



Ministry  
of Justice

# **Government's response to the criminal legal aid independent review and consultation on policy proposals**

March 2022

CP 645



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of Justice

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Presented to Parliament

by the Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice

by Command of Her Majesty

March 2022



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ISBN 978-1-5286-3218-8

E02724587                      03/22

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of  
the Controller of Her Majesty's Stationery Office

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# Foreword

The pandemic has been exceptionally challenging for our justice system. We owe our whole legal profession – solicitors, barristers, court staff and judiciary – a debt of gratitude for keeping the wheels of justice turning over the last two years. Thanks to their efforts, we are making headway in tackling the court backlog, and getting back to a more normal way of working – in the interests of victims, witnesses and the wider public.

We are very grateful to Sir Christopher Bellamy for his comprehensive and invaluable Independent Review of Criminal Legal Aid (CLAIR), along with his panel of experts, and everyone who contributed their views.

This is a crossroads moment for our justice system, as we build back a stronger and fairer society after the pandemic. Our legal aid system needs the investment to ensure continued high standards of representation before our courts, and sustainable criminal legal professions.

With that in mind, the Government accepts CLAIR's case for increases to fee schemes, and is proposing a 15% uplift for most schemes as soon as possible, injecting an additional £115 million a year into the system. In addition, we will hold £20 million a year for longer term investment, including reform of the Litigators' Graduated Fee Scheme (LGFS), the youth court, and the wider sustainability and development of solicitors' practice. Overall, this will increase our investment in criminal legal aid by an additional £135 million a year in line with Sir Christopher's recommendations. Alongside investment in court recovery, it will bring total taxpayer funding for criminal defence to £1.2 billion a year – the highest level of investment in criminal legal aid in a decade.

In the immediate term, our proposed cash injection will give a 15% boost to police station, Magistrates, elements of LGFS, Advocates' Graduated Fee Scheme (AGFS), solicitors in very high cost cases, and some smaller schemes. We will also support the next generation of criminal lawyers by making up to £2.5 million available for training grants for solicitors.

Our accompanying reforms will also ensure we can deliver on Sir Christopher's vision over the longer term, to put our legal aid system on stable and sustainable footing for the future. This includes reform of fee schemes, so they fairly reflect the way our legal professions work in the real world today – not when the schemes were first devised.

With this in mind, CLAIR made a number of non-fee recommendations about the future of criminal legal aid, which we also intend to take forward. This includes recommendations on diversity, the sustainability of the criminal defence market, and harnessing the power of new technology.

Supporting a sustainable, diverse and stable criminal defence market depends on both the right fees and an adequate supply of practitioners. As CLAIR highlights, getting this right

means supporting a more diverse range of practitioners in the long term – and drawing on talent from across all of our legal professions.

Like CLAIR, we believe Chartered Institute of Legal Executives (CILEX) professionals have an increasingly important role to play in the criminal defence market. So, for example, we want to remove the need for additional qualifications, enabling them to become duty solicitors more easily.

We will work with the professions and regulators on how we can collectively promote greater diversity across the system. We are also exploring new ways of delivering remote legal advice in police stations, removing barriers to this type of practice for people with caring responsibilities – which disproportionately impacts on women. We will also gather views on how and where innovative new technology can be used positively, and to greater effect.

CLAIR found that the long-term sustainability of the criminal solicitor profession was a particular challenge. To address this, we propose reviewing the Standard Crime Contract to reduce burdens and barriers to innovative ways of doing business. In addition to providing grants for training contracts for criminal solicitors, we will support solicitor advocates to gain higher rights of audience.

Overall, our proposed reforms will respond to CLAIR by increasing the efficiency across our system, delivering swift justice for victims and defendants, by incentivising early advice and resolution where that is appropriate. Our plans will reinforce a more sustainable market, with publicly funded criminal defence practice seen as a viable, long-term, career choice – attracting the brightest and best.

We are delivering on these objectives in line with CLAIR, to put our legal aid system on a sustainable and stable footing for years to come – for the benefit of the victims of crime, and everyone in our society who relies upon a robust and effective criminal justice system.



Rt Hon Dominic Raab MP  
**Deputy Prime Minister, Lord Chancellor  
and Secretary of State for Justice**



James Cartlidge MP  
**Parliamentary Under Secretary of State  
for Justice**

# Introduction

## Background

1. In December 2020 the Government commissioned the Criminal Legal Aid Independent Review (CLAIR), which considered criminal legal aid provision in England and Wales. The Review was undertaken by Sir Christopher Bellamy QC, a former judge with a wealth of legal experience. CLAIR was the second part of a wider review of criminal legal aid that was announced in December 2018. The first part of the review considered opportunities for reforming criminal legal aid throughout the life cycle of a case. That process focussed on priority areas for reform in light of pressing concerns from practitioners identified early on. These became known as the 'accelerated areas' in which we agreed to fast-track policy development. They included payments for examining unused material, cracked trials in the Crown Court, paper heavy cases, early engagement by defence practitioners (i.e. pre-charge advice) and payment to litigators for attending sending hearings (cases which are sent to the Crown Court).
2. Over the past four years the Government has boosted the amount available to criminal law practitioners by up to £74 million. Despite delays because of the pandemic, this is now starting to reach practitioners as cases make their way through the courts and bills from practitioners start to arrive at the Legal Aid Agency (LAA).
3. Both parts of the review shared the common goal of achieving a sustainable, efficient criminal legal aid system that drives efficiency and effectiveness in the courts. The Government wants to ensure that criminal legal aid continues to promote fairness towards all users of the justice system including victims, defendants and defence practitioners and build confidence in the justice system. The Government understands that the review has been long awaited with the length of time taken having been exacerbated by the demands of the pandemic. However, given its importance it is right that Government has taken the time needed to consider these issues properly in the round. This consultation has been published alongside the Means Test Review of legal aid, which seeks to ensure access to justice by making various changes to the means test for legal aid – ensuring that legal aid is available for those who need it the most.
4. The Government also wants to preserve the strong reputation of the English and Welsh justice system throughout the world. To do so, it is important we ensure that a career in publicly funded criminal legal practice remains desirable and achievable for talented and diverse practitioners. This is why our ambition for criminal legal aid sits alongside, and complements, our ambitions to support a greater role in the criminal justice system for Chartered Institute of Legal Executives (CILEX) professionals and solicitors, particularly solicitor advocates. The talents of these professionals will, over

time, feed through to England and Wales' outstanding independent judiciary that is widely admired as an international leader.

## **Aims and terms of reference**

5. CLAIR's Terms of Reference set out two main objectives:

**1) To reform the criminal legal aid fee schemes so that they:**

- a) fairly reflect, and pay for, work done.
- b) support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce.
- c) support just, efficient, and effective case progression; limit perverse incentives, and ensure value for money for the taxpayer.
- d) are consistent with and, where appropriate, enable wider reforms.
- e) are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies.
- f) ensure cases are dealt with by practitioners with the right skills and experience.

**2) To reform the wider criminal legal aid market to ensure that the provider market:**

- a) 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.
- b) operates to ensure that legal aid services are delivered by practitioners with the right skills and experience.
- c) operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

6. Sir Christopher Bellamy QC was supported throughout by an Expert Advisory Panel who assisted the review by contributing expert advice, testing and challenging its emerging findings and recommendations. The Panel was composed of experienced members with a range of backgrounds, including defence practitioners, the judiciary and academia, bringing significant skills and expertise that assisted the review in its analysis of the criminal legal aid system. Extensive evidence gathering was also undertaken and 330 responses were submitted to the review's 'Call for Evidence'. This was supplemented by evidence drawn from a variety of focus groups, surveys

and academic roundtables and visits to key partners across the criminal justice system including courts, police stations, LAA operational teams, barristers' chambers and solicitors' firms.

## The CLAIR Report

7. The final report was published by the Lord Chancellor, Rt Honourable Dominic Raab MP on 15 December 2021 alongside the Government's plans for responding to the review in a Statement to Parliament. The report made 19 recommendations, listed in full, alongside a summary of the Government's proposed responses at **Annex A**.

## Consultation

8. This response includes policy analysis and proposals for public consultation. All areas that are being consulted upon are listed in **Annex B**. The deadline for responses is **7 June 2022**.

# Chapter 1: The Role of Legal Aid in the Criminal Justice System

9. The presumption of innocence is regarded as the 'golden thread'<sup>1</sup> that runs through our criminal justice system. Faced with the prosecution, who have significant skills and resources to prepare their case, collate evidence, and call witnesses, 'equality of arms' is essential in protecting a defendant's right to a fair trial and criminal legal aid exists to safeguard that right.
10. Criminal legal aid ensures justice for those accused of a crime throughout the criminal justice system. It will pay for advice from one's first interview at the police station, to entering a plea or setting a date for a further hearing or trial, the full trial at the Magistrates' Court or the Crown Court and any subsequent appeal. Criminal legal aid supports the delivery of criminal justice in the best interests of the suspect or defendant as well as those of complainants, victims and wider society.
11. In some cases, taking a legally aided client through this process can be facilitated by several professionals including solicitors and solicitor advocates, legal executives, barristers and paralegals. For some suspects, accused or defendants the involvement of multiple practitioners will be essential to their case but for many a single practitioner can efficiently and effectively support and represent them through the criminal justice system. That is why our proposals on legal aid sit alongside our ambition to remove barriers to CILEX professionals working within the criminal justice system. It is also why we are looking at how best to increase opportunities for solicitors to achieve and exercise higher rights. The Government believes the structure of legal aid and the incentives it creates should always be designed with the interests of justice and aiding the defendant at its heart. Beyond legal practitioners the importance of the quantity and quality of the interaction between defence professionals and other professionals throughout the criminal justice system such as the police and the Crown Prosecution Service (CPS), is a theme that runs through CLAIR.

## Sir Christopher Bellamy QC's Review

12. In recognition of the importance of the interaction between different parties delivering criminal justice services, Sir Christopher took a 'whole system' approach in carrying out his review. His focus on improving engagement by all parties in the early stages of a case seeks to ensure that the entire system benefits from these efforts during subsequent stages.

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<sup>1</sup> *Woolmington v DPP* [1935] AC 462, 481.

13. The Government considers that this approach has great merit. This is why it is important that we consult on CLAIR's recommendations in the round and not on an issue by issue basis. In responding to CLAIR's recommendations the Government is seeking to ensure that we prioritise action in the areas that will deliver the greatest benefit for the whole system and support our wider ambitions on beating crime and improving the delivery of criminal justice. This will support timely case progression, which is in everyone's interests, particularly the victims of crime for whom early resolution will prevent the need to relive trauma during lengthy or protracted criminal proceedings.
14. The review has been carried out at a time when legal professionals, like many others delivering important public services, have experienced huge changes in the way they are required to work as a result of the pandemic. Whilst this situation has presented significant challenges, including a backlog of cases in the Crown Court, there are some opportunities to take the new approaches and learning from this period. For example, in relation to remote hearings and remote working, the LAA has been undertaking work on the use of digital signatures to assist case progression, to consider how we might be able to make improvements to the efficiency of the criminal justice system.
15. The Government also welcomes the Lord Chief Justice's recent guidance on the use of remote technology in courts in England and Wales and the Government is interested in exploring (see paragraphs 68-74) the experience of remote technology elsewhere in the criminal justice system and what practical support could be provided throughout in rolling out the technology to support its use.

## Legal Aid Spend

16. Legal aid supports the delivery of a significant proportion of matters considered in criminal courts across England and Wales. To set the review in some context, it is helpful to consider the scale of spend on criminal legal aid.<sup>2</sup>
17. Over recent years spend has decreased; in 2013-14 total spend was £985m and by 2019-20 it had reduced to £841m. This has been driven by a reduction in the volume of cases, which have fallen from 1.45m in 2013-14 to 1.06m in 2019-20. It is worth noting these falls were similar across both the Crime Lower (police station and Magistrates' Courts) and Crime Higher (Crown Court) areas, although smaller reductions for police station claims mask higher falls seen within the Magistrates' Court. Over this period Crown Court average costs have gone up due to case mix

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<sup>2</sup> The LAA spend figures in the following paragraphs are taken from the following published statistics: Legal aid statistics: July to September 2021 - GOV.UK ([www.gov.uk](http://www.gov.uk)). Figures for LGFS and AGFS include legacy schemes.

generally becoming more complex<sup>3</sup> and from increases in cases with high page counts of prosecution evidence. Average case costs rose from £2.6k to £4.2k for the Litigators' Graduated Fee Scheme (LGFS) by 63% and from £1.9k to £2.5k for the Advocates' Graduated Fee Scheme (AGFS) by 33%, this particularly reflects the impact of pages of prosecution evidence on the LGFS. In terms of the impact of the pandemic, overall criminal legal aid workload was lower again in 2020-21 (0.95 million cases). This was caused by fewer cases being able to be heard in the early stages of the pandemic.

18. Criminal spend in 2019-20 comprised £109m on Magistrates' Court representation, £126m on police station advice, £19m on other crime lower<sup>4</sup> work, £366m on LGFS, £210m on AGFS, £3m on Very High Cost Cases (VHCCs) and £8m on other crime higher<sup>5</sup> work. In 2020-21 criminal legal aid spend was £575m, comprised of £91m on Magistrates' Court representation, £115m on police station advice, £18m on other crime lower work, £208m on LGFS, £132m on AGFS, £4m on VHCCs and £6m on other crime higher (Crown Court). Spend was lower in 2020-21 due primarily to the lack of jury trials, but it is expected to exceed pre-pandemic levels in the near future from an increased number of cases being heard.
19. Through the Accelerated Items, which were implemented in September 2020 and which formed the first stage of the Criminal Legal Aid Review, we have increased funding in the system by £35-£51 million per annum for providers in steady state. Based on 2019-20 data, this represents an increase to AGFS spend of 9%-13% and an increase to LGFS spend of 5%-7%. It is expected that an additional £27m will be spent, as a result of these measures by 2022-23, rising to £36m by 2023-24. The flow of this funding through the system has been slower than expected due to the effects of the pandemic on the court system and lower than expected numbers of providers making claims where they are eligible but by the end of 2025, additional spend should be at 96% of steady state funding levels.
20. The Government's planning assumptions for sitting days in the coming years estimates sitting at least 105,000 days in each of the next three financial years. The final allocations for each year will be agreed through the concordat process between the Lord Chancellor and the Lord Chief Justice. However, these numbers, in conjunction with other elements of recovery in the Crown Court, would mean additional criminal legal aid spend of over £200m. The government's proposals in this consultation would also add up to an additional £135m p.a. in steady state comprising an expected £115m p.a. which includes fees for which we have put forward detailed proposals and solicitor training grants, and around an additional

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<sup>3</sup> This has been caused by both changes in the types of crimes being committed in wider society and also behavioural shifts by the police and CPS in terms of focusing resources more on serious violent and sexual crimes.

<sup>4</sup> Other crime lower covers prison law, advice & assistance and appeals

<sup>5</sup> Covering legal aid for the higher courts (Court of Appeal, Senior courts cost office and the Supreme Court)

£20m p.a. for longer term reform. This raises the investment in criminal legal aid to £1.2bn p.a. – the highest level of investment in over a decade.

## Data

21. CLAIR highlighted that in order to make good public policy concerning the provision of criminal legal aid, there is a need to improve the availability of data to enable better assessment of the efficiency, effectiveness, incentives and costs of providing these services. In support of the review, in February 2021 the Ministry of Justice (MOJ) published the [Data Compendium](#). To help inform decisions and the conclusions of CLAIR, the Law Society (LS), the Bar Council (BC), the LAA, the CPS and the MOJ worked together to combine some of their key datasets.
22. We have been able, for the first time, to combine publicly funded legal aid case payments with information on the characteristics of law firms and advocates that received those payments. Furthermore, this has been done over several years, which enables assessment of changes over time. Therefore, the dataset allows a richer analysis of the publicly funded criminal legal system than has previously been possible.
23. In addition to the data compendium, the review carried out a financial survey to investigate the profitability of firms operating in the criminal legal aid market. The key aim of the CLAIR survey was to gather evidence on the profitability of firms in the criminal legal aid market over the last three years and the current remuneration of the various legal professionals/roles in the firm. The details of this survey are in Annex J of the CLAIR Report.
24. A similar exercise was carried out to better understand the profitability of the criminal bar, which focused on income and expenses. This can be found in Annex L of the CLAIR report.
25. Other data gathered in CLAIR included a summary of trends in criminal legal aid (Annex C) and qualitative data from focus groups with legal aid practitioners (Annex E) of the CLAIR report.
26. In the future the Government intends to work closely with legal practitioners and other participants in the criminal justice system in the Advisory Board to gather further data to support policy making (see paragraphs 29 to 35 on the Advisory Board).

## Chapter 2: The future of the criminal legal aid professions

27. The regulation of the legal professions is and will remain, independent of Government. Legal practice is continuously evolving in the modern world, as seen with the growth of solicitor advocates and the increase in employed barristers, particularly in public sector organisations such as the CPS. It is a corollary of regulatory independence and a private market that the Government should not be “picking winners” in how practitioners conduct their affairs.
28. The intended beneficiaries of criminal legal aid in England and Wales are those suspected or accused of crimes. Their interests are best protected by a modern and flexible system which pays for them to receive appropriate representation without making presumptions about by whom or how it is delivered. The Government's goal is therefore to ensure that talent is drawn into criminal defence practice, that it is developed and retained, and that a variety of practitioners have access to all the work available on an equal footing, regardless of how their business is established.

### Advisory Board

#### Response to recommendations 1 (Advisory Board) and 4 (Data)

29. Strong working relationships are a cornerstone of the criminal justice system – Government Ministers and officials have regular and extensive contact with criminal justice partners, including with criminal defence practitioners and in the run up to the publication of this consultation. 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. The professions have echoed this, and Government agrees that isolated working reduces the effectiveness and efficiency of the criminal justice system.
30. Building and improving existing relationships leads to more harmonious working. The Government wants to work together with our criminal justice system partners to achieve tangible reform. We therefore support the creation of an Advisory Board. While Government considers that the Advisory Board would bring together criminal justice system partners at a senior level in a formalised and collective way which is not currently regular practice, we are not proposing that the Advisory Board should be put on a statutory basis – this will ensure that it remains flexible and can adapt to changing needs and conditions.
31. Governance structures for the criminal justice system already exist. CLAIR pointed to national and local Criminal Justice Boards as examples where bringing partners together is beneficial and improves the criminal justice system. We agree that

creating a forum dedicated to criminal legal aid, which specifically includes the professions as full partners is a useful addition to this landscape. The Advisory Board will add to existing structures, and we agree that embedding and formalising an understanding of the professions' direct experience of the working of the criminal justice system will add a valuable perspective and contribute to longer-term reform.

32. As CLAIR sets out, the lack of data on how practitioners work in delivering criminal legal aid services holds back thoughtful and wide-ranging reform and impedes important progress, including ensuring that the legal sector is representative of those for whom they provide services. Better data would improve our assessment of the efficiency and effectiveness of provision and MOJ's ability to make good public policy. We are pleased that CLAIR acknowledged these barriers. Consequently, we propose to respond to the recommendation to create an independent Advisory Board that will be a forum to consider the role of criminal legal aid within a whole criminal justice system context. We agree that improving the system should be informed by good data, and the Advisory Board will enable that by working with the professions to gather data and inform policy decisions. The Advisory Board therefore also has potential to be a vehicle for commissioning further collection of data where it would most benefit policy making and support Government and the professions to better identify and promote best practice.
33. CLAIR concluded that criminal legal aid fees and provider remuneration are important issues but should not be the primary focus of the Advisory Board. Remuneration is only one factor in improving the sustainability of the criminal legal aid market and the Government is committed to considering sustainability in the round alongside other CLAIR recommendations. In line with CLAIR's recommendation, we are proposing that an 'engagement forum' would be the best operating model for the Advisory Board and are seeking views on its remit and composition. The Advisory Board will be central to our commitment to modernising the criminal justice system in order to achieve greater stability and efficiency.
34. The criminal justice system is complex, with many interdependencies between agencies. For example, police behaviour, CPS charging decisions and court capacity can impact on case progression. A forum that draws together partners across the criminal justice system to discuss the role of criminal legal aid and the impact of these interdependencies would be a worthwhile addition to the current landscape. As part of our commitment to improving communication and outcomes for the criminal justice system the Advisory Board will fulfil the function of bringing partners together to further explore the issues identified in CLAIR. This includes improving diversity across the professions and reducing the gender pay gap in the provider market and the relationship between take up and quality of police station advice and subsequent case progression.
35. Decisions on the future allocation of public funds within the criminal justice system are an important matter of social, economic and fiscal policy and will always remain with Ministers accountable to Parliament. The advice of the Advisory Board will play an important part in this consideration, but noting this, and CLAIR's recommendation

against a fee review body, the Government's current view is that it would not be appropriate for the Advisory Board to have a remit allowing it to provide advice with fiscal implications such as the uprating of criminal legal aid fees.

