engagement (crime lower).

21. As set out above, how litigators are paid for pre-charge engagement will be consulted on at a later stage as any proposals are dependent on new guidelines from the AGO, currently the subject of a public consultation.

22. In developing the proposals set out in this consultation, we drew on a range of available evidence:

- a CPS case file review;⁷
- a survey undertaken by defence solicitor firms to collect further data on the cases reviewed in the CPS exercise;⁸
- a qualitative survey asking barristers about their experience of unused material;⁹
- billing data for the AGFS and LGFS; and
- focus groups with barristers and solicitors and solicitor advocates conducted in summer 2019.

23. This consultation is aimed at anyone with an interest in remuneration through criminal legal aid fees schemes in England and Wales. This will include, but is not limited to, members of the criminal defence profession and their representative bodies, members of the judiciary, court staff, defendants, academics and others involved in the criminal justice system.

⁷ For further details please see the accompanying Impact Assessment, Annex B: Unused material, paragraphs 1-15, p.4-8.

⁸ For further details please see the accompanying Impact Assessment, Annex B: Unused material, paragraphs 16-28, p.9-12.

⁹ For further details please see the accompanying Impact Assessment, Annex B: Unused material, paragraphs 29-39, p.13-16.

24. An Impact Assessment and Equality Statement accompany this document and should be read in conjunction with it. Comments on these documents are welcome.

The Current Fee Schemes

25. Payment for publicly funded criminal legal aid work is administered by the LAA through a range of fee schemes. There are different fee schemes for different areas of criminal legal aid work. These schemes variously pay fixed or standard fees, hourly rates, or graduated fees. Table A provides an overview of the various fee schemes and main type of fees paid for legal aid work:

Table A: The Legal Aid Fee Schemes

Category	Area of work	Who does this work?	Scheme	Main type of fees paid
Crime lower	Police station advice	Solicitors	Crime lower scheme	Fixed Fees
	Representation in the magistrates' court	Solicitors	Crime lower scheme	Standard Fees
	Prison Law	Solicitors	Crime lower scheme	Fixed Fees
Crime higher	Litigation services in the Crown Court (<60 day trial estimate)	Solicitors	LGFS	Graduated fees
	Advocacy services in the Crown Court (<60 day trial estimate)	Barristers and solicitor advocates	AGFS	Graduated fees
	Litigation services in the Crown Court (>60 day trial estimate)	Solicitors and solicitor advocates	Very High Costs Cases (VHCC) Scheme	Hourly rates
	Advocacy services in the Crown Court (>60 day trial estimate)	Barristers	VHCC Interim Fixed Fee Offer (IFFO) contracts	Negotiated fixed fees
	Higher courts (e.g. Court of Appeal, Higher courts (e.g. Court of Appeal, Supreme Court)	Barristers and solicitors	Other	Hourly rates

26. Further detail on which aspects of the relevant fee schemes are affected by the proposed changes are set out later in this document. This section sets out the basic structure of relevant fee schemes to provide context for the proposals discussed later in the document.

Litigators' Graduated Fee Scheme (LGFS)

27. The Litigators' Graduated Fee Scheme pays solicitors for work undertaken in most Crown Court cases.¹⁰ The LGFS was introduced in 2008 and was based on the AGFS that had been introduced earlier. However, it is important to note that the schemes are calibrated differently: AGFS fees are mainly driven by offence type and hearing length, whereas LGFS fees place much heavier reliance on PPE as a driver of the overall fee.

28. The LGFS pays litigators a **graduated fee** for Crown Court cases. The amount of the graduated fee is calculated using different pieces of case information known as proxies. These include:

- Case outcome (e.g. trial, guilty plea, cracked trial)
- Pages of prosecution evidence (PPE)
- Offence type (e.g. murder, fraud etc)
- Length of trial in days

29. An uplift or increased payment is made to litigators who represent multiple defendants in a case (20% for 2-4 or 30% for 5+). There are also prescribed payments for retrials and scenarios where a case transfers from one litigator to another.

30. Litigators may claim disbursements for expert fees and reasonable travel expenses incurred during the course of the case.

Other fixed fees

31. Fixed fees are paid for appeals and committals for sentence hearings, for hearings subsequent to sentence, for contempt proceedings and for alleged breaches of a Crown Court order.

