



Ministry
of Justice

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

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A consultation response produced by the Ministry of Justice. It is also available at

<https://consult.justice.gov.uk/digital-communications/criminal-legal-aid-independent-review-response/>

About this consultation response

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

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Enquiries (including requests for the paper in an alternative format) to: Email: CriminalLegalAidConsult@justice.gov.uk

An Impact Assessment, Equality Statement and Welsh language summary are available at: <https://consult.justice.gov.uk/digital-communications/criminal-legal-aid-independent-review-response/>

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Introduction

1. In March 2022 we launched a consultation responding to the Criminal Legal Aid Independent Review by Sir Christopher Bellamy QC¹ and setting out our policy proposals.
2. We received 203 responses to the consultation. The most common themes raised by respondents were that:
 - they felt the proposed fee increases were insufficient;
 - fee increases should be implemented as quickly as possible; and
 - fee increases should apply to cases underway on the date of implementation, even though those cases had been accepted on the basis that the current rates applied.
3. In light of the concerns about early implementation of fee increases this interim response to consultation deals with:
 - the proposed 15% uplift to most fee schemes;
 - the scope of pre-charge engagement (PCE); and
 - abolition of the Elected Not Proceeded fixed fee.
4. We are laying a Statutory Instrument to increase fees that will come into force for cases that begin from 30 September 2022 onwards.
5. In addition, the changes to the scope of PCE will be implemented through a contract amendment as soon as possible in October, following a contract consultation with representative bodies which is now underway.
6. The Government's response to the remainder of the consultation will be published in the autumn, following full analysis of the consultation responses. We note that many respondents have said that the additional funding is not enough. We will consider the options for longer term reform we set out in the consultation for our full response in the Autumn. However, in light of the calls to have the increased fees delivered quickly, we are proceeding now with the fee increases we proposed in our consultation document.

¹ Now Lord Bellamy QC

7. The Government's response to CLAIR proposed an uplift of almost all legal aid fee schemes by 15% as soon as practicable. These increases would inject an estimated additional £115m p.a. at steady state, at our projected 2024/25 volumes of cases. A further £20m p.a. was proposed for investment in longer term reform proposals, including a reformed LGFS, the Youth Court and sustainability and development of solicitors' practice which brings the total investment to an estimated £135m p.a. at steady state.

8. We also proposed extending the scope of payment for PCE work to cover work done ahead of an agreement, or where an agreement was not reached, in appropriate cases in line with the Attorney General's Disclosure Guidelines. We proposed abolishing the Elected Not Proceeded (ENP) fixed fee paid where an individual elects Crown Court trial in a case the magistrates' court thinks suitable for summary trial and then goes on to plead guilty.

Responses to Consultation

Fee Increases

9. We consulted on a 15% uplift to police station, magistrates' court fees (including youth court), advocates' graduated fees and VHCC fees for litigators. We also consulted on uplifting some elements of the litigators' graduated fee scheme, excluding the PPE related fees and trial length proxy.
10. We received 78 responses to question 28 about an increase in police station fees by 15%. 25 (31%) said that the 15% increase recommended by the Independent Review was the absolute minimum and 47 (60%) said 15% was insufficient.
11. We received 76 responses to question 47 about the proposed 15% increase in magistrates' court fees. 31 (41%) said the increase was welcome but not enough and 51 (67%) said the increase should be more than 15%. We received 43 responses to question 48 regarding structural reform to the magistrate's fee scheme. Most respondents, 36 (around 83%), did not want a structural reform of the fee scheme at the current time, but did want to see a quick uplift in rates.
12. We received 68 responses to question 49 about 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. 32 (47%) respondents agreed with our proposed approach, whilst 35 (51%) disagreed. 31 (46%) respondents said that the proposed level of investment in the LGFS and AGFS was insufficient and fell far short of the 15% recommended by CLAIR. 11 (16%) respondents said that immediate investment was needed.
13. We received 71 responses to question 50 about our proposed 15% uplift to LGFS basic fees, fixed fees, and hourly rates. 21 (30%) respondents agreed with our proposals to apply a 15% uplift to LGFS basic fees, fixed fees, and hourly rates. 50 (70%) respondents disagreed, stating that the proposed uplift is inadequate. Some respondents argued that in the context of rising rates of inflation, the Government should consider going beyond the 15%. 16 (23%) respondents argued that the 15% uplift should be applied to all LGFS fees, including those identified in the Independent Review as creating perverse incentives.
14. We received 66 responses to question 51 about applying a flat 15% increase to all remuneration elements covered by the AGFS. 26 respondents agreed with our proposals to increase the fees paid under the AGFS. 40 (60%) respondents disagreed, stating that the proposed level of investment was insufficient given the

lack of investment over some years. 7 (11%) respondents suggested that the fees should be increased by a minimum of 25%.

