



Ministry
of Justice

Government's response to the Criminal Legal Aid Independent Review and consultation on policy proposals

Executive Summary

CLAIR Consultation Full Government Response Executive Summary

1. The government's full response to the Criminal Legal Aid Independent Review (CLAIR) and consultation on policy proposals follows the 'government's interim response to the criminal legal aid independent review and consultation on policy proposals' which was published on 20 July 2022. It outlines a summary of the consultation questions and the responses we received, as well as a detailed government response and policy proposals for each of the themes and specific questions raised in CLAIR and the consultation.
2. The consultation paper 'government's response to the Criminal Legal Aid Independent Review and consultation on policy proposals' was published on 15 March 2022. It invited comments on analysis and proposals put forward in response to CLAIR, published in December 2021 by Sir Christopher Bellamy KC (now Lord Bellamy KC), which explored what is working well in the criminal justice system and what additional work needs to be done to improve criminal legal aid for providers and the public.
3. The interim response committed to increase most fees by 15% and this came into force on the 30 September 2022. Following further consideration and discussions with the Criminal Bar Association (CBA) and the Ministry of Justice, we were also able to lay a Statutory Instrument in October 2022 to apply the 15% increase to cases that already had a representation order granted on or after 17 September 2020 but had not yet had a main hearing. The full consultation response focuses on proposals for longer-term reform and outlines that we are largely taking forward the recommendations proposed in CLAIR.
4. A total of 203 responses were received on the consultation paper. Over 63% of these responses were from current and former solicitors. Other respondents included the main criminal legal aid profession representative bodies, barristers, law students, academics and a member of the public.
5. An Impact Assessment as well as an updated Equality Statement has been published alongside the full response.

The future of the criminal legal aid professions

Advisory Board

6. CLAIR noted that "negotiations with the MoJ tend to be conducted bilaterally with the main provider interests", an approach which does not give partners an opportunity to work together. Respondents were therefore asked for their views on establishing an Advisory Board to bring together stakeholders from across the criminal justice system to discuss the role of criminal legal aid.
7. The government has now established the Criminal Legal Aid Advisory Board (CLAAB) to bring together criminal justice system partners to consider the role of criminal legal aid within the context of the wider criminal justice system, with a view to ensure that criminal legal aid schemes comprise of the right structure and

incentives to support the wider objectives of a high performing criminal justice system. The Board met for the first time at the end of October 2022 and will meet quarterly.

Unmet need and innovation

8. CLAIR identified concerns around the sustainability of specific markets for criminal legal aid and that in certain geographic areas there is a risk of supply failure for duty solicitors. The consultation proposed expanding the Public Defender Service (PDS) to provide additional capacity in the criminal legal aid market. The government believes the (PDS has an important role to play, including dealing with cases of market failure. We do not currently have any plans to expand the PDS but will consider whether it has a role to play in testing new ways of working. In addition, the Legal Aid Agency (LAA) has started work on the design of a future Standard Crime Contract (SCC) to increase the sustainability of the legal aid market and to promote more efficient ways of working.

Training and Accreditation Grant Programmes

9. CLAIR recommended making training grants available for solicitor firms to address recruitment and retention difficulties that could lead to an unsustainable criminal solicitor market. The government is proposing to allocate the suggested £2.5m, in a steady state, for training grants (as well as the proposed approximate £3m for PDS expansion) to solicitors' fees for police station work, so that the whole package would benefit the wider solicitor profession. As well as reallocating around £10m proposed for Litigators' Graduated Fee Scheme (LGFS) reform to police station fees as that would benefit more solicitors' firms more quickly.

Diversity

10. CLAIR noted that male barristers specialising in public criminal work tend to earn more than their female counterparts, and this is generally true when the comparison is made between barristers with the same seniority. The government will continue to keep the issue of disparity in barrister's income under review, in conjunction with the Bar Standards Board (BSB). The BSB has a programme of work underway to clarify its expectations of chambers in promoting equality. This issue will also be considered by CLAAB, along with diversity within the criminal legal aid profession more generally.
11. CLAIR recommended that grants could be made available to ensure that diverse young barristers are not excluded from the profession in the entry years of practice at the Bar, due to the level of available fees. The increase of fees of up to 15% that came into force on the 30 September 2022 will help to attract and retain a diverse range of criminal practitioners. The government will continue to work with the representative bodies and the legal regulators, including the Legal Services Board (LSB), to examine the impact of sector-led diversity initiatives already in place which tackle barriers to entry, and any additional initiatives, through effective evaluation of these schemes. Further, the LAA will engage with stakeholders in the development of the future SCC, to consider how the duty solicitor arrangements might best

accommodate those with different working patterns, including those with caring responsibilities.