Special preparation

32. Under the current LGFS, every page of prosecution evidence (above the PPE cut-off and up to the 10,000-page cap) increases the graduated fee paid. At present, if there are pages in excess of 10,000 then work on these is remunerated under "special preparation" provisions and subject to assessment by the LAA.

¹⁰This excludes cases paid under a Very High Cost Cases contract.

Advocates' Graduated Fee Scheme (AGFS)

33. The AGFS is the fee scheme for Crown Court advocacy work undertaken by both self-employed barristers and Higher Court advocates employed by solicitor firms.

34. The scheme is the eleventh version of the AGFS since its inception, and is also known as "Scheme 11". Scheme 11 has the same basic structure as its preceding scheme, "Scheme 10". Scheme 11 made a number of changes which included moving 40 offences to different bandings, it re-introduced the "very unusual" criteria to special preparation and resulted in a number of fee increases which included:

- basic fees for trials, guilty pleas and cracked trials in sexual offences involving children, dishonesty cases, drugs cases, and a range of other offences
- daily attendance fees and basic fees for trials, guilty pleas and cracked trials in standard cases
- fees for ineffective trials, appeals against sentence and conviction, and elected cases not proceeded; and
- all other fees by 1%

35. Under the AGFS, advocates are paid a graduated fixed fee for Crown Court cases. The formula for how graduated fees for trials are calculated is as follows:

$$\mathbf{GF = BF + (D \times DAF)}$$

Where ---

GF is the amount of the graduated fee

BF is the basic fee specified as appropriate to the band of the offence for which the assisted person is tried and the type of trial advocate

D is the number of days or parts of a day on which the advocate attends at court by which the trial exceeds one day

DAF is the fee payable in respect of daily attendance at court for the number of days by which the trial exceeds one day, as appropriate to the band of the offence for which the assisted person is tried and the type of trial advocate

36. The basic fee for trials is thus dependent on the band of offence and the category of advocate. There are seventeen offence categories, broken down into forty-eight discrete offence bands. The category and band, designed to reflect the average complexity and amount of work required in a typical case, is the critical factor in determining an advocate's fee. Further details can be found under the Banding of Offences in the Advocates' Graduated Fee Scheme (AGFS) Version 1.2, December 2018.

37. When calculating the basic fee, the scheme builds in relativities between different types of advocate: QCs are paid double the rate of juniors, and leading juniors are paid one and a half times the rate of juniors. These relativities also apply to daily attendance fees and fees for guilty plea hearings and cracked trials.
38. The basic fee for trials also includes a “bundled” payment for attendance at day 1 of the trial, and up to three conferences.
39. The daily attendance fee is also dependent on the band of the offence and the category of advocate.

Graduated fees for guilty pleas

40. The basic fee for guilty plea is dependent on the band of offence and the category of advocate. This fee is set at 50% of the basic trial fee for the band of offence.

Graduated fees for cracked trials

41. A cracked trial is one where, following a plea and case management hearing, the case does not proceed to trial whether for a guilty plea or for other reasons such as the prosecution offers no evidence.
42. Currently, a cracked trial fee is payable in cases where a trial cracks in the final third of the period between the date of the PTPH and the date that the first day of the trial is listed.
43. The basic fee for cracked trials is dependent on the band of offence and the category of advocate. Currently, this fee is set at 85% of the basic trial fee for the band of offence.

Other fixed fees

44. Fixed fees are paid for other individual appearances and standard appearances, in particular PTPHs and sentence hearings. The fee is dependent on the length of the appearance, type of appearance, and in some cases, the category of advocate.

Special preparation

45. At present, cases are considered for a special preparation payment if they involve very unusual or novel points of law or factual issues, or the number of pages of prosecution evidence exceeds 30,000 in cases involving dishonesty offences, or 15,000 in cases involving drugs offences, or 10,000 in all other cases.¹¹

¹¹ Further details, including current fees, can be found in the Criminal Legal Aid (Remuneration) Regulations 2013 (No. 435), as amended.

Proposals for amending the fee schemes

46. This section sets out proposals to amend certain aspects of the AGFS and LGFS ahead of the fuller review, namely:

- how litigators and advocates are paid for work on unused material;
- how advocates are paid for work on paper heavy cases;
- how advocates are paid for cracked trials in the Crown Court; and
- how litigators are paid for work on sending cases to the Crown Court.