### **Consultation Questions – An Advisory Board**

1. Do you agree with our proposal for an Advisory Board? Please give reasons for your answers.
2. Do you have any views on what the Advisory Board's Terms of Reference should cover?
3. Do you believe existing criminal justice system governance structures (such as the National Criminal Justice Board) could be utilised so a new Advisory Board was not required? Please outline your reasons.

## **Finding Local Solutions**

### **Response to recommendation 2 (finding local solutions)**

36. The review highlights the importance of fostering a more joined-up approach to criminal legal aid across the criminal justice system both at a national and local level. It notes that current communication between criminal justice system agencies needs improvement, particularly between the defence and prosecution. As a result, CLAIR concludes that decisions made within the criminal justice system do not routinely consider the effect on the defence (as well as suspects, defendants and victims) and that the defence are not always able to feed into problem-solving and attempts to identify and adopt best practice.
37. Alongside the Advisory Board, the Government proposes to use existing Local Criminal Justice Board (LCJB) engagement forums to encourage greater collaboration between local defence communities and criminal justice system partners, as well as using scorecards to help re-invigorate LCJBs. Scorecards will enable LCJBs to scrutinise the data in their local area and tackle performance issues.
38. LCJBs have representation from criminal justice agencies such as the police, CPS, courts, Her Majesty's Prison and Probation Service (HMPPS) and the judiciary and therefore afford an ideal vehicle through which to improve local relationships with the defence community. Defence and LAA attendance at LCJB meetings is varied and few LCJBs currently have consistent representation. The Government is committed to using its existing relationship and communication channels with LCJBs to promote greater representation from the defence community on the Boards, so that there is a better understanding of common problems and a shared commitment to finding relevant solutions. To initiate this, the Lord Chancellor has written to the Chairs of LCJBs requesting that they encourage LAA engagement and invite the defence professionals to become active members of the Boards. The MOJ is also working

collaboratively with criminal justice system partners to review and update the guidance available to LCJBs.

39. This links to Part Two of the Police and Crime Commissioner (PCC) Review conducted by the Home Office, the outcome of which could assist in strengthening the working arrangements of LCJBs.
40. As part of its review, the Home Office has concluded that options should be developed to place LCJBs on a statutory footing, formalising the role of the PCC as chair and clarifying the membership of the board to ensure that they are able to operate at their best to deliver in the common interest of the criminal justice system.

## **Unmet need and Innovation**

41. The Data Compendium shows that since 2014-15 the number of criminal legal aid firms in England and Wales has decreased by 19% (from 1,510 in 2014-15 to 1,220 in 2019-20). The number of solicitors working for criminal legal aid firms declined between 2014-15 and 2018-19 by 20%, while the number of practising solicitors across all areas of law grew by 9%. There are also specific issues with duty solicitors where the practitioner cohort is small and aging, particularly in some rural and remote areas. While these changes in providers have mirrored decreasing workloads and therefore has not historically presented a significant problem, the market and workload are changing, putting sustainability at risk.
42. Trends in workload are on an upwards trajectory, with a planning assumption of over 105,000 sitting days and additional spending of £180m in 2022-23. In addition to the impacts of COVID-19 recovery, police station and Magistrates' Court work is likely to increase as a result of the impact of the recruitment of 20,000 new police officers and the efforts to tackle court backlogs leading to increased demand in Crown Courts. This will all result in an increase in demand for the services of criminal legal aid practitioners and whilst the criminal defence market is largely in private practice the Government has a role to play in ensuring there are enough practitioners to meet this demand.
43. In addition to broad concerns about the stability of the criminal defence profession, particularly of solicitors, CLAIR identified specific concerns about the sustainability of specific markets for legal aid. CLAIR identified a number of geographic areas where the duty solicitor market is at risk of a supply side failure, particularly due to age of legal professionals and changing patterns of habitation. We have also received anecdotal evidence from some practitioners about thematic areas where there are risks of advocacy gaps emerging, including for court appointed advocates, appeals and some challenging clients, for example, those with mental health issues or who have been unable to retain counsel. The Government believes that the policy proposals in this consultation, especially our proposed increases to legal aid fees, will address concerns about the stability of the criminal defence professions but is also seeking views on specific thematic and geographic areas of practice with specific

sustainability challenges in the context of where the Public Defender Service (PDS) may be able to help ensure provision.

44. However, the provision of criminal defence services is not static and CLAIR noted the growth of solicitor advocates, CILEX professionals, the widespread adoption of digital technology and emerging new models of providing legal services that may prove more effective in providing criminal defence capacity in some parts of the market.

#### **Response to recommendation 19 (ii) (the LAA)**

45. The current criminal legal aid system has been built to reflect the historic structure of the firms and professions. The Government believes that removing barriers to entry and making the legal aid system business-model neutral will help ensure that the right legal representation is available to everybody and assist in promoting greater diversity of practitioners. In the long term this may include further support for practitioners who can carry a single case through to conclusion to support choice for defendants and innovation for the legal professions. In support of the Government's objectives, and alongside work, for example to support increasing in-court opportunities for CILEX professionals and solicitors, the Government plans to review the Standard Crime Contract (SCC) in consultation with the professions.
46. The objective will be to consider how administrative burdens could be reduced, how more neutral business models could be adopted and will consider how other changes could drive innovation. The LAA and MOJ will also seek further views from the profession, other criminal justice system partners, and legal aid clients regarding the benefits, barriers and implications of the requirement for a provider's physical office presence for membership of a duty scheme.

#### **Response to recommendations 3(i) (unmet need and new ways of working), and 8 (other police station work)**

47. The MOJ will, with the Advisory Board and other agencies within the criminal justice system, continue to monitor the extent of unmet need for criminal legal aid and where specific elements of the market are at risk of failing. The Government's primary objective, as set out in this consultation, is to maintain a stable, efficient and effective criminal defence, with all the wider benefits this flourishing profession brings to the English and Welsh economy and society.
48. The Government does not believe however, that private legally aided provision is always and exclusively the only way that criminal defence can be delivered. The Government is keen to support the development of diverse professions and innovation in the delivery of legal services. In the short term the Government is also conscious of the risk in the market and the moral and legal obligations to ensure access to justice.
49. The Government therefore proposes to expand the PDS, on a limited basis initially focussed on providing additional capacity in geographic or thematic elements of the legal defence market where there is potential unmet need, risk of markets failing or

being disrupted such as for duty solicitors in rural areas and for specialised advocacy; or where the PDS might present greater value-for-money such as in VHCCs. To start with, the Government proposes a small expansion of the PDS's current provision including by trialling remote advice, particularly in rural areas where duty solicitor schemes struggle to fill a rota, and areas of specialist advocacy such as court appointed advocates. The Government is also interested in exploring providing the defence in some VHCCs and intends to consult to gather further data on this. In the longer term the Government believes the PDS has an important role to play as part of ensuring sustainable and stable provision of criminal defence. The Government will continue to review its position in the market and will use the PDS to test and demonstrate innovative methods of service provision (see consultation question 4 on the PDS).

50. Additionally the Government has noted Sir Christopher's thoughts on structural developments in the legal aid market and provision and his recommendation to consider how non-traditional forms of provider and new ways of working such as holistic models and not-for-profit providers might play a part in ensuring that the criminal defence market continues to provide access to justice. The Government will continue to consider this in due course potentially with the Advisory Board (noting this is still being consulted on) and is seeking thoughts of consultees on this issue now.

### **Consultation Questions – Unmet need and Innovation**

4. What are your views on our proposal to expand the PDS on a limited basis to provide additional capacity (and how much capacity) where the criminal legal aid market has potential unmet need, risk of markets failing or being disrupted or could possibly provide greater value for money – for example to provide remote advice in police stations, particularly in rural areas and to have a presence in the market for in more VHCCs?
5. What are your views on the benefits and disadvantages of requiring a provider to have a physical office to be a member of a duty scheme?
6. Do you have any views on how non-traditional forms of provider and new ways of working such as holistic models and not-for-profit providers might best play a part in the criminal defence market?

## **Diversity**

### **Response to recommendation 17 (Diversity)**

51. The Data Compendium shows that 13% of specialist criminal barristers (2019-20) and 22%<sup>6</sup> of solicitors (2018-19) working for firms conducting criminal legal aid work were

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<sup>6</sup> Percentages are calculated as a proportion of those with known ethnicity.

from ethnic minorities compared to 16% in the general working age population (Annual Population Survey 2019-20). Using the same data and time periods, overall, the criminal legal aid solicitor profession was broadly 50:50 male to female, however, among those aged over 45, the split was around 60:40 male to female. Among duty solicitors the split was 65:35 male to female in 2019. Among specialist criminal barristers in 2019-20, the sex balance at point of entry was roughly 50:50 male to female but the senior barristers contained a much higher proportion of males – resulting in an overall balance of 69:31.

52. This same data suggests female barristers on average earn less than men with the same years of practice. For example, female specialist criminal barristers with 23 to 27 years of experience had median public criminal fee income before expenses of £79k compared to £101k for their male counterparts. This data also suggests ethnic minority barristers tend to earn less than their equivalent white counterparts. For example, those with 23 to 27 years of experience had a median public criminal fee income before expenses of £83k compared to £99k for white barristers – although the fee income gap narrows for those who remain in the profession, before year seven they seem to be significantly worse off than their white counterparts.
53. CLAIR concluded that an increase in the level at which criminal legal aid fees are paid would help solicitor firms attract the best talent from any background and alleviate the challenges that barristers from ethnic minority backgrounds face in forging a career at the Bar. However, the report confirms that there is much more to do if the systemic barriers to progression within the professions are to be tackled.
54. A diverse profession better reflects the society it serves and is better positioned to respond to the needs of its clients. The importance of this is embedded in the regulatory objectives of the Legal Services Act 2007 and we welcome the efforts underway across the professions to make a career in the law accessible to anyone, regardless of background.
55. Much of this work naturally falls to the professions themselves, the regulators and the representative bodies and we are aware that a lot of good work is being undertaken in this area. We will engage chambers and firms on this challenge and want to work with them on how they and we will respond to the recommendations in the report and what more they can do to improve diversity.

## **Training and Accreditation Grant Programmes**

### **Response to recommendation 3 (ii) (unmet needs and new ways of working)**

56. CLAIR recommended making training grants available for solicitor firms to address recruitment and retention difficulties that could lead to an unsustainable criminal solicitor market. CLAIR found that many solicitors leave defence firms to join the CPS because the pay and conditions are better. CLAIR recommended increasing fees to enable defence firms to be able to offer salaries at a broadly similar level to the CPS. The CLAIR Data Compendium also noted that in 2018-19 around 80% of firms doing

criminal legal aid work had no new trainees at all. CLAIR also acknowledges that starting pay is often relatively low for these groups which can be a disincentive to those from disadvantaged backgrounds joining the profession.

57. We are interested in views on whether the Government funding solicitor training contracts for those starting careers in criminal defence could help firms with recruitment and retention issues, and how such an initiative could best be targeted (for example, whether this support should be targeted at encouraging more lawyers from underrepresented groups appointable on merit but who face financial or social barriers to entry into the solicitor profession so it better reflects the whole of the society criminal defence practitioners are serving).
58. We are also interested in other steps that can be taken to improve retention and encourage careers in firms undertaking criminal work. Linked to our wider objective through the judicial diversity forum action plan to support increased in-court opportunities for solicitors and to support a more diverse pipeline to the judiciary, we want to explore the value of Government supporting solicitors to gain higher rights of audience – increasing the range of work they can take on and giving firms more flexibility in how they deliver their services. We welcome views on this.

### **Consultation Questions – Training and Accreditation Grant Programmes**

7. What are your views on a training and accreditation grant programme? How can it make it more attractive to pursue a career in criminal defence?
8. How can the Government best support solicitors to gain higher rights of audience?

## **Investigating the sex balance in relation to duty solicitor schemes**

### **Response to recommendations 19 (iv) (the LAA), 17 (Diversity) and 8 (other police station work)**

59. CLAIR noted that work as a duty solicitor often involves unsocial hours and lengthy travel, and respondents to the review indicated that it was “extremely difficult for those with caring responsibilities to contemplate a career” in criminal defence. This work is in its very early stages, but to increase our understanding of how this could be addressed, we are keen to work with criminal justice partners to gather impact data on increased provision of remote advice as part of our proposed plans to trial expanding the PDS. This may make it easier for those with caring responsibilities to undertake this work, although acknowledge that in reality it is likely to involve some degree of unsocial hours. The Advisory Board may wish to consider the results from our trials in greater detail. As the drivers of this issue may include both working practices in police stations as well as within solicitor firms, any investigation will need to take a cross-system approach.

60. The Government also strongly supports the ongoing work of the judiciary on listing and remote hearings. Increased flexibility will allow for more efficiency as well as for those with caring responsibilities, particularly women, and those with mixed practices like solicitor advocates, to take up the full range of criminal defence work.
61. Duty solicitor compliance rules, referred to by CLAIR as the "14-hour rule" were brought in to reduce "ghost solicitors" who retain duty solicitor slots but do not complete sufficient amounts of criminal legal aid work. The 14-hour rule has been criticised for making it difficult for those with caring responsibilities to be duty solicitors, particularly women or part-time workers. We are not aware of any evidence that shows any substantive change in sex balance following the introduction of the 14 hours rule at the start of the 2017 contract, but we intend to continue to monitor its impacts. The LAA has amended this rule so it will be 50 hours per month in the 2022 crime contract rather than the current 14 hours per week to help in part to address some of this criticism and will monitor this change.

## **Investigating disparities in barristers' income**

### **Response to recommendation 17 (diversity)**

62. CLAIR noted<sup>7</sup> 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. For example, in 2019-20 the median fee income was £86.3k for men and £64.5k for women.<sup>8</sup> Especially in the early years of practice, ethnic minority barristers appear to earn less from public criminal work than their white counterparts. For instance, among barristers with between three and seven years of practise, the median fee income of ethnic minority barristers was £54k in 2019-20, compared to £66.9k for white barristers. Anecdotal evidence suggests that this may partly be caused by work allocations, with female barristers, for example, being more likely to be assigned rape and serious sexual offences (RASSO) cases, with knock-on implications for pay.
63. CLAIR concluded that in the first instance, this should be something for the Bar Council and Bar Standards Board to look into and resolve. However, work allocation within chambers is only a part of the wider system in which advocates are instructed. We therefore propose that a broader enquiry is required to understand not only work allocation, but the wider interactions between the professions (including solicitors, solicitor advocates, the Bar and CILEX professionals), and how the system can work better to provide opportunities for those from diverse backgrounds. This would also allow the Government to further investigate CLAIR's conclusions on pay disparities. As a result, we propose to ask the Advisory Board, if established, to invite the

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<sup>7</sup> Note, the fee incomes quoted in this paragraph are gross of expenses, which are believed to be around 20-30% of gross fee income.

<sup>8</sup> Please see Table 13.5 in Annex L of the CLAIR report for further information.

frontline regulators and representative bodies to investigate the causes of this issue, and to report back with recommendations for both MOJ and the professions.

### **Consultation Questions – Investigating disparity in barristers' income**

9. In your experience do you consider that it is the case that female barristers are more likely to be assigned lower fee cases, such as RASSO? Do you have any evidence to support this?

## **Support for barristers during early years**

### **Response to recommendation 17 (diversity), and 3ii (unmet needs and new ways of working)**

64. CLAIR found that it is difficult for those from less advantaged backgrounds to survive the entry years of practice at the Bar due to the level of available fees. Data from 2019-20 in the Data Compendium suggests the fee income earnings after expenses for junior barristers who specialise in public criminal work likely range from £16.6k to £19k in their first year of practice. The impacts of this were said to fall particularly hard on those from socially disadvantaged backgrounds, including ethnic minority lawyers. However, earnings appear to rise well over the national average after that point. The report recommended that individual chambers, or the Inns of Court, or the MOJ, could make available grants to ensure that diverse young barristers are not excluded from the profession in the initial period where they are trying to establish a regular income. There could be several drivers of this issue including work allocation practices and support for junior barristers within chambers. As a first step towards understanding this issue and potential solutions (expecting they may fall to the professions to take forward) we will ask the BC, Bar Standards Board and Inns of Court to consider what more can be done by the profession to support those from diverse backgrounds as they forge a career at the Bar.

### **Consultation Questions – Diversity**

10. Would training grants for criminal legal aid chambers in your view help with recruitment and retention issues? If yes, how could such an initiative best be targeted to support diversity?
11. What do you think the Government can do to improve diversity within the independent professions?
12. What do you think the professional bodies can do to improve diversity within the independent professions?
13. What evidence do you have of barriers different groups face in forging careers in criminal defence work generally?

14. What evidence do you have of other barriers women face in working within duty schemes beyond those identified? How much of a difference would an increase in remote provision of advice make to improving the sex balance? Is there anything else we should be trialling to address this?
15. What do you think might be driving the disparities in income in the criminal Bar noted by the review? What evidence do you have to support this?
16. What more in your view could solicitor firms and chambers do to support those from diverse backgrounds embarking on careers in criminal defence?

## Quality Issues

### Response to recommendations 8 (other police station work), and 19 (ii) (the LAA)

65. CLAIR identified a gap in the system around quality control for advocacy, while noting the important role that the Bar Standards Board and Solicitors Regulation Authority play in taking professional standards, particularly for advocacy, seriously. The review concluded that this was a matter for the ongoing work by the relevant regulators. The Legal Services Board (LSB)'s consultation on its statement of policy on ongoing competence is currently underway and we believe this process should be allowed to conclude before considering the issue further.
66. CLAIR also suggested that, subject to consultation with the profession, the LAA could consider a more frequent regime of peer reviews for solicitors as part of a review of administrative burdens in the round, in order to use the right number, mix and type of tools to assure quality. Peer review is well-established and respected. It looks at a very specific aspect of provider quality. Therefore, it is important to view it as part of a suite of different quality assurance measures which also include supervisory requirements, accreditation standards and contractual key performance indicators. Peer review is a more costly process; therefore, the intention is to move to an intelligence-led approach so that peer reviews are targeted most effectively. We would welcome discussions with the profession to review the balance between the various quality measures to minimise the administrative cost while ensuring quality is not compromised.
67. In addition to supporting the important work of the regulators, the Government has a role as a monopsony buyer to influence the criminal defence market to promote the welfare of clients and the good use of tax-payers' money. The Government has a contractual relationship with providers for some services (not advocacy) and will, as part of a review of the SCC, seek to ensure that these contracts promote high quality standards, including continuous professional development, quality assessment and consistency of service – the Government notes that similar expectations exist in the CPS and other contexts. For independent advocates, the Government proposes to explore creating a Lord Chancellor's list of advocates, with membership based on

quality of advocacy and consistency of service – the Government notes that similar provisions exist in the Attorney General's civil and CPS criminal lists.

### **Consultation Questions – Quality Issues**

17. How can the Government assist the professions to review the balance between the various quality measures to minimise the administrative cost while ensuring quality is not compromised? Do you have any views on this?
18. How can the Government best design the qualification criteria for any Lord Chancellor's lists of criminal defence advocates to ensure that listed advocates are incentivised toward quality control, professional development and consistent availability for work?

