

**From:** The Law Commission of England and Wales

**To:** Independent review of criminal legal aid: Call for evidence

**Date:** 06 May 2021

**cc:**

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## **LAW COMMISSION RESPONSE TO THE INDEPENDENT REVIEW OF CRIMINAL LEGAL AID: CALL FOR EVIDENCE**

1.1 This response includes:

- (1) our response to the call for evidence; and
- (2) relevant extracts of consultation responses (Appendix 1).

### **Our response**

#### **Introduction**

1.2 The Law Commission of England of Wales is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. The aim of the Commission is to ensure that the law is fair, modern, simple and cost effective.

1.3 The Law Commission is currently undertaking a project reviewing [Part 2 of the Proceeds of Crime Act 2002](#), concerning post-conviction confiscation. The project, which is sponsored by the Home Office, began in 2018. We published a consultation paper in September 2020, followed by a three-month public consultation. During this consultation we received responses in various formats, including formal written responses to our full and summary consultation questionnaires, as well as verbal responses in roundtable meetings and public webinars. We have since analysed the responses and we are currently developing our final policy and recommendations. We are due to publish our final report with recommendations in February 2022.

#### **Why are we making this submission?**

1.4 Post-conviction confiscation forms part of the sentencing process. It takes place in the Crown Court, whether on conviction from the Crown Court or magistrates' court. The purpose of the process is to remove from the defendant the benefit of their criminal conduct. Our provisional proposals – and pending recommendations – aim to improve the process by which confiscation orders are made; to ensure the fairness of the confiscation regime; and to optimise the enforcement of confiscation orders.

1.5 There are several aspects of our consultation paper which interact with criminal legal aid and inform this response. In the course of our consultation, we received responses from stakeholders with direct experience of the availability, adequacy and impact of legal aid in confiscation proceedings. It is only views which relate to these aspects of legal aid which are included below. Other aspects of the paper which interact more generally with legal aid have not been included (such as proposals for new elements of the confiscation process, which would require legal aid funding).

1.6 Our terms of reference do not extend to making recommendations for legal aid rates to be changed. However, in the course of our consultation several stakeholders

indicated that legal aid rates in confiscation proceedings are inadequate. They expressed the view that several problems we identified may be alleviated by increasing those rates to reflect the time and expertise required to provide high quality advice and representation in confiscation proceedings.

- 1.7 In making a submission to this call for evidence, we are seeking to convey the views of stakeholders who responded to our consultation, so that these opinions can be taken into consideration in your review. All views reproduced in response to the questionnaire are the authors' own and reproduced with their permission.
- 1.8 We welcome this review and hope our submission, and the evidence from our consultation responses, is of assistance.

#### The context of this submission

- 1.9 Our response relates to the following two issues.
- 1.10 First, in our consultation paper we provisionally proposed that defendants subject to a restraint order (which restrains assets representing the anticipated amount of their benefit from crime) should be permitted to release restrained funds to pay for private legal representation (consultation question 93 and summary consultation question 29). Currently, defendants are not permitted to use restrained assets to pay for private legal representation in any aspect of the criminal proceedings related to the restraint (including substantive criminal proceedings and confiscation proceedings), although they are permitted to release restrained funds to pay privately for representation in related civil and family proceedings.
- 1.11 Commissioners have not yet decided whether to recommend this proposal. However, during the consultation period several stakeholders made comments, in the context of this consultation question, on the adequacy and impact of criminal legal aid on the conduct and outcome of confiscation proceedings. These comments form the basis of our responses below, and relevant extracts have been submitted as an Appendix.
- 1.12 Second, in our consultation paper we provisionally proposed that, when a costs order is made against the prosecution following an application in relation to a restraint order, costs ought to be capped at legal aid rates (consultation question 95). Commissioners have not yet decided whether to recommend this proposal. As above, several stakeholders made comments on criminal legal aid in confiscation proceedings in the context of this question. These comments also form the basis of our responses below, and relevant extracts have been submitted as an Appendix.

#### In response to question one

- 1.13 The main issue raised by consultees was that the legal aid rates for confiscation proceedings are too low, and the extent of legal aid coverage is inadequate (**Garden Court Chambers, Financial Crime Practice Group at Three Raymond Buildings, one practitioner from the National Crime Agency and National Economic Crime Centre, Prison Reform Trust, Andrew Campbell-Tiech QC, Serious Fraud Office, Richard Atkins QC**). This comment was made both generally and in relation to defendants with restrained funds.