47. As noted above, how litigators are paid for pre-charge engagement will be the subject of a further consultation following the publication of the Attorney General's disclosure guidelines, which are currently the subject of a public consultation.

48. Please note that all monetary figures quoted exclude VAT.

49. Alongside this consultation paper, we have published an Equality Statement and an Impact Assessment. These should be read in conjunction with our proposals.

Unused material (AGFS and LGFS)

Background

50. Unused material is material that is disclosed to the defence because it is relevant to a case (material that is capable of undermining the prosecution case and/or assisting the defence), but not used as part of the prosecution evidence presented in court.

51. Some degree of work in relation to unused material was modelled into the Graduated Fees Schemes when they were introduced.¹² However, it is widely accepted that volumes of unused material have increased in the last 20 years, in particular digital material (e.g. mobile phone data).

52. The Justice Select Committee's 2018 report on criminal legal aid concluded that the pressure placed on defence lawyers to fulfil their professional obligations by reviewing unused material was fundamentally unfair and – with the continual increase in the amount of such material – likely to become unsustainable, and increasingly prejudicial to the defendant.¹³ These concerns were echoed in the Attorney General's Review of

¹² Refer to Introduction section of this document for more information on how current fee schemes operate.

¹³ <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/1069/1069.pdf>

the efficiency and effectiveness of disclosure in the criminal justice system¹⁴ which recommended a data gathering exercise was undertaken to assess categories, volumes and utilisation of unused material and that these findings should be considered by the review.

53. In 2019, the CPS conducted a comprehensive review of 3,000 Crown Court cases to identify the volume and type of case material, the amount of material being shared with the defence, and the level of activity being undertaken by the prosecution advocate at each stage of the case. This included a review of disclosed unused material.
54. The Ministry of Justice (MoJ) and the CPS established a data sharing agreement in order for CPS case file review data to be shared with and analysed by the MoJ. In addition, the MoJ asked defence solicitor firms to complete a survey asking for further information about the unused material involved in the cases included in the CPS exercise. The MoJ also undertook a qualitative perceptions survey asking barristers about their experience of unused material,¹⁵ and gathered supplementary qualitative information from defence solicitors and barristers in a series of focus groups,¹⁶ to better understand the work undertaken when reviewing unused material.
55. The primary findings from the CPS case file review and the survey undertaken by defence solicitor firms, suggested that most cases had some form of unused material disclosed to the defence, but in the majority of cases the volumes of it were very low. However, the case file review showed there were some outlier cases that potentially had very large amounts.¹⁷

¹⁴<https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system>

¹⁵For more information on our data analysis, please see the accompanying Impact Assessment, Annex B, paragraphs 29-39, p.13-16. Further details about the methodologies behind these data collection exercises can be found here: <https://www.gov.uk/guidance/criminal-legal-aid-review#methodology>.

¹⁶For more information on this please see the accompanying Impact Assessment, Annex C: Supporting Evidence from Practitioner Focus Group Discussions, Findings on Unused Material (AGFS) p.8-14.

¹⁷For more information on our data analysis, please see the accompanying Impact Assessment, Annex A: Further distributional analysis, paragraph 3, Table 21, p.32; Annex B: Unused material, paragraph 9-11, Figure 2, p.6-7. Further details about the methodologies behind these data collection exercises can be found here: <https://www.gov.uk/guidance/criminal-legal-aid-review#methodology>.