## **Technology**

68. While the use of remote technology in courts does not fall under the remit of CLAIR, the review notes the potential impact of this technology on the efficiency of the criminal justice system. CLAIR notes that remote technology could save costs and time, and could encourage case ownership, particularly for administrative matters. The report also highlights concerns among practitioners about courts returning to a policy of mainly physical hearings, and the inconsistency in the use of remote hearing between local courts.
69. Remote technology was also taken up more broadly through the criminal justice system during the pandemic, for example, in police stations, and as mentioned elsewhere in this consultation, the Government is exploring whether and how this can be pursued further. Video hearings with prisons have been used for many years in the criminal courts, and remote hearing technology is an integral part of Her Majesty's Courts and Tribunals Service's (HMCTS') Reform Programme.
70. CLAIR recognised that whilst the use of remote technology in a court hearing is a decision for the judiciary, these decisions could impact the efficiency of the criminal justice system. The report notes that effective use of remote hearings where matters could be dealt with properly that way could enable better case ownership, increase opportunities for those with caring responsibilities, and can support the delivery of justice through improving the efficiency of the criminal justice system and make more efficient use of the time of criminal defence practitioners.
71. The courts use of remote technology in hearings is rightly a judicial matter. We welcome the announcement that the Lord Chief Justice has recently produced guidance dated 14 February 2022 on the use of remote hearings which may promote consistency.
72. COVID-19 led to an accelerated roll out of technology to support remote hearings across all jurisdictions. 70% of all courtrooms are now equipped with our Cloud Video

Platform, enabling up to 20,000 cases to be heard virtually every week at the height of the pandemic. We are keen to understand the impact this has had on the criminal justice system. Separately from this consultation, we are considering further increasing video capacity in prisons, developing joint plans for direct bookings of calls to improve administration, and engaging with defence practitioners to maximise use of available capacity.

73. The Government sees this consultation as an opportunity to gather views from all parts of the criminal justice system on the use of remote technology to support the efficiency of the criminal justice system as a whole, but particularly where use has expanded during the pandemic. The Government is seeking information about the experience of using remote technology, to support the Judiciary to ensure remote hearings are used in the most effective way. To complement this, the Government will also separately be undertaking an assessment of the impact remote hearings have on criminal justice system efficiency, building on the qualitative analysis that HMCTS published last year.
74. There is also clearly a role for new technology in supporting our wider aims to assist an efficient and effective criminal justice system and a sustainable market. New technology has the potential to make defence work more efficient and simpler, for example, through supporting the sifting and preparation of documents, stripping out time and cost and increasing accuracy. Our LawtechUK programme, now concluding its second year, has helped innovators to overcome barriers to developing new products that can transform legal service delivery and unlock efficiencies. As part of our commitment to supporting the growth of the Lawtech industry and the long-term sustainability of the criminal legal aid market, we will look for more opportunities to engage with and support innovators who are targeting this part of the sector.

### **Consultation Questions – Technology**

19. How and to what extent does technology, including remote technology, support efficient and effective ways of working in the criminal justice system?

## Chapter 3: The Police Station

75. Legal aid provided before a suspect is charged is currently remunerated either by the police station fee scheme or the pre-charge engagement (PCE) fee scheme. CLAIR found this stage of the criminal justice system to be of particular importance to wider individual and system outcomes and identified an opportunity to target investment appropriately towards the front-end of the system in order to incentivise early engagement. CLAIR indicated this could be through targeting funding to promote better engagement at the police station stage and defence funding for engagement leading up to the first hearings in the Magistrates' Court. CLAIR argued that early engagement would lead to better outcomes for defendants, a more efficient criminal justice system through better case management, earlier case resolution, earlier guilty pleas where appropriate, and therefore could potentially yield savings for the wider system. This chapter covers the Government's response to CLAIR's findings and recommendations in this area, including both proposals for immediate investment and longer-term reform of both fee schemes.
76. CLAIR recommended a minimum increase of 15% (£100m p.a.) in fees to enable solicitors' firms to offer salaries broadly in line with the CPS, with fees distributed to incentivise early engagement. We have carefully considered these recommendations and agree with the broad premise of CLAIR's analysis. With remuneration for solicitors, we want to encourage early engagement which is why we are proposing a 15% increase to the police station and Magistrates' Court (including the Youth Court) fee schemes along with other proposals (for example, consulting on how best to implement training grants for solicitors' firms). In addition, we are also consulting on how to effectively deliver PCE. However, we are proposing not to implement the full 15% increase in LGFS due to CLAIR's analysis, with which we agree, on the problems caused by the Pages of Prosecution Evidence (PPE) element of that fee scheme (further details set out at paragraph 145). We are proposing up to around £10m of additional funding for solicitors to be delivered alongside wider reform of LGFS, subject to further policy development and data collection. With the fee increases for AGFS, we largely agree with CLAIR's analysis that an increase in fees was necessary to ensure the criminal Bar continues to attract and retain the talent and experience necessary to sustain the criminal justice system and are proposing a 15% uplift (£30m p.a.).
77. We are proposing investment in pre-charge and police station work as soon as possible through remunerating preparatory work for PCE, increasing rates by 15% and an uplift to police station fees to be implemented this year. For longer-term reform, we are proposing restructuring the police station fee scheme to better pay for work done by differentiating between relatively simple and relatively complex cases in the police station fee structure. Also, as part of longer-term reform, we are proposing to eventually subsume PCE into the police station fee scheme. We propose that, subject to further consultation and data collection, longer-term reform

would be on a cost-neutral basis. Full responses to CLAIR's recommendations and details of all the proposals are set out in the paragraphs below.

78. CLAIR identified some further issues relating to police station work, which are addressed elsewhere: lack of data (chapter 2), remote technology in the police station (chapter 2), and the 14-hour rule (chapter 2). Improving take up of advice in the police station, the Defence Solicitor Call Centre, accreditation of duty solicitors and police station representatives, and CILEX members as duty solicitors are topics covered later in this chapter.

## **Pre-charge Engagement (PCE)**

### **Response to recommendation 9 (pre-charge engagement)**

79. PCE refers to voluntary engagement between the parties to an investigation after the first police interview and before a suspect has been formally charged. It can result in several benefits including better-informed charging decisions; identifying and resolving issues in relation to evidence or narrowing the issues in dispute, and reducing anxiety and uncertainty for suspects.
80. The current provision for the remuneration of PCE involves meeting the 'Sufficient Benefit Test' (SBT) to demonstrate that there is sufficient merit to the client to justify spending public funds on the case. The SBT can only be satisfied where there is a formal or informal agreement to engage in the PCE between the prosecutors and/or investigators, suspect(s) and suspect's legal representatives. The defence will then be able to claim PCE from the date of this agreement onwards. Under the current provision, preparatory work conducted prior to agreement to determine whether PCE is appropriate is not remunerated.
81. In 2018, the Attorney General's Office published its review of the efficiency and effectiveness of disclosure in the criminal justice system. The review found that early and meaningful engagement between the prosecution team and the defence is crucial to improve the disclosure process and that a lack of pre-charge discussion between investigators/prosecutors and those representing the suspect hampers early resolution of evidential issues, particularly where there is a large quantity of digital material.
82. The 2018 review recommended that the Attorney General's Disclosure guidelines should include guidance on PCE and that the MOJ should review how such work is remunerated. Remuneration for PCE was one of the five areas where Government agreed to accelerate progress as part of the Criminal Legal Aid Review. Following consultation with interested parties, regulations to permit payments for PCE were introduced in June 2021.

## Remunerating preparatory work

83. CLAIR concluded that for PCE to be meaningful, the defence needs to know the prosecution case, to study the evidence and to take instructions before deciding whether it is in the client's best interests to engage.
84. We are proposing action to be implemented in the short-term to reform remuneration for PCE to include preparatory work, subject to consultation responses.

## Scope of Pre-charge Engagement

85. CLAIR recommended remunerating preparatory work done to determine whether PCE is appropriate. Government agrees that the current provision may not appropriately incentivise providers to take on PCE and so the potential benefits of PCE may not materialise within the system. Currently the hourly rates for advice and assistance for PCE are:
  - (a) £51.28 in London;
  - (b) £47.45 outside London.
86. PCE work is subject to an Upper Limit of £273.75, beyond which LAA agreement is needed to incur additional costs. Also, PCE at present is only paid for work after an agreement is reached with the police or prosecution to undertake PCE.
87. We agree that we should explore how work done ahead of PCE can be remunerated. Therefore, we are proposing to allow preparatory work to be remunerated and are inviting views on this proposal and how it could be claimed for. Our preferred approach to address CLAIR's recommendations is split into two areas: one where there is an agreement between the relevant parties to engage in PCE; and one where there is no agreement made.

### Scenario 1: Claiming Solicitors Preparatory Work Under an Agreement

88. When an agreement to engage in PCE has been reached between the relevant parties, defence practitioners will be able to claim for the preparatory and PCE work together. This would mean payment for pre-agreement work would be permitted at an hourly rate after an agreement was reached.

### Scenario 2: Claiming Solicitors Preparatory Work Without an Agreement

89. When an agreement to engage in PCE has **not** been reached between the relevant parties but the solicitor has conducted preparatory work, defence practitioners will be able to claim for this work on its own. There are three possible circumstances when this may occur:

- a) The solicitor has done the preparatory work and tried to seek agreement for PCE but was unsuccessful due to the police or prosecution not wanting to agree to PCE. The solicitor would be able to show the attempts made for PCE on their file note and the reason for proposing PCE.
  - b) The solicitor has done the preparatory work and decided that PCE would not be beneficial. The solicitor would need to justify on their file note what prompted them to undertake the preparatory work, how this met the SBT and why it did not lead to PCE.
  - c) The solicitor is approached by the police or CPS to engage in PCE but, after doing the preparatory work, decided that PCE would not be beneficial. The solicitor would be able to show the attempt made by the other parties for PCE on their file note, the preparatory work they did in response and the reasons why they did not consider PCE to be beneficial.
90. We are proposing that for the circumstances under scenario 2, the defence should show evidence that either they, the police or CPS did not want to engage in PCE and to explain the reason behind initiating the preparatory work. The Government wants to ensure that PCE meets its aims of enabling early resolution of matters where the relevant evidence exists, rather than being used routinely in circumstances where it is unlikely to be beneficial to ensure the scheme's integrity and will also explore in the design of any PCE system other safeguards against inappropriate claims. Payment will be made at hourly rates up to an upper limit beyond which the LAA's agreement would be needed to pay for additional costs.

### **Consultation Questions – Pre- Charge Engagement- Preparatory Work**

20. Do you agree that the proposal under scenario 1 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.
21. Do you agree that the proposal under scenario 2 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.
22. Are there any other factors, beside remuneration that limit practitioners from carrying out PCE? Please explain the reasons for your answer.
23. In our Impact Assessment we have indicatively assumed that preparatory work would be paid at an average of two hours per case with an uptake of up to 6% (or up to 32k cases). Do you agree that these are reasonable assumptions? Please explain the reasons for your answer.

### **Sufficient Benefit Test (SBT)**

91. As mentioned in paragraph 80, the SBT has to be met in order to claim PCE work and can only be satisfied when there is an agreement between the parties to take part in PCE. Under scenario 2, we would allow for preparatory work to be claimed where an agreement has **not** been reached. Therefore, we are proposing to amend

the SBT so that it sets out what is expected of solicitors under the AGO guidelines and the evidence that will be required to claim for PCE preparatory work. We propose that the preparatory work is claimable where it is undertaken to determine whether it would be beneficial to the client to undertake PCE under one of the following categories set out at Paragraph 4 of Annex B of the Attorney General's Guidelines on Disclosure:

*“Pre-charge engagement may, among other things, involve:*

- a) Giving the suspect the opportunity to comment on any proposed further lines of inquiry.*
- b) Ascertaining whether the suspect can identify any other lines of inquiry.*
- c) Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.*
- d) Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.*
- e) Agreeing any key word searches of digital material that the suspect would like carried out.*
- f) Obtaining a suspect's consent to access medical records.*
- g) The suspect identifying and providing contact details of any potential witnesses.*
- h) Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.”*

92. We recognise that this is not an exhaustive list of activities for which PCE may be undertaken. As part of this consultation, we are seeking views on whether there are other things for which PCE may be undertaken (in accordance with the AGO guidelines) and therefore on which preparatory work could be undertaken before deciding whether to agree to undertake PCE.
93. The amended approach to the SBT would require solicitors to record on their file note what preparatory work they have undertaken and the justification for doing so. For example, they may need to explain what information they obtained during or prior to the police station interview which indicated that PCE might be beneficial.
94. The Government proposes to implement the changes for PCE, subject to any comments received from this consultation, as soon as possible. Any changes to the operating of PCE will require amendments to be made to secondary legislation and the SCC which could involve a 2-3 months implementation period. See further below in this chapter for proposals relating to the longer-term reform of PCE.

### **Consultation Questions – Pre- Charge Engagement – Sufficient Benefits Test**

24. Do you agree with the proposed amendments to the 'Sufficient Benefits Test'? Please explain the reasons for your answer.
25. Do you have alternative proposals for amending the 'Sufficient Benefits Test' under scenario 2?
26. Do you think paragraph 4 of Annex B of the Attorney General's 'Guidelines on Disclosure' also reflects the type of preparatory work likely to be undertaken ahead of a PCE agreement?
27. Are there any other types of preparatory work that you think should be funded prior to the PCE agreement?

## **Police Station Fees**

### **Response to recommendation 7 (police station remuneration)**

95. Advice and assistance in the police station are currently remunerated by a fixed fee. The fee varies by police station 'scheme', based on a geographic area. The fee scheme's structure hinges on the premise that relatively simple and relatively complex cases should balance across a provider's caseload. There is an 'escape fee' provision whereby a practitioner can be paid at hourly rates if the work done surpasses the 'escape threshold'. The escape threshold is typically approximately 3x the fixed fee based on hourly rates. Only the work done above the threshold is paid as an escape fee, not the work done between the fixed fee and the threshold.

## **Investment in Police Station Fees**

### **Response to recommendation 5 (uplift in remuneration)**

96. We are proposing to uplift police station fees by 15%, to be implemented as soon as possible this year, subject to consultation responses. This is in line with the recommendation in CLAIR and demonstrates our commitment to properly remunerating early engagement in the police station. Subject to further consultation and data collection, any further reforms are proposed to be within this cost envelope (see paragraph 76).

### **Consultation Questions – Investment in Police Station Fees**

28. Do you have any views on our proposal to increase police station fees by 15%?

## Structural Reform of Police Station Fees

### Response to recommendation 7 (police station fee scheme structural reform)

97. CLAIR found the fundamental issue with the police station is that fixed fees give the provider no incentive to spend more time on a serious case where needed. It also concluded that the 'swings and roundabouts' premise was no longer adequate for properly remunerating work done, concluding that at current rates, the simple cases no longer pay for the complex cases and that providers routinely rely on subsidising police station work with more profitable work in the Crown Court. CLAIR found this to lead to perverse incentives whereby a practitioner may spend as little time on a police station case as possible to maximise volumes, thereby getting access to potential Crown Court clients. CLAIR concluded that measures should be put in place to enable payments to better reflect work done, especially to differentiate between relatively simple and relatively complex cases. CLAIR also found police station work to be too important to be a 'loss leader'.
98. We are proposing to reform the police station scheme in order to better pay for work done by better differentiating between relatively simple and relatively complex cases. Although there are two options presented below for how to do this, we intend, once informed by this consultation, to pursue one option for reform. This will be implemented in the longer-term as the design of any reformed scheme will need to be informed by the responses to this consultation, a data gathering exercise with the professions, and a pilot to set rates. It is proposed that the reformed scheme will be designed on a cost-neutral basis.

### Option 1: CLAIR's recommendation – standardised fees

99. CLAIR recommended reforming the fee structure along the lines of the Magistrates' Court fee scheme, namely, to create standardised fees. These are lower standard, higher standard and non-standard fees, whereby a provider may claim for a higher fee when a threshold of work done (by hours) is surpassed. This aims to differentiate between relatively simple and relatively complex cases by considering that a complex case may require more work to be done and the provider can claim for the appropriate fee. By bringing a higher fee into the scheme, CLAIR argued this would better pay for work done.
100. There are three ways we could set the fee thresholds for this reformed structure:
- a) **Either by time spent; or**
  - b) **Features of the case which indicate complexity (for example, offence type or other case characteristics); or**
  - c) **A combination of (a) and (b)**
101. If we set the thresholds for the standardised fees by (a) time spent on a case, this would mirror the Magistrates' Court scheme. Illustratively, CLAIR recommended that the lower standard fee should account for c.80% of cases to mirror the Magistrates' Court scheme and to balance the scheme with proportionate administrative burden.

102. Alternatively, if we set the thresholds for the standardised fees by (b) features of the case which indicate complexity (for example, offence type or other case characteristics), we would need to work with providers to understand which cases are typically complex and require more work and should qualify for a higher fee. This could, for example, be by grouping the offence types into the lower standard and higher standard fees. Providers already log offence type when claiming for the fixed fee, so we do not think this would introduce a significant amount of administrative burden. However, using offence types has the limitation that it does not account for anomalies, for example complexities CLAIR identified which make police station work particularly challenging, such as language barriers, mental health or drug problems. It could be that there are other factors which indicate complexity, which will be informed by this consultation.
103. By combining time spent and case type (option (c)), we would need to cover both of the above approaches.
104. For all of these options, we would need to work with the sector further to gather data, informed by consultation responses. As we currently understand, time spent data is inconsistently recorded across providers and may not be currently reliably recorded. As such time spent data on a broad and representative set of cases may need to be gathered through working with the sector in a primary data gathering exercise on future cases, rather than collecting historic data. This means we cannot determine at this point what the fees would be, and under which circumstances a higher fee would be claimable. We would also need to work with providers to gather data on features of a case which indicate case complexity, including to understand where more work may be required given a specific characteristic of a case. Responses to this consultation will inform what further work with providers is needed.

### **Consultation Questions – Standardised Police Station Fees**

29. If we were to pursue option 1, what features of a case do you think should be used as an indicator of complexity: (a) time spent; (b) case type – e.g. theft, murder; (c) case type – e.g. summary only, either way; indictable; (d) anomalous complexities – e.g. vulnerable client, drugs problems; (e) a combination of the prior; (f) other? Why?
30. Would you need to change your current recording and billing processes in order to claim for standardised fees which are determined by reaching a threshold of 'time spent' on a case?

### **Option 2: Adapting the escape fee threshold**

105. We think there is an alternative provision which could deliver the aims to reform the fee structure to better reflect work done, especially to differentiate between relatively simple and relatively complex cases and to incentivise early engagement. This would be to adapt the existing escape fee provision to bring the provision into reach for cases which require more work, as feedback from providers has been that the

current provision is rarely within reach. There are two ways the escape fee provision could be adapted:

- a) by lowering the threshold; or**
- b) by paying between the fixed fee and the escape fee.**

106. If we were to (a) lower the threshold for the escape fee, we would need to work with the profession to gather data on time spent on cases and to build a rationale behind where to set the threshold. This would be by determining at which point work done indicates a complex case, and a higher fee should be claimable. The fixed fee could be set to account for c.80% of cases, with the escape fee covering the remainder, as correspondingly recommended in CLAIR for the lower standard fee (under option 1). Providers already record time spent on police station cases in order to claim the fixed fee or escape fee, but this data is not always reported accurately as the data only needs to be evidenced when claiming the escape fee. As such, we do not think that accurate completion of this data should create a significant administrative burden given it is a current reporting requirement. This option is different to the Magistrates' Court-style restructure, as standardised fees in the Magistrates' Court are paid as claimed and checked at audit, whereas escape fees are paid at hourly rates and are fully assessed by the LAA.
107. If we were to (b) pay between the fixed fee and the escape fee, this may address the issue that the current provision is viewed as not being worth the claim since the work done to reach the escape threshold is currently remunerated by the fixed fee only. We therefore think that paying for work done between the fixed fee and the escape threshold would incentivise more providers to claim for the escape fee where appropriate, therefore putting in the work required for complex cases and being appropriately remunerated for that work.

### **Consultation Questions – Both options for police station structural reform**

31. Do you agree we should explore the types of structural reform proposed above, within the same cost envelope, in order to more accurately remunerate work done in the police station?
32. If you agree we should explore this reform, which option (1 or 2) do you think would better achieve the aims of better remunerating work done by differentiating case complexity, while reducing administrative burden? Why? Do you have any other ideas for reform?
33. To enable any structural reforms, we would need to collect a substantial amount of information from providers about time spent and other case features. As a provider, would you be able to provide this information from your existing systems, or by adapting your record keeping? Are there any particular barriers you foresee in providing this information reliably?

34. Do you think that the lower fee (under either option 1 or 2, either the lower standard fee or the fixed fee respectively) should account for 80% of cases? Why?