15. Of the 36 respondents who engaged with the proposal to increase litigator VHCC fees by 15% (question 80) - 8 (22%) were in favour while 16 (44%) disagreed. Recurring reasons cited by those respondents who disagreed with the proposal were that the increase was intrinsically insufficient (11 instances) and that it failed to take into account the prevailing inflation rate (5 instances). 5 respondents pointed out that VHCC fees had been subject to a reduction of 30% in 2013. 5 respondents (14%) felt that the funding earmarked for increases to litigator VHCC fees would be better directed towards the LGFS.
16. We received 49 responses to question 103 on increasing the fees by 15% for other criminal legal aid fees (i.e. free-standing advice and assistance, Court of Appeal). 26 respondents (53%) welcomed this increase however, many expressed that it should be the bare minimum. 47% disagreed with the proposal with most either stating that the 15% was insufficient or that it should be increased to 25%.

Pre charge engagement (PCE) and Elected Not Proceeded (ENP) Fixed Fee

17. 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. The current provision for the remuneration of PCE only begins once 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.
18. The proposal in the consultation was to increase the scope of PCE to enable solicitors to be paid for work done ahead of there being an agreement (or not) to undertake PCE. We also propose to abolish the ENP fixed fee and to pay the usual appropriate graduated fee in these cases.
19. Only a relatively small number of respondents answered the questions about widening the scope of PCE. 14 out of 47 (30%) supported scenario 1 (payment for work where an agreement is in place) and 30 (64%) disagreed on the grounds that the fees were too low and that a lack of disclosure would not enable meaningful PCE. 21 out of 46 (46%) supported scenario 2 (remunerating work done ahead of entering into an agreement) while 24 (52%) disagreed on the basis the fees were too low. The Law Society, for example, thought it was reasonable that where the PCE does not go ahead, the solicitor should be able to demonstrate why the preparatory work was undertaken; what work was done, and why the PCE did not proceed. Respondents highlighted that one of the barriers to effective PCE was the

ability of the police to disclose sufficient details of the case to enable PCE to take place, and clients' lack of trust in the police was another factor that would limit the use of PCE.

20. There was some misinterpretation of the PCE proposal where respondents assumed that scenario 1 and scenario 2 were mutually exclusive. We would like to clarify that the proposal was to implement paying for preparatory work under both scenarios. As remuneration for PCE is currently based on an agreement being made between the relevant parties, we set out two scenarios showing how preparatory work can be paid both with and without an agreement.
21. In regard to the Sufficient Benefit Test (SBT), we received 43 responses to Q24 on our proposed amendments to the current SBT. Approximately 47% of those who addressed this question agreed with our proposed amendments to the SBT. We received 35 responses to Q26 where around 62% agreed that 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. Although, many emphasised that the activities listed under that paragraph should be non-exhaustive.
22. CLAIR recommended abolition of the Elected Not Proceeded (ENP) fixed fee currently paid in either-way cases where the defendant elects for Crown Court trial in a case the magistrates think is suitable for summary trial, but subsequently changes their plea to guilty in the Crown Court. This means a guilty plea following election can be paid substantially less than a guilty plea in a case sent to the Crown Court by the magistrates' court. We received 65 responses to the question about the proposed abolition of the fixed fee payable for "Elected not proceeded" cases under the LGFS and AGFS. 61 (94%) respondents agreed with our proposal to abolish the fixed fee payable for "elected not proceeded" cases, with only 4 (6%) respondents disagreeing. Most respondents who agreed, felt that the current system is unfair as it penalises defence practitioners for correctly advising their client to elect Crown Court trial, which may have been the correct advice at the time.

Prison law fees

Prison law was one of the main areas of our consultation where we did not propose to uplift fees in line with the CLAIR recommendation of a 15% increase. 31 respondents answered the question, with 7 agreeing (23%) and 24 disagreeing (77%) with our proposed approach. Some, including the Association of Prison Lawyers, were critical of the proposal not to uplift fees by the recommended 15%.

LGFS PPE and trial length proxy fees

23. We proposed not increasing PPE fees as we thought the PPE elements of LGFS need reform and investment in those areas now would further embed the 'perverse incentives' highlighted in CLAIR. We also proposed not 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.

24. 62 respondents answered the question about excluding the PPE element of the LGFS from the fee increase. 41 out of 62 disagreed (66%) as they felt the whole fee scheme should be uplifted so that solicitors would receive the full 15% that CLAIR recommended as a minimum. 19 out of the 62 respondents agreed (31%) agreed with our proposed treatment on PPE, but did not accept that the proposed increase for LGFS overall was adequate.

Longer term reform proposals

25. Responses to the longer-term reform proposals, including whether or not we might propose using the £20m for longer term reform on fee increases instead, will be included in our full response in the autumn.

Impact Assessment

26. The Bar Council suggested the Impact Assessment needed to take into account the impact of the pandemic and the risk that sitting days will not meet expectations.

Government Response

Fee Increases

27. Although most wanted more than the proposed 15% increases, it was clear from comments that respondents supported the concept of fee increases, but also expressed the view that the increases were insufficient, particularly as far as solicitors were concerned. For example, the Law Society welcomed a number of the proposed fee increases but argued that they were either a 'starting point' for further increases or were insufficient. Numerous respondents pointed out that Sir Christopher recommended a 15% increase across the board as a minimum and that solicitors would not receive that overall under the proposals, due to not uplifting the elements of the LGFS that encourage perverse incentives. While consultees generally thought the proposed fee increases were insufficient, 17 respondents out of 45 (38%) accepted that the PPE proxy used in the overall calculation in the LGFS was not a good proxy for complexity.