Proposals

56. We propose fee increases to the LGFS and AGFS which would affect both solicitors and advocates (including solicitor advocates).
57. We recognise it is likely that the level of unused material served on the defence has increased since it was initially modelled into the fee schemes, to varying degrees depending on the circumstances and type of case.
58. This proposal only applies to cracked trials and trials, and excludes guilty pleas because evidence showed that practitioners do not generally need to review unused material in these cases.¹⁸
59. For reviewing unused material in cracked trials and trials, solicitors and advocates would be paid the equivalent of 1.5 hours' work for 0-3 hours spent reviewing unused material.¹⁹
60. We have chosen to cap this band at 3 hours as we identified that in the majority of trials including cracked trials (86% overall) up to 3 hours' work is undertaken.²⁰ This was estimated using assumptions regarding how much time, on average, providers are expected to spend considering different types of unused material.²¹
61. Within the 0-3 hours band, providers are estimated to spend up to 1.5 hours reviewing unused material in 74% of cases and between 1.5 and 3 hours in 12% of cases. Increasing the threshold to a figure above 3 hours, and correspondingly increasing the payment beyond 1.5 hours, would mean increasing the overpayment to the large number of cases which spend less than 1.5 hours reviewing disclosed unused material. Therefore, paying the equivalent of 1.5 hours for 0-3 hours is reasonable.²²
62. A benefit of having a fixed payment for 0-3 hours' work would also avoid the need for individual assessments for small claims, reducing the administrative burden on providers, and the LAA.
63. Reflecting the differences between the schemes, we have taken a different approach to the fixed fee payable for 0-3 hours' work for the LGFS and the AGFS. When calculating

¹⁸ Please see the accompanying Impact Assessment, Annex B: Unused material, Executive Summary, p.2-3 for more information on this.

¹⁹ All references to hourly rates in this section are the same rates as those prescribed in the Criminal Legal Aid (Remuneration) Regulations 2013 for "special preparation" under each scheme.

²⁰ Please see the accompanying Impact Assessment, Annex A: Further distributional analysis, paragraph 3, Table 21, p.32 for more information on this.

²¹ Unused material is broadly classified as being either documentary (paper) material or electronic material.

²² More information regarding the distribution of cases with 0-3 hours' worth of unused material can be found in the accompanying Impact Assessment, Annex A: Further distributional analysis, paragraph 3, Table 21, p.32.

the basic fee under the AGFS, the scheme builds in relativities between different types of advocate: QCs are paid double the rate of juniors, and leading juniors are paid one and a half times the rate of juniors. Under the AGFS, 0-3 hours' work will be paid the equivalent of 1.5 hours at the relevant hourly rate equivalent to the special preparation rates set out in Table B below.

64. Under the LGFS, the amount of the graduated fee is calculated using different pieces of case information known as proxies. These include:

- Case outcome (e.g. trial, guilty plea, cracked trial)
- Pages of prosecution evidence (PPE)
- Offence type (e.g. murder, fraud etc)
- Length of trial in days

The LGFS does not calculate a graduated fee based on the seniority of litigators. Therefore, under the LGFS, 0-3 hours' work will be paid the equivalent of 1.5 hours of preparation using a midpoint of £43.12 per hour, as the LGFS does not distinguish between seniority of litigators in calculating a graduated fee.

65. In both the LGFS and the AGFS, certain work is paid at hourly rates including work done reviewing evidence in certain circumstances. These hourly rates are set according to the seniority of the litigator or advocate under both schemes. For those cases with more than 3 hours' work spent reviewing unused material, we propose payment should be at hourly rates equivalent to the existing AGFS or LGFS special preparation hourly rates set out in Tables B and C below, subject to the assessment of those claims by the LAA. We have chosen to introduce fees equivalent to special preparation rates because they are currently used to remunerate similar work reviewing evidence (above the relevant threshold cut off point). Similar assessment principles apply to hourly rates claims across the AGFS and LGFS already, and across other existing schemes.

66. If we proceed with this proposal, we estimate there will be up to an additional 12,300 claims each year for time spent reviewing unused material in excess of 3 hours.²³ While we acknowledge that making special preparation type claims can be an additional administrative burden on providers, and the LAA,²⁴ rejected claims rates have been falling and the LAA will continue to work with providers to make the process as efficient as possible, whilst ensuring the right evidence is provided to process claims

²³ Please see the accompanying Impact Assessment, Costs of Option 5, paragraph 84, p.27 for more information on this.

²⁴ Please see the accompanying Impact Assessment, Costs of Option 5, paragraphs 79-80, p.26 for more information on this.

swiftly. We think this policy is proportionate in order to invest money into the right areas in the schemes to fairly reflect work done.

67. We will consider hourly rates as part of the fuller review, particularly in the context of the sustainability of the wider market. The current special preparation rates are in the tables below:

Table B: AGFS special preparation rates

Grade	Rate (per hour)
Junior alone	£39.39
Leading junior	£56.56
QC	£74.74

Table C: LGFS special preparation rates

Grade	Outside London (per hour)	London (per hour)
A – Senior solicitor	£48.36	£50.87
B – Solicitor, legal executive or fee earner of equivalent experience	£41.06	£43.12
C – Trainee or fee earner of equivalent experience	£27.15	£31.03

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

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.

