Ministry of Justice

# Government's 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

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| **To:** | This consultation response is aimed at anyone with an interest in criminal legal aid 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. |
| **Published on:** | 30 November 2022 |
| **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://www.gov.uk/government/consultations/response-to-independent-review-of-criminal-legal-aid

# Contents

# Foreword

The Criminal Legal Aid Independent Review (CLAIR) is an opportunity to help the justice system recover from the disruption caused by the pandemic, and to move forward stronger, as we work to drive down the Crown Court backlog.

This publication sets out our substantive response to CLAIR, following an interim response published in July 2022. Taken together, they set out ambitious reforms that put us on the road to a better functioning, more efficient and improved criminal justice system.

We would like to thank Lord Bellamy for his comprehensive Review, his panel of experts for their insights, and all who contributed to the Review and our subsequent consultation. Their views have been invaluable in shaping these important reforms.

A strong and secure legal aid system is in the best interests of victims, witnesses and the wider public. As a Government, we want legal aid to deliver the highest quality advice and support for those who need it, and to keep our world-class criminal defence profession on firm footing for the future. That requires both investment and structural reform.

The first phase of our reforms sought to address the immediate and severe funding challenges faced by the criminal legal aid profession.

Our initial package injected £115 million a year into the system. This amounts to a 15 percent pay increase for most fee schemes and is the biggest uplift the sector has seen in over a decade. This funding began to come into effect from the end of September 2022, and we subsequently agreed to extend it to the majority of cases already being worked on in the Crown Court.

The uplift includes fees for pre-charge engagement, police station work, Magistrates court work, elements of the Litigators' Graduated Fee Scheme (LGFS), the Advocates' Graduated Fee Scheme (AGFS), the work of solicitors in very high-cost cases, and some smaller schemes.

But this is about ensuring the stability and sustainability of our legal aid system in future. Phase two of our plans focuses on longer term systemic reform.

Central to this is the establishment of the Criminal Legal Aid Advisory Board, which will enable better dialogue between government and the legal professions in future. The board met for the first time in October 2022, and will be instrumental in informing policy decisions.

We want to make sure that our valuable criminal defence solicitors are fairly paid for all the vital work they do. That is why we are giving the profession a £21 million funding boost, including £5 million specifically for work in the youth court, so that children continue to get the best possible legal representation.

And as CLAIR recommended, we will restructure complex fees for police station work, investing an additional £16 million a year. This means total funding for police station work will be 30 percent higher than it was before the CLAIR reforms. It will support the criminal

defence solicitor profession, but also improve early engagement with defendants, leading to earlier pleas and swifter resolution of cases.

We have set aside an additional £3 million for special and wasted preparation, and £4m for pre-recorded cross-examination of vulnerable victims and witnesses over the next two years, to more fairly represent the extra work involved in these areas.

This brings our total funding package to over £138 million extra for the legal aid sector each year.

We have been clear and consistent in our responses to CLAIR, since 15 March 2022, that we would uplift most legal aid schemes by 15 percent but not those elements that encouraged perverse incentives like pages of prosecution evidence. In line with that, in our response to CLAIR, on 15 March 2022 we allocated an additional £21 million as part of our longer-term reforms. We have now allocated this all to solicitors, raising the overall package from 9 percent to 11 percent. We will consult on a reformed LGFS in 2024.

And through the Advisory Board, we will gather data on important areas like police station work, section 28 cross-examination, and case preparation to inform policy around fee structures in future.

CLAIR also made several non-fee related recommendations, not least to address the lack of diversity in our legal professions. We are committed to a vibrant, diverse criminal defence market and addressing the clear underrepresentation of women, ethnic minority and disabled lawyers, particularly at senior levels of the profession.

It is important that we attract and retain a range of criminal practitioners with different backgrounds and expertise, and open up routes of entry. This is a matter for the profession to lead on and will be a focus of the Advisory Board.

Overall, our ambitious reforms will deliver a stronger justice system for all who rely on it. They will reinforce a more sustainable market, with publicly funded criminal defence practice seen as a viable long-term career choice befitting of our world-class legal professionals.

We look forward to forging that future with the profession in the months and years ahead.

**Rt Hon Dominic Raab MP**

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

**Mike Freer MP**

Parliamentary Under Secretary of State for Justice

# Full Consultation Response and Government Next Steps

# 1. Remit of this Response

## Background

This document is the Government's full response to the criminal legal aid independent review (CLAIR) and consultation on policy proposals. It follows the 'Government's interim response to the criminal legal aid independent review and consultation on policy proposals' which was published on 20 July 2022. It outlines a summary of the consultation questions and the responses we received as well as a detailed Government's response and policy proposals for each theme and specific questions raised in CLAIR and the consultation.

The consultation paper 'Government's response to the Criminal Legal Aid Independent Review and consultation on policy proposals' was published on 15 March 2022. It invited comments on analysis and proposals put forward in response to CLAIR by Sir Christopher Bellamy KC.[1]

The consultation period closed on 7 June 2022 and this report summarises the responses, including how the consultation process influenced the final shape/further development of the policy/proposal consulted upon and next steps.

The interim response committed to increase most fees by 15% and this came into force on the 30 September 2022. Following further consideration and discussions with the Bar Council, Criminal Bar Association (CBA) and the Ministry of Justice (MoJ), we were also able to lay a Statutory Instrument (SI) in October 2022 to apply the 15% increase to cases that already had a determination to grant legal aid after specified dates but had not yet had a main hearing. A further SI will be laid shortly to extend that uplift to a further tranche of older cases.

The Impact Assessment accompanying the consultation was updated following the consultation to take account of evidence provided by stakeholders during the consultation period.

This document focuses on longer-term reform rather than the immediate fee increases that were covered by the interim response. The interim response provided a summary of consultation responses and the government response on fee increases, Pre-charge Engagement (PCE) and Elected Not Proceeded (ENP) fixed fee, prison law fees,

[1] Now Lord Bellamy KC

Litigators' Graduated Fee Scheme Pages of Prosecution Evidence (LGFS PPE) and trial length proxy fees.

**Summary of responses**

1. A total of 203 responses to the consultation paper were received. Of these, over 63% were from current or former solicitors. Other respondents included the main representative bodies for the criminal legal aid profession, barristers, law students, academics and a member of the public.

2. Respondents could choose which questions they answered and not all respondents answered all the questions.

3. 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.

4. In light of the responses encouraging early implementation of fee increases, in July 2022 the Government published an interim response to consultation that dealt with fee increases, PCE and ENP fixed fee, prison law fees, LGFS PPE and trial length proxy fees, as well as the Government response and next steps on each of these topics.

5. The interim response to the consultation should be read alongside this final response and is available at: Response to Independent Review of Criminal Legal Aid - GOV.UK (www.gov.uk) [https://www.gov.uk/government/consultations/response-to-independent-review-of-criminal-legal-aid]

6. The Government laid an SI (which is a piece of secondary legislation) to increase fees that came into force for cases for which legal aid was granted on or after 30 September 2022. Following further consideration and discussions with stakeholders, the MoJ proposed additional funding for criminal barristers and solicitors' firms, mainly centred around the cases in the Crown Court backlog that would not previously have been eligible for the uplift. So, on the 11 October 2022 the MoJ laid a SI to apply the 15% increase to cases that already had a determination to grant legal aid dated after 17 September 2020 but had not yet had a main hearing. A further SI, which will apply the 15% uplift to most cases prior to 17 September 2020 which have not yet had a main hearing, is expected to come into force in December 2022.

# 2. The future of the criminal legal aid professions

**Advisory Board**

7. The Criminal Legal Aid Independent Review (CLAIR) noted that "negotiations with the Ministry of Justice (MoJ) tend to be conducted bilaterally with the main provider interests", an approach which does not give partners an opportunity to work together. Respondents were therefore asked for their views on the establishment of an Advisory Board, which would bring together stakeholders from across the criminal justice system to consider the role of criminal legal aid within a whole criminal justice system context.

**Consultation Summary:**

8. **Question 1:** Do you agree with our proposal for an Advisory Board? (81 respondents answered this question).

9. Of those respondents that answered this question, most (66/81%) supported the creation of an Advisory Board. Of the number who supported the creation of an Advisory Board, around 36% commented that the Advisory Board should include board members from frontline roles, industry representatives or the wider defence community. Around 19% of respondents who answered this question wanted the Advisory Board to function as a pay review body and suggested that giving the board this function would "be key to practitioners having confidence in the Board".

10. Of those respondents who did not support the creation of an Advisory Board, some were concerned that it would create a further level of bureaucracy and were not convinced that a non-statutory body would have any real impact. Other respondents were concerned that an Advisory Board would merely become a "talking shop" with an inability to effect real change.

11. **Question 2:** Do you have any views on what the Advisory Board's Terms of Reference should cover? (63 respondents answered this question).

12. There were some general themes that emerged from the responses received regarding the creation of an Advisory Board. A common theme was that the Board should be composed of members from organisations who work on the 'frontline' delivering criminal legal aid services. Another key theme was that the Board should be able to provide advice regarding legal aid rates.

13. The Criminal Bar Association (CBA), the Law Society and Bar Council all suggested that the Board should be able to advise on fees and yearly renumeration. Responses also highlighted the need to ensure better recruitment and retention of younger lawyers and barristers as well as improvements to working conditions.

14. The Chartered Institute of Executives (CILEX) were particularly keen on the Advisory Board being able to conduct an impact review and post implementation review to ensure proposals were delivered and implemented sufficiently.

15. The Crown Prosecution Service (CPS) gave a list of areas to be considered in the Terms of Reference, including ensuring that diversity, equality and inclusion are considered specific issues in the wider criminal justice system. They also suggested that the Board should consider and make recommendations on the quality of assessment and training.

16. **Question 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. (61 respondents answered this question).

17. Of those respondents who answered this question, 67% were not in favour of the proposal to amalgamate the Advisory Board into an existing Board. The respondents generally commented that the Advisory Board should be a separate entity, which should focus on remuneration and fee levels. Respondents were also clear that their preference would be for the profession to be represented at this Board, rather than it take the form of the National Criminal Justice Board which does include representatives from the defence profession.

**Government Response:**

18. We have established an Advisory Board, which met for the first time at the end of October 2022, to bring together criminal justice system partners to consider the role of criminal legal aid within the context of the wider criminal justice system. The topics discussed at the first meeting included written work, wasted and special preparation in Crown Court cases, remuneration of Crown Court cases involving the Section 28 procedure and reform of the Litigators' Graduated Fee Scheme (LGFS). The Board will meet quarterly from now on.

19. The Board will provide independent advice to the Lord Chancellor on the operation and structure of the existing and future criminal legal aid schemes and assess how these schemes should change as the criminal justice system changes and develops. However, noting CLAIR's recommendation against establishing a fee review body, the Government's current view is that it would not be appropriate for the Advisory Board to provide advice on issues such as the uprating of criminal legal aid fees. Its overall objective is to ensure that the criminal legal aid schemes comprise the right structure and incentives to support the wider objectives of a high performing criminal justice system.

20. We have taken into consideration respondents' views on the scope and composition of the Board in developing its Terms of Reference. The Terms of Reference for the Criminal Legal Aid Advisory Board will be published shortly.

21. Membership of the Board is comprised of the main bodies who represent the criminal legal aid profession. This includes representatives from the Bar Council, Law Society, CBA, London Criminal Courts Solicitors' Association (LCCSA), Criminal Law Solicitors' Association (CLSA), CILEX and MoJ officials. Whilst the Board has met, a long-term chair has yet to be appointed.

**Unmet need and innovation**

22. CLAIR recommended that the MoJ should consider the extent of unmet need in the provision of criminal legal aid services in England and Wales. In response to that recommendation, we consulted on various models for an expanded Public Defender Service (PDS), which included using the PDS to deliver additional capacity where the criminal legal aid market has potential unmet need and to provide greater value for money, for example, by dealing with Very High Cost Cases (VHCCs). CLAIR considered the potential use of alternative methods of providing legal advice, which included adopting an 'holistic' approach, as a way of focussing on the individual rather than whether problems can be classified as "civil" or "criminal".

**Consultation Summary:**

23. **Question 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 dealing with more VHCCs? (72 respondents answered this question)

24. Of those respondents that answered this question, 38 (53%) argued that any expansion of the PDS would not be cost effective, given it has been shown to be significantly more expensive to run compared to private practice, and less efficient. Six respondents, including the Bar Council and CBA, argued that the best way of filling gaps in the market and addressing the issue of unmet need, is to increase legal aid rates to avoid providers leaving the market in the first place.

25. Both the Law Society and the CLSA argued that expanding the PDS would exacerbate the shortage of solicitors in private practice, given that any recruitment would need to come from the current pool of criminal defence solicitors.

26. Of those respondents that answered this question, 3% were opposed to the expansion of the PDS on the basis that they believe it is not truly independent of government.

27. The LCCSA argued that given the low numbers of VHCCs, this proposal would deprive existing criminal defence practitioners of this work.

28. Many respondents recognised that the provision of remote advice in police stations was a necessary response to the Covid-19 pandemic, but were concerned about this becoming a long-term policy, regardless of who provides that advice.

29. **Question 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? (73 respondents answered this question).

30. Of the 73 respondents who answered this question, 37 (51%) indicated that practitioners who participate in duty schemes which cover both police station and court work, should be required to have a physical office in the scheme area that they work in. The main reasons for this were around accessibility for clients and having local knowledge; acknowledging that not all defendants have access to remote technology; providing face to face services for particularly vulnerable clients; and avoiding flooding the duty schemes so that they remain sustainable.

31. A total of 27 of the respondents to this question indicated that there was no need for a physical office, due to the availability of current technology and the benefit of cost efficiencies; although there was some concern about how duty slots would be allocated (to avoid over/under subscription) and ensure fairness. There was also concern that relying on remote technology may lead to the resurgence of 'ghost' duty solicitors[2] as well as reduce the ability to attend a police station within 45 minutes.

32. In response to question five, 16 respondents suggested that rather than requiring a permanent office, access to flexible office space could be used, bearing in mind the need to provide a confidential environment.

33. Other comments included consideration of the geography for allocating duty slots; those in areas (particularly rural) with poor connectivity; and that the duty scheme in London needs to be reviewed.

34. **Question 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? (66 respondents answered this question).

35. The largest proportion of responses (22/33%) to the question indicated that they had no views on the subject.

36. In response to this question, 17 respondents (26%) considered that non-traditional forms of provider are not viable, or that they have no place in the market.

37. There were 15 respondents (23%) who commented that the system currently in place should be properly funded, with the CLSA noting that "*the impact of the current high levels of inflation mean that [any increase in fees] must be real terms increase not a pre-inflation increase*".

38. Seven respondents (11%) stated that firms are already or are at risk of becoming 'not-for-profit', highlighting that "rates at which we undertake work are significantly below commercial rates and the cost of the […] [PDS] ".

[2] Our work to date: ongoing competence - The Legal Services Board, last accessed 24/11/2022

**Government Response:**

39. We consulted on various models for an expanded PDS, which included using it to deliver additional capacity where the criminal legal aid market has potential unmet need and provide greater value for money, for example, by dealing with VHCCs.

40. We believe the PDS has an important role to play, including dealing with cases of market failure. Considering respondents were largely against this proposal, we do not currently have any plans to expand the PDS but will consider whether it has a role to play in testing new ways of working. We intend to divert the funding set aside for PDS expansion to solicitors' fees. We believe that wider proposals, including the work the LAA are doing to increase the sustainability of the criminal legal aid market, will have a beneficial effect on market capacity.

41. The Legal Aid Agency (LAA) has started work on the design of a future contract approach for criminal legal aid services. This work is linked to the proposals in the Government's consultation following CLAIR that the LAA undertakes a review of the Standard Crime Contract (SCC) to increase the sustainability of the legal aid market. The LAA will consider the contractual office requirements as part of this work. The next SCC is due to commence in October 2023 (though the current SCC is capable of extension by up to two years).

42. In relation to the place of non-traditional forms of provider and new ways of working in the criminal defence market, the LAA, as part of the review of the SCC, will consider different contracting arrangements and how different business models might operate within them to increase the sustainability of the criminal legal aid market and promote more efficient ways of working.

**Training and accreditation grant programmes**

43. CLAIR recommended that MoJ should consider training grants to support more trainees in criminal legal aid firms. We consulted on a proposal to allocate £2.5m a year to training grants for solicitors' firms to increase recruitment and retention.

**Consultation Summary:**

44. **Question 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? (86 respondents answered this question).

45. Responses to this question were focused on improving wages and the funding available for those training/qualifying. A total of 35 respondents (41%) raised concerns around retaining young talent when market competition is too high and wages not being competitive enough compared to other specialities.

46. **Question 8:** How can the Government best support solicitors to gain higher rights of audience? (70 respondents answered this question).

47. Most respondents said that training opportunities would be taken advantage of during qualifying stages in people's careers, allowing them to move to more lucrative areas. Therefore, there should also be greater focus on retention.