Quality issues

12. CLAIR identified a gap in the system around quality control for advocacy, arising following the decision not to proceed with the Quality Assurance Scheme for Advocates. The consultation raised that this issue should be considered further once the LSB's consultation on its statement of policy on ongoing competence has concluded. The consultation also raised that as part of a review of the SCC, the government would seek to ensure that contracts with providers promote high quality standards. The LAA intends to review its suite of quality measures as part of the development of a future SCC to ensure that the need for high quality legal services is balanced with appropriate cost and administration to providers in delivering those services.
13. The consultation proposed that the government should explore creating a Lord Chancellor's list of advocates, with membership based on quality of advocacy and consistency of service. Consultation respondents significantly opposed our proposal to explore the creation of a Lord Chancellor's list of criminal defence advocates; therefore, we will not take this forward at present but will keep the issue under consideration.

Technology

14. CLAIR noted that remote technology could save costs and time and could encourage case ownership, particularly for administrative matters. It also noted the inconsistency in the use of technology between different courts. The government recognises that technology, including remote technology, remains a valuable tool to support efficient and effective ways of working in the criminal justice system. The LAA is planning work to redesign and replace legacy services across the billing and payment systems to remove complexity and effort in order to improve efficiency for caseworkers and providers. Additionally, the Video Hearings Service is HM Courts & Tribunals Service's strategic video hearings solution that provides for fully remote and hybrid hearings, as well as telephone participation, delivering flexibility and increased capacity across the court estate.
15. These measures aim to improve the operation of the whole criminal defence market and justice system. They are designed to make the criminal justice system more efficient – particularly around new technology – and the criminal defence market more sustainable.

The Police Station

16. The main issue identified in CLAIR with police station fees was that the existing fixed fees do not differentiate between case complexity. There were two options put forward in the consultation for structural reform: option 1) the CLAIR recommendation to create standardised fees; and option 2) adapting the existing escape fee threshold. The government will consult further on a standard fee model

for police station fees based on time spent and to ensure the fee scheme more appropriately reflects the work done in police stations.

17. The government will re-invest the steady state £16m for longer-term reforms into harmonising the lowest paid police station fees and will consult further on the detail of this proposal. In order to minimise any further complexity, we will be keeping the fee scheme on practitioner seniority as it is so there will be no distinction between senior and junior practitioners.
18. Once these initial reforms to the Police Station fee scheme have been completed, we will look at subsuming Pre-Charge Engagement (PCE) into the fee scheme. We will consult further on the detail of how this can be done.
19. CLAIR highlighted the concern that the uptake of free legal advice in police stations is low. The consultation sought views on the potential further roll out of the Presumption of Legal Advice ('Opt out') scheme, which automatically opts children in to receiving free legal advice in custody. The PoLA scheme has been successfully trialled by the Metropolitan Police Service (MPS) and has now been rolled-out across all their custody suites. The government supports the MPS and wider police in this work and will continue to collaborate with them, the LAA and Home Office to monitor the trial and its impacts. We propose using this data to review what the trial could look like if rolled out for all children nationally.
20. CLAIR noted that Chartered Institute of Legal Executives (CILEX) professionals face difficulty being accepted as duty solicitors as they are required to be accredited under the Law Society (TLS) scheme. The consultation proposed working with the representative bodies and the LAA to review this position, to enable CILEX professionals to become duty solicitors without having to undergo additional qualifications. The government has committed to making it easier for appropriately qualified CILEX lawyers to take up roles as duty solicitors. We are therefore engaging with CILEX, the LAA and the Law Society, with a view to understanding how the similar CILEX qualification can be recognised within the legal aid scheme.
21. CLAIR pointed to complaints about the running and efficiency of the Defence Solicitor Call Centre (DSCC) and the consultation sought views on how we can further improve the DSCC, particularly around the impact of digitalisation and automation of LAA processes. On the DSCC, the LAA is committed to exploring improvements to the service, including making greater use of opportunities for digitisation and automation.

The Magistrates' Court

22. Post-charge engagement refers to the period after the police have charged the suspect but before the first hearing in the Magistrates' Court. CLAIR highlighted several operational issues with post-charge engagement and recommended additional funding be allocated. The government is committed to ensuring that different partners in the criminal justice system engage with each other at the earliest possible opportunity. However, because the main issues raised in the consultation response with post-charge engagement is linked to operational issues (such as

delays caused by other parties), we are not intending to make any changes to the way post charge engagement is currently remunerated.