Paper heavy cases (AGFS)

Background

68. Prior to AGFS Scheme 10 all previous versions of the AGFS included PPE as a proxy for complexity; each additional page (up to a maximum of 10,000) increased the overall fees paid to advocates. When AGFS Scheme 10 and 11 were designed, it was under the assumption (shared by representative bodies at the time) that pages of prosecution evidence were no longer a fair proxy for case complexity for the vast majority of cases,

although we recognised it still had a role in relation to drugs and fraud cases. Scheme 11 removed PPE as a proxy for complexity for most offences.²⁵ It resulted in an increase in some payments under the AGFS, particularly for junior advocates.

69. We understand that there are a variety of factors beyond sheer volume of PPE that contribute to the complexity of a case. As part of the fuller review we will consider how far the current brief fees across different offence types reflect this complexity. This will require taking a more holistic view of the AGFS than we have done as part of these initial proposals. Although PPE is not generally a good proxy for complexity, the billing data shows there are outlier cases with exceptional volumes of evidence.

Proposals

70. Ahead of the fuller review where we will look at drivers of complexity more broadly, we propose additional remuneration for cases we consider to be 'statistical major outliers' in terms of the volume of PPE. Information on how we have defined 'statistical major outliers' is set out in the Impact Assessment in the Methodology section for Option 2: Paper heavy cases (AGFS).²⁶

71. The proposed thresholds for the volumes of evidence per AGFS offence type are shown in Table D below. We have included different PPE cut-off points based on offence type to reflect the differing points where 'statistical major outliers' arise. Further detail on the methodology, assumptions and risks, behind these proposed thresholds is in the Impact Assessment which accompanies this document.²⁷

72. AGFS Offences 6 (dishonesty - fraud) and 9 (drug offences) are not within the scope of these proposals as the sub-bandings for these offences already include PPE thresholds. AGFS Offence 1 (murder/manslaughter) has also been excluded. Applying the methodology on statistical major outliers to murder/manslaughter cases would produce a 12,000 PPE cut off point which is higher than the existing 10,000 PPE threshold above which additional payments at hourly rates (as set out in Table B above) can be claimed for these cases. If the proposal applied to murder/manslaughter cases, the number of cases eligible for additional payment at hourly rates would decrease. We therefore propose to maintain the current 10,000-page threshold as the point at which murder cases are eligible for additional payment at the hourly rates in Table B above. We will consider Offence 1 (murder/manslaughter) fees as part of the

²⁵ PPE thresholds only applied to certain fraud and drugs offences.

²⁶ Please see the accompanying Impact Assessment, Option 2: Paper heavy cases (AGFS), Methodology, paragraph 44, p.16 for more information on this.

²⁷ Please see the accompanying Impact Assessment, Option 2: Paper heavy cases (AGFS), Assumptions and risks of Option 2, Table 8, p.19.

fuller review alongside our consideration of brief fees more generally. The proposed PPE thresholds are set out by Offence type in Table D below:

Table D: Proposed PPE Thresholds by Offence Type

AGFS Offence²⁸	Proposed PPE Thresholds (in number of pages)
1	N/A
2	750
3	700
4	750
5	650
6	N/A
7	550
8	600
9	N/A
10	800
11	350
12	750
13	750
14	350
15	150
16	300
17	100

73. After the volume of evidence in a case exceeds its set PPE threshold, we propose remunerating this work at the hourly rates in Table B, subject to the assessment of those claims by the LAA. If we proceed with this proposal, we anticipate up to an additional 4,000 claims for reviewing evidence above the proposed thresholds.²⁹

²⁸ For more detail on the AGFS offence types please refer to Banding of Offences in the Advocates' Graduated Fee Scheme. Available at: <https://www.gov.uk/government/publications/banding-of-offences-in-the-advocates-graduated-fee-scheme>

²⁹ Please see the accompanying Impact Assessment, Costs of Option 5, paragraph 84, p.27.