**Government Response:**

48. While respondents generally welcomed the concept of training grants, the majority, including the Law Society, thought that a fee increase would be more beneficial to the profession and do more to recruit and retain junior practitioners. Considering the responses received to the consultation, we intend to allocate the proposed £2.5m for training grants (as well as the proposed £3.2m for PDS expansion) to solicitors' fees for police station work, so that the whole package would benefit the wider solicitor profession. We also propose allocating the £10m proposed for LGFS reform to police station fees as that would benefit more solicitors' firms more quickly. The timetable for LGFS reform is outlined in Paragraphs 185-209. That would mean an additional total of £16m in steady state going into police station fees. Focusing increases on police station fees has the potential to divert some cases from the court process, reducing costs across the system. This approach also matches the main thrust of CLAIR which recommended funding increases to the earliest stage of the criminal justice system.

**Disparity in barrister's income**

**Consultation Summary:**

49. **Question 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 rape and serious sexual offences (RASSO) cases? Do you have any evidence to support this? (60 respondents answered this question).

50. A total of 36 respondents (60%) to this question disagreed that female barristers are more likely to be assigned lower fee cases, such as RASSO, whilst 11 (18%) agreed that it was the case. A total of 13 respondents (22%) stated that they were not able to comment and/or would defer their view to that of their Representative Body.

51. The respondents who disagreed, commented that they had no experience of barristers being given lower fee cases based on gender and would not condone cases being allocated on such a premise. Respondents also commented that they there was no evidence to suggest that female barristers were allocated cases owing to the lower fees paid for those cases, and that RASSO cases form a significant part of the case volume for both men and women.

52. The respondents who agreed, commented that male barristers tend to be allocated higher fee cases which was as a result of not having childcare responsibilities and being able to commit to longer complex cases. Respondents also commented that court sitting patterns do not lend themselves to flexible working hours and warned lists may adversely affect working mothers who are unable to commit to these listed cases. Finally, respondents also commented that female barristers who had taken career

breaks may not be as experienced as their male counterparts of a similar calling and may also be overlooked by instructing solicitors due to their previous absence.

53. Some respondents (eight/13%) specifically addressed the remuneration of RASSO cases, with six respondents advocating an increase in remuneration. Only two respondents stated that such cases were already sufficiently remunerated.

**Government Response:**

54. Although it is reassuring to note that the majority of respondents to this question were not aware of female barristers being assigned lower fee cases, the fact that 18% of respondents have encountered this scenario is concerning. Therefore, it would be helpful to understand more about the scale and context of this issue and consider how it could be addressed. This is, of course, an issue which the profession itself is best equipped to lead on.

55. The Bar Standards Board (BSB) Handbook already requires self-employed barristers to ensure that the affairs of their chambers "are conducted in a manner which is fair and equitable for all members of chambers, pupils and/or employees (as appropriate). This includes, but is not limited to, the fair distribution of work opportunities among pupils and members of chambers".

56. The BSB is additionally planning to release a statement to clarify its expectations of chambers in promoting equality. It will work with the profession to provide resources that encourage best practice in equality, diversity and inclusion, not simply setting out the minimum regulatory requirements. This will encompass issues such as fairness in the allocation of unassigned work and may drive a shift in focus from process to outcomes. The BSB is also holding a series of roundtables across all the circuits in the coming months to discuss these proposals.

57. We will continue to keep this issue under review, in conjunction with the BSB. It will also be considered by the Criminal Legal Aid Advisory Board, along with diversity within the criminal legal aid profession more generally, as part of its programme of work.

**Diversity**

58. CLAIR recommended that grants could be made available to ensure that diverse young barristers are not excluded from the profession in the entry years of practice at the Bar, due to the level of available fees. In addition to their views on grants, respondents were asked questions to further understand the barriers that those from diverse backgrounds might currently face as they forge a career at the Bar. This included understanding what more can be done to improve diversity within the criminal defence professions.

**Consultation Summary:**

59. **Question 10:** Would training grants for criminal legal aid firms in your view help with recruitment and retention issues?

60. A total of 57% of respondents to this question agreed that training grants for criminal legal aid firms would help address recruitment and retention issues. Respondents suggested that training grants would potentially widen the pool of professionals and provide training opportunities for people from a range of backgrounds. Only 16% of respondents directly disagreed with the initiative, arguing that issues with recruitment and retention were directly attributable to low fees, and that raising fees would increase the attractiveness of legal aid work across the board. Around 7% of respondents suggested that this initiative could improve recruitment but not retention, since the latter is dependent on fee levels, and at present, career progression is not always available following the training period.

61. **Question 11:** What do you think the Government can do to improve diversity within the independent professions?

62. Of those who answered this question, 50% argued that in order for the Government to improve diversity within independent professions, fee levels should be improved. They suggested that increasing fees would be the best way of attracting and retaining a diverse range of practitioners, including those from low-income households. Respondents argued that increasing fees would also enable firms to pay higher maternity pay which would increase the retention of women returning from maternity leave. Of those that responded to this question, 5% expressed the view that improving the diversity of criminal legal aid should not be a Government priority, suggesting that it is already a highly diverse profession compared to the working-age population of the United Kingdom (UK) and to other branches of the legal profession.

63. **Question 12:** Do you think the diversity issues identified are the right ones to focus on? Why?

64. Only 18% of respondents engaging with this question agreed that the diversity issues identified in the CLAIR consultation were the right ones to focus on. These respondents referenced the underrepresentation of professionals from minority backgrounds, with some adding that overrepresentation of privately educated lawyers was also a concern. Of those that answered the question, 68% disagreed with the question, arguing instead that more Government funding is required to improve diversity, as better pay will naturally improve diversity over time, and improve the attractiveness of criminal law as a career choice.

65. **Question 13:** What evidence do you have of barriers different groups face in forging careers in criminal defence work generally?

66. A total of 37% of respondents to this question referenced the socio-economic barriers that those forging careers in criminal defence face, including the underrepresentation of those from marginalised social backgrounds and the financial burden that training fees represent for those from less privileged backgrounds. Of those that answered the

question, 33% suggested that women faced particular barriers related to caring responsibilities, given that a career in criminal legal aid work often requires work during antisocial hours, which is often coupled with low pay. However, 25% of respondents considered that there is no evidence of barriers for those in particular groups, arguing that women and minority lawyers are overrepresented in criminal defence compared to other areas of legal work.

67. **Question 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?

68. Of the respondents who answered this question, 33% mentioned childcare as a barrier for professional women in criminal defence and some respondents believed that remote assistance would benefit those with childcare responsibilities. However, respondents also raised concerns around pay, suggesting that low pay leads to pregnant women working longer than they may wish, since firms typically pay only statutory maternity leave.

69. Of those that answered the question, 22% of respondents were opposed to providing police station advice remotely, arguing that it provides an inferior service compared to face-to-face interviews, as solicitors that present in person are better equipped to gain the confidence of their client and are better equipped to ensure that rights are being maintained by the police. In contrast, 14% of respondents were in favour of the continuation of remote advice, suggesting it would make this type of work more accessible for people with caring responsibilities, who are disproportionately likely to be women.

70. **Question 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? (61 respondents answered this question)

71. Poor remuneration and/or a lack of funding was cited by nine (15%) of the 61 respondents to this question as being the primary reason for disparities in income within the criminal Bar. Personal reasons/choices were also cited by five respondents (8%) who indicated that issues such as childcare responsibilities, being unable to commit to warned lists (where a case does not have a specific date but is expected within a certain period) and choosing to work only in local courts were relevant factors in not being allocated more complex and better remunerated cases.

72. Some respondents cited the pay disparity between case types and that consideration should be given to the type of work being undertaken by men and women at the Bar. The allocation of more straightforward cases to junior barristers was cited by some respondents as contributing towards the pay disparity, with junior barristers often undertaking more routine cases in the Magistrates' Court such as burglary, harassment, and low-level dishonesty cases.

73. A total of ten respondents (16%) cited a range of other reasons for the disparity in barrister income which included ability, case allocation bias by instructing solicitors and differences in experience, with more experienced barristers being allocated more complex cases.

74. **Question 16:** What more in your view could solicitor firms and chambers do to support those from diverse backgrounds embarking on careers in criminal defence? (83 respondents answered this question).

75. Of the 83 respondents to this question, 36 (43%) commented that this matter could be supported by the Government, through an increase in fees and legal aid funding which is required to attract diverse entrants to a career in criminal defence work.

76. Many other respondents believed that, in order to support those from diverse backgrounds in successfully pursuing a career in criminal law, it would take a more strategic response covering multiple aspects from secondary education through to job retention. A total of five respondents (6%) believed that there were insufficient applicants from diverse backgrounds and, furthermore, five respondents (6%) commented that fewer good quality candidates in general, including those from diverse backgrounds, are willing to pursue a career in criminal law, with fees being cited as one possible reason.

77. A number of respondents, 17 (20%), put forward a range of suggested ways to increase diversity which included the advertising and promotion of pursuing a career in criminal law within schools and colleges, encouraging firms to recruit beyond the traditional Oxbridge/Russell Group universities and to use alternative routes to career entry such as the Solicitors Qualifying Examination (SQE) and the CILEX qualifications.

78. The use of bursaries, funded mentoring/work experience programmes and funded training grants, targeted to those from diverse backgrounds, was recommended by eight respondents (10%) to assist with the early years cost of pursuing a career in criminal law. Furthermore, three respondents (4%) suggested the use of regulatory levers in supporting the progression of ethnic minority solicitors, women, and those from a less privileged socio-economic background into pursuing careers in criminal law.

79. Finally, six respondents (7%) believed that nothing further should be done to increase diversity.

**Government Response:**

80. The increase in fees of up to 15% which came into force on the 30 September 2022 will help to attract and retain a diverse range of criminal practitioners.

81. Whilst not in scope of the CLAIR review or this consultation, it is clear that the underrepresentation of women, individuals from ethnic minority backgrounds and disabled lawyers, particularly at senior levels, is not limited to the criminal legal aid profession. As the Legal Services Board's (LSB's) 2020 report *The State of Legal Services* states:

> ‘Our analysis of published data paints a mixed picture of the composition of the profession… There have been some successes. The year 2019 marked one hundred years of women working in the law, but also the milestone of there being more female than male solicitors for the first time. Compared to the UK workforce average there are higher proportions of ... [ethnic minority] lawyers in most professional groups, while there is parity of both black solicitors and barristers on this basis... There is substantial overrepresentation of lawyers who were privately educated… There remain issues with retention and significant gaps in progression to more senior roles.’[3]

82. On earnings, CLAIR noted, “the 2019-20 data suggests female barristers on average earn less than men with the same years of practice, and that ethnic minority barristers also tend to earn less than their equivalent white counterparts.”[4]

83. However, law firms which specialise in criminal work do employ a higher proportion than average of lawyers from an ethnic minority background – 30%, compared to an average across the sector of 18%, according to the Solicitors Regulation Authority’s most recent research.[5] The CLAIR data compendium also records that 51% of lawyers at firms specialising in criminal work were female in 2018/19, compared to 52% across the sector, but that only 35% of duty solicitors were female in 2019.

84. In contrast, the Bar Council’s 2021 report *Race at the Bar* suggests that both women barristers and those from ethnic minority backgrounds are slightly underrepresented in criminal practice compared to the average, with 35.7% of criminal barristers being female and 12.3% being from an ethnic minority.[6] This is compared to the representation of 38.2% women and 14.7% from an ethnic minority across the Bar as a whole, as captured in the BSB’s 2020 report on *Diversity at the Bar*.[7]

85. There are a number of sector-led diversity initiatives already in place which tackle barriers to entry, such as the Law Society’s Diversity Access Scheme which offers aspiring solicitors from low socio-economic backgrounds full funding for their Legal Practice Course or Solicitors Qualifying Exam fees, plus mentoring and work experience opportunities. There are also initiatives focusing on the barriers to the progression of women and ethnic minority practitioners, such as the Bar Council’s Accelerator Programme which aims to break down such barriers in the Bar.

86. MoJ will continue to work with the representative bodies and the legal regulators, including the LSB, to examine the impact of these and any additional initiatives through effective evaluation of these schemes. We encourage criminal legal aid professionals

[3] The Legal Services Board (LSB), The State of Legal Services (2020), p. 26

[4] The Criminal Legal Aid Independent Review (2021), p. 117.

[5] The Solicitors Regulation Authority, ‘How Diverse is the Solicitors’ Profession?’ (2022)

[6] The Bar Council, ‘Race at the Bar’ (2021)

[7] Bar Standards Board, Diversity at the Bar (2020), p. 4

to work closely with regulators and representative bodies, and within their own organisations, with the aim of accelerating progress on this crucial issue

87. In addition, the Criminal Legal Aid Advisory Board will consider the issue of diversity in the criminal legal aid profession as part of its programme of work.

88. In relation to increasing the provision of remote legal advice in police stations, the LAA will engage with stakeholders on the development of the future crime contract, to consider how the duty solicitor arrangements might best accommodate those with different working patterns, including those with caring responsibilities. The LAA will seek to use the contract review process to reflect on learning from the shift in working practices employed during the Covid-19 pandemic, including the role that remote working practices should play in a modern criminal legal aid and wider criminal justice system. The provision of remote legal advice in police stations would need to be considered by a wider body than the LAA, therefore this work will include collaboration with the Home Office, His Majesty's Courts and Tribunal Service (HMCTS), the judiciary, CPS, and the police, and will require cooperation and communication across the justice system and related stakeholders.

**Quality issues**

89. The CLAIR consultation focused on three quality-related areas, set out below:

- CLAIR identified a gap in the system around quality control for advocacy, arising following the decision not to proceed with the Quality Assurance Scheme for Advocates. The consultation raised that this issue should be considered further once the LSB's consultation on its statement of policy on ongoing competence has concluded.
- CLAIR also suggested that the LAA could consider a more frequent regime of peer reviews for solicitors as part of a review of administrative burdens in the round. The consultation suggested viewing peer review as part of a suite of quality assurance measures and moving to an intelligence-led approach, so that peer reviews are targeted most effectively.
- Finally, the consultation raised that, as part of a review of the Standard Crime Contract, the Government would seek to ensure that contracts with providers promote high quality standards. For independent advocates, the consultation proposed the Government explores creating a Lord Chancellor's list of advocates, with membership based on quality of advocacy and consistency of service.

**Consultation Summary:**

90. **Question 17:** How can the Government assist the professions to review the balance between various quality measures to minimise the administrative cost while ensuring quality is not compromised? Do you have any views on this? (78 respondents answered this question).

91. Of those that answered the question, 26 (34%) had strong views on the role of the LAA, and the perception that audits are often duplicated, time-consuming and the administrative requirements are bureaucratic. Similarly, Peer Review was noted to be a burden for firms, with five respondents (6.5%) stating that they find the current Peer Review schedule too frequent. Respondents acknowledged that quality assurance frameworks should be in place but highlighted the actual time and financial cost associated with compliance as unreasonable.

92. In 'Other' comments, there were suggestions of making improvements to training and support throughout the career journey to improve quality and as part of professional development compliance, improving data-driven LAA audit schedules (Peer Review and Contract Management review) and the need for a fit-for-purpose IT system.

93. **Question 18:** How can the Government best design the qualification criteria for any Lord Chancellor's lists of criminal defence advocates to ensure that listed defence advocates are incentivised toward quality control, professional development and consistent availability for work. (55 respondents answered this question).

94. Respondents to this question had strong views on the suggestion of a 'Lord Chancellor's list'. There were 20 responses (36%) expressing that they did not feel a list was necessary, and two respondents (4%) raised concern that the use of a list may result in an influence over which defence solicitors are instructed or chosen.

95. It was suggested that further funding and pay increases would incentivise advocates to provide a good quality service and maintain professional development and availability for work. A total of 14 respondents (25%) cited 'more funding or better pay' as a solution. Of these respondents, some focussed on the need for further training in youth crime and vulnerable witnesses. Responses confirmed that further funding of training in these areas would be welcomed by the profession, particularly given that Barristers fund their own training at present.

96. The LSB's submission draws attention to a current 'Competence Project', which has established that "there are no regular, formal assessments of legal professionals beyond requirements for continuing professional development".[8] Following consultation with a wide range of stakeholders, they are drafting a statement of policy on what measures the Legal Service regulators should have in place, to ensure those they regulate remain competent throughout their careers. This project should go some way to addressing standards of competence and quality of work. Three respondents (5.5%) stated that any qualification criteria should be drafted/created in consultation with key stakeholders.

**Government Response:**

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Our work to date: ongoing competence - The Legal Services Board

97. The LAA will keep in mind the issues raised in response to these questions and intends to review its suite of quality measures as part of the development of a future Standard Crime Contract, to ensure that the need for high quality legal services is balanced with appropriate cost and administration to providers in delivering those services. Other ongoing areas of work that will address quality issues include the Quality of Advocacy Working Group, led by the CPS, and work surrounding CILEX professionals participating in the duty solicitor scheme (outlined in Paragraph 150).

98. There was significant opposition from respondents to our proposal to explore the creation of a 'Lord Chancellor's list' of criminal defence advocates. We do not therefore propose to take this forward at present but will keep the issue under a consideration. We will provide any further details in due course.

## Technology

### Consultation Summary:

99. The use of remote technology in courts did not fall under the remit of CLAIR, however the review noted the potential impact of this technology on the efficiency of the criminal justice system. CLAIR recognised that remote technology could save costs and time, and could encourage case ownership, particularly for administrative matters.