### **Practitioner seniority and harmonisation under either option**

108. It is recommended within CLAIR that the reformed scheme should have a weighting for senior practitioners to take on complex cases. Under either reformed scheme (option 1 or 2), a weighting could be built into the higher fees for complex cases such that a senior practitioner would receive a higher fee. CLAIR viewed this as a way to incentivise senior practitioners to take on complex cases in the police station to drive better outcomes for suspects. Whilst intuitively appealing we do not have the evidence-base to support the rationale that a senior practitioner, who may do very little police station work, would provide better outcomes for a suspect in the police station than another practitioner who regularly does police station work.
109. It is also recommended that any reformed scheme should phase out the different rates by geographic area. While these fixed fees were set based on average case costs in that area at the time in 2008, we recognise that due to time passed, and in the context of the changing custody estate and the movement of work between police forces, this model may no longer be appropriate. The variation of fees between police station schemes also means that providers may carry out the same work and be paid different fees based on police station location, which does not fairly pay for work done. Further, the varying fees add complexity which could be reduced. We therefore propose that any reformed scheme should be designed at harmonised, e.g. national, regional, or London/non-London rates, rather than retaining the existing 245 different fees. This is with a view to fairly remunerating work done and reducing administrative burden, and this is consistent with wider reform.

### **Consultation Questions – Practitioner Seniority and Harmonisation of Fees at Police Stations**

35. How could the police station fee scheme be reformed to ensure complex cases get the right level of input by an adequately experienced practitioner?
36. Should there be more incentives for a senior practitioner to undertake complex cases in the police station? Why? What impacts would this have?
37. Do you agree that the reformed scheme should be designed at harmonised rates, rather than existing local rates? This may be at national level or London/non-London rates. Please also provide reasons why.

## **Early engagement: longer-term reform**

110. Building on the proposed immediate changes to PCE covered above, and to be considered alongside police station fee structural reform also covered above, we are exploring further reform of the fee schemes in the longer-term to incentivise early engagement to achieve those benefits outlined at the start of this chapter.

### **Subsuming PCE into Police Station Fee Scheme**

111. We agree with CLAIR that PCE and the associated preparatory work should be incorporated within a reformed police station fee scheme in the longer-term, in order to incentivise early engagement. The current fee scheme may not encourage solicitors to be proactive after a police station interview, since PCE is voluntary. Instead of having two separate claims to cover police station work and PCE, we propose making PCE claimable under the reformed police station fee scheme. We believe this could help encourage early engagement in standard case management. Furthermore, we believe that this could help reduce administrative burdens for the LAA and the providers by consolidating fee schemes. However, we need to understand more from providers about the proportion of police station cases which require PCE and whether it is appropriate to standardise this work. This will also inform the design of the reform. Should standardised fees in the police station be implemented (see Option 1 under police station structural reform), it may be that the work done for PCE may bring a claim into the higher standard fee. Alternatively, the scheme could be designed to provide a separate fee for PCE. We are seeking views on these proposed changes. These changes would be made alongside any wider police station fee scheme structural reforms mentioned above, depending on consultation responses. This would be after the changes to PCE to remunerate preparatory work mentioned above.

### **Consultation Questions – Longer-term reform for early engagement - Subsuming PCE into the Police Station Fee Scheme**

38. Do you agree that in the longer-term, PCE should be remunerated under the police station fee scheme as a specific element of police station work? Please explain the reasons for your answer.

39. How do you think PCE could best function within the police station fee scheme for example, as an in-built or separate fee, and based on hours spent or not, noting our options for broader reform?

## Improving the Uptake of Legal Advice in Police Custody

### Response to recommendation 8 (other police station work)

112. CLAIR highlights the low uptake of legal advice by suspects in police custody and the numerous anecdotal explanations for this, several of which are particular issues among young ethnic minority suspects who have lower levels of trust in the criminal justice system for instance, as highlighted by the Taylor Review and the Lammy Review from 2016 and 2017 respectively. One of the avenues by which we hope to improve the uptake of legal advice is by adjusting the mechanism by which a suspect is offered the independent legal advice to which they are entitled.
113. At present, an individual in police custody has to 'opt in' and ask for this advice, which means that often those who need legal advice the most do not receive it. This is likely to impact ethnic minority individuals especially given their significant overrepresentation in arrest rates. To increase the number of children that receive the legal advice they need when in police custody, the MOJ is supporting a number of police forces in trialling the effect of a 'presumption' of legal advice, that is to say police will automatically 'opt-in' a child to receive independent advice unless they expressly refuse. Once MOJ has received the results from this pilot the findings will be used to inform future policy development.
114. The MOJ is in strong support of this trial and considers it a priority for the department to improve uptake of legal advice in police stations, particularly for children. We will work with the LAA, Law Society, BC, and others to ensure the defence community fully engage with the development of this work. We will also work with the Youth Justice Board to ensure the user-perspective is considered and a child-centred approach is taken as well as with experts in the field to identify how best to assess this work. We are keen to understand whether it leads to improved outcomes following arrest, such as better protection of vulnerable individuals, and increased take up of out of court disposals, with a particular focus on how this could positively address racial disparities in the justice system.
115. Improving the uptake of legal advice by children is not to be done in isolation, however, and it is important that concurrent efforts look to improve the quality of advice that the child receives, as highlighted by CLAIR and the rest of this response.

### Consultation Question – Improving the Uptake of Legal Advice in Custody

40. Which cohorts of users would benefit most from being part of an extended roll out of the trial / what should we prioritise?

## **Police Station Accreditation**

### **Response to recommendations 19 (iv) (the LAA), and 8 (other police station work)**

116. CLAIR highlighted that there is a question of who actually attends the police station – duty solicitors or an accredited police station representative either from the solicitors' firm, or from an outside agency. Accredited representatives must be supervised by a duty solicitor. CLAIR also considered whether duty solicitors should be based in larger police stations.
117. CLAIR recommended that the Advisory Board and the LAA should review the appropriate balance between the use of duty solicitors and accredited representatives, particularly in terms of supervision. We agree and propose that the role of duty solicitors and accredited police station representatives should be considered by the Advisory Board, if established, alongside the wider issue of accreditation parity and location, including office presence and basing in police stations. Any future proposals are likely to require data gathering and will be subject to consultation.

## **CILEX Members as Duty Solicitors**

### **Response to recommendation 18 (CILEX members as duty solicitors)**

118. CLAIR noted the difficulties CILEX professionals face in being accepted as duty solicitors, as they are required to be accredited under the Law Society's Criminal Litigation Accreditation Scheme (CLAS) which does not recognise CILEX's advocacy qualifications as equivalent to its own. CLAIR recommended that the LAA and the Law Society should review this position to enable CILEX professionals to become duty solicitors without having to undergo additional qualifications.
119. The Government is keen to see increased opportunities for CILEX professionals across the justice system – including making it easier for them to become duty 'solicitors' to increase the sustainability and stability of the provider base and to reduce barriers to access to this work where people enter the legal professions through alternative routes. We propose to take this recommendation forward, working with the representative bodies and the LAA.

### **Consultation Questions – CILEX members as duty solicitors**

41. Do you agree CILEX professionals should be able to participate in the duty solicitor scheme without the need to obtain Law Society accreditation? If not, why not? If yes, what, if any, accreditation should they require to act as a duty solicitor?

## **Defence Solicitor Call Centre (DSCC)**

### **Response to Recommendation 19 (iv) (the LAA)**

120. The Defence Solicitor Call Centre (DSCC) was established to provide a single, central contact point for all police stations. It improved an earlier system where there were multiple, inconsistent and varying quality access points to duty solicitors.
121. CLAIR pointed to complaints about the running and efficiency of the DSCC. As part of our commissioning cycle, the LAA keep performance levels and user complaints under regular review, and actively engage providers through contract management to ensure improvements are embedded and lessons learned. Recent call handling performance has been strong with over 95% of calls answered across 2021 and over 96% of cases deployed within five minutes. While during handover between suppliers in autumn 2019 a significant volume of complaints were received, these have since stabilised and are currently tracking at less than 0.02% of contacts handled; in addition, over 600 solicitors were surveyed for feedback last year reporting satisfaction levels in excess of 95%. Any feedback from providers is used to drive continuous improvement and to enhance our future services.
122. We would like to hear your views on how we can further improve the DSCC, particularly around the impact of digitalisation and automation of LAA processes.

### **Consultation Questions – Defence Solicitor Call Centre**

42. How else could we improve the DSCC, for example would greater digitisation and automation of LAA processes increase the quality of service?

## Chapter 4: The Magistrates' Court

123. Criminal legal aid fees in the Magistrates' Court are paid through a system which generally pays standard lower or higher rates, depending on the amount of work done. CLAIR found this system working well whilst recommending some reforms. Alongside this consultation the Government is also consulting on a review to the means test where our proposals will bring 3.5 million additional people into scope of legal aid in the Magistrates' Court – this will ensure access to publicly funded defence, paid for via this scheme is widely available in the court where the vast majority of criminal cases are heard.

### Post-Charge Engagement

#### Response to recommendation 10 (post-charge engagement)

124. Post-charge engagement refers to the period after the police have charged the suspect but before the first hearing in the Magistrates' Court. CLAIR highlights that it is often difficult for the defence and CPS to have an informed discussion in good time ahead of the first hearing in the Magistrates' Court. The lack of early and effective communication can lead to delays and inefficiencies at the first hearing. CLAIR emphasised that dealing with these difficulties was an inefficient use of taxpayers' money. CLAIR suggested that the delays in post-charge engagement can be attributed to any one or more of the parties involved, namely the police, CPS or defence practitioners (see paragraph 76).
125. The report also highlighted several operational issues with post-charge engagement including a lack of case ownership where an individual from each agency (Police, CPS and defence) is identified as responsible for the case; issues with the early exchange of contact details; difficulties with having an informed discussion with a responsible person at the CPS until late on in the process; and issues with the defence receiving the Initial Details of the Prosecution Case in a timely manner.
126. The report urges the Police, the CPS and the defence to investigate ways of disclosing the full prosecution case to the defence in a timely manner.
127. While the report does not make any direct recommendations to address these operational issues, the Government is committed to ensuring that different partners in the criminal justice system engage with each other at the earliest possible opportunity. There is a wealth of ongoing work happening across the criminal justice system to address these issues. For example, the March 2021 joint commitment from the CPS, National Police Chiefs' Council and the College of Policing to take action to drive improvement in case progression including a commitment to work closely with partners to ensure early engagement, proactive case management, robust case progression and effective and timely decision making.

128. CLAIR recommends additional funding for post-charge engagement, noting the challenges such as delays and sharing of evidence. In CLAIR's recommendation to uplift fees under all fee schemes, it made the point that investment should be appropriately weighted towards the front-end of the system, including defence funding for engagement leading up to the first hearings in the Magistrates' Court, which would include post-charge engagement.
129. CLAIR recommended specifically remunerating discussion between parties before the first hearing in the Magistrates' Court. This would be with the aim of incentivising more efficient case management, communication and early engagement between key parties (police, CPS, and the defence) leading up to the first hearing at the Magistrates' Court.
130. This kind of work is currently remunerated under the Magistrates' Court fee scheme after a representation order is granted. If a representation order is granted for legal aid in the Magistrates' Court, any work done after a suspect has been charged would be claimed as part of the Magistrates' Court fee scheme. The amount of work done determines whether a lower standard fee, higher standard fee or a non-standard fee is payable. At present we do not have the evidence needed to determine whether a separate fee for this element of post-charge engagement would achieve the benefits that have been suggested. Therefore, the Government is committed to exploring this issue further with stakeholders. As a next step we would like to seek views on what the Government can do to make appropriate provision for early and efficient post-charge engagement.

### **Consultation Questions – Post-Charge Engagement**

43. Do you think changes need to be made to the way work is remunerated between the period after charge and the first hearing at the Magistrates' Court? Please explain the reasons for your answer.
44. Do you routinely carry out post-charge engagement? Do you record this work in order to claim for a fee under the magistrates' court scheme?
45. Do you face any issues which limit you from carrying out post-charge engagement ahead of the first hearing at the Magistrates' Court? Please elaborate on the kind of issues.
46. If you have experienced issues with PCE, what kind of solutions do you think could be put in place? What changes do you think needs to be made and by whom?

## **Criminal legal aid fees in the Magistrates' Court**

131. The Magistrates' Court fee scheme pays 'standardised fees.' These are lower standard, higher standard, and non-standard fees. To calculate standard fees, an hourly rate is applied to all hours spent on the case and the hourly rates vary depending on the kind of work completed. The sum of hours worked determines

whether the case is paid the lower standard or higher standard fee. A firm is paid the lower standard fee if the case value does not reach the lower standard fee limit. A firm is paid the higher standard fee if the case value surpasses the lower standard fee limit but not the higher standard fee limit. If the higher standard fee limit is passed, then a non-standard fee is paid. A non-standard fee is remunerated using the same hourly rates and is assessed in more detail than standard fees.

132. The standardised fee structure is still a 'swings and roundabouts' structure as the standard fees are fixed within their bands. However, CLAIR found these achieved a better balance between the swings and roundabouts than the police station and LGFS schemes, while retaining relative administrative simplicity.
133. CLAIR concluded that structural reform to the current Magistrates' fee scheme was unnecessary but that an increase to fees should enable an improvement in quality of advice and better outcomes in the Magistrates' Court.

## **Investment in Magistrates' Court Fees**

### **Response to recommendation 5 (uplift in remuneration)**

134. CLAIR recommended an increase Magistrates' Court fees by 15%. The Government agrees and proposes to implement as soon as possible this this year, subject to consultation responses.

#### **Consultation Questions – Investment in Magistrates' Court Fees**

47. We are proposing to increase Magistrates' Court fees by 15%. Do you have any views?

## **Structural reform of the Magistrates' Court fees**

### **Response to recommendation 11 (the Magistrates' Court)**

135. CLAIR concluded that structural reform to the current Magistrates' fee scheme was unnecessary but that an increase to fees should enable an improvement in quality of advice and better outcomes in the Magistrates' Court. We are seeking consultees' views on that conclusion.

#### **Consultation Questions – Structural Reform of the Magistrates' Court Fee Scheme**

48. Do you agree that the Magistrates' Court fee scheme does not require structural reform at the current time? Please give reasons for your answer.

## Chapter 5: The Crown Court

136. Defence remuneration for most Crown Court matters is through the LGFS, primarily claimed by solicitors, and the AGFS, claimed by advocates. LGFS was implemented in 2008, while AGFS dates from 1997 (and was substantially reformed in 2018). In this context 'advocates' refers to either barristers or solicitor advocates, who are solicitors that have been granted higher rights of audience.
137. The introduction of graduated fee schemes for Crown Court defence work was designed to achieve a balance between properly paying for work reasonably conducted on a case and avoidance of the cumbersome line-by-line assessment of individual bills which had operated up to this point. Graduated fee schemes rely on a series of proxies to remunerate providers. Such schemes inevitably create a 'swings and roundabouts' effect whereby some cases of the same type are more profitable than others; however, these effects should broadly balance out for providers undertaking varied caseloads, and graduated fees offer administrative savings and certainty.
138. Under LGFS, the graduated fee paid to the litigator consists of a basic fee (determined by the offence class and case outcome – guilty plea, cracked trial, contested trial). This is often supplemented by an uplift based on the PPE served, and uplifts based on trial length and number of defendants. In addition, fixed fees are available for certain other types of proceedings (e.g. committal for sentence), while payment at hourly rates still operates for some activities (e.g. special preparation) and for ancillary proceedings (e.g. confiscation).
139. Remuneration for Crown Court advocacy under the AGFS consists of a basic fee (determined by which "band" the offence falls into, the seniority/role of the advocate, and how the case resolves – guilty plea, cracked trial, contested trial). Should the case proceed to trial, the advocate may also claim a Daily Attendance Fee for the second and any subsequent trial days at Court. In addition, advocates may claim a fixed (daily) fee for attendance at interlocutory hearings (such as sentencing hearings) relating to the substantive matter, as well as for ancillary proceedings (e.g. confiscation). Claims for special preparation at hourly rates can be made under limited circumstances, for example where the PPE exceeds the (prescribed) level considered to be covered by the basic fee.
140. CLAIR follows two other recent reforms to Crown Court remuneration. In 2018 the MOJ implemented amendments to the AGFS after consultation including with the Bar, at a commensurate annual cost of £23 million. In 2020 several 'accelerated measures', increasing funding to both LGFS and AGFS, were introduced following completion of the first phase of the criminal legal aid review. These measures were forecast to inject a further £36-51 million annually into criminal legal aid. However, in practice, on account of work progressing more slowly due to the pandemic and lower

than anticipated uptake of the new measures by practitioners, additional spend has so far been below expectations, but we expect it will continue to increase towards expected levels as cases work through the system (see paragraph 19).

## **Investment in AGFS and LGFS**

### **Response to recommendations 5 (uplift in fees) and 14 (general AGFS uplift)**

141. CLAIR concluded that reform of Crown Court litigator and advocate remuneration was required so that the fee schemes are capable of fairly paying for elements of criminal practice that have evolved over the last 15 years and supporting wider criminal justice system priorities. CLAIR acknowledged that reform would take time, but simultaneously urged for short-term investment in the system to place it on a stable footing.
142. CLAIR called for a substantial increase in legal aid funding for solicitors' firms with a view to safeguarding stability and ensuring equality of arms with the prosecution. With regard to the LGFS specifically, the report (section 12.37) calls for increases to basic fees but also upward adjustment of other fees, including those applicable to confiscation work.
143. In relation to the AGFS, CLAIR felt that funding should be increased overall by around 15%, with the aim of ensuring there is a sufficient number of advocates in criminal practice in preparation for an expected rise in the volume of cases requiring Crown Court advocacy services in the medium term.
144. Government recognises the need to conduct a wholesale review of the LGFS and the AGFS and implement reforms which will better cater for the practices expected of criminal litigators and advocates in future. We also in principle accept CLAIR's argument that increases in funding cannot await implementation of recommendations for reform without risking creating system instability. We are therefore proposing to implement fee uplifts under the existing LGFS and AGFS frameworks as soon as possible during 2022 before implementing further cost neutral reforms within this funding envelope as soon as they can each be prepared.
145. Increases to LGFS fees and rates should be viewed as forming part of a package of uplifts directed towards criminal legal aid solicitors (alongside enhancement of other relevant fee schemes and the development of training grants for solicitors' firms). Given CLAIR's concerns regarding the primacy of PPE in driving litigator remuneration (with which we agree), we are minded to focus additional funding on enhancing basic fees, fixed fees, and casework elements paid at hourly rates. We are not, at this stage, proposing to increase "Initial" fees (determined by class of offence and PPE band) or per-page PPE rates (payable for PPE in excess of the initial fee floor). Further, we are not proposing to increase trial length proxy payments as this provision is only applicable to cases which run to trial, contrary to CLAIR's general approach to prioritise reward of work conducted at the earlier stages in the process. However, as an exception to the general policy of reform within the same

cost envelope, we propose that further investment of up to around £10m p.a. in Crown Court litigator remuneration would accompany implementation of a future fee scheme, once the optimal model has been determined.

146. While the services of expert witnesses may be required at any stage in criminal proceedings, they are most frequently commissioned (by litigators) in relation to Crown Court matters. For convenience, we address expert fees in this section. CLAIR found that practitioners were experiencing difficulty in securing expert evidence at the rates currently prescribed in Regulations, a finding consistent with feedback reported during day-to-day LAA operations. CLAIR recommended increasing expert fees in line with other general uplifts recommended in the Report. We agree with this recommendation and propose to increase all expert rates as described below.

147. We propose to apply the follow uplifts to Crown Court remuneration:

**LGFS**

15% increase (for the reasons outlined in paragraph 76 above) to:

- a) All basic fees.
- b) All fixed fees.
- c) All hourly or per-item (letters/ telephone calls) rates.
- d) All expert fees.

**AGFS**

15% increase to:

- a) All basic (brief) fees (trial/cracked trial, guilty plea).
- b) All trial daily attendance fees.
- c) All fees for confiscation hearings.
- d) Basic consideration fees for unused material.
- e) Per-day payment rates for contempt hearings.
- f) All fixed fees.

148. We also propose to proceed with CLAIR's recommendation to abolish the fixed fee in triable either way cases where the client elects for Crown Court trial and subsequently pleads guilty and instead pay the usual graduated fee as soon as possible in 2022 for both AGFS and LGFS. "Elected not proceeded" fees were incorporated into the schemes to discourage election for Crown Court trial in the face of a strong prosecution case. However in practice, as reported by participants in CLAIR evidence-gathering, the prosecution may not have served a sufficient proportion of its case ahead of the hearing at which mode of trial is discussed to permit the defence solicitor to fully advise their client on prospects of success.