74. We have chosen to use the existing special preparation hourly rates, because those rates are paid for similar work reviewing evidence for cases above the current 10,000-page threshold.

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

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.

Cracked trials in the Crown Court (AGFS)

Background

75. A “cracked trial” is a case that does not proceed to trial as anticipated either on or before the first day of trial. This might be because the defendant (who previously entered a plea of “not guilty”) decided to plead guilty at a later date, or because the prosecution cannot proceed with the case.³⁰

76. Currently, the basic fee for a cracked trial in the AGFS is dependent on the offence band and the category of advocate (QC, leading junior or junior alone). At present, this fee is set at 85% of the basic trial fee for the band of offence. Currently, only cases that crack in the final third of the time between the PTPH and the date on which the case is listed for trial are eligible for a cracked trial fee. Cases that crack in the first two thirds are paid as a guilty plea. The guilty plea fee is set at 50% of the basic trial fee for the band of the offence.

77. When the AGFS Scheme was revised (Scheme 10) we believed that 85% of the trial fee was the right level for a cracked trial, as the full trial brief fee also included payment for the first day of advocacy. Since then, we have heard concerns about paying for work done and views on whether or not the balance between brief fees and the daily attendance fees (known as “refreshers”) is right. When cases that were due to have longer trial lengths “crack”, advocates have told us that they are concerned about not being properly remunerated for the work they have undertaken in preparing for the trial up to that point. In addition, they do not receive refreshers that they would have done

³⁰ “Cracked trial” is defined in Paragraph 1, Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 (No. 435).

had the trial proceeded. We have been told this is a concern for advocates if they cannot find alternative work to make up the difference.

78. Practitioners who participated in our focus groups observed that preparations for cracked trials were the same as for contested trials as advocates could not reliably estimate whether cases would crack.³¹

79. We therefore consider it appropriate to raise the cracked trial fee from 85% of the trial fee to 100% of the trial fee, to better meet the principle of paying for work done (see proposals below). The fuller review will consider concerns about the ability to find alternative work within the context of its objectives on sustainability.

80. At this stage, we are consulting on changes to the AGFS only in relation to cracked trials. Due to structural differences between the two schemes, the way cracked trials are paid under the AGFS does not apply in the same way as payments for cracked trials under the LGFS. Under the AGFS the cracked trial fee is a fixed percentage of the basic trial fee whereas under the LGFS the fee that is payable is linked to a number of additional factors such as the basic fee, class of offence, the number of defendants, whether the case has been transferred from another provider, or whether the case is a retrial. The PPE thresholds and PPE cut off thresholds within the LGFS do not exist in the AGFS. We will consider cracked trial payments under the LGFS as part of the fuller review.

Proposals

81. We propose to expand the applicability of cracked trial fees to all cases that crack after the first Crown Court hearing (at which a plea is entered), usually the PTPH, removing the thirds distinction from the AGFS. The vast majority (87%) of 2018-19 AGFS cases cracked in the final third.³² This means removing the thirds distinction would not greatly increase the number of cases eligible for cracked trial fees. Removing the thirds distinction would lead to better case management and closer aligns with the principles underlying the LGFS and CPS fee schemes, although we acknowledge that these are separate schemes which operate differently in practice.

82. We also propose to increase the AGFS cracked trial basic fees from 85% to 100% of the brief fee. This means that all cases that are listed for trial and subsequently crack (for whatever reason) will be paid the same basic brief fee as the advocate would have

³¹ For more information on this, please see the accompanying Impact Assessment, Annex C: Supporting Evidence from Practitioner Focus Group Discussions, Findings on Cracked trials in the Crown Court (AGFS) p.21-30.

³² Around 25% of AGFS bills are for 'cracked trials'. 89% of these crack in the final third, 7% crack in the second third and 4% crack in the first third.

been paid had the trial gone ahead. This reflects that advocates will be ready for trial ahead of the expected start date of the trial.

83. Therefore, the proposed increase in the cracked trial fee will more adequately remunerate advocates for work done in preparing a case for trial.

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

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.

Sending cases to the Crown Court (LGFS)

Background

84. The Better Case Management (BCM) initiative was introduced in January 2016.³³ BCM links key initiatives, which together should improve the way cases are processed through the system, for the benefit of all concerned within the criminal justice system (CJS).