100. The consultation sought views from across the criminal justice system on the use of remote technology to support the efficiency of the criminal justice system as a whole, particularly where the use of remote technology has expanded during the pandemic.

101. **Question 19:** How and to what extent does technology, including remote technology, support efficient and effective ways of working in the criminal justice system? (75 respondents answered this question).

102. A large proportion of respondents to this question (44 /59%) agreed that remote technology is effective, efficient and saves time and money. Respondents highlighted the fact that although technology was beneficial, the acceptance and use of it varied across different courts. Nine respondents (12%) thought that a National Protocol with regard to remote attendances, detailing which situations were suited to remote attendance, would promote consistency and accessibility in this area.

103. The suitability for remote attendance varied depending on the type of attendance, with 19 respondents (25%) stating that remote attendance is not suitable for all cases. The types of case considered suitable, based on responses, included administrative hearings, remand reviews and mentions.

104. There were 20 respondents (27%) that agreed that consolidation or extension of existing, proven technologies is the way forward. Feedback on the Common Platform was negative, with 18 respondents (24%) stating that it is not fit for purpose. The Crown Court Digital Case System however, was lauded as a success by nine respondents (12%) and is said to have "*revolutionised the way in which lawyers can conduct cases and retain case ownership*".

105. Six respondents (9%) thought that more funds need to be made available to support the uptake of technology, with investment in Prison Video Link high on the list of priorities for eight respondents (11%).

**Government Response:**

106. We recognise that technology remains a valuable tool to support efficient and effective ways of working in the criminal justice system. The MoJ has existing plans for an ambitious programme of digital work, to combat a challenging technical and operational environment. This includes work the LAA is planning, such as redesigning and replacing legacy services across the billing and payment systems. The aim is to remove the complexity and effort from legal aid billing, so that the overall efficiency for caseworkers and providers alike is improved. This is also a key enabler in supporting more structural changes to fee schemes which will improve our ability to better reflect political intent. The work to modernise the enabling systems is complex and will take time to support more structural reforms to legal service delivery.

107. Additionally, and as shown from the consultation response analysis, remote technology plays an important role across the criminal justice system. The Lord Chief Justice highlighted this in his published national protocol on remote working (14 February 2022), which outlined guidance and best practice for remote attendance by advocates in the Crown Court.[9] Remote hearings have become an integral part of courts and tribunal services, delivery system-wide benefits and efficiencies for our criminal justice partners. The Video Hearings Service is HMCTS's strategic video hearings solution designed and developed in partnership with the judiciary. The Video Hearing Service provides for both fully remote and hybrid hearings as well as telephone participation, delivering flexibility and increased capacity across the court estate. The Service has been designed to Gov.uk standards and supports access to justice requirements. It gives participants the ability to join private consultation rooms, which better reflects the in-person hearing experience together with bespoke features to retain the majesty and gravitas of the physical court room. Judges have greater control over hearings and have dedicated support from specially trained officers based in Courts and Tribunal Service Centres (CTSCs).

[9] *Message from the Lord Chief Justice – Remote Attendance by Advocates in the Crown Court.* February 2022, Online. Available at: https://www.judiciary.uk/guidance-and-resources/message-from-the-lord-chief-justice-remote-attendance-by-advocates-in-the-crown-court/

# 3. The Police Station

**Police Station Fees and Structural Reform**

**Consultation Summary:**

108. There were two options put forward in the consultation for structural reform:

- **Option 1:** The Criminal Legal Aid Independent Review (CLAIR)'s recommendation to standardised fees. This option was to reform 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.

- **Option 2:** Adapting the escape fee threshold. This option would adapt the existing escape fee provision by either lowering the current threshold; or by paying between the fixed fee and the escape fee (which is not currently done).

109. **Question 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? (69 respondents answered this question).

110. Over 70% of respondents to this question indicated "time spent" as being a key indicator of complexity. Of those that answered this question, 30% supported 'time spent' being used as the sole indicator of complexity under Option 1 while roughly 41% suggested that a combination of indicators (including time spent) should be used to reflect the complexity of the case.

111. **Question 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? (57 respondents answered this question).

112. Of those respondents that answered this question, 49% indicated that no changes would need to be made to recording and billing processes in order to claim for standardised fees determined by time spent. However, 37% of respondents to this question commented that some changes would need to be made but indicated that the changes made would be fairly minimal and straightforward to implement.

113. **Question 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? (57 respondents answered this question).

114. Of the respondents who addressed this question, 26% indicated that the proposed structural reforms could not be achieved within the same cost envelope or on a cost neutral basis. Some indicated that further investment would be needed while others stated that it needed to be evidence based. A total of 24% of respondents to this question agreed that there was a need to explore the proposed types of structural reform.

115. **Question 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? (48 respondents answered this question).

116. Of the respondents addressing this question, 42% stated that they preferred Option 1 (standardisation of the fees) over Option 2 (adapting the escape fee threshold), with only 2% of respondents supporting Option 2. A total of 21% of respondents to this question indicated that they would not choose either option with some suggesting that both options were not workable solutions. However, many respondents did not provide an alternative solution. A few respondents suggested that both options should be implemented.

117. **Question 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? (48 respondents answered this question).

118. Of those that answered this question. 25% (including the Law Society and London Criminal Courts Solicitors' Association (LCCSA) stated that the Legal Aid Agency (LAA) should already have the data required for these reforms and were unsure why the current data would not suffice. A total of 27% of respondents to this question stated that they would be able to provide the information and that they did not see any barriers to doing this. Some respondents indicated that they would not be able to provide the data due it being difficult or time consuming.

119. **Question 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? (42 respondents answered this question).

120. Of the respondents who addressed this question, 36% answered ‘No’, indicating that they disagreed with the assumption that the lower fee would apply to 80% of cases. There were 17% of respondents (including the Law Society, Criminal Law Solicitors' Association (CLSA) and LCCSA) stated that they could not answer that question as they did not know what the assumption was based on. Some respondents indicated that they agreed with the assumption while a few suggested that the lower fee applying to 75% of cases would be more accurate.

**Government Response:**

121. We will consult further on a standard fee model for police station fees based on time spent. Using a standard fee model will involve creating a lower, higher and non-standard fee to help distinguish between case complexity, meaning that time spent' will be the key indicator that determines the complexity of a case.

122. We understand that most of this data is already submitted to the LAA, however, we believe the current data may not reflect the work undertaken at the police station and may not be sufficient for implementing changes to the scheme. This is because whilst the current data suggests that the hours worked in the police station fit within the current fixed fees rates, we understand from the profession that this may not be the case. Therefore, we consider that there is a risk that practitioners may be under-recording the time spent on each case. The data we use will determine the appropriate thresholds for the cases which should reach the lower, higher and non-standard fee. If the data is not reflective of the work currently undertaken at the police station, this could lead to the thresholds being skewed. We would want to ensure that the new standard fee model appropriately reflects the work that needs to be done at the police station. Therefore, we will be engaging with the profession on this to determine whether the current LAA data the MoJ holds can be used to support the structural reform of the scheme.

We intend to introduce a standard fee model once we are in a position to also harmonise the fee scheme mentioned in the section below. This is to ensure we minimise making the scheme more complicated before harmonisation can be done. For example, creating different fees within each of the 245 current police station fee schemes would lead to twice as many fees being created (plus non-standard fees). This would not be practicable for providers or for the LAA. Furthermore, doing both reforms together would help to keep the changes made to the fee scheme to a minimum.

**Practitioner seniority and harmonisation of fees at police stations**

**Consultation Summary:**

123. **Question 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? (56 respondents answered this question).

124. Of the respondents who addressed this question, 52% stated that the fees needed to be increased in order to ensure that complex cases were receiving the right level of input. Just over 40% of respondents provided some suggestions as to how the fee scheme could be reformed to recognise seniority. The most common answer was to use the years of Post Qualification Experience (PQE) to grade practitioners (i.e., five years of PQE could qualify for a higher fee). Both the Law Society and the Legal Aid Practitioners Group (LAPG) highlighted that paragraph 9.99 in the Crime Contract Specification already has a list of complex cases and suggested updating this table to differentiate between the grades of fee earners.

125. There were some respondents who felt that it was not practical to have senior practitioners covering complex cases. Some of the reasons given included the fact that solicitors are on rotas so are already pre-assigned to cover cases over a given period. It was also highlighted that it was not always obvious before arrival at the police station whether a case would be a complex or simple one.

126. **Question 36:** Should there be more incentives for a senior practitioner to undertake complex cases in the police station? Why? What impacts would this have? (57 respondents answered this question).

127. Of the respondents who addressed this question, 51% of the respondents to this question agreed that there should be more incentives for a senior practitioner to undertake complex cases. 31% highlighted that the fees would need to be improved first. Some respondents disagreed that more incentives were needed and were concerned that this could create a two-tier system. It was emphasised that junior practitioners need to be exposed to complex cases.

128. **Question 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. (56 respondents answered this question).

129. Of those who responded to this question, 54% agreed that the rates should be harmonised. Several respondents (including the Law Society, CLSA and the LAPG) emphasised that any changes should not lead to a reduction in any of the fees and therefore should be no lower than the highest police station fixed fee. Some of the respondents argued that there should be a London weighting due to higher cost of living while others supported having a national rate. On the other hand, 39% were against harmonisation and believed that local rates should be considered. A key issue raised was that the current rates should consider the time spent travelling. One respondent commented that there was very little difference in the cost of doing business in areas outside of London, as compared with London.

**Government Response:**

130. We have listened to the concerns around harmonising the fees in a cost neutral way and that any harmonisation should not lead to a reduction in fees. We have decided to move away from a cost-neutral approach. However, due to its cost we are not able to implement full harmonisation where there would be no reduction in fees. However, as set out in Paragraph 48 above, we have decided to re-invest the steady state £16m that we had originally proposed for longer-term reforms into harmonising the police station fee scheme. We are exploring how this can be used to uplift the lowest fees within the scheme and will consult further on the detail of this proposal.

131. In relation to practitioner seniority, we will be keeping the fee scheme as it is and therefore, there will be no distinction between senior and junior practitioners. Although many respondents agreed that there should be an incentive for senior practitioners to

take on complex cases, we have decided to focus on introducing a standard fee model and harmonising the fee schemes.

132. Making any reforms in relation to practitioner seniority would require a different range of data to be collated in addition to what is already required for the standardising the fees. As this has not been done before, we would also need to run a pilot to test out the rates for senior practitioners in practice.

133. Increasing the complexity of reforming the scheme would likely lead to further delays in making changes to it. We believe it would be best to minimise any further complexity at this stage. Instead, we will focus on ensuring that the fees reflect the work done at police stations through standardising and harmonising the police station fee scheme.

**Longer-term reform for early engagement - Subsuming Pre-Charge Engagement (PCE) into the Police Station Fee Scheme**

**Consultation Summary:**

134. **Question 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. (45 respondents answered this question).

135. Of those that answered this question, 35 (77%) were in favour of subsuming PCE into the police station fee scheme; whilst nine (20%) stated that they did not agree with the proposal.

136. Of the respondents who responded positively to the suggestion, nine (20% of all respondents to this question) considered that the work should be remunerated as a bolt-on or uplift to existing Standard Fees. Seven respondents (16%) thought the fee should be stand-alone and four respondents (8%) proposed that payment of an interim fee for this area of work would take into account the fact that some cases take longer than others and would help providers' cash flow.

137. **Question 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? (46 respondents answered this question).

138. A total of 22 (49%) of the respondents who addressed this question were in favour of the work being remunerated as a separate fee or hourly rate.

139. There were 12 respondents (26%) who thought payment for PCE should be included in the police station fixed fee, with the Law Society, Criminal Bar Association, LCCSA, and the Bar Council suggesting a facility for an interim payment to assist with cash flow for lengthy cases.

140. Of those that answered this question, nine (20%) considered payment for PCE work should be remunerated as a bolt-on to existing Fixed Fees. A few respondents were

concerned that remunerating on hours spent would not incentivise providers to be more efficient and that a bolt-on fee would remove this risk.

**Government Response:**

141. As 77% of the respondents were in favour of subsuming PCE into Police Station Fees, we will look into doing this once the initial reforms have been completed. This means we will focus on standardising and harmonising the police station fees, as mentioned in Paragraphs 123-133 above, to ensure the fee scheme appropriately reflects the work done in police stations. Once this is complete, we will consult further on the details of how PCE can be incorporated into the Police Station Fee Scheme.

**Improving the uptake of legal advice in custody**

142. CLAIR highlighted the low uptake of legal advice by suspects in police custody and provided 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. The Presumption of Legal Advice ('Opt Out') scheme being trialled by the Metropolitan Police Service automatically opts children in to receiving free legal advice in custody (see also, Inclusive Britain report).[10] The consultation highlighted that the MoJ is in strong support of this trial and is keen to understand whether the trial leads to improved outcomes for individuals following arrest, and in particular how this could positively address racial disparities in the justice system. The consultation sought views on the potential further roll-out of the trial.

**Consultation Summary:**

143. **Question 40:** Which cohorts of users would benefit most from being part of an extended roll out of the trial/what should we prioritise? (53 respondents answered this question).

144. A total of 52 respondents (98%) thought the trial should be continued, with only one respondent citing that representation is a matter for the individual client to opt in to.

145. Of the respondents who were in favour of the scheme continuing, 28 (53%) highlighted that cases requiring an Appropriate Adult (as currently defined by the Police and Criminal Evidence Act 1984 (PACE) Codes) - which would include all children under 18 and certain cohorts of vulnerable people (such as those with mental health issues) - should be prioritised for any further roll-out of the scheme. In addition, six respondents (11%) outlined that those requiring an interpreter should also be included. The Birmingham Law Society considered that any suspect with an identified neurological condition or learning difficulty should be included, with the Law Society supporting further extension of the scheme to young adults up to the age of 25. A

[10] *Inclusive Britain: Summary of Actions and Reports*. Action 40. Available Online: https://www.gov.uk/government/publications/inclusive-britain-action-plan-government-response-to-the-commission-on-race-and-ethnic-disparities/inclusive-britain-summary-of-recommendations-and-actions

respondent from academia proposed prioritising minority groups that are overrepresented in arrest rates.

146. Nine respondents (17%) considered that the 'Opt Out' system should be the default position for defendants receiving legal advice in custody and that the scheme should therefore be rolled out universally. The LCCSA and Commons Law Community Interest Company (not for profit criminal law firm) were in favour of this approach, stating that universal roll-out would improve access to justice across the board.

147. Two respondents (4%) added that, in addition to vulnerable people, the scheme should be made available to those with no previous experience of custody. The Law Society was in favour of this approach but recognised there could be challenges in accurately identifying this cohort.

**Government Response:**

148. Following a successful trial of the Presumption of Legal Advice initiative in Brixton and Wembley police stations, the Metropolitan Police Service has rolled out the trial to all police stations in London. In addition, we know there has been interest from other constabularies to either adopt the trial, or to consider doing so in the future. The MoJ supports the Metropolitan Police Service and wider police in this work and will continue to collaborate with them, the LAA and Home Office to monitor the trial and its impacts. We propose using this data to review what the initiative could look like if rolled out for all children nationally.

149. We recognise that there was strong support for the Presumption of Legal Advice trial being rolled out to further cohorts, in particular vulnerable individuals. At this stage there are no plans by the Police to roll out the trial beyond children, since we would need to fully understand the trial's impact before being able to explore possibilities for roll out to additional cohorts, but this will be kept under review.

**Chartered Institute of Legal Executives (CILEX) members as duty solicitors**

150. CLAIR noted that CILEX professionals face difficulty being accepted as duty solicitors as they are required to be accredited under the Law Society scheme. The consultation proposed working with the representative bodies and the LAA to review this position to enable CILEX professionals to become duty solicitors without having to undergo additional qualifications. This was with an aim of increasing the sustainability and stability of the provider base and reducing barriers to access to this work where people enter the legal professions through alternative routes.

**Consultation Summary:**

151. **Question 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? (61 respondents answered this question).

152. Of those that answered this question, 19% of respondents were in favour of CILEX accreditation being extended, commenting that simplifying the accreditation process for CILEX professionals could address concerns around recruitment of duty solicitors. However, 52% disagreed, arguing that all duty solicitors should go through the same accreditation process and expressing concerns that removing the need for Law Society accreditation for CILEX professionals would be inconsistent and might give the latter an unfair advantage.

**Government Response:**

153. CLAIR stated that:

> 'CILEX pointed out that to be formally accepted as a duty solicitor, the LAA requires accreditation under the Law Society's Criminal Litigation Accreditation Scheme (CLAS). This in turn requires that the person is both an accredited representative under Police Station Representatives Accreditation Scheme (PSRAS) and has passed the Law Society's Magistrates' Court Qualification scheme (MCQ). CILEX argues that its own CILEX Advocacy Qualification is comparable to the MCQ and should be acceptable to the LAA as an appropriate qualification to undertake the duty lawyer role.'[11]

154. Clearly it is important that all those formally accepted as duty solicitors have the necessary skills and qualifications for this demanding role. Equally, the Government has committed to making it easier for appropriately qualified CILEX lawyers to take up this role. We are therefore engaging with CILEX, the LAA and the Law Society, with a view to understanding how the similar CILEX qualification can be recognised within the legal aid scheme.