## **Consultation Questions – Investment in criminal legal aid fee schemes**

49. Do you agree with our proposed approach of short-term investment in the LGFS and AGFS as they currently stand, followed by further consideration of longer-term reform options? Please give reasons for your answer.
50. Do you agree with our proposed 15% uplift to LGFS basic fees, fixed fees, and hourly rates, noting the further funding for LGFS reform? Please outline your reasons.
51. Do you agree with Government proposals to apply a flat 15% increase to all remuneration elements covered by the AGFS? Please outline your reasons.
52. Do you agree that the fixed fee payable for “Elected not proceeded” cases under the LGFS and AGFS should be abolished, with the result that these cases will attract the relevant guilty plea or cracked trial payment? Please outline your reasons.

## **LGFS Reform**

### **Response to recommendation 13 (restructuring LGFS)**

149. CLAIR also recommended longer term structural changes to remuneration for Crown Court litigation to replace graduated fees with a standardised fee system (incorporating offence classes) similar to that already in use for Magistrates' Court work, to tackle anomalies produced by the current LGFS.
150. The problem CLAIR identified within the LGFS was the increasing dominance of PPE in determining fees payable to litigators, exacerbated by the proliferation of digital evidence. This, it was felt, destabilised the whole system by causing solicitors' firms to prioritise securing cases with a high page count to subsidise less profitable areas of work (e.g. police station advice and assistance) and increase cashflows.
151. Overall, CLAIR's recommendations for reform of the LGFS emphasised the importance of preparation and promoting sustained engagement with the prosecution to facilitate resolution of cases at the earliest opportunity.
152. Ahead of exploratory work on structural changes, we are not proposing to increase per-page PPE rates or amend current bands, nor to uplift trial length proxies for cases where the evidence does not reach the prescribed threshold. While much of the overall graduated fee can be determined with reference to the pages of prosecution evidence, CLAIR argued that the reliance on PPE was “the central weakness of the LGFS” and did not reflect the work done or whether the pages were read or not. Our view is that the PPE elements of LGFS need reform and investment in those areas now would further embed the ‘perverse incentives’ CLAIR identified. Alongside the investments we are making in the basic and hourly fees for LGFS, and investment in the police station and Magistrates' Court scheme we are consulting on other investments to support litigators, particularly training contracts and support for solicitor-advocates gaining higher rights of audience.

153. We agree with the observations that CLAIR has made regarding the imbalances in the LGFS caused by PPE. Submissions to the Review by practitioners and Representative Bodies frequently cited the significant role of the PPE proxy in determining fees as the key weakness in the LGFS' ability to reflect the diverse preparatory activity carried out by litigators, a barrier to consistent cashflow and, uncommonly, a potential driver for behaviour not in the wider interests of justice.
154. CLAIR recommended that replacement of the current remuneration arrangements for substantive matters with a standard fee scheme be the key LGFS reform. We consider implementation of standard fees to be one possible remedy to the primacy of page count in determining fees.
155. The LGFS is long-established and prioritises simplicity of administration. However, as a consequence, we do not collect information as part of the billing process which demonstrates how much time litigators are committing to case preparation, which activities (such as perusal of PPE) contribute to this workload (and in what proportions), and which factors create a requirement for additional work. To test the rationale for introducing standard fees and, if the mechanism is adopted, set appropriate fee levels and thresholds as well as weightings for any proxies, we would need to work with firms and their representative bodies to design and run a data-gathering exercise.
156. There are some foreseeable disadvantages to introduction of standard fees. It is probable that practitioners would be required to record and report more case information to enable assessment by the LAA, particularly in relation to non-standard claims. Some administrative simplicity would be lost in the name of more appropriate remuneration, and it is possible some Crown Court litigator bills would take longer to process and pay.

### **Consultation Questions – Enhancing the LGFS' effectiveness in remunerating substantive matters**

53. Do you consider replacement of basic fees within the LGFS with a standard fee structure, akin to the Magistrate's Court scheme, to be, in principle, a better way to reflect litigators' preparatory work and reduce reliance on the PPE proxy? Please outline the reasons for your answer.
54. Do you consider that PPE requires reform and should be considered further once we have established an evidence base? Please outline your reasons.
55. In your view, how should the LGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?

### **Consultation Question – Improving the service and assessment of PPE**

56. What improvements would you like to see made in relation to the way in which evidence (especially electronic) is:

- a) Served on the defence?
- b) Defined in Regulations?
- c) Quantified at assessment?

157. CLAIR found that the hourly rates applicable to litigator work related to confiscation insufficiently recognise the importance of this area to the wider criminal justice system, and recommended they be increased. Government acknowledges that work related to the Proceeds of Crime Act (2002) is unusually complex as it involves elements of both criminal and civil law, and notes the difficulties experienced in attracting practitioners to this specialist area at current rates of pay. We propose to increase the appropriate rates as described above in “Investment in LGFS and AGFS”.

### **Consultation Question- Confiscation Proceedings**

57. Do you agree with our proposal to increase confiscation fees by 15%?

158. We have considered CLAIR's proposal to replace fixed fees for handling appeals from the Magistrates' Court and committals for sentence with standard fees to have merit. Evidence to the Review suggested that the amount of preparatory work required of the litigator for these types of case varied widely. However, we do not yet hold the data needed to examine this recommendation fully and propose to include these classes of proceedings in the scope of a future data-gathering exercise to assess the work done on appeals and committals for sentence.

### **Consultation Question – Standard fees for appeals to Crown Court and committals for sentence**

58. Would you welcome replacement of LGFS fixed fees for appeals to the Crown Court and committals for sentence with a standard fee arrangement, akin to the Magistrates' Court scheme? Please give your reasons.

159. The Government would welcome sustained collaboration with solicitors and the Representative Bodies during and beyond consultation in mapping out the future of Crown Court litigator remuneration. We will continue to seek views on the specific recommendations of CLAIR, the type of quantitative and qualitative evidence needed to build insight into litigation, and alternative ways of structuring fees – which may include shorter term amendment of existing provisions (for example adjustment of PPE bands and per-page rates).

## **Consultation Questions – Understanding Crown Court litigator work**

59. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of litigators in preparing Crown Court cases and facilitate refinement of the LGFS? Do you record this data, and would you be willing to share it with us?
60. Which factors influence the time you spend preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence?

## **AGFS Reform**

### **Response to recommendation 15 (AGFS reform)**

160. The principles of the AGFS differ from those underpinning the LGFS to reflect historical demarcation between the two professions' roles in proceedings. Remuneration for Crown Court advocacy is premised on a basic ("brief") fee (determined by offence class) to cover preparation, and advocacy at the first day of trial. This is supplemented by a daily attendance ("refresher") fee for any subsequent days at trial, as well as separate fees for attendance at pre-trial (interlocutory) hearings. Proxies play a role in enhancing the overall fee, but to a much lower extent than in LGFS.
161. As with the LGFS, CLAIR recommends a two-phase approach to reform of the AGFS. This comprises an initial uplift to fees and hourly rates under existing arrangements to improve sustainability and retention of experienced advocates in criminal legal aid, and longer-term refinement of the scheme so that it more fairly reflects the demands of modern advocacy – this will be within the same cost envelope.
162. CLAIR's specific aspirations for the AGFS concentrate on recognising the changing nature of advocate criminal practice – creating an increased emphasis on preparation and supporting early resolution of cases by ensuring matters concluding before trial (guilty pleas and cracked trials) are properly remunerated. The Report does not recommend changes to the underlying structure of the advocate remuneration scheme. It considers payment of a brief fee supplemented by Daily Attendance Fees for cases running to a second or subsequent day at trial, to be a sound model.
163. We are in broad agreement with the recommendation to retain the current framework for Crown Court advocate remuneration, given the AGFS was subject to structural reform and recalibration as recently as 2018. However, we also note CLAIR's proposal that the adequacy of brief fees in reflecting work properly conducted both within and across offence classes be reviewed. As part of the consultation we are seeking views on whether brief fees, as set in 2018, continue to fairly reflect the level of pre-trial work required of advocates.

### **Consultation Question – Fundamental AGFS Structure**

61. Do you consider the current AGFS model to be optimal for remunerating Crown Court advocacy? What changes would you like to see? Please outline your reasons.

62. We propose to deliver reform within the existing cost envelope. To ensure we achieve our objectives, we would welcome views on which elements or tasks within Crown Court advocacy should be prioritised for funding.

164. CLAIR proposes several reforms of the current AGFS to build on an initial general increase to fees and hourly rates under the existing arrangements. While they are not total structural revolutions (the Report recommends retention of the current framework), CLAIR's recommendations still involve significant changes to the principles of advocate remuneration.

165. In addition to increasing the hourly rate applicable to Special Preparation, CLAIR recommended broadening of the circumstances under which this enhancement can be claimed as the optimal method of supplementing brief fees, or fees for individual hearings, where an advocate had to undertake preparation in excess of the norm. The Report further suggested that an assessment of whether a case met certain complexity criteria/markers could "lay the ground" for a Special Preparation claim. The Government accepts the principle that advocates, for a variety of reasons, must conduct unusual amounts of preparatory work on a minority of cases or hearings within cases, which may not be adequately remunerated. However, our current assessment is that expansion of the Special Preparation provisions could be problematic, and we are seeking your views on this issue.

166. We do not currently collect the necessary data on hours worked and the types of preparatory activity involved (client conferences, drafting Defence Case Statement and so on) to gauge the norm for the array of cases undertaken by advocates (which, ideally, should be sufficiently remunerated by the brief fee). Nor are we in a position to compile an exhaustive list of the factors outside of the advocate's control which might necessitate additional work. Further, there is uncertainty surrounding the proportion of complexity markers that can be objectively verified at assessment. There is a high level of risk that increasing the availability of Special Preparation payments would create a significant administrative burden for both practitioners and the LAA, and a proliferation of billing disputes.

### **Consultation Questions – Supplementing the basic or hearing fee where preparatory work required exceeds the norm**

63. Do you consider broadening the availability of Special Preparation payments to be the best method of remunerating cases (or hearings within cases) where preparation required of the advocate exceeds the norm? Please tell us the reasons for your answer.

64. Do you agree with the recommendation that fixed fee payments for interlocutory hearings should benefit from the possibility of enhancement? If so, under what circumstances should an enhancement be applicable?
65. Would you welcome introduction of a fee scheme for advocacy which reduces the weighting accorded to basic fees in favour of remuneration where complexity criteria are satisfied and/or discrete procedural tasks have been completed? Please outline your reasons.
66. Do you think that fairer remuneration of outlier cases could be achieved by way of amendments to the existing AGFS, e.g. adjustment to PPE thresholds beyond which Special Preparation can be claimed or the relative level of basic fees? If so, for which offence classes do you consider current provisions to be anomalous?
67. Are there any models for Crown Court advocate remuneration you feel we have not yet considered? Please give details.

167. We are seeking, during and beyond consultation, to collaborate with advocates, their representative bodies, and potentially the proposed Advisory Board, to establish what data should be collected to build a picture of the demands of modern advocacy. Equally, we are inviting respondents to consider the conceptual basis of the AGFS. We wish to understand whether there is any consensus regarding the optimal structure of a scheme in the long-term which balances fair remuneration for work properly conducted with the need to minimise the administrative burden for all parties. Could the AGFS be made more effective by changing the emphasis accorded to existing proxies (for example by lowering PPE thresholds for certain offence classes)?

### **Consultation Questions – Further data and research**

68. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of advocates in preparing Crown Court cases, and facilitate reform of the AGFS? Do you record this data, and would you be willing to share it with us?
69. Which factors increase the complexity of the advocate's work in Crown Court proceedings?
70. In your view, how should the AGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?

168. To support resolution of cases at the earliest opportunity and efficient use of Court time, CLAIR recommended an enhanced fee be claimable by advocates for attendance at effective Plea and Trial Preparation Hearings (PTPHs) and Further Case Management Hearings (FCMHs) where the issues of the case and its possible disposal are discussed in detail. In principle, we consider that this recommendation has merit, as it aligns with Government priorities for reforming the criminal justice

system for the benefit of all participants. However, implementing this proposal could be challenging, and we are therefore seeking views from across the system to establish whether and how it should be pursued. Our concerns are two-fold. First, defining what constitutes an effective PTPH is subjective and will require careful consideration in conjunction with the Judiciary and the Criminal Procedure Rules Committee. Second, the effectiveness of a PTPH or FCMH is determined by the actions of multiple parties. There is a strong likelihood that there will be instances where a defence advocate who has prepared properly for the PTPH is unable to claim an enhanced fee because the hearing failed to progress the case for reasons outside of the advocate's control.

### **Consultation Question – Enhanced payment for “Effective” PTPHs/FCMHs**

71. Do you think advocates should be able to claim a higher fee for attendance at a PTPH or FCMH where meaningful case progression has been achieved? If so, what criteria, in your view, should be satisfied for this type of hearing to be considered effective? Please outline your reasons.

169. CLAIR further recommended changing the prescribed circumstances under which Wasted Preparation can be claimed by reducing the qualifying threshold for a claim from eight to two hours of preparation. Were this recommendation to be implemented in full, the effect would be to make Wasted Preparation available in significantly more cases than currently. We acknowledge the impact that late listing changes can have on trial advocates (particularly those with caring responsibilities) but have reservations concerning the rationale for full implementation, particularly relating to the volume of claims which could be triggered and the risk of paying twice for the same work. We are seeking views during consultation regarding whether and how it should be taken forward in the context of reforms within the same cost envelope.

### **Consultation Questions – Wasted Preparation Payments**

72. Do you support the principle of making Wasted Preparation available in more instances? If so, under what circumstances should it be claimable? Please provide reasons.

73. In your view, which case criteria should be satisfied for a Wasted Preparation claim to be allowable (e.g. duration of trial, volume of PPE, hours of preparation conducted)?

## **Section 28 pre-recorded cross-examination**

170. Pre-recorded video evidence and cross-examination (s.28) is one of a range of special measures available for vulnerable and intimidated victims and witnesses, supporting them to give their best evidence. It enables those eligible to have their cross examination pre-recorded on video at a separate hearing ahead of the trial. This video is then played back during the trial. The aim is to enhance the quality and

reliability of evidence by improving witness experiences of cross-examination and enhancing event recall by reducing the time between complaint and cross-examination.

171. S.28 has been available for vulnerable witnesses (witnesses under 18 and any witness whose evidence is likely to be diminished because of a mental disorder, physical disability or significant impairment of intelligence and social functioning) in all Crown Courts since November 2020, and is available for complainants of sexual and modern slavery offences in seven Crown Courts. The Government plans to extend s.28 for this cohort to all Crown Courts as soon as practicable.
172. Cases featuring s.28 attract a single AGFS trial brief fee, with the advocate also paid a daily attendance fee if pre-recorded cross-examination extends to more than one day, and the appropriate fee for any preceding Ground Rules hearing. If a case does not proceed to a trial following a pre-recorded cross-examination hearing, they will be paid for the s.28 hearing as soon as possible. In the event of a lengthy gap between the s.28 hearing and the trial, then advocates can make a claim for an interim payment through the hardship provisions if they meet the criteria.
173. Barristers have raised concerns that present fees do not recognise the additional work involved in a case featuring a s.28 hearing, particularly where there is a lengthy gap between the hearing and the trial, necessitating that counsel re-prepare the case. We would propose that any changes would need to be made on a cost neutral basis, subject to the outcome of this consultation and further data gathering.

### **Consultation Questions – Section 28 pre-recorded cross-examination**

74. Would you be willing to help us gather data on the additional work involved in a case with a s.28 hearing?
75. How do you think the fee scheme should be remodelled to reflect s.28 work?

## **Listing**

174. Although the report acknowledges that listing is not within the remit of CLAIR, Sir Christopher notes that case ownership and preparation are fundamental to the system of criminal legal aid and listing issues undermine this.
175. CLAIR suggests that listing problems arise due to the unpredictable nature regarding the length of cases and the possibility that a case might be ineffective at the last minute. In particular, the report highlights recent criticism of over-listing and the 'warned list' (where a case does not have a specific date but is expected within a certain period). CLAIR noted the warned list might be a contributory factor as to why the proportion of women leaving the Criminal Bar is higher than expected. This is due to the difficulties balancing caring responsibilities with criminal practice, in part due to the unpredictability of listing arrangements. The report also highlights the importance

of effective training and recruitment of listing officers to support improved communication between all criminal justice system partners in addressing listing-related issues, particularly at a local level.

176. CLAIR recognised that listing is a judicial function, but it has an impact on the wider system of criminal legal aid. Whilst the report does not make any direct recommendations regarding listing, we are committed to making sure there is an efficient and effective criminal justice system. The principles to deliver this are set out in Better Case Management, and the Crown Court Improvement Group – under the leadership of the senior judiciary – is focussing on delivering cross system proposals to, for example, reduce the number of ineffective trials. Listing forms a key part of this.
177. The HMCTS Reform Programme will deliver a strategic, national scheduling and listing tool to support judges in listing cases across all courts replacing the range of systems currently in use. The new tool “List Assist” will provide judges with greater certainty that listing decisions will translate into court lists. Listing officers will have more information at their fingertips to support decisions by judges, giving them more time to focus on administering scheduling and listing on behalf of the judiciary. The improved data on listing will help senior judges to consider how more consistency across Crown Courts can be achieved.
178. HMCTS recognises how important the listing officer role is to the effective administration of the Crown Court. Work continues on a range of measures designed to ensure that listing officers have the capacity and resources to undertake the role effectively, that they have access to relevant and required training and guidance, and that everything possible is being done to ensure that skilled and experienced listing officers are retained.

## Chapter 6: The Youth Court

179. The youth justice system's statutory aim is to prevent offending by children. When dealing with children, courts and other organisations are to have regard to protecting the welfare of the child. The youth justice system is therefore distinct from the adult system and focused on recognising children's unique needs, intervening early, and diverting them from the system where possible.
180. We believe it is key that those children who are prosecuted in Court can effectively engage with the process. That is why we have a dedicated Youth Court with specially trained Magistrates who can give a range of sentences greater than the adult Magistrates' Court. Only the most serious ("grave") crimes are heard in the Crown Court – in the year ending December 2020, this applied to 5% of the 12,900 sentencing occasions of children, a proportion that has remained broadly consistent over time.<sup>9</sup>
181. Youth Courts offer a more informal environment, the flexibility to adjust hearings where needed, and a range of special measures – such as the right to anonymity – in order to protect vulnerable children and reflect the very different needs that children have from adults.

### Youth Court Fees

#### Response to recommendation 12 (i) (the Youth Court)

182. Child defendants are some of the most vulnerable and benefit most from tailored, specialist support as well as a defence lawyer who has their rehabilitation in mind. In addition, Youth Court work requires an understanding of the distinct youth justice system, process and sentencing options. Building up trust and understanding with a child can be challenging and requires extra time and effort to be given. However, the CLAIR report highlights that current Youth Court fee levels may lead to inexperienced lawyers taking on these cases, who may only have a short time to meet the child to engage them, understand their case, win their trust and represent their interests effectively.
183. CLAIR therefore recommends that criminal legal aid fees payable in the Youth Court be increased to reflect the importance of this work and seriousness of the young defendant's situation. The report provided two possible approaches for doing this: ensuring that Youth Court fees be no less than the equivalent fees that would have been payable in the Crown Court, or allowing an enhanced fee for Youth Court work but maintaining the current situation whereby this work remains payable under the

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<sup>9</sup> Criminal Justice Statistics Quarterly, year ending December 2020  
<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020>

Magistrates' Court scheme. CLAIR also recommends that cases in the Youth Court that would otherwise be triable in the Crown Court should, save in exceptional circumstances, qualify for a certificate for counsel.

184. The general uplift of 15% to Magistrates' Court fees proposed in Chapter 4 would benefit youth work, as the Youth Court is remunerated under the Magistrates' Court fee scheme and will therefore be included in this uplift. We accept the premise of CLAIR's recommendation that a relative increase over and above the standard Magistrates' Court rates for some youth cases could better reflect the seriousness and complexity of the work these require, will reflect the need to spend additional time with child clients, and might attract more experienced lawyers to Youth Court work. However, we currently do not have an evidence base to say how significant an increase in quality of advocacy could be achieved with greater remuneration.
185. We propose two alternative options in response to CLAIR's recommendations in this area which would widen the circumstances where a certificate for counsel is automatically available or to introduce an enhanced fee for Youth Court work.