85. BCM forms part of the implementation of Sir Brian Leveson's report 'Review of Efficiency in Criminal Proceedings'; it is based on the overarching principles or themes of the report:

- Getting it Right First Time;
- Case Ownership;
- Duty of Direct Engagement; and
- Consistent judicial case management.

86. This initiative is reflected in the Criminal Procedure Rules which now provide that the parties are required to actively assist the court in fulfilling its duty to ensure that criminal cases are dealt with justly.³⁴ Such active assistance includes communication between the parties at all times and identifying disputed issues ahead of the case being sent to the Crown Court for trial. Defence solicitors need to assess the relative strengths of the prosecution and defence cases to be able to advise accurately on plea. In particular, the aim of BCM (and the Criminal Procedure Rules and the sentencing guidelines on discount for early guilty plea) is to encourage the defendant, and hence the defence

³³ <https://www.judiciary.uk/subject/better-case-management-bcm/>

³⁴ <https://www.justice.gov.uk/courts/procedure-rules/criminal>

solicitor, to consider plea and anticipated trial issues at an earlier stage before allocation and sending, if possible.

Proposals

87. We therefore propose to pay litigators for the work that the BCM initiative now emphasises should be done as early as possible. We believe this proposal would pay better for the work done ahead of cases being sent to the Crown Court to comply with the BCM initiative and the Criminal Procedure Rules.
88. We propose increasing LGFS fees for cases sent to the Crown Court for trial by the equivalent of 2 hours' work done in the magistrates' court (£45.35 per hour) to cover the additional BCM work now done ahead of sending cases to the Crown Court.³⁵ This is the current hourly rate prescribed in regulations for the purposes of calculating the appropriate standard fee in magistrates' court cases. The proposed fee increase is based on our estimate of the work required to comply with the requirements of the BCM initiative, and that while the time involved will very much depend on the circumstances of the case, we think that on average 1-2 hours work is likely to be done to comply with the BCM initiative before cases are sent to the Crown Court. However, we would welcome consultees' views on this.
89. We have not yet considered the overall suitability of these or other hourly rates across all fee schemes, but we will do this as part of the fuller review, particularly in the context of the sustainability of the wider market.

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.

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.

³⁵ £45.35 per hour is the rate for magistrates' court work which is equivalent to the work done ahead of sending cases to the Crown Court.

Impact Assessment, Equality and Welsh Language

Impact Assessment

90. The Impact Assessment accompanying this consultation document provides monetised details of the anticipated impacts of implementing these proposals. We would welcome information and views on this to help us improve the quality of our assessment.
91. We will publish a government response to this consultation in due course which will set out those reforms we intend to implement. At this stage we will also publish a revised Impact Assessment setting out revised estimates in light of any changes to the proposals following the consultation.

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.

Equality

92. The Equality Statement accompanying this consultation document considers the likely equality impacts on solicitors (and solicitor advocates), barristers and defendants from the proposals set out in this consultation.
93. For each proposal we have indicated, on the basis of the latest available evidence, what the likely impacts on equality are. The specific equalities questions below are designed to invite stakeholder feedback on each of these proposals and their impacts in this consultation. Following the results of the consultation, we will review the impacts and update this Equality Statement where necessary.

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.

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.

Welsh Language Impact Test

94. We are not proposing to restrict the advocacy or litigator markets, nor treat them differently in Wales than we do in England. Pre-consultation, we do not consider these proposals will have an impact on legal services through the medium of Welsh. Please see the accompanying Impact Assessment for more information.
95. In accordance with our Welsh Language Scheme we have also issued the Executive Summary of our consultation in Welsh. The translation can be found here: <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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

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.

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

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.

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

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.

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.

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.

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.

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.

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.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by [insert date] to:

Email: criminallegalaidreview@justice.gov.uk

Criminal Legal Aid Review team
Ministry of Justice
102 Petty France
London SW1H 9AJ

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

Alternative format versions of this publication can be requested from criminallegalaidreview@justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in [insert publication date, which as far as possible should be within three months of the closing date of the consultation] months' time. The response paper will be available on-line at <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the Department publishes a response to the consultation in accordance with the access to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if the Department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf



© Crown copyright 2020

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Alternative format versions of this report are available on request from criminallegalaidreview@justice.gov.uk