**Defence Solicitor Call Centre**

155. 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. CLAIR pointed to complaints about the running and efficiency of the DSCC and the consultation sought views on how we can further improve the DSCC, particularly around the impact of digitalisation and automation of LAA processes.

**Consultation Summary:**

156. **Question 42:** How else could we improve the DSCC, for example would greater digitisation and automation of LAA processes increase the quality of service? (59 respondents answered this question).

157. A total of 28 respondents (47%) who answered this question suggested that a move to an automated or digital system to allocate duty solicitors would improve the current

[11] CLAIR. p.75

service, with respondents suggesting a custom app or online portal to automate the process and ensure that information such as the Officer in Charge details, custody records and disclosure are provided upfront. Of those 28 respondents, six (10%) further stated that there is no need for the DSCC, citing it should be replaced by a digitalised service or that the current service adds little value to the process of ensuring high-quality advice. In total, 16 respondents (27%) shared the view that the DSCC was not needed.

158. Seven respondents (12%) highlighted inefficiency in the current DSCC service, citing instances where incorrect details were recorded, solicitors were called in error during unsocial hours and instances where they experienced difficulties in contacting the DSCC by telephone. Five respondents (8%) flagged the need for further training for DSCC staff and nine respondents (15%) stated they would prefer to revert to the previous process, where police staff would call the Duty Solicitor at the outset of the case, and use any money saved to improve other areas of the criminal justice system.

159. One source of frustration evident in the responses to the consultation regarded the training of DSCC staff with five respondents (8%) flagging the need for more training for DSCC call handlers. Of this number, three respondents (5%) highlighted a pattern when a new provider takes over the DSCC contract, whereby it has been noted that "…new staff were struggling with unfamiliar computer systems with the consequence that they were, for example, sending duty solicitors to the wrong police stations. The solution is not just in IT improvements, but for the staff who operate the IT to be properly paid and well trained."

**Government Response:**

160. The LAA continuously monitors the performance of the DSCC by reviewing specific Service Level Agreements and user complaints. The LAA acknowledges that there were issues with the transition between suppliers during autumn 2019 but since then, performance of the service has stabilised. Recent call handling performance has been strong with over 96% of calls answered in the 12 months to August 2022 and over 96% of cases deployed within five minutes. During the same period, customer satisfaction surveys show positive results, with 100% of defence solicitors stating that the DSCC contacted them in a timely manner (from a sample of 600). In addition, complaint volumes have been low, accounting for less than 0.01% of all contacts.

161. It is important that there continues to be a managed process in place to ensure that the allocation of cases from the police station to defence solicitors is carefully managed and carried out in a fair and impartial way. However, the LAA is committed to exploring improvements to the service, including making greater use of opportunities for digitisation and automation. The LAA will review the individual consultation responses received in response to this question as part of this ongoing work.

# 4. The Magistrates' Court

**Post-charge engagement**

162. Post-charge engagement refers to the period after the police have charged the suspect but before the first hearing in the Magistrates' Court. The Criminal Legal Aid Independent Review (CLAIR) highlighted several operational issues with post-charge engagement. While the CLAIR did not make any direct recommendations to address these operational issues, additional funding was recommended for post-charge engagement.

163. Currently, this work is remunerated under the Magistrates' Court fee scheme after a representation order is granted. We do not have the evidence needed to determine whether a separate fee for post-charge engagement would achieve the benefits suggested by the report. Therefore, as part of this consultation we sought views on what the Government can do in this area and to gain a better understanding the issues highlighted.

**Consultation Summary:**

164. **Question 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. (48 respondents answered this question).

165. Of the 48 respondents to this question, 34 (71%) agreed that changes need to be made to the way work is remunerated between the period after charge and the first hearing at the Magistrates' Court. The main reasons for this being around the amount of work that is required, particularly when chasing for information, which is not remunerated.

166. Of the 48 responses to this question, 14 respondents (29%) indicated that there was no need for any changes, although some stated that the level of rates could be increased.

167. Issues with disclosure were raised, in particular, with police not updating solicitors and with the Crown Prosecution Service (CPS) not providing papers in time to allow meaningful work to be done. Other comments included: the lack of incentive for the police to engage; that the legal aid process needs to improve and be swifter; and the lack of incentive for solicitors to engage with the CPS before the first hearing.

168. **Question 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? (42 respondents answered this question).

169. Of the 42 respondents answering this question, 22 (52%) indicated that they do not routinely carry out post-charge engagement. The main reason for this being the amount of time it takes to receive evidence and that it is difficult to contact the CPS.

170. A total of 19 respondents (45%) indicated that they do carry out post-charge work, although most do not record this and do not claim a fee.

171. Eight respondents (19%) indicated that they carry out post-charge engagement only once the representation order has been granted and four respondents (10%) stated that the work could not be claimed for.

172. There was an indication from the consultation responses that there is little time for engagement due to the target of five days before the first hearing for service of the Initial Details of the Prosecution Case (IDPC) and there was a suggestion for earlier receipt of the IDPC to allow remuneration under the representation order.

173. **Question 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 kinds of issues. (50 respondents answered this question).

174. Of those that respondent to this question, 36 (72%) cited issues with the CPS as being the major difficulty faced when attempting to carry out post-charge engagement work. A lack of contact and case ownership was highlighted, alongside delays in receiving relevant papers. Respondents also commented on their experience of the late upload of IDPC, requesting that this should be made available from the point of charge rather than the day of the hearing.

175. Poor responses to communications to the CPS and incomplete papers also caused frustration among respondents. They mentioned that this prevented meaningful post-charge engagement.

176. There were 12 respondents (24%) that mentioned that a lack of funding for post-charge work hindered them in undertaking the work and nine respondents (18%) also highlighted difficulties in engaging with their client. Issues around communicating with clients, such as them having had their phone confiscated or mental health issues, were factors in a lack of post-charge work.

177. **Question 46:** If you have experienced issues with post-charge engagement, what kind of solutions do you think could be put in place? What changes do you think needs to be made and by whom? (45 respondents answered this question).

178. The majority of respondents who answered this question, (27/60%), indicated they had experienced issues with the CPS which had impacted post-charge engagement work. Of these respondents, 15 (33%) would like the IDPC to be a faster service. Seven (16%) of these respondents suggested that a nominated point of contact and better communications from the CPS would lead to meaningful post-charge engagement with the client and other agencies. Two respondents (4%) said that where

delays in the provision of IDPC before the first hearing are experienced, the CPS should be responsible for applying to the court for an adjournment.

179. Calls for improvements to be made by the police to allow appropriate post-charge engagement work were made by eight (18%) respondents, who said that they would welcome provision of the charge sheet at the point of charge and better communication from the Police, with case ownership being in place for an Office in Charge.

180. Ten respondents (22%) called for adequate payment for post-charge engagement.

**Government Response:**

181. The Government is committed to ensuring that different partners in the criminal justice system engage with each other at the earliest possible opportunity. However, because the main issues raised in the consultation response with post charge engagement are linked to operational issues (such as delays caused by other parties), we are not intending to make any changes to the way post charge engagement is currently remunerated. There is a wealth of work taking place across the criminal justice system to address some of these operational issues, for example, the CPS pilots on early disclosure of evidence. Therefore, we believe it is best for Government to engage in the work currently underway across the criminal justice system and keep this area under review.

## Structural reform of Magistrates' Court fee scheme

**Consultation Summary:**

182. **Question 48**: Do you agree that the Magistrates' Court fee scheme does not require structural reform at the current time? (43 respondents answered this question).

183. Most of the respondents to this question, (36/83%), did not want a structural reform of the fee scheme at the current time, but did want to see a quick uplift in rates. For those who were in support of structural reform, mentioned that they wanted to ensure better remuneration (fees) for work done.

**Government Response:**

184. CLAIR concluded that structural reform to the current Magistrates' Court fee scheme was unnecessary. The majority of consultation respondents also suggested that structural reform of the Magistrates' Court fee scheme was not needed. Therefore, we do not intend to reform the Magistrates' Court fee scheme beyond the 15% increase in fees already implemented.

# 5. The Crown Court

**Enhancing the Litigators' Graduated Fee Scheme (LGFS)**

185. CLAIR suggested that a standard fee structure would address the current perverse incentives highlighted in the LGFS scheme. A standard fee regime leans more towards simplicity, whereas the current LGFS scheme reflects work done through proxies such as Pages of Prosecution Evidence (PPE).

**Consultation Summary:**

186. **Question 53:** Do you consider replacement of basic fees within the LGFS with a standard fee structure, akin to the Magistrates' 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. (62 respondents answered this question).

187. The main theme from 33 of the respondents who answered this question (53%), including The Law Society and the Bar Council, was that a change to the payment structure would be welcome, as long as the fee structure accurately reflects the work undertaken and there is a minimum of a 15% increase in payment for work done.

188. The Law Society and Yorkshire Union of Law Societies both went on to say that the fees need to be reformed so that there is parity between Advocates' Graduated Fee Scheme (AGFS) and LGFS with regards to cracked trial cases. They stated that a considerable amount of work is often undertaken in these cases and should be rewarded accordingly.

189. Other comments from respondents in favour of reforming the fee scheme include:

- Any reform must be undertaken cautiously.
- Any new fee structure would need to be properly modelled and widely consulted on.
- Any new fee scheme must not include perverse incentives that exist in the current LGFS scheme.

190. There were 11 respondents (18%) who were not in favour of reforming the current fee scheme as they felt it worked well, however, they were of the opinion that the fees needed increasing.

191. **Question 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 respondents answered this question).

192. Of the 55 respondents who answered this question, a recurring theme from 34 of the respondents (62%) who agreed reform was required, was that PPE is the principal weakness in the current system and, as most evidence is served electronically, there is an issue with computer/video evidence not being able to be expressed as physical

pages. The Law Society stated that there is a need to replace the PPE proxy with something that effectively measures electronic evidence in all its forms. Birds Solicitors stated that reform is required so that electronically served evidence can be counted as PPE if PPE is to remain and that there needs to be recognition of time spent on video and audio evidence.

193. The London Criminal Courts Solicitors Association (LCCSA) and the Criminal Law Solicitors Association (CLSA) both expressed concern that any reform would require significant increase in many fee rates to take account of the removal of the relatively high amounts paid for some high PPE cases which are at present subsidising lower paying cases.

194. There were 22 respondents (22%) that did not agree that PPE requires reform.

195. **Question 55:** In your view, how should the LGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice? (49 respondents answered this question).

196. Of the 49 respondents who answered this question, 12 (25%) were in favour of paying for work actually done, and to pay fair and decent hourly rates.

197. Eight respondents (16%), including the Crown Prosecution Service (CPS), stated that there needs to be proper early engagement from CPS/Police and Prosecution with regard to pleas.

198. The Birmingham Law Society were among six respondents (12%) who were of the view that the LGFS should be restructured to better reflect the work undertaken by providers. They also stated that the LGFS is not the appropriate vehicle to produce early engagement which is reliant on a suitable level of disclosure from the prosecuting authority and the cooperation of the defendant. Respondents felt that it would not be sensible to seek to use the fee scheme to incentivise early resolution of cases which may create a conflict between the provider's financial interests and the defendant's wider interests in ensuring that justice is achieved.

199. Both Commons Law Community Interest Company and the LCCSA stated that the increasing guilty plea payments was 'dangerous' and would encourage premature advice, whereas The Law Society and Birds Solicitors were in favour of increasing guilty plea fees.

200. **Question 58:** Would you welcome the 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. (46 respondents answered this question).

201. The majority of respondents (33/72%) to this question said that they would welcome the replacement of LGFS fixed fees for appeals to the Crown Court and committals for sentence with a standard fee arrangement. It was considered that this would provide

fairer remuneration, which better reflected the complexity of cases, as well as providing greater certainty of remuneration.

202. Other respondents (10/22%) commented that the current fixed fees are too low and uneconomic with complex cases not being remunerated properly. Respondents also expressed views that there was not enough information within the proposal to agree to a new scheme.

203. A smaller tranche of respondents (six/13%) said they would not welcome the replacement of the system of fixed fees under the LGFS, as there has not been enough opportunity to assess the utility of the current system.

**Government Response:**

204. The Criminal Legal Aid Independent Review (CLAIR) recommended that the LGFS should be restructured with a standardised fee system and that any replacement fee(s) should reflect the need to properly remunerate the work actually undertaken. CLAIR also recommended the replacement of fixed fees in respect of both appeals from the magistrates' court and committals for sentence.

205. CLAIR found that the central weakness of the LGFS is that it is based primarily on the volume of pages served, irrespective of whether the pages are read, and not on the work done. Further, CLAIR stated that the LGFS incentivises firms to obtain cases with a large volume of PPE, such as frauds, and then to delay the outcome until the trial begins to increase the fees they are paid. Litigators often spend time negotiating with the Legal Aid Agency (LAA) what should be included in PPE.

206. CLAIR recommended a 15% increase in fees and the Government has uplifted the vast majority of fees by 15% (save for prison law fees and the PPE elements of the LGFS). We have increased police station, Magistrates' Court, Youth Court and LGFS basic fees, fixed fees and hourly rates by 15%. In total, we have invested an additional £55m-£63m per annum in solicitors' firm fees in steady state and we propose allocating the additional funding initially earmarked for longer term reform of LGFS for the reason set out at paragraph 48.

207. We agree with the observations that CLAIR made regarding the imbalances in the LGFS caused by the over-reliance on PPE and, further, that the implementation of standard fees to be one possible remedy to the dominance of page count in determining fees. Most respondents recognised the need to reform the LGFS. However, the Government does not collect data pertaining to case preparation times, which contributes to preparation times, or which other factors create a requirement for additional work. Reconfiguring the existing scheme to a simple, standard scheme is fraught with complexity and it is anticipated that such a data gathering exercise from beginning to end, including a feasibility study and data analysis, would take a minimum of 30 months to complete. This is because we would require data from a large number of completed cases to enable us to model a new scheme accurately. We think LGFS reform is more urgent to address quickly given the impact PPE has on fees.

208. It is our intention therefore, to model and consult on a revised fee scheme based on the data we have (offence type, outcome, trial length and volume of evidence) and to work closely with stakeholders to make informed assumptions about work done to produce options for a new model that relies less heavily on PPE and instead focus fees more on fixed basic fees for each offence type. We expect to consult on a revised LGFS scheme by early 2024. The work to revise the LGFS will engage a sub-group of the Criminal Legal Aid Advisory Board.

209. It is anticipated that a long-running period of review (at least 24 months) for all LGFS cases after the scheme has been in place for a set period will be required to test the assumptions and further fee changes may be necessary as a result. We are mindful of the CLAIR recommendation to increase LGFS fees to 15% as soon as possible. Undertaking this modelling will allow us to collect the necessary evidence in order to help us move towards that objective.

**Pages of Prosecution Evidence (PPE)**

210. The LGFS determines fees by a formula that uses proxies to assess the complexity of the case, and one of these proxies is the number of PPE served. Other proxies include the offence class, case type (trial or guilty plea) and length of trial.

**Consultation Summary:**

211. **Question 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? (43 respondents answered this question).

212. In response to improvements in relation to the way evidence is served on the defence, seven (16%) respondents suggested inclusion of electronic evidence in PPE, to be given the equivalent page count and improving the delays in serving evidence. The certainty of remuneration included the recognition of the full composition of evidence, with further points made by respondents that this needed to include any evidence relied upon by the prosecution and supporting material. The inclusion of electronic evidence has been raised consistently throughout the consultation responses to questions on PPE sections, highlighting that it should be included and remunerated for.

213. Eight respondents (19%) to this question suggested improvements to delays in the service of evidence, citing the need for prompt evidence and responses to requests to avoid court delays and improve accessibility (Law Society). These included not being too dependent on electronic service, evidence to be served at the point of charge/summons and raw materials and downloads to be uploaded to the secure email system Egress at the outset of a case.

214. Further suggestions from five respondents (12%), including the CPS, (12%) included earlier notification in the process, for example of the defence representatives. Respondents, such as the Law Society, also suggested a requirement for the

consistency in the format of evidence served and uploaded to the Digital case system for ease of access and assessment. There were smaller groups of respondents that commented on the need to get rid of the Common Platform and to consider the CPS' role in capping costs.

215. In response to improvements in relation to the way evidence is defined in regulations, 11 (26%) respondents suggested abolishing the distinction between used/unused evidence with further suggestions that this is replaced by time taken to consider the material. A number of respondents, including the CLSA, were in agreement that the current distinction is "arbitrary" and does not remunerate providers for work undertaken.

216. Five (12%) respondents were in favour of including electronic evidence within regulations; for example, the Law Society and practitioners such as Commons Law Community Interest Company spoke of the need to update regulations to ensure remuneration for reviewing electronic evidence. Two respondents (5%) also thought that this should include telephone evidence, with the need for consistency of extraction, for example, to a Portable Document Format (PDF) and for the evidence in full to be counted as PPE. There was a group of respondents who wanted to see clarity of definition in the regulations, particularly in relation to what is considered a 'page' in updated regulations.

217. In response to improvements in relation to the way evidence is gathered at assessment a general theme across responses suggested abolishing the distinction of used/unused evidence with pages to include all material, this was supported across responses to other sections of the question.