#### **Option 1: Widening the scope for "Assigned Counsel" to all Indictable Only offences**

186. We could make a certificate for counsel automatically available for all indictable only offences heard in the Youth Court (around 10% of those heard in the Magistrates' Court based on 2019 statistics). This approach may attract more senior advocates due to the higher fees being available for the most serious charges where it is particularly important that young defendants have strong legal representation. This approach would ensure there was more funding available for advocacy in those cases, and the increased fee could attract more experienced lawyers to take these on. This would likely have a positive impact on the quality of service provided and the outcomes for young people and society as a whole.

#### **Option 2: Enhanced Youth Court fee for all Indictable Only and Triable Either Way offences**

187. Alternatively, we could introduce an enhanced fee for all indictable only and triable either way Youth Court cases. This option could help to reflect the seriousness and complexity of the work done in the Youth Court, and it may attract more experienced lawyers to take on the indictable only and triable either way cases. This could have a positive impact on the quality of service provided and the outcomes for young people and society as a whole. In comparison to option 1, this would apply to a wider proportion of Youth Court cases (around 60% of those heard in the Magistrates' Court based on 2019 statistics). An enhanced fee would be similar to the non-standard fee under Magistrates' Court scheme. Our current thinking is that an enhanced fee would cost the same as Option 1 (widening the scope of Assigned Counsel), this would require choices as to enhanced levels but would not enable all relevant fees to be raised to crown court levels. We would welcome views on whether this option should be restricted to only the most serious, indictable only offences.

188. Together with the general uplift to all Magistrates' Court cases, both proposed options above would mean all Youth Court cases were better remunerated, and the most serious further still. We consider both options to be a realistic and viable means of delivering on the Youth Court fee-related recommendations made in the CLAIR report whilst ensuring good value for taxpayers.
189. We are specifically interested in which option would better reflect the seriousness and complexity of the work done in the Youth Court and would likely deliver the most improvements to legal advice for children.
190. We would also consider alternative suggestions which respondents believe could deliver improvements to good quality advice and advocacy in the Youth Court at a similar cost and would value any additional evidence or data that can be provided.

### **Consultation Questions – Youth Court Fees**

76. Considering the fee proposals above in paragraphs 186 to 187, which do you think would better reflect the seriousness and complexity of some Youth Court work and deliver improvements to legal advice for children, whilst ensuring good value for taxpayers?
77. Which proposal do you think would provide better quality legal representation for children before the Youth Court?
78. If you oppose the outlined options or want to propose an alternative, please explain your proposal, the rationale and evidence behind it, and include any unintended consequences which you think could arise.

## **Training and Accreditation for Youth Representation and Advocacy**

### **Response to recommendation 12 (ii) (the Youth Court)**

191. CLAIR also recommends 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.
192. We accept CLAIR's finding that there is an important role for training to drive up quality of advocacy, in parallel with fee reforms. We therefore echo the call for regulators to develop more specific and standardised training for youth work.
193. However, it is our main goal to incentivise youth work, making it attractive to experienced practitioners and a viable area to specialise in. We see this as the most direct way to ensure quality in the legal advice children receive. Any measures which could hamper supply (by restricting Youth Court work to those who are accredited) of youth practitioners must therefore be carefully considered to ensure that they do not have unintended adverse consequences. Unless and until it is clear that an increase

in fees has made youth work more attractive overall, and also for experienced practitioners, the introduction of any new requirements for this work could instead risk making it less attractive to practitioners. If accreditation were made a prerequisite for higher fees and few practitioners pursued it, it could also risk creating a two-tier market with some children unable to access higher quality legal advice. We therefore do not propose to make accreditation a formal condition of lawyers receiving any increased fees at this stage however we welcome your views on this point.

194. We recognise, and are supportive of, the significant amount of work that has been done by the sector, such as the Quality of Advocacy Working Group, over recent years to increase the availability and uptake of appropriate training. For example, we are aware that the Youth Justice Legal Centre runs training courses with good uptake among newly qualified practitioners. We encourage the sector to identify leads to further develop standard, formal training which all practitioners are encouraged to undertake.

### **Consultation Questions – Youth court accreditation**

79. Do you agree that accreditation should not be made a formal condition of lawyers receiving increased fees for youth work? Please explain.

## Chapter 7: Other criminal legal aid issues

195. As discussed in CLAIR the efficiency of criminal legal aid involves a number of smaller fee schemes and the administration of legal aid by the LAA. These issues are addressed in this section.

### Very High Cost Cases

#### Responding to recommendation 16 (i) and (iii) (other criminal legal aid)

196. VHCCs are cases which are likely to exceed 60 days in trial and are mostly complex fraud cases. To conduct a VHCC, certain eligibility criteria must be met. The LAA must be notified of a possible VHCC and, unless exceptional circumstances arise which make the case unsuitable to contract, will then issue a contract to the solicitors' firm and advocate(s) involved. Litigators currently agree case plans based on an individual case contractual provision whereby the expected work required is agreed on a three-monthly basis. Advocates use an alternative provision introduced in 2014, the Interim Fixed Fee Offer (IFFO), to agree a fixed fee upfront before signing a contract for a VHCC. The LAA uses underlying principles to calculate an initial offer for IFFOs, but the offer is routinely negotiated upwards.

197. We have two clear objectives regarding VHCCs, which are to control costs to protect the use of taxpayer funds and to ensure the availability of suitably experienced practitioners to take on these complex cases. This may be achieved through CLAIR's recommendation or via the other options presented below. As noted above the Government is also interested in whether the PDS can usefully play a role in this market. Any decision for reform will be informed by the consultation responses.

### Investment in VHCC fees

198. In relation to litigators' fees for VHCCs, CLAIR recommended an upwards adjustment in line with the overall recommendation to raise solicitors' remuneration. If the IFFO arrangements continue, CLAIR recommended no increase in advocate remuneration under the IFFO arrangement.

199. We propose increasing fees for litigators by 15%, as recommended in CLAIR, to be implemented as soon as possible this year, subject to consultation responses. This is with a view to more fairly paying for work done, as well as ensuring the availability of suitably experienced litigators for these cases. Since advocates are able to negotiate fees upwards from the original offer under the current scheme, where appropriate, we are not proposing an uplift to advocates fees under the IFFO scheme.

## **Consultation Questions – Investment in VHCCs**

80. We propose increasing fees for litigators conducting VHCCs by 15%. Do you have views? Please explain your reasons.

## **Structural Reform of IFFOs**

### **Responding to recommendation 16(iii) (other criminal legal aid)**

200. CLAIR found the legal basis for IFFOs to be unclear and identified an issue with IFFOs to be that there is no dispute resolution mechanism in place for the LAA and providers. It also noted the substantial fees paid to advocates and significant increases in fees paid to QCs. CLAIR recommends clarifying the legal basis for the IFFO scheme in the Regulations and to set up an independent resolution mechanism should there be disagreement over fees.
201. It is worth noting that the underlying principles for the IFFO calculator faces the same issues as the LGFS and, to a lesser extent, AGFS – an overreliance on PPE which means the scheme does not pay fairly for work done and an inability to properly assess the work required in relation to digital evidence, which is particularly pertinent in fraud cases where computers/phones are seized.
202. We have a number of overarching objectives regarding VHCCs, which are to control costs to protect the use of taxpayer funds and to ensure the availability of suitably experienced practitioners to take on these complex cases. Regarding the structure of the scheme, we are aiming to more fairly pay for work done by better setting out the underlying principles used to calculate the fee and further clarify the operation of the scheme – whether through a negotiation mechanism or other means. This may be achieved through CLAIR's recommendation or via the other options presented below. Any decision for reform will be informed by the consultation responses.

### **Option 1: Accept CLAIR's recommendation**

203. We could accept CLAIR's recommendation to further clarify the basis of the IFFO scheme, including within Regulations and/or to set up an independent resolution mechanism. We think this would better control costs of these cases by putting controls in place ahead of fee agreement. It would also put the operation of the scheme beyond doubt. We propose that this negotiation should be designed on the basis of better setting out work expected to be done in a case, which we think would better pay for work done.

### **Consultation Questions – Individual Fixed Fee Offers (IFFOs): CLAIR'S Recommendation**

81. Do you support the further clarification of IFFOs in Regulations? Why?

82. Would you find a dispute resolution mechanism, prior to signing a contract, useful? If so, what form do you consider such a mechanism could take? Why?

### **Option 2: Reverting to the contractual provision**

204. The contractual provision is still provided for in Regulations and is still used by litigators. We could abolish the use of IFFOs and require that all VHCCs are agreed using the individual case contract agreement in line with the litigators' scheme. This would require providers to negotiate on a 3-monthly basis rather than agreeing a fee for the entire case upfront with no provision for clawback. We believe this would more fairly pay for work done, as there are control stages in place for the providers to evidence work done. Fees would be increased by 15% in line with others.

### **Consultation Questions – Individual Fixed Fee Offers (IFFOs): Reverting to the Contractual Provision**

83. Would you support reverting to the individual case contract provision for VHCCs, instead of the IFFO scheme? Why?

84. Would returning to the contractual provision benefit the conduct and effective case management of these cases? Why?

85. Would you consider any changes to be required to the individual case contract provision before reverting back? If so, which changes?

### **Option 3: Adapting IFFO scheme, aligned to wider reform**

205. As the IFFO scheme faces challenges aligned to the LGFS/AGFS (over-reliance on pages of prosecution evidence as a proxy for determining payment, therefore not paying fairly for work done), we could make changes to the IFFO scheme, aligned to our policy position on LGFS and AGFS, if appropriate, once we have received and considered feedback from this consultation. We could better define the work intended to be remunerated by updating and clarifying the principles which underlie the IFFO. Such changes could include reasonable calculation of the initial fee, revised supporting guidance and contract clauses, and changes to the legislation if necessary.

### **Consultation Questions – Individual Fixed Fee Offers (IFFOs): Adapting the Scheme**

86. What principles need to be changed under the current provision in order to fairly reflect the work done?

87. If the IFFO provision is to be retained, what do you consider a reasonable approach to the negotiation and payment of fixed fees?

### **Option 4: Eventually subsume VHCCs into LGFS/AGFS**

206. This is also recommended in CLAIR and is a longer-term option which does not necessarily preclude pursuing options 1-3 in the interim. The idea behind this is that a reformed LGFS/AGFS will be based on proxies which better reflect work done and so will fairly pay for work done in VHCCs.

### **Consultation Questions – Subsuming VHCCs into Fee Schemes**

88. Would you support VHCCs being subsumed into the LGFS/ AGFS once reformed if based on proxies that better reflect work done in order to pay for it more fairly? Why?

89. Are there specific considerations regarding VHCCs which are needed when reforming the LGFS/AGFS? Which ones?

## **Criminal Cases Review Commission (CCRC)**

### **Responding to recommendation 16 (i) and (ii) (other criminal legal aid)**

207. If someone believes they have been wrongly convicted or sentenced and has already appealed to the criminal courts in the usual way, they may make an application to the Criminal Cases Review Commission (CCRC) to review the conviction or sentence. The CCRC can refer the case to the appeal courts again. Legal aid for applications to the CCRC is administered by the LAA. Advice and assistance on applications to the CCRC is intended to be an “initial screening process”, primarily to screen out weak claims that do not meet the CCRC criteria. The CCRC will then determine the merits of the matter.

### **Investment in Fees for CCRC work**

208. CLAIR recommended an increase in the fees for advice and assistance on applications to the CCRC. We propose increasing fees for CCRC work by 15%, to be implemented as soon as possible this year, subject to consultation responses.

### **Consultation Questions – Investment in Fees for CCRC Work**

90. We propose increasing fees for litigators conducting CCRC work by 15%. Do you have views?

## **Structural Reform of Fees for CCRC work**

209. Evidence to CLAIR stated that fees for applications to the CCRC are low and fewer and fewer firms are prepared to take on this work. The CCRC stated that there was a substantial fall in the number of applicants who had legal representation, now only about 10% of the applications it receives are from legally aided defendants compared with one third in 2008. The result, according to CLAIR, has been that applications have been poorly prepared by unrepresented defendants and some are lodged mistakenly with the CCRC rather than the Court of Appeal. The CCRC considers that the low level of legal aid fees hinders its work and there are risks of miscarriages of justice.
210. In order to address quality issues with applications to the CCRC, CLAIR argued that providers must be incentivised to take on this work through reform of the fee structure which recognises varying complexity of the work, thereby more fairly paying for work done. CLAIR therefore recommended that existing fixed fees for advice and assistance on applications to the CCRC should be restructured to standard lower, higher, and non-standard fees to reflect complexity and time likely required to be spent. This is with a view to applicants being able to prepare a structured submission to the CCRC, which would help resolve unmeritorious cases earlier, assist the CCRC in dealing with its workload, and lead to higher confidence in the justice system generally.
211. We do not have sufficient evidence to determine that providers are disincentivised by the current fee scheme from taking on CCRC applications work. We would like to seek views from providers on the prohibitive challenges relating to this work. We would also like to understand views on the impact of accepting CLAIR's recommendation. To structure your responses, there are two alternative options for consideration (below).

### **Consultation Questions – Structural Reform of Fees for CCRC Work**

91. Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why?
92. If you already undertake CCRC applications work, what are some of the challenges with this work?
93. Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones?

94. Is there a clear demarcation of work which should be done by the provider of legally aided services and that which should be done by the CCRC?
95. Do you routinely and accurately record time spent on this work?

### **Option 1: Accept CLAIR's recommendation**

212. In order to implement the reform of the fee structure into standardised fees, we would need to better understand the work done in the area in order to set the thresholds for the different fees. This would include gathering data on time spent on cases. We would need to work with the profession to understand at which point a higher fee should be applicable to adequately incentivise providers to take on this work, should the fee schemes currently disincentivise it, and fairly pay for work done. The reformed scheme would require practitioners to record time spent on the case in order to claim for the correct fee.

### **Consultation Questions – CLAIR's recommendation on CCRC reform**

96. Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why?
97. Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why?

### **Option 2: Retain the existing provision with uplifted fees**

213. It is not clear from the findings in the review, which were primarily from the CCRC rather than legal aid providers, that the reason for the fall in legally aided applications to the CCRC has been a result of the structure of the fee scheme and that reform would address this issue. We agree that those entitled to legal aid should be able to access it and would like to understand further from consultees whether the structure of the fee scheme is a hinderance on supporting applications to the CCRC.

### **Consultation Questions – Retain the Existing CCRC Provision with Uplifted Fees**

98. Do you consider that retaining the existing fee scheme once the fees have been uplifted would incentivise providers to take on this work? Why?

## **Prison Law**

### **Response to recommendations 16 (i) and (iv) (other criminal legal aid)**

214. At present, advice and assistance is paid at a fixed fee and has an escape threshold which is calculated based on prescribed hourly rate. Advocacy assistance in

sentencing and disciplinary cases and in parole board cases follow a similar scheme to the Magistrates' Court scheme, i.e. they are paid a lower standard, higher standard and non-standard fee.

215. CLAIR found that prison law cases are complex and that the fixed fee and the current escape fee mechanism did not reflect this complexity. Sentence cases, for example, take into consideration a host of factors when calculating a release date such as the applicable legislation, time spent on remand for the offence and the length of the original sentence amongst others. Prisoner vulnerability in the form of mental health problems as well as difficulty in gaining access to clients adds to this complexity. CLAIR noted that practitioners found it difficult to gain access to clients in prison and highlighted issues with phone and video conferencing delays. CLAIR recommended an uplift to prison law fees and that advice and assistance cases should be reformed into a system of standard fees, i.e. there should be a lower standard, higher standard and non-standard fee to reflect case complexity. Finally, CLAIR recommended that the Advisory Board should consider how legal aid advice on prison law is made available and delivered.
216. One area in which the Government has already taken steps to address the concerns of legal professionals in contacting prisoners and preparing for their hearings is adjudications. Due to the pandemic, the Government introduced virtual Independent Adjudications (IAs) in place of face-to-face hearings and issued guidance to prisons to ensure prisoners continued to have access to lawyers for disciplinary hearings. In consultation with the Association of Prison Lawyers, the Government has taken action during the pandemic to improve guidance to prisons on conducting virtual IA hearings including how to facilitate prisoners' requests for legal advice or representation and reminding prison staff to send the virtual IA link to solicitors.

## **Investment in Prison Law Fees**

217. Whilst we have carefully considered the CLAIR recommendations, the Government wants to focus reform on improving early engagement in the early stages of criminal cases and reducing the court backlog. As that is the case, at this stage, we are not proposing to uplift prison law fees in line with the uplifts for other areas of crime lower work.

### **Consultation Questions – Investment in Prison Law Fees**

99. Should the Government focus on the early stages of the criminal process and not uplift prison law at this stage? Please explain your reasons.

## Prison Law Work

218. CLAIR noted the Howard League's (*prison law charity*) submission that workload is high in prison law cases and the fixed fees did not fairly pay for the work done.
219. We are seeking views on a restructuring of the fee scheme for advice and assistance to a lower standard, higher standard and non-standard fee and whether this will address issues around case complexity. To test the rationale for introducing standard fees and, if the mechanism is adopted, set appropriate fee levels and thresholds, we would need to work with firms and their representative bodies to design and run a data-gathering exercise. We would also want to consider how reform in this area could be delivered on a cost neutral basis, subject to consultation responses and further data collection.
220. As set out above, CLAIR recommended that the Advisory Board is tasked with considering how the prison law scheme works to develop understanding in this area. Whilst the detailed remit of the Advisory Board is being considered, we will ensure that this topic is one of those considered for discussion when the board is being developed.

### Consultation Questions – Prison Law Work

100. What more could be done by the Government to address problems around access to clients in prison?
101. Do you agree with the proposal to restructure the fee scheme for advice and assistance in prison law cases?
102. What data would need to be taken to implement this reform?

### Other Criminal Legal Aid Fees

221. Other crime lower fees are paid for free-standing advice and assistance and appeals. Other crime higher fees are paid for work in the Court of Appeal. We propose to increase the fees for these other areas by 15%.

### Consultation Questions – Other Criminal Legal Aid Fees

103. Do you agree with our proposal to increase the fees for these other areas by 15%?

## **The Legal Aid Agency**

### **Response to recommendation 19 (i) (the LAA)**

222. The Review pointed to several areas for the LAA to consider in terms of its objectives and ways of working. In particular, it pointed to a review of the LAA's objectives, the SCC, and staff training, and for the LAA to consider the issues raised across the Review.
223. The LAA is an important delivery organisation that help the most vulnerable people in society to obtain access to legal representation. They provide simple, timely and reliable access to legal aid that secures value for money for the taxpayer. They do this by building strong relationships across the justice system to deliver a vital service to suspects and defendants in criminal legal proceedings. The LAA's objectives are set annually in the business plan, align to the MOJ's objectives in its Outcome Delivery Plan and reflect the Director of Legal Aid Casework's statutory function and the current division of policy and operational division.
224. The LAA has a duty to secure value for money for the taxpayer and to ensure funds are spent in line with that which is set out in the regulations. The National Audit Office (NAO) reviews the LAA's accounts every year and holds the LAA to a 1% threshold of materiality for error.
225. It is good practice that departments routinely review their public bodies to ensure that they are delivering their functions efficiently and effectively, that these functions are aligned to departmental and government priorities, and that good governance structures are in place. The LAA is reviewed as part of the public bodies review programme and we will consider the process for setting the LAA's objectives in light of that process.

### **Responding to Recommendation 19 (iii) (the LAA)**

226. CLAIR also noted that reviewing staff training programmes may be of assistance in implementing a more flexible approach to reimbursement claims. We agree that staff training is an essential part of the LAA's operations, and we remain committed to enabling staff to complete casework effectively and efficiently within the boundaries of the schemes established by the Lord Chancellor.
227. LAA Caseworkers are provided with comprehensive training that reflects the duty to the taxpayer to only pay what is claimed in line with the regulations and that claims are adequately evidenced. Training will be tailored to reflect any future changes to the payment mechanisms set out in the regulations. We routinely share our training approach and documents with provider representative bodies so that they can fully understand our requirements and will continue to do so.