- 1.14 Stakeholders identified the following impacts of the current availability and adequacy of legal aid for confiscation proceedings.
- (1) Access to specialist representation in proceedings is restricted, including in complex restraint and confiscation proceedings (**Bar Council of England and Wales, Richard Atkins QC, Financial Crime Practice Group at Three Raymond Buildings, Garden Court Chambers, Andrew Campbell-Tiech QC**).
  - (2) Where lawyers are paid through legal aid for confiscation proceedings, low rates mean they are unable to resource the quality of work required to fulfil their responsibility to their clients (**BCL Solicitors LLP, Prison Reform Trust**).
  - (3) This leads to delay because confiscation work is not prioritised (**Serious Fraud Office**) and appropriately qualified counsel are not forthcoming (**Andrew Campbell-Tiech QC**). Poor quality legal representation also leads to mistakes, which are costly in the long-term (**Richard Atkins QC**).
  - (4) Inadequate access to legal aid in restraint and confiscation proceedings results in self-representing defendants, who are a burden on the court (**Kingsley Napley LLP**).
- 1.15 In relation to restraint proceedings specifically, the following impacts were identified by consultees.
- (1) Lawyers are not specifically remunerated for restraint work associated with criminal charges and end up doing extra work without additional remuneration (**Fraud Lawyers' Association, Criminal Law Solicitors' Association**). This view was not shared by the **Serious Fraud Office**, which considered that the availability of legal aid for defendants with restrained funds was adequate.
  - (2) Public funds are inappropriately used for wealthy defendants who would not otherwise be eligible for legal aid were their assets restrained (**Martin Bentham, BCL Solicitors LLP, Bar Council of England and Wales**).
- 1.16 A secondary issue was that third parties and victims do not have adequate access to legal aid in confiscation proceedings (**Private Prosecutors' Association, Criminal Law Solicitors' Association** and **Penelope Small**).

### **In response to question two**

- 1.17 As identified in our response to question one, several stakeholders consider that the legal aid rates for confiscation proceedings (including restraint proceedings) are too low, which deters experienced lawyers from taking on complex cases (in particular, see the **Serious Fraud Office's** response to consultation question 12). This is damaging to sustainability, quality and efficiency, for the reasons identified in question one.

### **In response to question seven**

- 1.18 The main two reforms proposed or supported by consultees to respond to the problems identified above are:

- (1) to improve the rates and availability of legal aid for confiscation and related criminal proceedings, such as restraint; and/or
  - (2) to permit defendants to release restrained funds to pay privately for legal representation in confiscation and criminal proceedings.
- 1.19 Stakeholders' views in relation to (1) are reproduced below and form the basis of our submission above. As mentioned, our terms of reference do not extend to making recommendations for legal aid rates to be changed.
- 1.20 Commissioners have not yet decided whether to recommend the proposal in consultation question 93, which corresponds to (2), above. We received a range of views on this proposal, not all of which are included in this response. For example, some stakeholders expressed concern that the proposal may lead to extensive dissipation of restrained funds which are suspected to represent the defendant's benefit from criminal conduct. This would undermine the objectives of restraint as supporting the confiscation regime. These views have not been reproduced below, insofar as they do not relate directly to the provision of legal aid.

#### **In response to question nine**

- 1.21 We have attached a copy of this response, with extracts of all responses referred to above at Appendix 1.

# Appendix 1: Response extracts

## RESPONSES TO CONSULTATION QUESTION 93 AND SUMMARY CONSULTATION QUESTION 29

### Consultation question 93

#### 1.1 Consultation question 93 asked:

We provisionally propose that:

(1) The current test for release of funds for legal expenses is varied to permit the payment of legal expenses connected with criminal proceedings and confiscation.

(2) Legal expenses should be subject to:

(a) Approval of a costs budget by the judge dealing with the case.

(b) The terms of a table of remuneration, set out in a statutory instrument.

Do consultees agree?

### Responses to consultation question 93

1.2 The following extracts are from responses to this question. Please note that only the comments which relate to the availability and adequacy of legal aid in confiscation proceedings are included below. The comments and extracts do not represent the full spectrum of views submitted in relation to this consultation question.

1.3 Practitioners from **Garden Court Chambers** said:

Such expenses should not be limited to the figures available for legal aid, unless there is a vast improvement in remuneration for such work, but should reflect the value of the necessary work to be done.