218. There was also a clear response for consistency across how electronic evidence is quantified with a suggestion from the LCSSA that "no distinction should be made if the material is served on paper or electronically" with the Law Society also noting that the overall classification of 'pages' is outdated. The third bracket of respondents suggested that evidence should be quantified as time taken to consider, supported by the Law Society and CLSA. The Law Society noted their previous suggestion to attribute 'points' to work undertaken to improve consistency of remuneration, this was annexed to their submission to CLAIR.

**Government Response:**

219. As set out above, CLAIR argued that the central weakness of the LGFS is its reliance on PPE which does not incentivise providers to focus on the actual work required but rather, it incentivises firms to try to obtain cases with a large amount of served material, and to delay the outcome until the trial begins. CLAIR also highlighted fundamental issues with the practical application of the PPE proxy itself, with litigators often spending time negotiating with the LAA about what should be included in the PPE count. The longer-term reform of the role of PPE within the LGFS will form part of the modelling and consultation on a revised fee scheme as outlined in response to Question 54 above and will consider ways that distinctions between electronic

evidence, non-electronic evidence, video evidence and unused material can be applied. We expect to consult on a new LGFS by early 2024. The work to revise the LGFS will engage a sub-group of the Criminal Legal Aid Advisory Board.

**Understanding Crown Court litigator work**

**Consultation Summary:**

220. **Question 59:** What new data would you recommend the Ministry of Justice (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? (33 respondents answered this question).

221. Of the 33 respondents who answered this question, nine (27%) were in favour of recording the time spent on cases with four of the 33 responses indicating that data should be collected. Five out of the 33 responses felt that there was no need to record data with two suggesting that this is due to having fixed fees. Six out of 33 respondents stated that collecting data would be time consuming. There was a small reference from one of 33 respondents to there being little point in collecting data due to the varied nature in cases. Three respondents recommended that the MoJ should look at what data it already has.

222. There were a few 'Other' responses which covered taking account of children's cases, and the extra time these may take, and suggesting that the penalty for electing for a Crown Court trial on cases that do not proceed is removed.

223. **Question 60:** Which factors influence the time you spend preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence? (37 respondents answered this question).

224. Of those respondents who answered this question, 18 (49%) indicated that factors that influence the time spent preparing for substantive Crown Court proceedings, appeals to the Crown Court and committals for sentence were mainly case complexity (49%), the type of clients (53%) and the amount of material served/disclosed (53%).

225. Ten of the 37 respondents felt that it should be obvious what the factors should be whilst six respondents suggested that each case needs to be assessed on its own merit, so it is difficult to answer. Other factors mentioned included the number of hearings, the work not always being cost effective, making sure the client receives the best advice and difficulties in getting papers to defendants in prison.

**Government Response:**

226. We will consider the factors that influence the time spent preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence in the context of planned LGFS reform as set out in response to Question 53 above.

**Fundamental AGFS structure and Reform**

227. CLAIR found that the underlying model for advocate remuneration, consisting of a brief fee covering preparatory work and representation at the first day of trial and daily attendance fees for the second and subsequent days at trial, is a sound approach in principle. CLAIR was, however, critical of the scheme's flexibility for catering for those cases requiring exceptional amounts of preparation by the advocate.

228. CLAIR recommended that the level of the brief fees be reviewed, and that the circumstances in which Special Preparation can be claimed be expanded so as to create a more effective escape mechanism for complex cases. It also recommended introduction of the possibility of enhancement of the fees payable for certain discrete hearings within cases if they required exceptional levels of preparation or achieved case progression. Further, CLAIR recommended that the circumstances in which Wasted Preparation can be claimed are broadened.

229. In consultation, we accepted CLAIR's recommendations that a review of brief fees was required and that a more effective method of remunerating cases (or hearings within cases) which require a time commitment from the advocate that exceeds a normal range. As we do not collect the data relating to time spent on preparation, nor factors which increase a case's complexity, which would permit an in-depth analysis of advocacy, we sought views in consultation on whether CLAIR's approach represented the optimal way to refine the AGFS, and on what data should be collected to inform future design of the scheme.

**Consultation Summary:**

230. **Question 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. (41 respondents answered this question).

231. Addressing the first part of Q61, 15 (43%) of the 35 respondents to this component viewed the current scheme to be structured well, with no fundamental reform necessary. Nine (26%) felt the scheme was sub-optimal, while the remaining 11 (31%) said that reform should centre on increasing fees within the current structure.

232. In relation to the second part of the question – the general changes respondents would like to see made – the most common answer from eight respondents was the suggestion of a review of the current parameters/relativities. This was followed by:

- Focus on the areas highlighted by CLAIR (Special Preparation, written work, Wasted Preparation) (seven respondents).
- Introduce bolt-ons where case complexity or client needs are greater than the norm (five respondents).
- Re-balance the scheme, with less emphasis on trial days (three respondents).
- Simplify the scheme by reducing the number of offence bands (two respondents).

233. The Criminal Bar Association (CBA) also alighted on the theme, touched on by numerous respondents across the AGFS questions, that the LAA's interpretation of Regulations in its assessment of claims is too restrictive and its evidential requirements too onerous. The CBA urged a change of culture at the LAA whereby claims would be assessed on the basis of a presumption of payment. We do not consider that the level of scrutiny applied to AGFS claims is excessive. The LAA has a statutory duty to ensure effective stewardship of public money and minimise the error rate in making payments.

234. **Question 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. (37 respondents answered this question).

235. Of the 37 respondents who addressed this question, 11 (30%) commented that all elements of the scheme required further investment, and five (including the CBA, LCCSA, and The Law Society) felt that the MoJ ought to focus on identifying and uplifting fees for those offence types which are perceived to be relatively poorly paid, for example, serious offences with low page counts.

236. The CLSA was amongst four respondents (around 11%) who urged the Government to use CLAIR as a blueprint for reform and adhere to the recommendations made within the report. Four respondents also advocated for prioritisation of remuneration for client conferences and correspondence.

237. A number of discrete themes related to preparation and pre-trial work were each mentioned by three respondents – Special Preparation, Pre-Trial Hearings, and a general exhortation to prioritise early-stage work above days of trial.

238. A wide range of other AGFS fee reform areas were considered to be of high importance by a very small number of respondents. These mostly concerned discrete preparatory tasks or specific offence bands.

239. **Question 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. (36 respondents answered this question).

240. Of the 36 respondents who addressed this question, 15 (42%) signalled their complete or qualified agreement with the notion, while ten (28%) stated their opposition.

241. There were 12 respondents (33%) who commented that the expansion of the availability of Special Preparation payments would not achieve the aim of better remunerating cases with outlier levels of associated preparation unless it was accompanied by a change in LAA assessment culture. Respondents elaborated by

suggesting that broadening of Special Preparation definitions would result in determination of claims becoming a more subjective enterprise and increase the volume of supporting evidence required of practitioners. The Bar Council and the CBA both queried why all claims of this type needed to be assessed and suggested the LAA could move to a dip-sampling or a risk-based approach.

242. Some respondents, including the Birmingham Law Society, stated that a combination of the administrative costs associated with making a claim for Special Preparation and the perceived low hourly rate created a barrier which would need to be addressed if this enhancement mechanism were to be optimised.

243. Both the Bar Council and the CBA argued that, should Special Preparation be expanded in future, the provision would need to be renamed as the word “Special” connotes rarity or exceptionality, and may dissuade advocates from making reasonable claims. As a modified approach, both organisations put forward the principle of “unbundling” the Brief Fee and enabling practitioners to automatically claim a fixed fee for the first three hours of certain preparatory activities, for example, written work, with the possibility of making an additional (assessable) claim for time in excess of this – that is replicating the arrangement already used to remunerate consideration of unused material. The Law Society and one other respondent pointed out that a prerequisite of expanding Special Preparation was determining the amount of time committed by advocates to preparation of an average case (of a given type) involving an average client, i.e., how to set the tipping point beyond which the Brief Fee (or Hearing Fee) could no longer be considered adequate remuneration. This, The Law Society felt, was problematic in light of the lack of granular data held by both the LAA and many advocates.

244. **Question 64:** Do you agree with the recommendation that fixed fee payments for interlocutory hearings should benefit from the possibility of enhancement? (31 respondents answered this question).

245. Of the 31 respondents who answered this question, 25 (81%) agreed that they should, while three (around 10%) disagreed.

246. Most respondents to this question went on to give examples of criteria which, if satisfied, would qualify a hearing as meriting enhancement. Seven respondents (23%) advanced a framework whereby an uplift would become payable if one or more complexity/gravity markers in a non-exhaustive list, was applicable to that particular hearing (or potentially the overall case), for example, multiple applications, consideration of hospital orders or likely a period of imprisonment exceeds four years.

247. Five respondents felt that an enhancement should be payable in any instance where the preparatory work conducted by the advocate, or the length of the hearing itself, was beyond a calculated “norm”.

248. The Birmingham Law Society and the CBA both recommended that an enhancement should be paid for any hearing involving legal argument, however, the CBA wanted this to take the form of the applicable trial refresher fee.

249. A variety of other criteria and wider suggestions were put forward by a single respondent. These were as follows:

- Pay an enhanced fee where:
    i. Expert evidence is heard
    ii. The hearing is assisted by an intermediary
    iii. The page count exceeds a defined level
    iv. The defendant is vulnerable
    v. The legal and factual issues under consideration are complex
    vi. A judge gauges the advocate's workload for the hearing to be unusually high
- Adopt the offence banding structure for PCMHs/FCMHs
- Mention hearings should benefit from a general fee uplift.

250. **Question 65:** Would you welcome the 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? (33 respondents answered this question).

251. Of the 33 respondents who answered this question, 11 (33%) were in favour of the proposition while ten (30%) objected. The remainder were either agnostic or found the question to be unclear.

252. Seven respondents could foresee enhancements based on complexity markers playing a role in a future advocate remuneration scheme, provided it was as an addition to Brief Fees and not a partial replacement. Four respondents stated they would welcome the idea as long as a (non-exhaustive) list of markers could be agreed upon, and objectively verified at assessment. Only one respondent was of the view that determination of whether a complexity marker should apply to a claim be left to a caseworker.

253. There were three respondents who recommended that the MoJ should simply review and further uplift Brief Fees instead of introducing further proxies. The LCCSA suggested that a 25% uplift would be appropriate, while the CBA expressed the view that setting of future Brief fees should assume a greater level of complexity inherent in the average modern case.

254. **Question 66:** Do you think that fairer remuneration of outlier cases could be achieved by way of amendments to the existing AGFS, for example, adjustment to PPE thresholds beyond which Special Preparation can be claimed or the relative level of basic fees? (30 respondents answered this question).

255. There was a relatively even split between those who felt this was possible (11/37%) and not possible (10/33%).

256. Some respondents, including the Bar Council and the Law Society, were in favour of a general review of PPE thresholds to bring a greater volume of cases into the scope of Special Preparation. Others urged a focus on adjusting thresholds for those (often serious) offences which tended not to generate sufficient pages to bring Special Preparation into play, for example, sexual offences or robbery.

257. Others felt that the page count as a marker of complexity had limitations and instead proposed a simplified approach to enhancement of the Brief Fee, whereby a percentage enhancement would be payable if one or more objectively verifiable markers were present, for example, the case is a conspiracy/multi-hander or telephone evidence is central to the case.

258. Two respondents (7%) were of the view that increasing the hourly rate for Special Preparation and making it less arduous to claim were of at least equal importance to reviewing and adjusting thresholds. One respondent felt that it was unnecessary to recalibrate any element of the current AGFS, and that a blanket increase in Brief Fees would suffice.

259. **Question 67:** Are there any models for Crown Court advocate remuneration you feel we have not yet considered? Please give details. (26 respondents answered this question).

260. The majority of respondents who answered this question (15/58%) either replied negatively or were agnostic; the remainder did not offer a view.

261. Three respondents, including St. Philips Chambers and the Bar Council, felt that the weakness of the current AGFS resulted from historical underfunding of the scheme rather than its intrinsic structure. The Bar Council stated that:

> ‘The Bar Council has explored this area for many years and worked co-operatively with the MOJ on the design of fee schemes. We do not have an entirely new scheme to recommend. The fundamental problem is not the structure of the AGFS, it is the underfunding of it.’

262. The Bar Council went on to suggest that the scheme could be improved by formalising a stage payment mechanism so that fees could be paid as and when they are accrued, rather than amalgamated into a single payment at the conclusion of proceedings. Both the CBA and the Bar Council called for a review of the rates allowable for travel and accommodation expenses.

263. One respondent preferred a reversion to use of PPE as a central determinant of fees.

**Government Response:**

264. CLAIR viewed the current AGFS model, consisting of a brief fee supplemented by Daily Attendance Fees for cases which run to a second or subsequent day of trial, to be sound as it balances fair remuneration with ease of administration. However, it found the lack of an escape mechanism to ensure complex cases (excepting those where the complexity derives from a high volume of served evidence or novel points of law) attract a superior fee, was the scheme's central weakness.

265. The CLAIR report concluded that the optimal remedy should take the form of an expansion of the circumstances under which a claim for Special Preparation could be allowed and posited that an assessment of whether a case met certain defined "complexity markers" could "lay the ground" for the making of such a claim. CLAIR urged that this remedy be accompanied by a wider review of the adequacy of brief fees, given the degree to which the advocate's role may have changed over the lifetime of the AGFS.

266. In response, the Government has accepted the principle that the AGFS may not adequately remunerate outlier cases (or hearings within cases) on which the advocate has been required to undertake unusually high levels of preparation. However, it was unable to accept that CLAIR's proposed remedy was optimal on the following grounds.

267. We do not currently collect the necessary data on hours worked and the types of preparatory activity involved to gauge the norm for the array of cases undertaken by advocates (which, ideally, should be sufficiently remunerated by the brief fee).

268. We are not in a position to compile an exhaustive list of complexity markers. It is unclear whether complexity markers could be objectively verified at assessment, which may create additional administrative burdens for the LAA and practitioners and increase the volume of billing disputes. We asked multiple questions in consultation to elicit views on which elements of the AGFS required attention, the optimal method for reform of these areas, and which criteria affected the complexity of the advocate's work. Responses revealed there was little consensus as to how the scheme could best be reformed, nor the presenting factors which tend to lead the advocate to commit a greater number of hours to preparatory work.

269. During discussions with MoJ in early autumn 2022, the Bar made representations that Special Preparation (including written work and consideration of audio-visual evidence) and Wasted Preparation should be prioritised for further investment. We have proposed to inject an additional £3m into remuneration of these elements over the next two-years, with the detailed criteria for disbursement of the new funding to be determined in consultation with the Criminal Legal Aid Advisory Board, as well as through further consideration of the responses to this consultation.

270. While additional investment in Special Preparation and Wasted Preparation, in addition to the general 15% uplift to advocate fees announced in the interim consultation response, addresses some of CLAIR's recommendations, further work will be required to achieve the long-term reform of the AGFS for which CLAIR called for. In particular, we need to assess whether brief and hearing fees continue to remunerate advocates reasonably for preparatory work in the majority of cases and determine at what point (and for which reasons of complexity) a case becomes exceptional and should benefit from a higher fee.

271. In light of this, we are now proposing to work with advocates and their representative bodies to gather granular data (where this is held) which explores the pre-trial tasks advocates habitually or less commonly conducted and the time taken to accomplish these tasks. This will allow us to properly assess the adequacy of current fees, and devise and consult on reforms which result in fair remuneration and align with wider justice priorities.

**Further data and research**

**Consultation Summary:**

272. **Question 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? (29 respondents answered this question).

273. Of the 29 respondents who answered this question, six (21%) felt the key piece of intelligence would be a breakdown of the hours spent by an advocate on non-advocacy activities, in relation to a wide array of case types.

274. Five respondents (17%) stated that they already recorded data at this grain, of which, four said they were willing to work with the MoJ. Another four respondents said they were unable to help, either because of the impracticality or cost of collecting granular data afresh, or because they felt it would be futile in the context of the Government's stance on cost neutrality. Five respondents believed that the LAA already holds all of the data pertaining to hours worked necessary to inform AGFS reform. The LAA does not, however, collect information at this granularity as part of the billing process for the majority of cases that are remunerated by way of fixed brief fees.

275. Three respondents emphasised the importance of conducting qualitative research alongside, and potentially ahead of, quantitative analysis. For two of these respondents, the preferred method would be to interview barristers and solicitor-advocates to build a general picture of modern criminal advocacy, whereas the Bar Council favoured discussion of the relativities underpinning the AGFS.

276. The Bar Council also called for reform of the AGFS to form part of the Advisory Board's remit as optimisation of the scheme is heavily dependent on the wider functioning of the criminal justice system.

277. **Question 69:** Which factors increase the complexity of the advocate's work in Crown Court proceedings? (31 respondents answered this question).

278. The most common factor, commented on by ten respondents (32%) of the respondents who addressed this question, was the presence of mental health issues in their client and/or their general disposition towards proceedings. This was followed by two evidential factors – the overall volume of PPE/disclosure (nine responses/29%) and the extent of digital material (five responses/16%).