28. As the consultation responses would support an increase in fees, although many felt the proposed increases were inadequate, we will proceed with the fee increases as consulted; namely:

- We will increase by 15% all police station and magistrates' court fees, CCRC fees, fees for litigators in VHCCs and, in addition, the following uplifts to Crown Court remuneration:
- LGFS
15% increase (for the reasons outlined 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 all fees

29. In order to maintain the current relativity between the increased fees we are also increasing escape fee thresholds and limits by 15%, where they arise.

30. Given the department's financial allocation we cannot increase fees any further at this point. However, respondents, including the Law Society and others, suggested that the further £20m p.a. that was proposed for investment in longer term reform proposals, including in a reformed LGFS, the Youth Court and sustainability and

development of solicitors' practice would be better spent on increasing fees. We will consider these responses further and set out our conclusion in our full response in the autumn. We want to avoid embedding any perverse incentives in the fee schemes and want to do further work in relation to issues such as the role of PPE in the LGFS, before we consider increasing fees any further.

31. The increases (other than for VHCCS) will come into force on 30 September 2022 and apply to cases where a determination is made on or after that date. It will apply to VHCCs signed after 30 September and to any Task List in existing VHCC's agreed after 30 September 2022.

Pre charge engagement (PCE) and Elected Not Proceeded (ENP) Fixed Fee

32. Notwithstanding that some consultees felt there were barriers to PCE beyond remuneration, eg disclosure, almost half thought there was value in PCE to help progress and/or resolve cases sooner. This is in line with our objective to resolve cases as early as possible, which CLAIR also supported. The Law Society thought the current rates for PCE were too low. However, these are the same hourly rates paid for other legal aid work, and will also benefit from a 15% increase.

33. We propose to implement both PCE scenarios to allow for payment where there is an agreement to undertake PCE (scenario 1) and where there is no agreement following consideration of the possibility of PCE in appropriate cases (scenario 2).

34. To enable the remuneration of preparatory work, the wording for the sufficient benefit test will need to be updated. These changes in scope requires the LAA to consult with representative bodies on amending the 2022 Standard Crime Contract, which will commence in October 2022. That contract consultation has commenced.

35. On the abolition of the ENP fixed fees, we accept that there is a risk that the fees could penalise lawyers for providing correct advice. We will therefore abolish the ENP fixed fees and all cases where the Crown Court is elected will now be paid a graduated fee for both litigation and advocacy.

Prison law fees

36. We did not propose to uplift Prison law fees as we want to focus our resources on the early stages of the process, in line with CLAIR. Given our financial allocation, our view is that we cannot increase prison law fees at this point.

37. However, again, we will consider whether the further £20m p.a. that was proposed for investment in longer term reform proposals would be better spent on increasing

fees, including potentially prison law fees, and set out our conclusion in our full response in the autumn.

LGFS PPE fees

38. 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. We are not, at this stage, going to increase the per-page PPE rates (payable for PPE in excess of the initial fee floor) or the “Initial” fees (determined by class of offence and PPE band). Further, we are not going 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.
39. Our view was that the PPE elements of LGFS need reform and investment in those areas now would further embed the ‘perverse incentives’ CLAIR identified. 17 respondents out of 45 accepted that PPE was not a good proxy for complexity (for example, the Law Society said the PPE proxy was ‘anachronistic in a digital age’).
40. We agree that the current PPE proxy is not a good indicator of work done and that, as one respondent observed, fraud and conspiracy cases get paid very well given high volumes of PPE, whereas some very serious cases are poorly paid if PPE is low. For those reasons we will not apply the 15% uplift to the PPE proxy.
41. 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 also consulted on other investments to support litigators, particularly training contracts and support for solicitor-advocates gaining higher rights of audience which we will respond to in the autumn.

Impact Assessment

42. As set out above, the Bar Council suggested the Impact Assessment needed to take into account the impact of the pandemic and the risk that sitting days will not meet expectations
43. The estimated impacts of the proposals set out in our Impact Assessment are presented at their expected steady state values, which are based on the volumes and mix of claims in 2019-20 and the expected/projected volumes of claims in 2024-25. Estimates based on 2019-20 volumes reflect the most recent caseload prior to Covid-19, while estimates based on 2024-25 volumes include the impact of the projected increase in volumes due to an increase in sitting days and police numbers. Taken together, these should best reflect the overall impact of these proposals both in the short-term and what we expect to see in future.

Next Steps

44. We are laying a Statutory Instrument for the necessary fee increases, as set out above, which will come into force on 30 September.

45. In addition to the fee increases we are implementing now we will issue our substantive response to the remainder of the consultation in the autumn. This will include our timetable for reform and how we propose to allocate the additional £20m of funding that we set aside, originally for longer-term reform.

46. Finally, following our substantive response in the autumn, we propose to work with the professions on designing proposals to reform fee schemes (should we conclude reform is needed).

Consultation principles

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

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



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