1.4 The **Financial Crime Practice Group at Three Raymond Buildings** said:

Whether this is workable will of course depend upon the table of remuneration. We would not endorse the use of legal aid rates as the benchmark – restrained funds prima facie belong to a defendant and there is an argument that if he has the funds he should be able to select his representatives of choice, subject to judicial scrutiny of the cost. Therefore, a balance is required which recognises that legal aid rates are not considered sufficient by many practitioners, particularly in complex cases.

1.5 One practitioner from the **National Crime Agency and National Economic Crime Centre** said:

The standard LSC rates for confiscation work are undoubtedly unsatisfactory, but surely the cure to that issue is to improve the rates, possibly controlled by a SI as mentioned elsewhere. Whilst this would add to the LSC's budget this could be back filled by the Treasury from ARIS receipts. Whilst this may appear to be a "money go round" it is impossible, or at least very difficult, to preserve the position of victims (see below) whilst at the same time reducing the available amount for legal fees.

[...]

In summary whilst it is of course accepted that lawyers should be properly remunerated at a satisfactory scale, the opinion of PoCC is that the proposals as they stand would create conflict in the statutory provisions of S.47A as above, clearly the available amount for confiscation would be reduced when everyone wants to see maximum recovery, and a danger of victims being disenfranchised.

1.6 The **Serious Fraud Office** said:

The availability of legal aid to those whose assets are subject to restraint provides adequate cover. The dissipation of restrained assets on legal fees, particularly in cases where there potentially victims to be compensated would not be appropriate.

It will also lead to considerable and unnecessary litigation about release of funds for legal fees. In cases of pre-charge restraint, Criminal Legal Aid is not available, however there are specific provision of civil legal aid. If the Defence community disagree, then the availability of legal aid funding is a separate area which requires review.

The comparison with Civil Recovery is unhelpful. There is limited or no legal aid available for this, and where the respondent can establish they have no recourse to other funds, to not permit them to draw on the property would be to effectively shut them out of the proceedings. Moreover, Civil Recovery does not seek to directly compensate victims (it instead goes to the state) and so there is less concerns with the value of the asset being dissipated/defrayed by legal fees (as the state might have otherwise paid those fees through legal aid in any event). This would be particularly unfavourable in cases where there are victims to be compensated.

1.7 The **Private Prosecutors' Association** said:

The PPA agrees that the test is varied to permit the payment of legal expenses as proposed. The PPA agrees that expenses should be subject to approval by the judge and a table of remuneration. Careful consideration will be needed when determining the rates in the table of remuneration, to ensure that they are proportionate and reasonable. Rates need to take into account that many victims of crime, especially financial crime, have little choice but to pursue criminal proceedings themselves through private prosecutions. The reality is that these victims cannot access the courts at rates comparable to public funding and these victims should not be penalised because of this (as rates recoverable currently are capped at legal aid rates).

1.8 The **Bar Council of England and Wales** said:

While this is essentially a question of policy, we agree. Harmonisation of the various POCA regimes relating to the release of restrained funds for legal expenses would have the advantages identified in the consultation paper, principally (a) broadening access to specialist representation and (b) the preservation of public funds which would otherwise be spent on legal aid fees for lawyers of wealthy defendants who (absent restraint) would be quite able to pay themselves.

1.9 A journalist with the Evening Standard, **Martin Bentham**, said:

I agree for the reasons that you set out in the consultation document in which you cite a report by me in the Evening Standard (page 594 of your consultation).

I understand the logic of the current position but wrote that story and others on this theme because the practical reality is that in some cases the sums theoretically being preserved for confiscation by the grant of legal aid are never in fact recovered. In cases where the victim of the defendant's crime is the public purse (e.g. with VAT fraud) that means that public money is spent via legal aid with the aim of preserving assets for confiscation which will simply reimburse the state at the end of the confiscation process (if it is successful). In effect, it means paying money out in the hope of recovering the same money later, which, when the victim is the public purse, brings no gain and only the potential of loss.

### Summary consultation question 29

1.10 Summary consultation question 29 asked:

Do consultees agree that the legal expenses connected with criminal proceedings and confiscation should be payable from restrained funds, subject to:

Approval of a costs budget by the judge dealing with the case.

The terms of a table of remuneration, as set out in a Statutory Instrument?

### Responses to summary consultation question 29

1.11 The following extracts are from responses to this question. Please note that only the comments which relate to the availability and adequacy of legal aid in confiscation proceedings are included below. The comments and extracts do not represent the full spectrum of views submitted in relation to this consultation question.