## Chapter 8: Financial Summary

228. The Impact Assessment accompanying this consultation document provides a monetised statement of the anticipated impacts of implementing the detailed proposals provided in the chapters above. Where detailed policy proposals are not yet provided, impacts have not been assessed.
229. We would welcome information and views on the Impact Assessment and associated evidence base to help improve the quality of our estimates.
230. The table below shows a breakdown of the proposed expenditure in steady state. As the Impact Assessment explains, the estimated costs of the policy proposals have been assessed against two baselines; one using the most recent pre-COVID caseload for 2019-20, and another taking into account the projected increases to demand for legal aid. Crown and Magistrates' sitting days are projected to increase beyond 2019-20 levels up to 2024-25 (by 20-29% and 7% respectively) along with legal aid police station volumes (10%). The increases are due to court recovery measures to reduce backlogs in the court and in the police station from expected increases in police officers.
231. All figures in the table below have been rounded using the rounding convention used in the accompanying Impact Assessment. Estimates below £10m have been rounded to the nearest £100,000, those below £100m to the nearest £1m and those above £100m to the nearest £5m. Consequently, some totals may not agree due to rounding. The baseline years of 2019-20 and 2024-25 are used to provide volumes estimates and are not associated with expected implementation. The figures are steady state; we expect to achieve steady state 2-3 years after each set of changes are implemented.

**Table 1: Steady State Expenditure Summary - based on volumes in 2019-20 and 2024-25**

	<b>Costs on 2019-20 volumes £m</b>	<b>Costs on 2024-25 projected volumes £m</b>
Fee uplifts and reform of ENP	95	115
Training grants	2.5	2.5
<b>Total included in the Impact Assessment (IA) (rounded)</b>	<b>97</b>	<b>115</b>
Youth courts	4.7	5.1
PDS expansion	3.2	3.2

	<b>Costs on 2019-20 volumes £m</b>	<b>Costs on 2024-25 projected volumes £m</b>
Support for sustainability and development of solicitors practice and LGFS Reform.	8	10
<b>Total longer-term options not included in the IA</b>	<b>16</b>	<b>19</b>
<b>Total (rounded)</b>	<b>115</b>	<b>135</b>

232. 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 consultation.

### **Consultation Questions – Impact Assessment**

104. 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.

## Chapter 9: Equalities Analysis

233. 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.
234. For each proposal we have indicated, on the basis of the latest available evidence, what the likely impacts on equality are. Our analysis considered the impacts of our proposed changes on people with particular protected characteristics in relation to the specific proposals we plan to implement in 2022. There are other longer-term proposals set out in this consultation document, but at this stage the proposals are not sufficiently detailed to enable us to assess who would be impacted and any potential impacts on people with protected characteristics.
235. The specific equalities questions below are designed to invite 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.

### **Consultation Questions – Equalities**

105. 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.
106. 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.

# Annex A: Summary of CLAIR’s recommendations and the government’s response

Recommendation Number and CLAIR Chapter	Recommendation	Government’s Response
<b>Recommendation 1</b> <b>CLAIR Chapter 15</b>	<p><b>Advisory Board</b></p> <p>An independent Advisory Board should be established to advise the Lord Chancellor at regular intervals on the arrangements for the delivery of criminal legal aid. The remit of this body should include:</p> <ul style="list-style-type: none"> <li>(i) participation by other stakeholders, including the Police, the CPS, and the Courts, as well as providers, to foster transparency and understanding of how decisions on criminal legal aid affect the wider criminal justice system, and vice-versa;</li> <li>(ii) on-going consideration of the criminal legal aid system, identifying specific problems as they arise, and possible further reforms, including new ways of working;</li> <li>(iii) advising the MOJ on the data needed to ensure that criminal legal aid is efficient and responsive, in all areas of England, and in Wales, and (iv) and fostering diversity and equality of opportunity</li> </ul>	<p>The Government proposes to establish an engagement forum to bring CJS partners together to understand evolving policy issues and the impacts of change in the CJS on criminal defence.</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 2</b> <b>CLAIR Chapter 15</b>	<b>Finding local solutions</b> The MOJ should encourage and facilitate local arrangements, whether through local Criminal Justice Boards or otherwise, for improving lines of communication between the defence, the Police, the CPS and the Courts, with a view to understanding common problems and finding solutions in the interests of the criminal justice	LCJBs represent the best way for MoJ to “encourage and facilitate” greater local collaboration between defence professions and CJS partners. Scorecards will help re-invigorate LCJBs, allowing them to scrutinise data in their local area and tackle performance issues; defence engagement will add value to those conversations. As chair of the National Criminal Justice Board, the Lord Chancellor will write to LCJB Chairs on the day the response is published, asking them to encourage local defence and Legal Aid Agency attendance. MoJ has committed, to develop options to place LCJBs on a statutory footing and clarify their membership, alongside strengthening existing LCJB guidance and this work can now also be used to promote greater defence representation on Boards.

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 3</b> <b>CLAIR Chapter 15</b>	<p data-bbox="490 308 1088 343"><b>Unmet needs and new ways of working</b></p> <p data-bbox="490 363 1458 906">The MOJ should consider, in conjunction with the Advisory Board as appropriate, the extent of unmet need in criminal legal aid in Wales or England, for example in terms of particular geographical areas (whether rural locations, small towns or inner cities), particular types of user (such as young suspects/defendants, or those with mental health issues), particular communities (such as those from an ethnic minority background) or particular areas of work (such as appeals or prison law); and if so, how those needs should be met, in particular by support grants to not-for-profit or similar organisations, or other measures, with a view to pilot schemes. Such consideration should include new possible ways of working as discussed in Chapter 15, including “holistic models” that span both criminal and civil needs, focussing on the needs of the user,</p> <p data-bbox="490 927 1458 1007">MOJ should consider training grants to support more trainees in criminal legal aid firms.</p>	<p data-bbox="1469 308 1704 343"><b>Training grants</b></p> <p data-bbox="1469 363 2107 651">To consult on whether funding training grants could help solicitor firms recruit and retain staff and how such an initiative might best be targeted to support those from backgrounds. We are also interested in views on whether funding accreditation for solicitors to gain higher rights of audience.</p>
<b>Recommendation 4</b> <b>CLAIR Chapter 15</b>	<p data-bbox="490 1031 562 1066"><b>Data</b></p> <p data-bbox="490 1086 1458 1294">The MOJ should invest in and significantly improve the availability of data to enable better assessment of the efficiency, incentives, costs and effectiveness of criminal legal aid and the various fee schemes, including the effect of 156 decisions in different parts of the criminal justice system on the provision and cost of criminal legal aid.</p>	<p data-bbox="1469 1086 2107 1166">We are seeking views on better collection of data as part of this consultation.</p> <p data-bbox="1469 1187 2107 1310">Subject to its establishment, the Advisory Board to gather improved data from the professions</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 5</b> <b>CLAIR Chapters 6 and 7</b>	<p data-bbox="488 308 1429 344"><b>A general uplift of the remuneration of criminal legal aid firms</b></p> <p data-bbox="488 360 1429 523">There should be a substantial increase in the remuneration available to firms doing criminal legal aid work, better to enable criminal legal aid firms to invest in recruitment, compete for talent, maintain quality, provide training, and ensure retention.</p> <p data-bbox="488 547 1429 874">Additional funding of at least £100 million per annum (an overall increase of some 15%) is required, not least to enable criminal legal aid firms to offer remuneration broadly commensurate with the CPS and to ensure equality of arms. To increase efficiency and protect the taxpayer, such an increase should be accompanied by reforms to the structure of remuneration set out below. offer remuneration broadly commensurate with the CPS, and to ensure equality of arms.</p> <p data-bbox="488 898 1429 1018">To increase efficiency and protect the taxpayer, such an increase should be accompanied by reforms to the structure of remuneration set out below</p>	Covered according to individual fee schemes below.

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 6</b>	<b>Structural reform of fee schemes mainly affecting criminal legal aid firms</b>	
<b>CLAIR Chapter 7</b>	<p>(i) The general principles for reform of the solicitors' remuneration schemes should be that work done should be properly paid</p> <p>(ii) perverse incentives be removed and</p> <p>(iii) administration costs be minimised.</p> <p>The best available compromise for meeting these objectives is the present remuneration scheme for the Magistrates' Court, which is a system of lower standard, higher standard, and non-standard fees, permitting most routine work to be carried out at a fixed cost, while allowing reasonable claims for more complex cases. I recommend that the Magistrates' Court scheme be also the basic model for criminal legal aid work in the police station and the remuneration model should reflect the seniority of the solicitor where appropriate. The remuneration should also incentivise case ownership, early engagement with the police/CPS, and proper preparation. In principle, each main component of the work, namely the police station, the Magistrates' Court and the Crown Court, should not be reliant on cross subsidy from other work.</p>	Covered according to individual fee schemes below.

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 7</b> <b>CLAIR Chapter 8</b>	<b>Police station remuneration</b>  The remuneration payable for police station advice and assistance should be restructured along the lines of the Magistrates' Court remuneration scheme namely a lower standard fee, a higher standard fee, and a non-standard fee in exceptional cases, so as to reflect better the different circumstances of cases, improve quality, and ensure that proper advice and assistance is available as early as possible. Such restructuring should be based on the matters specified in paragraph 2(3) of Schedule 4 currently used to calculate the escape fee, but also reflect the seniority of the solicitor concerned.  The remuneration rates should increase as recommended above and should as soon as practicable phase out different rates based on individual police stations.	We are proposing a 15% increase to police station fees.  We are consulting on the reform of the police station fee scheme in the longer term to better pay for work done by differentiating relative case complexity. We have presented two options in the consultation, either CLAIR's recommendation for reform (standardised fees, along the lines of the Magistrates' Court fee scheme) or adapting the escape fee provision. We believe either option could achieve the aims set out in CLAIR. We propose that any reformed scheme should be designed at harmonised rates. Subject to further policy development and data collection, we propose that the reformed scheme will be designed on a cost-neutral basis.  We are also consulting on the impact of introducing a weighting for senior practitioners to take on complex cases.

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 8</b> <b>CLAIR Chapter 8</b>	<b>Other aspects of police station work</b>  The MOJ should, in conjunction with the Advisory Board as appropriate, and in collaboration with the police and Home Office, initiate a detailed study of the operation and effectiveness of advice and assistance in the police station, including assembling more detailed data, for example on whether the take- up of such advice by suspects can be improved, the quality of the service given, the means of delivery (physically or remotely), the possibility of basing duty solicitors in larger police stations, the use of accredited representatives and their effective supervision, and improvements in training and/or accreditation needed generally, and in particular in relation to young or vulnerable suspects, and those from an ethnic minority background.	<p>The Government is working with the police to trial an opt-out system, particularly for youth suspects. The Government is consulting to see views on how this can be further rolled out and to understand other initiatives the sector may be undertaking to improve uptake.</p> <p>The MOJ will work the regulators and sector to provide on quality control and is consulting on how to make sure quality control measures are not unduly burdensome.</p> <p>The Government is also exploring new ways to deliver police station advice and proposed to trial remote advice via the PDS.</p> <p>The Government proposes that the Advisory Board considers issues around accreditation of representatives and location of duty solicitors including office presence and basing in police stations.</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 9</b> <b>CLAIR Chapter 9</b>	<p data-bbox="490 363 1451 523"><b>Pre-charge engagement</b></p> <p data-bbox="490 547 1451 754">Pre-charge engagement should be remunerated. The preparation necessary to determine whether pre-charge engagement is appropriate or not should be remunerated irrespective of whether pre-charge engagement subsequently takes place.</p> <p data-bbox="490 547 1451 754">Similarly work reasonably necessary to maintain contact with the police and/or the client in the period between the initial police station arrest/interview and the charging decision should be remunerated, irrespective of the extent of any substantive pre-charge engagement, and whether ultimately there is a charge or not.</p> <p data-bbox="490 778 1451 850">This remuneration should be treated as an extension of the police station scheme, as reformed as recommended above.</p>	<p data-bbox="1469 363 2107 483">We are proposing to allow preparatory work to be remunerated and are inviting your views on how this could be claimed for.</p> <p data-bbox="1469 507 2107 707">We are also proposing to amend the Sufficient Benefit Test so that it sets out what is expected of solicitors under the AGO guidelines and the evidence that will be required to claim for PCE preparatory work.</p> <p data-bbox="1469 730 2107 1023">As part of the longer-term reforms, we are proposing for PCE and the required preparatory work to be incorporated into the police station fee scheme. We are seeking views on whether these changes should be made and welcoming views on how this could be best done.</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 10</b>	<b>Post-charge engagement</b>	
<b>CLAIR Chapter 9</b>	To encourage as much communication as possible between the police/CPS and defence prior to the first hearing in the Magistrates' Court, criminal legal aid funding should be available to remunerate discussion between the defence and the prosecution prior to that first hearing, including remunerating the preparation necessary for such discussion, for example any reasonable requests relating to the disclosure of the initial details of the prosecution case or unused material. This remuneration should be based on the same structure as the present Magistrates' Court scheme	The Government is committed to exploring this issue further with stakeholders. As a next step we would like to seek views on what the Government can do to make appropriate provision for early and efficient post-charge engagement.
<b>Recommendation 11</b>	<b>The Magistrates' Court</b>	
<b>CLAIR Chapter 10</b>	<p>(1) The existing Magistrates' Court scheme should be retained, but remuneration increased in line with the general uplift in remuneration recommended above,</p> <p>(2) There should be a system of higher and lower standard fees for appeals and committals for sentence from the Magistrates' Court to the Crown Court,</p> <p>(3) Committals for sentence should not be remunerated at less than the equivalent remuneration for a guilty plea in the Crown Court</p> <p>(4) I suggest for consideration (but I cannot formally recommend) that legal aid for a defendant committed for sentence to the Crown Court should depend on the Crown Court eligibility criteria rather than on the Magistrates' Court criteria for eligibility.</p>	<p>(1) We are consulting on a 15% uplift to fees under the Magistrates' Court fee scheme. We are inviting views on not reforming the fee scheme.</p> <p>(2) and (3) are fees remunerated under the LGFS and covered in the LGFS chapter.</p> <p>(4) is addressed in the Government's Legal Aid Means Test Review</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 12 The Youth Court</b>		
<b>CLAIR Chapter 11</b>	<p>(1) The MOJ should generally prioritise devoting additional resources to the Youth Court, in particular by raising the fees either to the level that would apply were the case to be tried in the Crown Court, or generally in relation to other Magistrates' Court fees and provide that there be certificates for counsel for Youth Court appearances.</p> <p>(2) An appropriate system of accreditation with appropriate training should be developed for advocates appearing in the Youth Court.</p>	<p>To consult on two fees options:</p> <p>1) to make a certificate for counsel automatically available for all indictable only offences heard in the Youth Court; or</p> <p>2) to introduce an enhanced Youth Court fee for indictable only and triable either way cases.</p> <p>Additionally, to consult on whether accreditation should not be made a formal condition of lawyers receiving increased fees for youth work due to risks.</p>
<b>Recommendation 13 Restructuring the Litigators' Graduated Fees Scheme</b>		
<b>Chapter 12</b>	<p>The LGFS should be restructured, on the understanding that the intention is not to reduce solicitors' remuneration overall, to the contrary, but to rebalance such remuneration to better reflect work actually done and to facilitate the general increase in fees recommended above.</p> <p>The restructuring of the LGFS should proceed along the following lines:</p> <p>(i) The principle of lower standard fees, higher standard fees and non-standard fees used in the Magistrates' Court, and recommended above for police station advice and assistance should be extended to the LGFS, with different fees applicable to</p>	<p>We are proposing a short-term increase of 15% to basic fees, all fixed fees, all hourly or per-item rates, and expert fees.</p> <p>For (i) and (ii) we are inviting views on the longer term reform of the LGFS, to include the optimal basic structure of litigator remuneration, the role of PPE in determining fees, and what data should be collected to enable a thorough examination of litigator preparatory work.</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
	<p>different classes of offences set out in the LGFS Table of Offences, the latter to be simplified as appropriate.</p> <p>(ii) A standard fee arrangement should replace the current fixed fees for appeals from the Magistrates' Court and committals for sentence.</p> <p>(iii) Part 3 of Schedule 2 of the Regulations, providing for payment of a fixed fee where a guilty plea or cracked trial follows a client election, should be abrogated.</p>	<p>We are consulting on abolishing fixed fees for "Elected not Proceeded" cases (iii).</p>
<b>Recommendation 14 General uplift in remuneration under the AGFS</b>		
<b>CLAIR Chapter 13</b>	<p>In accordance with my recommendation in Chapter 13, advocates remuneration under the AGFS should be increased overall by some £35 million. This includes both barristers and solicitor advocates (15%) partly through an overall increase in fees, and partly through a restructuring of the AGFS as recommended below</p>	<p>We are consulting on a short-term increase of 15% to the following:</p> <ol style="list-style-type: none"> <li>1. All basic (brief) fees (trial/cracked trial, guilty plea).</li> <li>2. All trial daily attendance fees.</li> <li>3. All fees for confiscation hearings.</li> <li>4. Basic consideration fees for unused material.</li> <li>5. Per-day payment rates for contempt hearings.</li> <li>6. All fixed fees.</li> </ol>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 15</b>	<b>Structuring the AGFS</b>	
<b>CLAIR Chapter 13</b>	<p>The restructuring of the AGFS should include a general uplift in fees and the following changes:</p> <ul style="list-style-type: none"> <li>(i) The relationship between the brief fees for different offences should be reviewed, in particular to determine whether fees for murder and serious sexual offences adequately reflect the gravity and complexity, and whether PPE is having a distorting effect.</li> <li>(ii) Greater flexibility in the provisions governing special preparation so that work reasonably done be properly remunerated.</li> <li>(iii) The fees for special preparation and considering unused material be increased.</li> <li>(iv) Wasted preparation where an advocate cannot attend a trial through no fault of their own should be claimable in all cases of wasted preparation in excess of 2 hours.</li> <li>(v) Work reasonably undertaken should be claimable and payable within 90 days without the need to await the conclusion of the trial before claiming payment.</li> <li>(vi) Fixed fees under the AGFS including those provided for the PTPH should benefit from the possibility of enhanced payment through a claim for special preparation or otherwise, so as to</li> </ul>	<p>We are consulting on reform of the AGFS to follow a short-term increase in funding of 15%, as follows:</p> <ul style="list-style-type: none"> <li>(i) For which classes of offence do the brief fees and PPE thresholds prescribed not adequately reflect the general complexity of cases?</li> <li>(ii) Whether expansion of special preparation is the best method for differentiating between cases in remunerative terms.</li> <li>(iv) Whether Wasted Preparation should be available under more circumstances, and if so, what should the qualifying criteria be?</li> <li>(v) Whether a mechanism enabling interim payments to advocates for Crown Court work should be introduced.</li> <li>(vi) The principle and implementation of enhanced payments for PTPHs/FCMHs and interlocutory hearings.</li> </ul> <p>We are proposing to abolish Part 4 of Schedule 1 of the Regulations, providing for</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
	<p>reflect the work necessarily done in the particular circumstances.</p> <p>(vii) The fees for confiscation matters should benefit from the general uplift in a way that sufficiently incentivises advocates to take on this work</p> <p>(viii) Part 4 of Schedule 1 of the Regulations be abrogated, as for the LGFS above.</p>	<p>a fixed fee to be paid in “Elected not Proceeded” cases (viii).</p> <p>We are consulting on increasing rates and fees for Special Preparation and consideration of unused material (iii), and confiscation matters (vii), as part of, and in line with, the general 15% uplift to AGFS fees.</p> <p>We are also seeking views on the overall structure of the AGFS and which data should be collected to inform a fuller examination of the advocate's role.</p>
<b>Recommendation 16 Other Criminal legal aid Expenditure</b>		
<b>CLAIR Chapter 14</b>	<p>The recommendations set out in Chapter 14 above in relation to appeals, references to the CCRC, IFFOs, prison law and experts' fees should be carried into effect, particularly as regards:</p> <p>(i) The overall increases in remuneration there recommended</p> <p>(ii) The restructuring of remuneration for advice and assistance on CCRC work with lower, higher and non-standard fees.</p> <p>(iii) In relation to IFFOs, amending the Regulations to clarify the statutory basis and provide a mechanism for dispute resolution.</p> <p>(iv) In relation to prison law, the restructuring of advice and assistance work with lower, higher, and non-standard fees.</p>	<p>(i) We are consulting on uplifting litigators fees for VHCCs by 15% and for applications to the CCRC by 15%.</p> <p>(ii) We are inviting views on the reform of CCRC work into standardised fees.</p> <p>(iii) We are consulting on different options for remunerating advocates for VHCCs with a view to more fairly paying for work done.</p> <p>(iv) We are consulting on whether:</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response	
		<p>the Government should focus on the early stages of the criminal process and not uplift prison law at this stage.</p> <p>On what has been done to address problems around access to clients in prison and what more could be done.</p> <p>On whether the fee scheme for advice and assistance in prison law cases should be restructured.</p>	
<b>Recommendation 17</b>	<b>Diversity</b>		
83	<b>CLAIR Chapter 15</b>	<p>a. I recommend that the LAA work with the MOJ, and solicitors' representatives, to determine why the sex balance in relation to duty solicitors is in favour of male solicitors, and if so, what steps should be taken to achieve a more equal sex balance</p> <p>b. The MOJ, the Bar Council and the Bar Standards Board should establish to what extent, and if so why differences exist in the publicly funded incomes earned or the work undertaken by criminal legal aid barristers on the basis of sex or ethnicity, with a view to taking any necessary corrective action, having regard to the principles of equality in the expenditure of public monies,</p> <p>c. The MOJ working with the Bar Council and Bar Standards Board as appropriate consider whether further support for young barristers after pupillage is appropriate with a view to increasing</p>	<p>(i) We want to test what can be done to make duty solicitor work easier for those with caring responsibilities. We will explore this through our PDS trial of increased remote provision of advice. We are also seeking views on what else could be done to improve the sex balance in this work.</p> <p>(ii) We will ask the Advisory Board to investigate this issue with the frontline regulators and representative bodies, to better understand what might be driving these disparities. We are also seeking further evidence on this issue.</p>

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
	diversity within the profession and if so, how that should be achieved.	(iii)As a first step towards understanding whether further support for young barristers could help support diversity within the profession, we will ask the Bar Council, Bar Standards Board and Inns of Court to consider what further support they and chambers could provide and how this could best be targeted.
<b>Recommendation 18 CILEX members as duty solicitors</b>		
<b>CLAIR Chapter 8</b>	I recommend that the LAA and MOJ review the provisions regarding the acceptance of CILEX members as duty solicitors	The government will seek views on increased opportunities for CILEX members across the justice system and reducing barriers to them becoming duty solicitors.