279. A further seven factors featured in three separate responses. These were:

- Case type
- Whether, and to what degree, legal argument is necessary
- The quality of the prosecution's review and service of the evidence
- The level of assistance provided by the instructing solicitor
- Number of witnesses, especially those requiring special handling
- Ancillary applications
- Consideration of expert reports

280. Nine factors were mentioned by a single respondent:

- Custody status of client
- Involvement of co-defendants
- Judicial decisions
- Shortcomings in police investigations
- Late service of papers
- Body-worn video & CCTV
- Need for interpreters/intermediaries
- Photographic evidence
- Listing issues

281. **Question 70:** In your view, how should the AGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice? (30 respondents answered this question).

282. The greatest number of respondents who answered this question (ten/33%) had strong views that a fee scheme should prioritise rewarding defence inputs rather than outcomes because inefficiencies result from procedural and process issues that are not within the advocate's control. Four of these respondents reasoned that rebalancing the AGFS so that a greater proportion of the overall fee stems from preparation (as opposed to trial days) would achieve the same effect.

283. In the context of improving remuneration for preparatory work, a number of suggestions were made by respondents:

- Enhance payments for "Substantive" hearings.

- Pay enhancements where complexity criteria are met.
- Pay full guilty plea fee for early engagement resulting in resolution.
- Give PTPHs fee parity with trial day refreshers.
- Remunerate meetings with the prosecution.
- Return to a system of payment at hourly rates.
- Ensure trial fees are paid in full where there is evidence of active engagement with the prosecution.

284. The CBA commented in their response that assessing the alignment of defence remuneration with wider justice priorities and initiatives should be incorporated into the Advisory Board's terms of reference. Other respondents put forward ideas for changes that could facilitate earlier resolution:

- The CPS should review the practice of deploying Higher Court Advocates to conduct entire Plea and Trial Preparation Hearing lists, who may not have the authority to make decisions on alternative charges
- The CPS could do more to safeguard against a tendency to "Over-charge" at the outset with a view to reaching a compromise with the defence on the day of trial
- His Majesty's Courts and Tribunal Service and the Judiciary could look to expand pilot initiatives involving dedication of a Court to early resolution of candidate cases.

285. Two respondents felt that the LAA could introduce an audit or peer review process for advocates to ensure that advice provided to clients was given with their best interests in mind, and not because their representative was seeking to access a more favourable fee.

286. Finally, one respondent pointed out that some defendants perceive their best interests as being served by delaying a plea until their case comes to trial. This is a product of an adversarial/trial by jury justice system which no early engagement initiative can influence.

**Government Response:**

287. Our consultation sought views on the nature of the evidence we could collect which would allow for a fuller picture of modern advocacy to be constructed and guide future reform. We also asked respondents to highlight the features of a case which, in their experience, increased the complexity of the advocate's work.

288. Our preferred option to guide future reform would be to devise an extensive data-gathering exercise, collecting information from advocates and chambers on the time spent on the array of tasks which constitute pre-trial preparation. The task list could include both Court-directed and defence-generated written work (for example, proofs or advice), as well as non-written preparation (for example, conferences). We could also

seek to capture intelligence on complexity markers, such as the client's mental health or disposition towards proceedings and the degree to which legal argument is involved in the case. The aims of the exercise would be to determine the average amount of time required to prepare a case of a given type and, in the long run, design an AGFS which pays a reasonable fee for "standard" cases, incorporates an escape mechanism for exceptional cases, and promotes preparatory work at critical points where there are opportunities to resolve or progress cases.

289. A minority of consultation respondents stated that they already recorded data at this granularity. A further group reported that they would be able to begin collecting information in this way but were concerned at the prospect of an unremunerated administrative burden.

290. We will complement quantitative research through collaborative discussion of reform involving the Criminal Legal Aid Advisory Board and other stakeholders. Some consultation respondents argued for the use of interviews with barristers and higher rights solicitors to build a better understanding of advocacy. The Bar Council favoured, for expediency, discussion of the relativities within the AGFS. We recognise that collecting case data in sufficient volume and granularity to refine the scheme effectively will take time; however, this need not preclude earlier reform where discussions result in a persuasive case for change.

**Enhanced payment for "Substantive" Plea and Trial Preparation Hearings (PTPHs) or Further Case Management Hearings (FCMHs)**

291. CLAIR recommended that fees for PTPHs and FCMHs should benefit from the possibility of enhancement if they result in meaningful case progression.

**Consultation Summary:**

292. **Question 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? (40 respondents answered this question).

293. Of the 40 respondents who answered this question, 22 (55%) were opposed to the idea, with 15 (38%) in favour.

294. Of those who were in opposition, nine (41%) objected primarily on practical grounds, citing the difficulty of defining in an exhaustive way "meaningful progression". Eight (36%) were opposed on grounds that the principle was fundamentally unfair – pointing out that lack of progression could result from factors outside of the defence's control, for example, CPS or judicial actions, client decisions.

295. The CBA and Bar Council felt that any enhancement mechanism for PTPHs/FCMHs should hinge on advocate inputs rather than hearing outcome, while the CPS questioned the rationale for introducing pecuniary incentives for rewarding progression,

given the Criminal Procedure Rules already impose an expectation on the parties that progression will be achieved.

296. Three respondents considered that PTPHs/FCMHs merited a blanket fee uplift to the extent that these hearings would constitute a greater proportion of overall advocate Crown Court remuneration than is currently the case, because they are a crucial part of the trial process.

297. However, one respondent was concerned that elevating the fees payable (either across the board or where the PTPH/FCMH generated a desired outcome) might undermine the "Returns" principle by encouraging some advocates to focus excessively on securing a case progression enhancement, without engaging fully with outstanding issues. Another respondent felt that enhancing AGFS fees in this area would not be a fair reflection of the advocate's input at this stage of the trial process – the respondent asserted that most of the preparation fell to the litigator.

298. Amongst those who were in favour, two respondents said that the Judge should determine whether meaningful progression had occurred; another respondent, Lucy Welsh from Sussex University, put forward a set of criteria which could be used to evidence progress. These were as follows:

- Entry of plea.
- Fixture of trial date.
- Agreement of witness requirements.
- Agreement of s.10 admissions.
- Agreement of s.9 statements.
- Identification of legal issues.
- Identification of any legal argument envisaged as necessary and fixing a timetable for dealing with that argument.

**Government Response:**

299. CLAIR recommended that an enhanced fee be payable for effective PTPHs and FCMHs. In response, the Government agreed with the premise that the opportunity for a higher fee could encourage early engagement and, potentially, earlier resolution of appropriate cases. However, we foresaw difficulties with achieving a definitive list of criteria which would, if satisfied, signify that the hearing had been "case-progressive". We also felt that linking fees to hearing effectiveness had the potential to penalise defence advocates in instances where a lack of progression could be ascribed to factors outside of their control.

300. A majority of consultation respondents agreed with the Government's position, although some did put forward criteria that could be used to denote an effective PTPH/FCMH. The CBA and the Bar Council were both of the view that future fees for PTPHs should exclusively reflect advocate inputs rather than hearing outcome, while

other respondents felt that a substantial uplift to the fixed fees available for these types of hearing would be a better option for promoting early engagement.

301. We will include PTPHs/FMCHs (and other discrete hearings) in the scope of future quantitative and qualitative research to determine the optimal way forward.

**Wasted Preparation Payments**

**Consultation Summary:**

302. **Question 72:** Do you support the principle of making Wasted Preparation available in more instances? (39 respondents answered this question).

303. Of the 30 respondents that, made a "Yes/No" selection in response to this question, 26 (87%) were in favour of widened availability while four (13%) were not.

304. Some respondents gave a more detailed rationale in support of expanded Wasted Preparation, with reasons given including that it is a matter of basic fairness (not usual for a professional to be denied payment for work conducted in good faith), that it would encourage early case preparation and greater case ownership, and that it could help to maximise the capacity and willingness to take on cases of a reduced pool of criminal legal aid advocates. The Law Society called for Wasted Preparation to be made available for Magistrates' Court proceedings.

305. Five respondents (13%) felt that using Wasted Preparation to mitigate wider criminal justice system inefficiencies was not a good use of public money. Others articulated proposals for alleviating these inefficiencies, suggesting for example that Listing Officers should refrain from "over-listing" and prioritise the availability of the defence advocate(s) when making decisions. The CBA was, however, complimentary about the impact of the *List Assist* software currently being developed.

306. One respondent said that a re-designed AGFS, which prioritised early preparation and incorporated a formal stage payment mechanism, could help to reduce the call for Wasted Preparation payments.

307. **Question 73**: In your view, which case criteria should be satisfied for a Wasted Preparation claim to be allowable (for example, duration of trial, volume of PPE, hours of preparation conducted)? (33 respondents answered this question).

308. The most common answer, given by 13 respondents (39%), was to retain the three existing thresholds (trial length, PPE, hours of preparation conducted) in some combination, with some adjustments. The next most common answer, appearing in seven responses (21%), was that all qualifying criteria should be removed, i.e., all (wasted) preparation should be remunerated (subject to assessment).

309. Some respondents wanted the MoJ to look at alternative criteria, for example, client vulnerability or how late the listing change is made. One respondent thought that Wasted Preparation should be claimable where the case cracks on the first day of trial

or the trial otherwise “under-runs”, while other respondents put forward the idea of using variable rates, depending on case type and trial length.

310. The CBA proposed an approach mirroring the arrangement for paying for consideration of unused material whereby, the first three hours of Wasted Preparation could be claimed without assessment in instances where the advocate is prevented from attending trial through no fault of their own.

**Government Response:**

311. Of those that responded to the consultation questions on Wasted Preparation, 87% agreed with CLAIR’s recommendation that the circumstances in which it can be claimed should be broadened. For some respondents, reform of the Regulations in this area was of a higher priority than any other element of the AGFS.

312. Following further representations from the Bar, the Government decided to expedite the reform of Wasted Preparation ahead of this final consultation response. We agree that we should relax the qualifying criteria for claims in line with CLAIR’s recommendation. More detailed proposals are currently under consideration by MoJ and by the Advisory Board, taking into account the consultation responses, and detail an approach where there would no longer be a requirement for a case to have proceeded to a five-day trial before a Wasted Preparation claim can be entertained, and the 150 PPE threshold for cracked trials would be removed. The minimum number of hours of preparation that would need to have been undertaken for a claim to be made would be reduced from eight to two. This proposed approach aligns with CLAIR’s recommendation for reforming Wasted Preparation and aligns with the views of one third (8 of 24) of consultation respondents, who suggested that existing qualifying criteria should be loosened in line with CLAIR’s recommendation.

313. Furthermore, an advocate would be able to claim for Wasted Preparation in instances where their case has been added to a Warned List and subsequently not called on within the relevant period and for ineffective trials. In both scenarios, according to the proposals under consideration, there would be no requirement for the advocate to have returned the brief.

314. We have agreed to invest an additional £3m over the next two-years to enable a broadening of the circumstances in which Wasted Preparation payments can be made, alongside changes to the availability of Special Preparation. We are developing amended criteria to govern Wasted Preparation claims through further consideration of consultation responses and in consultation with the Criminal Legal Aid Advisory Board.

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

**Consultation Summary:**

315. **Question 74:** Would you be willing to help us gather data on the additional work involved in a case with a Section 28 (s.28) hearing? (33 respondents answered this question).

316. Of the 33 respondents who addressed this question, 18 (55%) said they were willing to assist. One respondent recommended any data-gathering exercise be co-ordinated by the professional bodies rather than the MoJ, while the Law Society expressed doubt that practitioners would be amenable to committing resource without the possibility of recompense.

317. **Question 75:** How do you think the fee scheme should be remodelled to reflect s.28 work? (27 respondents answered this question).

318. This question elicited a low number of responses compared with other AGFS themes, perhaps a reflection of the fact that the procedure has only recently started to be rolled out across more Court sites. Further, responses collated did not demonstrate a clear consensus with regard to the preferred method for remunerating s.28 work.

319. Three respondents, including the CBA and the Bar Council, favoured payment of a second brief fee for the substantive trial (regardless of whether there has been a change of advocate). Slightly more respondents (four) felt there was justification in paying a second fee, but not necessarily the full brief fee – their suggestion was to pay a re-trial fee.

320. Some respondents would be content to retain the current s.28 fee structure provided the identity of the advocate remains the same throughout, albeit with some adjustments. One thought there was a strong argument for a fee increase of 25-33%, given the sensitivity and specialised nature of the work; another felt that there should be an interim payment for the s.28 hearing.

321. Other suggestions for creating a bespoke s.28 model were as follows:

- Ground Rules Hearings should attract a trial refresher fee rather than a legal argument fee as a matter of course.
- Special Preparation should be available when there is a change of advocate between the Ground Rules Hearing and the s.28 hearing.
- Consider a separate payment (Special Preparation) for viewing/editing of Achieving Best Evidence (ABE) and cross-examination videos.
- Refresher fees should be payable in instances where the Judge makes a special measures order to repeat Ground Rules Hearing and/or s.28 Hearing.
- Remunerate this type of work at hourly rates.
- Create a set of stand-alone s.28 fees on the basis of a fresh analysis of the advocate's activities.
- Make provision for an uplift where the s.28 procedure applies to more than one witness.

322. The CPS proposed that defence remuneration for s.28 work should broadly align with prosecutor pay for the same.

323. One respondent commented that efficiencies relating to defence remuneration and the wider system could be achieved by amending the s.28 procedure such that cross-examination took place just prior to the substantive trial.

**Government Response:**

324. Pre-recorded cross-examination (provided for by s.28 of the Youth Justice and Criminal Evidence Act 1999) is a special measure that enables certain victims and witnesses have their cross examination pre-recorded and then played at trial. S.28 has been available for all children and vulnerable adults in the Crown Court since November 2020 and is now available to adult complainants of sexual and modern slavery offences.

325. We asked about remodelling fees to ensure the demands of s.28 work is reflected However, there was limited consensus. Some respondents proposed payment of a second full brief fee or re-trial fee, while others favoured the introduction of a bespoke model.

326. We agree that there is a need to ensure s.28 work is properly reflected in remuneration. We have now allocated an additional £4m over the next two-years to defence advocates involved in s.28 cases. Proposals formulated on the basis of consultation responses, including payment of an additional fee to reflect the extra preparation required ahead of the substantive trial, are currently under consideration by the Criminal Legal Aid Advisory Board.

327. We also asked whether respondents would be willing to help us gather data on the extra work involved in s.28 hearings to inform future changes to the fee structure. More than half of respondents to this question told us they would. We will consider options for engaging with practitioners on next steps for remuneration of s.28 work, recognising limits on their time and resources.

# 6. The Youth Court

## Youth Court fees

**Consultation Summary:**

328. There were two options put forward for the consultation regarding Youth Court fees:

- **Option 1:** Widening the scope for "Assigned Counsel" to all Indictable Only offences. In this option, a certificate for counsel would be automatically available for all indictable only offences heard in the Youth Court, allowing an advocate to support the case alongside a solicitor.

- **Option 2:** Enhanced Youth Court fee for all Indictable Only and Triable Either Way offences. In this option, an enhanced fee would be paid within the current scheme for all indictable only and triable either way Youth Court cases.

329. **Question 76:** Considering the fee proposals (Options 1 and 2), 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 fair value for taxpayers? (42 respondents answered this question).

330. Overall, Option 2 was the most supported option, with 62% of those who responded to this question indicating that the enhanced fee would better reflect the seriousness and complexity of some Youth Court work than Option 1. Other responses either emphasised the need for further funding or gave reasons why Option 1 would not produce the best outcome. For more information on this, please refer to the summary for Question 78 below.

331. **Question 77:** Which proposal do you think would provide better quality legal representation for children before the Youth Court? (41 respondents answered this question).

332. Around 44% of those engaging with this question indicated that Option 2 would provide better quality legal representation for children than Option 1. Other responses either referred to their answer given to Question 76 or felt they could not comment on whether either option would provide better quality representation for children. A few of the responses to both Question 76 and Question 77 proposed that both options should be implemented. Overall, Option 2 was the most supported option.

333. **Question 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. (34 respondents answered this question).

334. We received 34 responses to question 78. However, responses to Questions 76 and 77 also addressed this question. Several respondents said that extending assigned counsel under Option 1 would not necessarily lead to improvements in the quality of representation provided to children in the youth court. Respondents explained that Crown Court advocates may not have the required knowledge or experience to undertake work in the Youth Court. Furthermore, it was highlighted that assigned counsel may attract more junior and inexperienced advocates.

335. Another main reason why Option 2 was preferred, was due to a wider number of cases (around 60%) being eligible for a fee enhancement whereas option 1 would not reach as many Youth Court cases (around 10%).

336. Some respondents (17%) suggested that the enhanced fee should also be extended to summary offences to reflect the fact that all children are vulnerable and require specialist support, whilst others, including the Law Society, suggested basing the enhanced fee on certain case characteristics, such as the age of the child, rather than on the offence type.

337. Some respondents also emphasised that more investment and remuneration is still needed within the youth court. A few respondents, including the Criminal Bar Association (CBA) and the Bar Council recommended that both options should be implemented.

**Government Response:**

338. As the enhanced fee option (Option 2) received the most support from the consultation responses, we will implement this and consult further on the details of applying the enhancement within the current fee scheme.