1.12 The law firm **Kingsley Napley LLP** said:

As the Law Commission rightly highlights, defendants are prohibited from using their restrained but legitimately obtained money to fund their defence, contrasting with the position in civil recovery proceedings.

We also believe this will go some way to alleviating pressure on the legal aid budget by allowing more defendants to privately fund their representation. It may also reduce the likelihood of self-representing defendants, whose cases place a significantly greater case management burden on the court.

1.13 The **Fraud Lawyers Association** said:

Contrary to the assertions in the Consultation Paper from our own enquires Civil Legal Aid does not appear to be available for the suspect of a criminal investigation who is made subject to a pre-charge restraint order to apply to discharge or vary their restraint order.

According to [Annex E of the Criminal Legal Aid Manual](#) CLS funding is only available to non-suspects who are subject to a restraint order (i.e. the spouse or partner of a suspect in a criminal investigation who is made subject to a restraint order. Annex E suggests CRM 1 and 2 (Advice and Assistance) is available to a suspect subject to a pre-charge restraint order, however, unless a subject receives benefits this is subject to a means test. [Key Card 45](#) states that in order to pass the means test a person's income needs to be less than £99 per week (plus allowances for dependants) and their capital must not exceed £1,000 (plus allowances for dependents).

Regulation 11 (3)(g) of [The Criminal Legal Aid \(Financial Resources\) Regulations 2013](#) suggests that living allowances under a restraint order should not count as disposal income.

However, there does not appear to be any such exception to the capital limits in regulation 13 of the above regulations to allow the capital of an individual subject to a restraint order to be disregarded.

In any event, Advice and Assistance under CRM 1 and 2 does not cover advocacy and Advocacy Assistance under CRM 3 is not available for applications to vary or discharge a pre-charge restraint order.

Our research suggests that there is therefore currently no, or very limited, funding available for suspects in an investigation, which is contrary to the interests of justice.

Legal costs incurred in dealing with a restraint order for defendants who have been charged are covered under the defendant's representation order. In non-VHCC cases, this leads to a situation where lawyers are effectively undertaking at times substantial extra work for no additional remuneration as the fee from the LAA is fixed irrespective of whether lawyers need to deal with restraint orders in addition to the criminal charges themselves. Previously, it was possible to make an additional claim for POCA-related work undertaken during the criminal proceedings themselves but this is no longer possible.

We therefore strongly support allowing suspects to use restrained funds to fund legal expenses. It seems appropriate that these costs are reasonable and we would be content with a cap on hourly rates commensurate with the [guideline hourly rates](#) for summary costs assessments.

#### 1.14 The law firm **BCL Solicitors LLP** said:

Section 41(4) of POCA 2002 permits the variation of a restraint order to allow the subject to withdraw reasonable legal expenses, but not to challenge any matter related to the index offence(s), including POCA 2002 proceedings. This is an unsatisfactory situation because restraint orders restrain both legitimate and illegitimate assets for confiscation, and restrict defendants' right to choose their



representation. These rules can cause a real risk of injustice. Permitting the withdrawal of legal expenses connected with confiscation, and the substantive criminal cases from which the restraint arises, would be a fair step, and would allow defendants a range of practitioners to instruct, and would also that ensure legal aid is not expended unnecessarily. Any costs budget and rates of remuneration must be flexible enough and must be set at appropriate level so as to allow defendants to select skilled legal representation of their choice, who in turn are not fettered in their ability to defend their clients' interests to the maximum by inappropriate costs/remuneration regimes.

### Other relevant responses to this issue

- 1.15 During a public webinar on our consultation paper (held on 19 November 2020), the head of St Philips chambers, Richard Atkins QC, commented on the proposal in consultation question 93. The following represents a summary of his comments.
- (1) Allowing the use of restrained funds to pay for legal representation would ease the burden on the legal aid budget, which has been cut for successive years.
  - (2) The rates paid for criminal confiscation work are “derisory”, both as a reflection of the work required to provide high quality representation, and in comparison to civil recovery rates (which are also considered low).
  - (3) The low rates result in experienced barristers avoiding confiscation proceedings, including after the trial. Lower quality representation causes cases to last longer and more mistakes to be made. This increases the cost overall.
- 1.16 Although submitted under consultation question 92, which concerned release of living expenses from restrained funds, the **Criminal Law Solicitors' Association** said:

Funding is not available for a respondent/defendant to deal with restraint proceedings per se.