23. CLAIR concluded that structural reform to the current Magistrates' fee scheme was unnecessary, and this was reflected in most of the consultation responses. We do not intend to reform the Magistrates' Court fee scheme beyond the 15% fee increase already implemented.

The Crown Court

24. CLAIR suggested that a standard fee structure would address the current perverse incentives highlighted in the Litigators Graduated Fee Scheme (LGFS) scheme. A standard fee regime leans more towards simplicity, whereas the current LGFS scheme reflects work done through proxies such as Pages of Prosecution Evidence (PPE). It is the government's intention to model and consult on a revised LGFS scheme based on current data and assumptions developed in conjunction with practitioners, with a view to rely less heavily on PPE and instead focus fees more on fixed basic fees for each offence type. We expect to consult on a revised LGFS scheme by early 2024. The work to revise the LGFS will engage a sub-group of CLAAB.
25. An additional £3m (over the remainder of the Spending Review (SR) period) will be invested to enable broadening of the circumstances in which Wasted Preparation payments can be made, alongside changes to the availability of Special Preparation, under the Advocates Graduated Fee Scheme (AGFS). We will develop detailed criteria for disbursement of the new funding in consultation with CLAAB.
26. CLAIR made a series of recommendations to remedy issues with the existing AGFS remuneration model and to promote fair remuneration under the scheme. Further work will be required to achieve the long-term reform of the AGFS called for in CLAIR. In particular, we need to assess whether brief and hearing fees continue to remunerate advocates reasonably for preparatory work in the majority of cases and determine at what point (and for which reasons of complexity) a case becomes exceptional and should benefit from a higher fee. In order to do this, we propose working with advocates and their representative bodies to gather more data.
27. Pre-recorded video evidence and cross-examination (Section 28) is one of a range of special measures available for vulnerable and intimidated victims and witnesses, supporting them to give their best evidence. The government has allocated an additional £4m (over the remainder of the SR period) to defence advocates involved in hearings conducted under Section 28 of the Youth Justice and Criminal Evidence Act 1999. We will consider options for engaging with practitioners on next steps for remuneration of s.28 work, with an aim to gather data on the extra work involved in s.28 hearings to inform future changes to the fee structure.

The Youth Court

28. There were two options put forward for the consultation regarding youth court fees: option 1) Widening the scope for “Assigned Counsel” to all Indictable Only offences; and option 2) Enhanced youth court fee for all Indictable Only and Triable Either Way offences. The enhanced fee option received the most support from the consultation responses. We will therefore implement this and consult further on the details of applying the enhancement within the current fee scheme. The government will allocate an additional £5m, in a steady state, towards Youth Court fee reform, on top of the wider uplift to Magistrates’ Courts fees.
29. CLAIR also recommended that regulators develop a form of accreditation for all practitioners undertaking Youth Court work and that the higher rates for Youth Court work should be available only to those who have the necessary accreditation. The government believes that accreditation should not be a formal requirement for lawyers receiving increased fees for youth court work.

Other criminal legal aid issues

30. CLAIR recommended an increase of 15% for litigators’ fees for Very High Cost Cases (VHCCs). The government has accepted this recommendation and the increased fees came into force on 30 September 2022. The government agrees with CLAIR that the Interim Fixed Fee Offers (IFFOs) scheme needs to be clarified. We will engage with practitioners on revising the VHCC arrangements to ensure that advocates are remunerated fairly and proportionately for VHCCs. This would be on a cost-neutral basis. We will develop proposals and consult on this ahead of clarifying the scheme in regulations.
31. CLAIR recommended that existing fixed fees for advice and assistance on applications to the Criminal Cases Review Commission (CCRC) should be restructured to standard lower, higher, and non-standard fees to reflect complexity and time likely required to be spent. The government proposes to devise standard fees for CCRC cases with a lower and higher standard fee, reflecting different levels of work undertaken dependent on the complexity of the matter, similar to non-standard fees in Magistrates’ Court work.
32. CLAIR found that prison law cases are complex and that the fixed fee and the current escape fee mechanism did not reflect this complexity. CLAIR recommended that fees for advice and assistance cases should be reformed into a system of standard fees. The government will not be increasing fees for prison law advice and assistance at this stage. Instead, we want to focus investment on reforming and improving engagement in the early stages of criminal cases, helping divert people out of the criminal justice system and reduce backlogs. The government agrees with CLAIR that fees for prison law advice and assistance should be reformed into a system of standard fees and will take forward work on this.