339. In the Impact Assessment for the Criminal Legal Aid Independent Review (CLAIR) consultation, we proposed an additional £5m (in steady state) towards the Youth Court reforms; this is on top of the wider uplift applied to Magistrates' Courts fees. Our analysis shows that distributing that £5m across all Indictable Only and Triable Either Way offences would lead to an average fee increase of around 70% per case. This significant uplift per case reflects the seriousness and complexity of the work done in the Youth Court.

**Youth work accreditation**

**Consultation Summary:**

340. **Question 79:** Do you agree that accreditation should not be made a formal condition of lawyers receiving increased fees for youth work? Please explain. (55 respondents answered this question).

341. The majority of respondents who answered this question agreed that accreditation should not be a formal requirement of lawyers receiving increased fees for Youth Court work. Many did not give a detailed explanation for this response, but some expressed

the view that this is because practitioners are qualified enough or because there are existing controls, such as the BSB's Code of Conduct, Inns of Court College of Advocacy's (ICCA's) 'Advocacy for Children in Conflict with the Law' (ACCL) course and the Solicitors Regulation Authority (SRA)) plans to introduce (later this year) practice behaviours to outline the standard of advocacy expected from solicitors practising in the Youth Court. There was also mention of Youth Court work being more concentrated in urban areas and how this would raise issues if formal accreditation was made a requirement.

342. Some respondents disagreed and said increased fees and accreditation should be tied to ensure quality, these respondents supported a form of accreditation in general but not one that is necessarily tied to fees.

343. Other respondents supported a "quality mark", as already being developed by professional bodies. They pointed to the compulsory training that barristers are required to undertake when working with children and favoured introducing similar non-compulsory training for solicitors.

344. The importance of experience over accreditation was also highlighted, alongside alternative methods of displaying competency, such as peer review.

**Government Response:**

345. The Government's position is that accreditation should not be a formal requirement for lawyers receiving increased fees for Youth Court work. We will instead work with the sector to identify leads to further develop standard training which all practitioners will be encouraged to undertake. We will also continue to support enhanced training and the initiatives already taking place within the sector.

# 7. Other criminal legal aid issues

**Very High Cost Cases (VHCCs) and Interim Fixed Fee Offers (IFFOs)**
**Consultation Summary:**

346. VHCCs are cases which are likely to exceed 60 days in trial and are mostly complex fraud cases. Litigators currently agree case plans based on an individual case contractual provision. 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.

347. The Criminal Legal Aid Independent Review (CLAIR) recommended an increase of 15% for litigators' fees for VHCCs. The Government has accepted this recommendation and the increased fees came into force on 30 September 2022. CLAIR did not recommend an increase in advocate remuneration for VHCCs.

348. CLAIR recommended clarifying the legal basis of the IFFO scheme and setting up an independent resolution mechanism. We consulted on this option, alongside alternative models for remunerating advocates for VHCCs.

**Consultation Summary:**

349. **Question 80:** We propose increasing fees for litigators conducting VHCCs by 15%. Do you have views? Please explain your reasons. (36 respondents answered this question).

350. Of the 36 respondents who answered this question, eight (22%) were in favour while 16 (44%) signalled their disagreement. Recurring reasons cited by those respondents who disagreed with the proposal were that the increase was intrinsically insufficient (11 responses) and that it failed to consider the prevailing inflation rate (five responses).

351. Five respondents, including Commons Law Community Interest Company, pointed out that VHCC fees had been subject to a reduction of 30% in 2013. This was a significantly higher percentage decrease than that applied to any other area of litigator remuneration which would not be reversed by the current proposal.

352. The Yorkshire Union of Law Societies advocated for VHCCs to be prioritised for further investment, with a view to attracting greater numbers of experienced practitioners to what are often complex cases.

353. Several respondents expressed a view that an increase in fees alone would not improve VHCC arrangements and that wider reform was of greater importance. Three respondents, including the London Criminal Courts Solicitors' Association (LCCSA), referred to an administrative burden imposed on VHCC litigators by the principle of

negotiating work stages in advance which, in their view, compares unfavourably with IFFO arrangements for advocates.

354. Five respondents (14%) felt that the funding earmarked for increases to litigator VHCC fees would be better directed towards the Litigators' Graduated Fee Scheme (LGFS). Indeed, one of these respondents queried why a separate VHCC scheme was necessary at all and urged the Ministry of Justice (MoJ) to absorb high cost cases into a reformed LGFS.

355. **Question 81:** Do you support the further clarification of IFFOs in Regulations? Why? (24 respondents answered this question).

356. Ten (42%) of the 24 respondents who answered this question, supported further clarification of IFFOs in Regulations, one (4%) respondent did not support further clarification and 13 (54%) respondents stated that they had no view and/or could not comment.

357. The respondents who supported further clarification commented that they agreed with CLAIR's finding that the legal basis for IFFOs was unclear and should therefore be properly clarified. Furthermore, the respondents stated that IFFOs do not necessarily reflect the work required to be undertaken and accordingly, further clarification was necessary. Finally, these respondents also stated that whilst clarification in Regulations was required, they would strongly oppose any amendment to, or erosion of, the IFFO scheme which would not adequately remunerate the advocate in reading all served material (in all formats).

358. The respondent who did not support further clarification stated that the IFFO scheme works well and that the definition of cases which qualify for IFFO status was clear. Additionally, the respondent also stated that the calculator used to generate the initial IFFO offer provides sufficient clarity when used together with the associated guidance note.

359. Three respondents (13%) specifically addressed the remuneration of IFFOs and stated that there should be parity between the payments made to both employed and self-employed advocates.

360. **Question 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? (24 respondents answered this question).

361. Of those that answered this question, 14 respondents (58%) agreed that a dispute mechanism would be useful, one respondent (4%) did not agree that a dispute mechanism would be useful, and nine respondents (38%) stated that they had no view and/or could not comment. Of the 14 respondents who stated that a dispute resolution mechanism would be useful, five (38%) stated that they had no preference as to how it should be structured, two (7%) stated that it should be by way of mediation, five (38%)

stated that it should be structured to include independent practitioners and two (7%) stated that it should be structured as an independent body.

362. The respondents also provided further comment on what a dispute mechanism should encompass, namely: being used to consider whether exceptional cases that would not ordinarily meet the VHCC criteria should be included within the IFFO process, determining what can/cannot be included within the IFFO and whether any uplift in subsequent offers is commensurate with the complexity of the case. The respondents also stated that a dispute mechanism should provide swift resolution and not hold up the progress of the case and that it should be instigated when the Legal Aid Agency (LAA) has not made a final offer within three months following Counsel representations. Finally, the respondents stated that a dispute resolution mechanism should provide the advocate with the opportunity to make representations to address any specific case complexities as well as providing an opportunity to make representations about what should be considered when determining the IFFO.

363. **Question 83:** Would you support reverting to the individual case contract provision for VHCCs, instead of the IFFO scheme? Why? (26 respondents answered this question).

364. Of the 26 respondents who answered this question, seven (27%) supported reverting to the individual case contract provision for VHCCs instead of the IFFO scheme, seven (27%) did not support the proposal and 12 (46%) stated that they had no view and/or could not comment.

365. The respondents who supported the proposal stated that the individual contractual provision is a more accurate way of funding VHCCs and furthermore, that it is fairer and better remunerates the work undertaken. Additionally, respondents also stated that if both employed and self-employed advocates were able to work within the same payment scheme, there would be no issue with reverting to the contractual provision.

366. The respondents who did not support reverting to the contractual provision stated that they would strongly oppose such a proposal as the contractual provision was disliked by Counsel for many years and was the subject of boycott action previously; the IFFO scheme addressed previous issues. Furthermore, respondents commented that reverting to the contractual provision would result in Counsel opting not to undertake such work, on the grounds that the LAA had previously taken a bureaucratic approach when determining the number of hours allowed under a case contract. Finally, the respondents stated that the IFFO scheme would work if solicitor advocates were given access to it.

367. **Question 84:** Would returning to the contractual provision [for IFFOs] benefit the conduct and effective case management of these cases? Why? (26 respondents answered this question).

368. Five (19%) of the 26 respondents who answered this question, agreed that returning to the contractual provision would benefit the conduct and effective case management

of cases, eight (31%) did not agree that returning to the contractual provision would be beneficial and 13 (50%) stated that they had no view and/or could not comment.

369. The respondents who agreed that returning would benefit the conduct and case management of cases, stated that it would ensure a clearer scheme consistent with the litigator scheme and, furthermore, that it would ensure accurate and constant management oversight of cases which could last a considerable period.

370. The respondents who did not agree that returning would be beneficial stated that, as with Question 83, the IFFO scheme would work well if it were opened to solicitor advocates and furthermore, that a return to the contractual provision would invariably see counsel declining instructions and refusing to take on such cases.

371. **Question 85:** Would you consider any changes to be required to the individual case contract provision before reverting back? If so, which changes? (26 respondents answered this question).

372. Of the respondents who answered this question, six (23%) considered that changes would be required to the individual case contract provision before reverting back, seven (27%) respondents considered that no changes were necessary, and 13 (50%) respondents stated that they had no view and/or could not comment.

373. The respondents who proposed changes commented that the introduction of an independent dispute mechanism, similar to that proposed for IFFOs in Question 82, would be important. Furthermore, the respondents also stated that set blocks of work should be introduced with provision to add to them as required. Finally, the respondents stated that due to the complexity of the work in this area, appropriate increased remuneration would be necessary.

374. The respondents who disagreed that changes would be required to the individual case contract provision were of the view that such changes were unnecessary given that the IFFO scheme should remain in place and that the individual case contract provision should not be introduced for counsel.

375. **Question 86:** What principles need to be changed under the current provision [for IFFOs] in order to fairly reflect the work done? (26 respondents answered this question).

376. Three of the respondents (12%) who answered this question, stated that principles needed to be changed under the current provision to fairly reflect the work done, five respondents (19%) stated that no change to the principles were necessary, and 18 respondents (69%) stated that they had no view and/or could not comment.

377. The respondents who agreed that principles under the current provision needed to be changed stated that the cases under the IFFO scheme needed to be remunerated fairly to reflect the complex nature of the work undertaken. Furthermore, the respondents

also stated that basic tasks should be agreed initially with further applications for time blocks to be submitted thereafter if and when required.

378. The respondents who did not agree stated that the current IFFO scheme was previously negotiated by the MoJ, LAA, Bar Council and the Criminal Bar Association (CBA) and there is no need to amend it given that the scheme works well and is neither disproportionate nor wrong in principle. The respondents also stated that no changes to the principles would be necessary if there was parity in the fees paid to all advocates regardless of employment status.

379. **Question 87:** If the IFFO provision is to be retained, what do you consider a reasonable approach to the negotiation and payment of fixed fees? (27 respondents answered this question).

380. Responses to this question fell broadly into three categories, namely: four respondents (15%) who suggested approaches to the negotiation and payment of fixed fees under the IFFO scheme, three respondents (11%) who suggested other wider approaches and 20 respondents (74%) who had no view and/or could not comment.

381. The respondents who suggested approaches stated that amending the increased payment threshold for additional material/evidence from the current 30% threshold to a new 10% threshold (and introducing incremental 10% threshold percentiles thereafter) would be welcomed. Furthermore, the respondents also advocated an objective and fair dispute resolution mechanism not limited to the overall IFFO fee but rather, to include other areas such as considering the implications of the service of additional material / evidence during the lifetime of a case.

382. The respondents who suggested wider approaches stated that there should be parity in the fees paid under the IFFO scheme to both employed and self-employed advocates.

383. **Question 88:** Would you support VHCCs being subsumed into the LGFS/Advocates' Graduated Fee Scheme (AGFS) once reformed if based on proxies that better reflect work done in order to pay for it more fairly? Why? (40 respondents answered this question).

384. A total of 16 respondents, stated that they would support VHCCs being subsumed into LGFS/AGFS (40%), with respondents opining that "*It would simplify making claims*" and "*it would be a fairer system*".

385. Of those that answered the question, 12 respondents would not support VHCCs being subsumed into LGFS/ AGFS (30%). Comments included "*VHCC should remain due to these cases being out of the ordinary and extremely complex*" and "*It is unlikely that a revamped LGFS would be able to cater for the exceptional VHCC cases and a VHCC scheme should be retained. These cases are far outside the normal run of even complex criminal cases and must be better and more fairly remunerated*."

386. The CBA, supported by one further respondent were strongly opposed to this proposal, commenting that:

> 'The history of VHCCs has been to capture exceptional cases that are unsuitable for AGFS. This has resulted in the criterion of trial length having been for cases estimated to exceed: five weeks, eight weeks and more latterly 12 weeks. It therefore follows that the current cases are not just exceptional but truly exceptional. It would be irrational for there to be a change of course when both the LAA and the CBA have previously accepted that AGFS is unsuitable for these handful of cases.'

387. **Question 89:** Are there specific considerations regarding VHCCs which are needed when reforming the LGFS/AGFS? Which ones? (28 respondents answered this question).

388. Eight of the 28 respondents (29%) who answered this question thought that there were specific considerations regarding VHCCs that should be taken into account when reforming the schemes.

389. Six respondents (21%) repeated their assertion that they did not consider VHCC cases should be subsumed into AFGS/ LGFS, as dealt with in question 88.

390. Three respondents (11%) did not think that there were any specific considerations that should be included in a reform of AGFS/ LGFS.

**Government Response:**

391. CLAIR highlighted the fact that the legal basis for IFFOs is unclear and recommended clarifying the scheme in regulations. 42% of respondents to this question in our consultation supported doing this, while most others had no view and/or could not comment.

392. The calculator that the LAA relies on to negotiate IFFOs is largely based on PPE as a proxy for case length and complexity. In cases with large volumes of digital or third-party material, the calculator may produce an unreasonably large fee. Average IFFO offers to King's Counsel have risen from £185,000 when the scheme was introduced in 2014 to £232,000 in 2021 – an increase of 25%.

393. We will engage with practitioners on revising the VHCC arrangements to ensure that advocates are remunerated fairly and proportionately for VHCCs. This would be on a cost-neutral basis. We will develop proposals and consult on this ahead of clarifying the scheme in regulations.

394. The majority of consultation respondents supported introducing a mechanism to resolve disputes between the LAA and providers over IFFOs. We will develop proposals and consult on what form any dispute resolution mechanism might take.

**Fees for Criminal Cases Review Commission (CCRC) Work**

**Consultation Summary:**

395. Applications for review by the CCRC originate when someone believes they have been wrongly convicted or sentenced and has already appealed to the criminal courts in the usual way. They may then make an application to the CCRC to review the conviction or sentence. The CCRC can refer the case back to the appeal courts. Legal aid for applications to the CCRC is administered by the LAA. Advice and assistance given 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.

396. CLAIR pointed to a decrease in applications to the CCRC (from around 33% to 10%) from Legally Aided applicants. The review recommended an increase in fees for advice and assistance on applications to the CCRC in line with general fee increases and restructuring the fee scheme for CCRC matters to introduce lower and higher standard fees.

**Consultation Summary:**

397. **Question 91:** Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why? (25 respondents answered this question).

398. Of those that answered this question, 23 (92%) considered that rates are too low. Of those that commented on the central theme, many also commented on the negative impact of the current Upper Limits and the difficulties involved in extending the Upper limit. Consideration of Sufficient Benefit was also felt to be significantly more complex in CCRC matters and acted as a restrictive barrier to practitioners.

399. The Criminal Appeal Lawyers Association (CALA) was amongst four respondents who considered that other factors are involved in dissuading litigators from undertaking CCRC cases. These factors included the level of prescribed Upper Limits, the scope of the remuneration scheme, the Sufficient Benefit test, and LAA decision-making.

400. CALA was also amongst three respondents to suggest the uplift to rates should be 25% and that there should be the opportunity to apply a 100% uplift for particularly complex cases.

401. **Question 92:** If you already undertake CCRC applications work, what are some of the challenges with this work? (18 respondents answered this question).

402. The Law Society were one of five respondents (28%), who were of the view that:

- The consideration of the Sufficient Benefit Test is significantly more complex and time consuming in CCRC matters.
- Payment, including disbursements, at the conclusion of the case is problematic to cashflow.
- The level of experts' fees is low.

- The CRM5 (application to extend the Upper Cost limit) process is cumbersome and time consuming.

403. Other issues raised were the complex nature of the work, the low rates and low initial cost limits, the challenging nature of the clients involved, difficulties in obtaining paperwork and transcripts, the location of clients and availability of video link in prisons.

404. **Question 93:** Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones? (26 respondents answered this question).

405. Of those that answered this question, 12 respondents (46%), including the CALA, were concerned at the lack of interim payments, as this means providers incur significant costs on transcripts, experts and counsel that will not be reimbursed until the end of the case.

406. The Law Society were amongst five respondents (19%) who were concerned about the availability of experienced solicitors to undertake work in relation to CCRC matters and the amount of administrative burden placed upon providers in ensuring that they can undertake the work properly funded. They were also concerned about providers being hampered in their access to applicants due to restrictions in access and the access to video link facilities.

407. Some respondents expressed concern about the funding regime, especially negotiating with the LAA, which is described as overly bureaucratic, creating significant uncertainty for lawyers about how much they will be paid. In addition, they stated that as in other sectors of the criminal legal aid market, morale in relation to the conduct of CCRC casework is low. They state that this is brought about by a combination of the economic effects of funding problems, a sense that they are not trusted by the LAA, despondency about low referral rates and frustration about what lawyers perceive to be a lack of open communication with the CCRC.