## RESPONSES TO CONSULTATION QUESTION 95

### Consultation question 95

- 1.17 Consultation question 95 asked:

We provisionally propose that a rule be adopted to the effect that, if the court considers an unsuccessful or discharged application for restraint was reasonably brought, costs should be capped at legal aid rates.

Do consultees agree?

If consultees do not agree, should:

- (1) No costs be awarded.
- (2) Costs be awarded subject to a pre-determined discount to reflect the reasonableness of the application; if so, we would welcome consultees' views as to what discount might be appropriate.

(3) Reasonable costs be awarded in all of the circumstances of the case, not capped at legal aid rates.

(4) Costs be awarded in some other formula? If so, we would welcome consultees' view as to what formula might be appropriate.

### Responses to consultation question 95

1.18 The following extracts are from responses to this question. Please note that only the comments which relate to the availability and adequacy of legal aid in confiscation proceedings are included below. The comments and extracts do not represent the full spectrum of views submitted in relation to this consultation question.

1.19 The **Bar Council of England and Wales** said:

We do not agree that costs recoverable in restraint proceedings should be capped at legal aid rates. We consider there to be a real risk that adopting the proposal in the consultation paper may restrict access to those with true specialism in this practice area. Experience has shown that restraint can be a complex jurisdiction, often requiring the assistance of one of a relatively limited pool of expert practitioners who may be unavailable (or less available) at legal aid rates.

We would suggest that, where an application is reasonably made, the ability to recover "reasonable costs" would be sufficient to ensure proper representation, and should be the model adopted. As noted in the consultation paper, the capping of costs recovery in criminal proceedings has been much criticised, and does not in our view provide a template which should be adopted.

1.20 The **Financial Crime Practice Group at Three Raymond Buildings** said:

Where a suspect or a (third party) non-suspect is required to overturn restraint we consider there is no justification for any approach other than he can cover full costs subject to detailed assessment. If on the contrary a cap on rates is applied by legislation (rather than being left to SCCO assessment of market rates), it should certainly not be at legal aid rates which many practitioners consider insufficient, particularly for complex cases.

1.21 Practitioners from **Garden Court Chambers** said:

Certainly the defendant should be able to recover their reasonable costs. These should be awarded based on all the circumstances of the case, not capped at legal aid rates. Counsel who are sufficiently experienced to respond to restraint orders are rarely willing to do so at the poor legal aid rates available, particularly given that reasonably brought applications may still be complex. The defendant should not lose out in those circumstances.

1.22 Barrister **Penelope Small** said:

Most cases brought by third parties require expertise which cannot be found on the funds provided by criminal legal aid.

## OTHER RESPONSES

1.23 The following comments in relation to legal aid were made outside of consultation questions 93 and 95.

1.24 In response to consultation question 9, which asked about creating a statutory requirement that confiscation proceedings are commenced within a prescribed time, barrister **Andrew Campbell-Tiech QC** said:

Legal aid is at such a low level that few senior and experienced practitioners are willing to undertake the cases.

1.25 In response to consultation question 12, which asked about introducing mandatory timetables for the service of statements in confiscation proceedings, the **Serious Fraud Office** said:

However, the SFO queries whether the introduction of timeframes under the CPR is an answer to the delays encountered in progressing confiscation cases. The timetables that are presently imposed by the court are often not complied with by the defence. The root cause of the drift with confiscation cases is often attributable to insufficient resources. Confiscation cases are often not prioritised and defence solicitors frequently complain of difficulty arranging legal prison visits with convicted clients. In addition, defence solicitors are paid from legal aid which has such low rates of pay that these are not an incentive to deliver on time or to provide a high quality service.

1.26 In response to consultation question 96, which asked about making binding determinations of interests in property in the Crown Court, the **Criminal Law Solicitors' Association** said:

In respect of such applications as they currently stand those who assert third-party interests in properties do not have an automatic right to a representation order and have to pay privately. Whilst provision does exist it is as rare as hens' teeth for an individual to be granted a representation order to participate as third party within such applications. This can lead to injustices.

1.27 In response to consultation question 104, which was a catch-all question at the end of the consultation, the **Prison Reform Trust** commented on the impact of confiscation proceedings and orders on defendants. They also added that:

Legal aid is available but confiscation proceedings are lengthy and complex. As such, legal representatives are not always able to provide the resources and specialist representation needed.