Recommendation Number and CLAIR Chapter	Recommendation	Government's Response
<b>Recommendation 19</b>	<b>The LAA</b>	
<b>CLAIR Chapter 15</b>	<p>(i) The MOJ should reconsider and re-frame the objectives of the LAA to the effect that the LAA's primary objectives should be to support the resilience of the criminal legal aid system and reduce unnecessary bureaucracy, while maintaining proportionate control over costs</p> <p>(ii) The MOJ, the LAA and relevant stakeholders work through the existing terms of the SCC and the LAA's related procedures with a view to simplifying and reducing administrative burdens where proportionate to do so.</p> <p>(iii) The LAA review its staff training programmes with a view to implementing the more flexible approach to claims for reimbursement recommended in this Review while mindful of the need to reject unreasonable claims and safeguard the taxpayer.</p> <p>(iv) The LAA consider the various specific matters raised in this Report in particular in relation to the DSCC (Chapter 8), the working of the police station scheme including accreditation (Chapter 8), the 14-hour rule (Chapter 8), earlier payment of advocates' fees (Chapter 13), and reimbursement of experts' fees in the Magistrates' Court (Chapter 14), with a view to resolving with the MOJ what action may be appropriate.</p>	<p>There are existing reviews of LAA objectives by the National Audit Office and Cabinet Office ALB review process.</p> <p>Propose an LAA-led review of the SCC to take reform from CLAIR into account</p> <p>Continue to make use of existing LAA staff training programmes and review mechanisms existing LAA staff training programmes and review mechanisms.</p> <p>Consult on future improvements for the DSCC, including digitalisation. Ask the Advisory Board to consider accreditation.</p> <p>There have been recent changes to the 14hour rule.</p>

# Annex B: Consultation Summary

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
An Advisory Board	15	2	<ol style="list-style-type: none"> <li>1. Do you agree with our proposal for an Advisory Board? Please give reasons for your answers.</li> <li>2. Do you have any views on what the Advisory Board's Terms of Reference should cover?</li> <li>3. Do you believe existing criminal justice system governance structures (such as the National Criminal Justice Board) could be utilised so a new Advisory Board was not required? Please outline your reasons.</li> </ol>
Unmet need and innovation	15	2	<ol style="list-style-type: none"> <li>4. What are your views on our proposal to expand the Public Defender Service on a limited basis to provide additional capacity (and how much capacity) or where the criminal legal aid market has potential unmet need, risk of markets failing or being disrupted or could possibly provide greater value for money – for example to provide remote advice in police stations, particularly in rural areas and to have a presence in the market for in more Very High Cost Cases (VHCCs)?</li> <li>5. What are your views on the benefits and disadvantages of requiring a provider to have a physical office to be a member of a duty scheme?</li> <li>6. Do you have any views on how non-traditional forms of provider and new ways of working such as holistic models and not-for-profit providers might best play a part in the criminal defence market?</li> </ol>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Training and accreditation grant programmes	15	2	<p>7. What are your views on a training and accreditation grant programme? How can it make it more attractive to pursue a career in criminal defence?</p> <p>8. How can the Government best support solicitors to gain higher rights of audience?</p>
Disparity in barrister's income	15	2	<p>9. In your experience do you consider that it is the case that female barristers are more likely to be assigned lower fee cases, such as RASSO? Do you have any evidence to support this?</p>
Diversity	15	2	<p>10. Would training grants for criminal legal aid chambers in your view help with recruitment and retention issues? If yes, how could such an initiative best be targeted to support diversity?</p> <p>11. What do you think the Government can do to improve diversity within the independent professions?</p> <p>12. What do you think the professional bodies can do to improve diversity within the independent professions?</p> <p>13. What evidence do you have of barriers different groups face in forging careers in criminal defence work generally?</p> <p>14. What evidence do you have of other barriers women face in working within duty schemes beyond those identified? How much of a difference would an increase in remote provision of advice make to improving the sex balance? Is there anything else we should be trialling to address this?</p> <p>15. What do you think might be driving the disparities in income in the criminal Bar noted by the review? What evidence do you have to support this?</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Quality Issues	8	2	<p>16. What more in your view could solicitor firms and chambers do to support those from diverse backgrounds embarking on careers in criminal defence?</p> <p>17. How can the Government assist the professions to review the balance between the various quality measures to minimise the administrative cost while ensuring quality is not compromised? Do you have any views on this?</p> <p>18. How can the Government best design the qualification criteria for any Lord Chancellor's lists of criminal defence advocates to ensure that listed advocates are incentivised toward quality control, professional development and consistent availability for work?</p>
Technology	2	2	<p>19. How and to what extent does technology, including remote technology, support efficient and effective ways of working in the criminal justice system?</p>
Pre-charge engagement: preparatory work	9	3	<p>20. Do you agree that the proposal under scenario 1 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.</p> <p>21. Do you agree that the proposal under scenario 2 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.</p> <p>22. Are there any other factors, beside remuneration that limit practitioners from carrying out PCE? Please explain the reasons for your answer.</p> <p>23. In our Impact Assessment we have indicatively assumed that preparatory work would be paid at an average of two hours per case with an uptake of up to 6% (or up to 32k cases). Do you agree that these are reasonable assumptions? Please explain the reasons for your answer.</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Pre-charge engagement: sufficient benefits test	9	3	<p>24. Do you agree with the proposed amendments to the 'Sufficient Benefits Test'? Please explain the reasons for your answer.</p> <p>25. Do you have alternative proposals for amending the 'Sufficient Benefits Test' under scenario 2?</p> <p>26. Do you think paragraph 4 of Annex B of the Attorney General's 'Guidelines on Disclosure' also reflects the type of preparatory work likely to be undertaken ahead of a PCE agreement?</p> <p>27. Are there any other types of preparatory work that you think should be funded prior to the PCE agreement?</p>
Investment in police station fees	8	3	28. Do you have any views on our proposal to increase police station fees by 15%?
Standardised police station fees	7	3	<p>29. If we were to pursue option 1, what features of a case do you think should be used as an indicator of complexity: (a) time spent; (b) case type – e.g. theft, murder; (c) case type – e.g. summary only, either way; indictable; (d) anomalous complexities – e.g. vulnerable client, drugs problems; (e) a combination of the prior; (f) other? Why?</p> <p>30. Would you need to change your current recording and billing processes in order to claim for standardised fees which are determined by reaching a threshold of 'time spent' on a case?</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Both options for police station structural reform	8	3	<p>31. Do you agree we should explore the types of structural reform proposed above, within the same cost envelope, in order to more accurately remunerate work done in the police station?</p> <p>32. If you agree we should explore this reform, which option (1 or 2) do you think would better achieve the aims of better remunerating work done by differentiating case complexity, while reducing administrative burden? Why? Do you have any other ideas for reform?</p> <p>33. To enable any structural reforms, we would need to collect a substantial amount of information from providers about time spent and other case features. As a provider, would you be able to provide this information from your existing systems, or by adapting your record keeping? Are there any particular barriers you foresee in providing this information reliably?</p> <p>34. Do you think that the lower fee (under either option 1 or 2, either the lower standard fee or the fixed fee respectively) should account for 80% of cases? Why?</p>
Practitioner seniority and harmonisation of fees at police stations	8	3	<p>35. How could the police station fee scheme be reformed to ensure complex cases get the right level of input by an adequately experienced practitioner?</p> <p>36. Should there be more incentives for a senior practitioner to undertake complex cases in the police station? Why? What impacts would this have?</p> <p>37. Do you agree that the reformed scheme should be designed at harmonised rates, rather than existing local rates? This may be at national level or London/non-London rates. Please also provide reasons why.</p>

<b>Subject</b>	<b>CLAIR Chapter Reference</b>	<b>Government's Response to CLAIR Chapter Reference</b>	<b>Questions</b>
Longer-term reform for early engagement - Subsuming PCE into the Police Station Fee Scheme	9	3	<p>38. Do you agree that in the longer-term, PCE should be remunerated under the police station fee scheme as a specific element of police station work? Please explain the reasons for your answer.</p> <p>39. How do you think PCE could best function within the police station fee scheme for example as an in-built or separate fee, and based on hours spent or not, noting our options for broader reform?</p>
Improving the uptake of legal advice in custody	8	3	40. Which cohorts of users would benefit most from being part of an extended roll out of the trial / what should we prioritise?
CILEX members as duty solicitors	8	3	41. Do you agree CILEX professionals should be able to participate in the duty solicitor scheme without the need to obtain Law Society accreditation? If not, why not? If yes, what, if any, accreditation should they require to act as a duty solicitor?
Defence Solicitor Call Centre	15	3	42. How else could we improve the DSCC, for example would greater digitisation and automation of LAA processes increase the quality of service?

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Post-charge engagement	9	4	<p>43. Do you think changes need to be made to the way work is remunerated between the period after charge and the first hearing at the Magistrates' Court? Please explain the reasons for your answer.</p> <p>44. Do you routinely carry out post-charge engagement? Do you record this work in order to claim for a fee under the Magistrates' Court scheme?</p> <p>45. Do you face any issues which limit you from carrying out post-charge engagement ahead of the first hearing at the Magistrates' Court? Please elaborate on the kind of issues.</p> <p>46. If you have experienced issues with PCE, what kind of solutions do you think could be put in place? What changes do you think needs to be made and by whom?</p>
Investment in Magistrates' Courts fees	10	4	47. We are proposing to increase Magistrates' Court fees by 15%. Do you have any views?
Structural reform of Magistrates' Court fee scheme	10	4	48. Do you agree that the Magistrates' Court fee scheme does not require structural reform at the current time? Please give reasons for your answer.

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Investment in criminal legal aid fee schemes	11 and 12	5	<p>49. Do you agree with our proposed approach of short-term investment in the LGFS and AGFS as they currently stand, followed by further consideration of longer-term reform options? Please give reasons for your answer.</p> <p>50. Do you agree with our proposed 15% uplift to LGFS basic fees, fixed fees, and hourly rates, noting the further funding for LGFS reform? Please outline your reasons.</p> <p>51. Do you agree with Government proposals to apply a flat 15% increase to all remuneration elements covered by the AGFS? Please outline your reasons.</p> <p>52. Do you agree that the fixed fee payable for “Elected not proceeded” cases under the LGFS and AGFS should be abolished, with the result that these cases will attract the relevant guilty plea or cracked trial payment? Please outline your reasons.</p>
Enhancing LGFS's effectiveness in remunerating substantive matters	12	5	<p>53. Do you consider replacement of basic fees within the LGFS with a standard fee structure, akin to the Magistrate's Court scheme, to be, in principle, a better way to reflect litigators' preparatory work and reduce reliance on the PPE proxy? Please outline the reasons for your answer.</p> <p>54. Do you consider that PPE requires reform and should be considered further once we have established an evidence base? Please outline your reasons.</p> <p>55. In your view, how should the LGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Improving the service and assessment of PPE	12	5	56. What improvements would you like to see made in relation to the way in which evidence (especially electronic) is: a) Served on the defence? b) Defined in Regulations? c) Quantified at assessment?
Confiscation work	12	5	57. Do you agree with our proposal to increase confiscation fees by 15%?
Standard fees for appeals to Crown Court and committals for sentence	12	5	58. Would you welcome replacement of LGFS fixed fees for appeals to the Crown Court and committals for sentence with a standard fee arrangement, akin to the Magistrates' Court scheme? Please give your reasons.
Understanding Crown Court litigator work	12	5	59. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of litigators in preparing Crown Court cases and facilitate refinement of the LGFS? Do you record this data, and would you be willing to share it with us?  60. Which factors influence the time you spend preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence?
Fundamental AGFS structure	13	5	61. Do you consider the current AGFS model to be optimal for remunerating Crown Court advocacy? What changes would you like to see? Please outline your reasons.  62. We propose to deliver reform within the existing cost envelope. To ensure we achieve our objectives, we would welcome views on which elements or tasks within Crown Court advocacy should be prioritised for funding.

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Supplementing the basic or hearing fee where preparatory work required exceeds the norm	13	5	<p>63. Do you consider broadening the availability of Special Preparation payments to be the best method of remunerating cases (or hearings within cases) where preparation required of the advocate exceeds the norm? Please tell us the reasons for your answer.</p> <p>64. Do you agree with the recommendation that fixed fee payments for interlocutory hearings should benefit from the possibility of enhancement? If so, under what circumstances should an enhancement be applicable?</p> <p>65. Would you welcome introduction of a fee scheme for advocacy which reduces the weighting accorded to basic fees in favour of remuneration where complexity criteria are satisfied and/or discrete procedural tasks have been completed? Please outline your reasons.</p> <p>66. Do you think that fairer remuneration of outlier cases could be achieved by way of amendments to the existing AGFS, e.g. adjustment to PPE thresholds beyond which Special Preparation can be claimed or the relative level of basic fees? If so, for which offence classes do you consider current provisions to be anomalous?</p> <p>67. Are there any models for Crown Court advocate remuneration you feel we have not yet considered? Please give details.</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Further data and research	15	5	<p>68. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of advocates in preparing Crown Court cases, and facilitate reform of the AGFS? Do you record this data, and would you be willing to share it with us?</p> <p>69. Which factors increase the complexity of the advocate's work in Crown Court proceedings?</p> <p>70. In your view, how should the AGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?</p>
Enhanced payment for "Substantive" PTPHs/FCMHs	13	5	<p>71. Do you think advocates should be able to claim a higher fee for attendance at a PTPH or FCMH where meaningful case progression has been achieved? If so, what criteria, in your view, should be satisfied for this type of hearing to be considered effective? Please outline your reasons.</p>
Wasted Preparation Payments	13	5	<p>72. Do you support the principle of making Wasted Preparation available in more instances? If so, under what circumstances should it be claimable? Please provide reasons.</p> <p>73. In your view, which case criteria should be satisfied for a Wasted Preparation claim to be allowable (e.g. duration of trial, volume of PPE, hours of preparation conducted)?</p>
Section 28 pre-recorded cross-examination	5	5	<p>74. Would you be willing to help us gather data on the additional work involved in a case with a s.28 hearing?</p> <p>75. How do you think the fee scheme should be remodelled to reflect s.28 work?</p>

<b>Subject</b>	<b>CLAIR Chapter Reference</b>	<b>Government's Response to CLAIR Chapter Reference</b>	<b>Questions</b>
Youth Court fees	11	6	<p>76. Considering the fee proposals above in paragraphs 186 to 187, which do you think would better reflect the seriousness and complexity of some Youth Court work and deliver improvements to legal advice for children, whilst ensuring good value for taxpayers?</p> <p>77. Which proposal do you think would provide better quality legal representation for children before the Youth Court?</p> <p>78. If you oppose the outlined options or want to propose an alternative, please explain your proposal, the rationale and evidence behind it, and include any unintended consequences which you think could arise.</p>
97 Youth work accreditation	11	6	79. Do you agree that accreditation should not be made a formal condition of lawyers receiving increased fees for youth work? Please explain.
Investment in VHCCs	14	7	80. We propose increasing fees for litigators conducting VHCCs by 15%. Do you have views? Please explain your reasons.
Individual Fixed Fee Offers (IFFOs): CLAIR'S Recommendation	14	7	<p>81. Do you support the further clarification of IFFOs in Regulations? Why?</p> <p>82. Would you find a dispute resolution mechanism, prior to signing a contract, useful? If so, what form do you consider such a mechanism could take? Why?</p>

<b>Subject</b>	<b>CLAIR Chapter Reference</b>	<b>Government's Response to CLAIR Chapter Reference</b>	<b>Questions</b>
Individual Fixed Fee Offers (IFFOs): Reverting to the Contractual Provision	14	7	<p>83. Would you support reverting to the individual case contract provision for VHCCs, instead of the IFFO scheme? Why?</p> <p>84. Would returning to the contractual provision benefit the conduct and effective case management of these cases? Why?</p> <p>85. Would you consider any changes to be required to the individual case contract provision before reverting back? If so, which changes?</p>
Individual Fixed Fee Offers (IFFOs): Adapting the Scheme	14	7	<p>86. What principles need to be changed under the current provision in order to fairly reflect the work done?</p> <p>87. If the IFFO provision is to be retained, what do you consider a reasonable approach to the negotiation and payment of fixed fees?</p>
Subsuming VHCCs into fee schemes	14	7	<p>88. Would you support VHCCs being subsumed into the LGFS/ AGFS once reformed if based on proxies that better reflect work done in order to pay for it more fairly? Why?</p> <p>89. Are there specific considerations regarding VHCCs which are needed when reforming the LGFS/AGFS? Which ones?</p>
Investment in Fees for CRRC Work	14	7	<p>90. We propose increasing fees for litigators conducting CCRC work by 15%. Do you have views?</p>

Subject	CLAIR Chapter Reference	Government's Response to CLAIR Chapter Reference	Questions
Structural Reform of Fees for CRRC Work	14	7	<p>91. Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why?</p> <p>92. If you already undertake CCRC applications work, what are some of the challenges with this work?</p> <p>93. Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones?</p> <p>94. Is there a clear demarcation of work which should be done by the provider of legally aided services and that which should be done by the CCRC?</p> <p>95. Do you routinely and accurately record time spent on this work?</p>
CLAIR's recommendation on CRRC reform	14	7	<p>96. Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why?</p> <p>97. Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why?</p>
Retain the Existing CRRC Provision with Uplifted Fees	14	7	<p>98. Do you consider that retaining the existing fee scheme once the fees have been uplifted would incentivise providers to take on this work? Why?</p>
Investment in prison law fees	14	7	<p>99. Should the Government focus on the early stages of the criminal process and not uplift prison law at this stage? Please explain your reasons.</p>

<b>Subject</b>	<b>CLAIR Chapter Reference</b>	<b>Government's Response to CLAIR Chapter Reference</b>	<b>Questions</b>
Prison law work	14	7	<p>100. What more could be done by the Government to address problems around access to clients in prison?</p> <p>101. Do you agree with the proposal to restructure the fee scheme for advice and assistance in prison law cases?</p> <p>102. What data would need to be taken to implement this reform?</p>
Other criminal legal aid fees	14	7	103. Do you agree with our proposal to increase the fees for these other areas by 15%?
Impact Assessment	N/A	8	104. 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.
Equalities	N/A	9	<p>105. 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.</p> <p>106. 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.</p>

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