408. **Question 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? (27 respondents answered this question).

409. Of the 27 respondents who answered this question, seven (26%), including the CALA, were of the view that there is a misunderstanding of what is involved in undertaking this work and stated that the work by providers is not a screening exercise but involves substantive investigative work and advice. They also stated that the CCRC has wide investigative powers which are used to do additional work or to examine what has been submitted by the solicitors.

410. Three respondents (11%) including the Law Society and the CCRC, were concerned that CLAIR suggested that the demarcation line between the work of the Commission and solicitors may require clarification. They stated that this is not the view of solicitors who regularly deal with this work; their experience is that applications to the CCRC are

submitted once the investigatory work is completed and not in such a way as to request the CCRC to undertake further detailed investigation, unless the investigations require use of the Commission's investigatory powers. They go on to state that this, therefore, potentially saves the Commission time and money and refer to the recent research by Sussex University, which was commissioned by the CCRC, which demonstrates that solicitor led submissions make a significant difference to the work of the Commission and outcomes. They state there is a natural demarcation in the work solicitors cannot undertake and this is the work the commission must exercise its investigatory powers.

411. In addition, the CCRC have responded to state that they do not accept that a case is more likely to be referred just because an applicant has the benefit of legal representation. They recognise the value of timely, focussed and candid submissions by practitioners. Such submissions focus on salient issues and ensure that usual appeal rights have been exhausted – or that 'exceptional circumstances' are readily identified. Further they recognise that useful inquiries can be made by practitioners and that witness statements and expert reports can help frame submissions. These may remove the need for the CCRC to conduct similar work. Legal representatives can also enhance submissions by making relevant inquiries with previous representatives regarding professional conduct at trial and appeal and give advice on waiving legal privilege.

412. The CCRC agree with the profession that well-structured applications save the CCRC time and money and that well-formulated applications made by legal representatives undoubtedly speed the review process up and reduce the administrative burden. The CCRC considers that it is clear what falls within the remit of representatives.

413. **Question 95:** Do you routinely and accurately record time spent on this work? (26 respondents answered this question).

414. Of those that responded to this question, nine responded 'N/A' or that they did not do this type of work because of the low rates of pay.

415. The main theme in relation to routinely and accurately recording time spent, is that this time of work must be recorded, as work is paid on a per item basis, and it is also a Contractual requirement to do so.

416. The Law Society and Birds Solicitors also refer to not recording time on this type of work until the Sufficient Benefit Test is passed.

417. **Question 96:** Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why? (18 respondents answered this question).

418. Five of those that responded to this question (28%), including The Law Society, were of the view that:

- A standard payment should be introduced for case sifting to check the merits of a case.
- That ten hours work be claimable once the Sufficient Benefit Test is established.
- That an escape fee be introduced for cases over ten hours of work (similar to Non-Standard Fees in Magistrates Court work).
- Interim payments be made once the initial ten hours work has been completed.
- Allow uplifts for senior professionals and/or enhanced rates for complex work.

419. CALA were amongst seven respondents (39%) who considered that the current system is adequate but only if the remuneration is increased significantly and by allowing an uplift in exceptional cases up to 100%.

420. **Question 97:** Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why? (27 respondents answered this question).

421. Of the 27 respondents who answered this question, 18 (67%), including The Law Society, were of the overall opinion that reforming the fee scheme would incentivise providers to take on this type of work. Several respondents stated that any reform would need to involve more than just introducing standard fees and that the only incentive, would be proper remuneration including the ability to claim an uplift in fees on complex cases.

422. Only the Birmingham Law Society stated that they did not believe reforming the fee scheme would incentivise providers. They stated that introducing standardised fees would be counterproductive, as this is one of the few areas of work that get paid for time spent and if the hourly rates paid reflected the skill involved in this area of work, that would incentivise providers.

423. **Question 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? (25 respondents answered this question).

424. A total of 11 respondents (44%) of those who answered this question, including the CALA, were in favour of retaining the existing fee scheme with uplifted fees. Several commented that they were of the view that retention of the existing scheme would work but only if there were the ability to claim an uplift during the life of the case, that the basic rate is increased (with an increase over 15%) and then the ability to claim enhancement up to 100% be available.

425. Of the respondents who answered this question, ten respondents (40%), including The Law Society, were not in favour of retaining the existing fee scheme with an uplift in fees. The respondents felt that this alone, would not deal with the current problems with appeal funding, the initial case assessment or the need to pay an enhanced rate for experienced appeal providers to undertake the work. They also stated that there is

a need for a system for interim payment of disbursements and work in progress on lengthy and complex appeals. Commons Law Community Interest Company and others stated the CRM5 mechanism (to increase the initial Upper Cost Limit) was a barrier to anyone wanting to do this work.

**Government Response:**

426. The majority of respondents supported reform of the fee scheme. We therefore propose to devise and consult on proposals for standard fees to provide CCRC cases with a lower and higher standard fee, reflecting various levels of work undertaken dependent on the complexity of the matter; and an 'escape' case fee where parameters for the scheme are exceeded. This would be a similar model to Non-Standard Fees in Magistrates' Court work. We would consider introducing staged billing to assist with cash flow in these lengthy types of cases. A total of 67% of respondents to the consultation thought that reform of the fee scheme would incentivise more providers to undertake this type of work. Future and/ or retrospective data capture is needed to fully understand the work undertaken in this area and a further consultation will be necessary following analysis of any data collected to set standard fees appropriately.

427. Increases to fees of 15% have been initiated in the short-term, with effect from 30 September 2022.

**Prison Law and 'Other' Areas of Work**

**Consultation Summary:**

428. Currently, prison law advice and assistance are 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.

429. CLAIR recommended an uplift to prison law fees. In the consultation, we proposed not increasing fees for prison law advice and assistance. Instead, we wanted to focus investment on reforming and improving engagement in the initial stages of criminal cases, helping divert people out of the criminal justice system and reduce backlogs.

430. CLAIR also recommended that fees for advice and assistance cases should be reformed into a system of standard fees. We consulted on this.

431. **Question 100:** What more could be done by the Government to address problems around access to clients in prison? (33 respondents answered this question).

432. The main theme from many respondents to this question, including The Law Society and the Association of Prison Lawyers (APL), was the requirement to improve video link facilities and access to video link facilities across the prison estate, with 20 respondents (61%) stating this as being the main challenge in obtaining access to clients, whether serving custodial sentences or those on remand.

433. The APL were amongst eight respondents (24%) who stated that a standardised booking system for legal visits and video links was required across the prison estate, as each prison has its own system which causes delays in getting access to clients whether that be by way of a legal visit, on the telephone or via video link.

434. The APL were one of eight respondents (24%) who state the need for clients to be able to have access to confidential legal advice. The APL state that this should be able to take place in a confidential space that is well lit (especially for video links with ethnic minority clients), sound proofed and separate from the prison population. Many also referred to the different rules across the prison estate as to whether IT equipment such as laptops, can be taken into prisons by solicitors.

435. Five respondents (15%) refer to the need for improvement of the 'email a prisoner' system, since emails can be delayed in reaching clients and that confidential legal information cannot be shared through this system.

436. Other suggestions to address the problems accessing clients are to:

- Improve the postal system to ensure clients receive correspondence promptly and can send correspondence.
- Provide training for staff within prisons on how to use video link facilities.
- Reduce the movement of clients, especially to prisons at a distance from their instructed solicitor.
- Address the lack of prison and criminal law providers.

437. **Question 101:** Do you agree with the proposal to restructure the fee scheme for advice and assistance in prison law cases? (19 respondents answered this question).

438. Ten respondents (53%) agreed with the proposal to restructure the fee scheme for advice and assistance. Some, including the Law Society and the Bar Council, stated that this would have to include increased remuneration. The APL said changing the system would create additional bureaucracy and make no difference to the sustainability of the sector if not accompanied by an increase in remuneration.

439. **Question 102:** What data would need to be taken to implement this reform? (14 respondents answered this question).

440. The most common comment, from nine respondents (64%) of those who engaged with this question, was that accurate data on time spent by providers on each type of Prison Law case would be required to implement any reform of the prison law fee scheme.

441. The Law Society was one of two respondents (14%) who are of the opinion that the LAA/MoJ will already have a certain amount of data regarding Prison Law work, and that there should be analysis of that data before any new exercise in gathering data.

442. Both the Law Society and the LCCSA stated they did not believe that Prison Law providers would engage in any new exercise in the collection of data.

443. **Question 103:** Do you agree with our proposal to increase the fees for these other areas by 15%? (49 respondents answered this question).

444. Of those that answered this question, 26 (53%), welcomed this increase however, many expressed that it should be the bare minimum. Just under half of the respondents disagreed with the proposal with most either stating that the 15% was insufficient or that it should be increased to 25%.

**Government Response:**

445. In the consultation, we proposed not increasing fees for Prison Law advice and assistance. Instead, we wanted to focus investment on reforming and improving engagement in the initial stages of criminal cases, helping divert people out of the criminal justice system and reduce backlogs.

446. Although most respondents supported uplifting prison law fees, we will not uplift prison law fees at this stage. This is because we want to focus available funding on the initial stages of criminal cases to support early case resolution.

447. We also asked about restructuring the fee scheme for advice and assistance in prison law. More than half of respondents to this question supported doing this. We believe that restructuring the fee scheme could address the issue that providers are currently not rewarded for extra work on complex cases unless they reach the escape fee threshold. We understand that most of this data is already submitted to the LAA. We will be sharing more information on this and engaging with the profession to determine whether the current LAA data we hold can be used to support the structural reform of the scheme.

**Impact Assessment**

**Consultation Summary:**

448. **Question 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. (97 respondents answered this question).

449. Overwhelmingly, 90 respondents to this question (93%), did not agree with the policy conclusions in the Impact Assessment, stating that more funding was necessary. Of the respondents who answered this question, 46 (47%) felt that fees should be index linked or at least be subject to annual review.

450. A total of 42 respondents (43%) were of the consensus that the 15% uplift should be applied across the board and 57 (59%) expressed that this was not enough money.

**Government Response:**

451. An Impact Assessment, covering the uplift to most cases in the Crown Court backlog, which were not previously eligible from the September 2022 uplifts, is being published alongside this full Government response in the Annex.

452. This is in addition to the Impact Assessment published in July 2022 which covered the general 15% fee uplift, Pre-charge Engagement, and Elected Either Way Guilty Plea Fixed Fee. The remaining policies that will be implemented as part of CLAIR, but which are still being worked through, will subsequently be published in a future Impact Assessment(s) once proposals have been finalised. These include the further proposals brought forward for increased funding for Section. 28 cases and an expansion of special and wasted preparation payments, as well as extra money in the Youth Court and Police Station. The financial summary section below sets out the Steady State Expenditure Summary detailing the anticipated funding increases.

## Equalities

### Consultation Summary:

453. **Question 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. (31 respondents answered this question).

454. The two main responses to this question were ‘no’ (eight respondents) or that diversity can only be improved with a substantial rise in fees (six respondents). There were slightly more responses that indicated ‘no’, notably the Law Society who noted they were not aware of any evidence that suggests certain groups of individuals with protected characteristics would be affected more than others.

455. The responses that noted that diversity can only be improved with a substantial rise in fees cited that an increase in fees will go some way to address remuneration and retention issues with barristers who have particular protected characteristics - such as women and ethnic minorities - and those with caring responsibilities or who are state educated. This was similar to a smaller group who were of the view that the current proposals were financially insufficient to recruit and retain within the sector.

456. A small proportion of respondents cited specifics of proposals regarding prison law and legal representation proposals as concerning for people with disabilities including those with mental ill health and marginalised groups who are proportionately more likely to be imprisoned.

457. **Question 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. (19 respondents answered this question).

458. The majority of respondents to this question (12/63%) gave a ‘don’t know’ answer. A small number of respondents provided answers that also included highlighting the system was underfunded or the proposals were insufficient.

459. Across both equality questions, respondents cited the need for more data to provide a detailed response. Notably the Bar Council expressed a desire to see granular data on individuals impacted by both gender and race, the Criminal Bar Association were also of this opinion. There was also a common response that everyone is affected, with general comments made regarding underfunding in the system.

460. The suggestions or recommendations provided by respondents can be categorised into requests for more data-based modelling and analysis noted predominantly by the Bar Council, and fair remuneration for work undertaken notably highlighted by the Crown Prosecution Service (CPS) and CBA. The Bar Council suggested they would like to see granular analysis and modelling of protected characteristics data. They have also suggested they would like to “work collaboratively with the MoJ, the Law Society, the LAA and other stakeholders to monitor, investigate and address such equalities of outcomes.”

**Government Response:**

461. We have updated the Equality Statement that was published alongside the Government’s interim response to the CLAIR in July 2022 to reflect any new equality impacts arising from our proposals. The updated Equality Statement can be found here: [add link]

# 8. Financial Summary

### Steady State Expenditure Summary

462. The tables below show the estimated total additional fee income to solicitors' firms and barristers from both the funding published as part of the Government's interim response to CLAIR and the additional measures published in this final consultation response.

463. The estimates of the additional measures and their distribution among schemes should be considered as indicative, as the policy detail has not yet been finalised. Final figures and their distribution across schemes will be covered by a separate Impact Assessment(s) once these measures are agreed.

464. The tables below do not include the uplift to outstanding Crown Court cases (referred as Option 1 in the Impact Assessment) as they are time-limited, that is, until the eligible cases are closed.

**Table X – Indicative estimated solicitors' firms additional fee income, steady state**

| | **Measures in July 2022 Government's Interim Response** | | **Additional Measures in Final Consultation Response[1]** | **Total** | |
|---|---|---|---|---|---|
| | Increase (£m) | % Increase | Increase (£m) | Increase (£m) | % Increase |
| **Crime Lower** | | | | | |
| Police | 25 | 18% | 16 | 41 | 30% |
| Magistrates' Court | 16 | 15% | 5[2] | 21 | 20% |
| Prison Law | - | 0% | - | - | 0% |
| Other | - | 15% | - | - | 15% |
| **Crime Lower total** | **41** | **16%** | 21 | 62 | 24% |
| **Crime Higher** | | | | | |
| LGFS | 16 | 4% | 0[3] | 16 | 4% |
| AGFS (solicitor advocate element) | 6 | 15% | 0.3[4] | 6 | 16% |
| VHCC | 0.1 | 15% | - | - | 15% |
| Other | 0.1 | 5% | - | - | 5% |
| **Crime Higher total** | **22** | **4%** | 0.3 | 22 | 4% |
| **Total** | **63** | **9%** | 21 | 85 | 11% |

[1] These measures include longer-term reforms and the additional funding for special and wasted preparation, section 28 and Youth Court. However, they do not include the uplift to outstanding Crown Court cases (referred as Option 1 in the Impact Assessment) as they are time-limited, that is, until the eligible cases are closed. The measures for which funding is considered in this table are not included in the Impact Assessment as the policy detail around how to implement these measures is still being developed. Therefore, these figures and their distribution among schemes should be considered as indicative. Once these measures have been finalised, they will be covered by a separate Impact Assessment(s).
[2] In this table all Youth Court funding has been allocated to solicitors' firms. However, in practice, some of this funding might go to barristers.
[3] The policy for Special preparation is still being developed, which might add some funding to LGFS
[4]New measures include additional funding for Special and Wasted preparation. It has been assumed that a proportion of that additional funding will go to solicitor advocates.

**Table Y – Indicative estimated criminal barristers additional fee income, steady state**

| | Measures in July 2022 Government's Interim Response | | Additional Measures in Final Consultation Response[1] | Total | |
|---|---|---|---|---|---|
| | Increase (£m) | % Increase | Increase (£m) | Increase (£m) | % Increase |
| **Crime Lower** | | | | | |
| Police | - | 0% | - | - | 0% |
| Magistrates' Court | - | 0% | - | - | 0% |
| Prison Law | - | 0% | - | - | 0% |
| Other | - | 0% | - | - | 0% |
| **Crime Lower total** | - | 0% | - | - | 0% |
| **Crime Higher** | | | | | |
| LGFS | - | 0% | - | - | 0% |
| AGFS | 39 | 15% | 3.2[2] | 42 | 17% |
| VHCC | - | 0% | - | - | 0% |
| Other | 0.2 | 5% | - | 0.2 | 5% |
| **Crime Higher total** | **39** | **15%** | **3.2** | **43** | **16%** |
| **Total** | **39** | **15%** | **3.2** | **43** | **16%** |

[1] These measures include longer-term reforms and the additional funding for special and wasted preparation, section 28 and Youth Court. However, they do not include the uplift to outstanding crown court cases (referred as Option 1 in the Impact Assessment) as they are time-limited, that is, until the eligible cases are closed. The measures for which funding is considered in this table are not included in the Impact Assessment as the policy detail around how to implement these measures is still being developed. Therefore, these figures and their distribution among schemes should be considered as indicative. Once these measures have been finalised, they will be covered by a separate Impact Assessment(s).
[2]New measures include additional funding for Special and Wasted preparation. It has been assumed that a proportion of that additional funding will go to solicitor advocates.

# 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

# Annex

The Annex can be found at: https://www.gov.uk/government/consultations/response-to-independent-review-of-criminal-legal-aid

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