



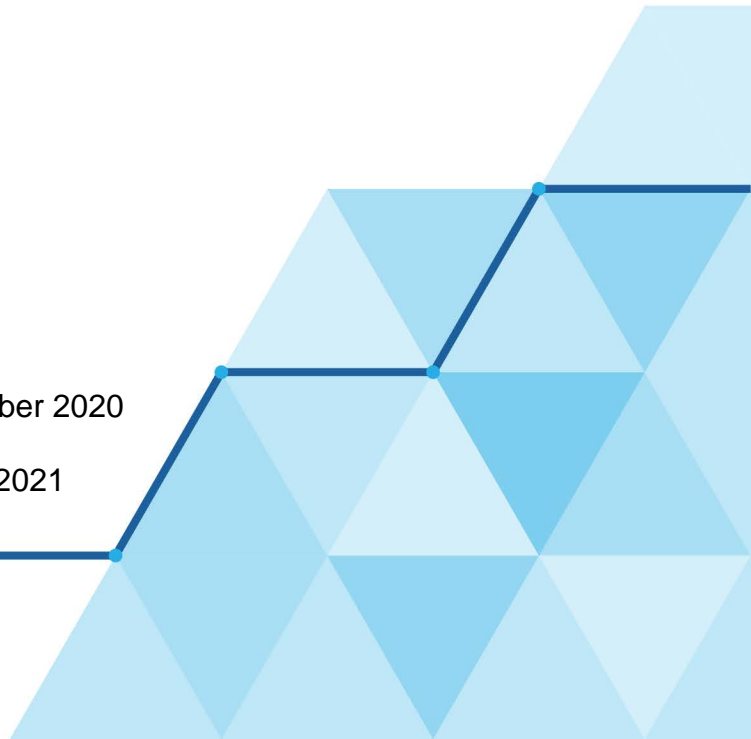
Ministry
of Justice

Criminal Legal Aid Review

Remuneration for pre-charge engagement

This consultation begins on Monday 14th December 2020

This consultation ends on Monday 25th January 2021





Ministry
of Justice

Criminal Legal Aid Review

Remuneration for pre-charge engagement

A consultation produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>

About this consultation

- To:** This consultation is aimed at anyone with an interest in remuneration through criminal legal aid fees schemes in England and Wales. This will include, but is not limited to, members of the criminal defence profession and their representative bodies, police station staff, defendants, academics and others involved in the criminal justice system.
- Duration:** From 14/12/20 to 25/01/21
- Enquiries (including requests for the paper in an alternative format) to:** Email: criminallegalaidreview@justice.gov.uk
Criminal Legal Aid Review team
Ministry of Justice
102 Petty France
London SW1H 9AJ
- How to respond:** Please send your response by 25th January 2021 to:
Email: criminallegalaidreview@justice.gov.uk
Criminal Legal Aid Review team
Legal Aid
Ministry of Justice
102 Petty France
London SW1H 9AJ
- Response paper:** A response to this consultation exercise will be published in due course <https://consult.justice.gov.uk/>

A Welsh language summary is provided on the consultation page. An Impact Assessment indicates that Welsh language speakers are not likely to be particularly affected. A Welsh Language Impact test has been included as part of the Impact Assessment, which is attached to this document.

An Impact Assessment, Equality statement and Welsh language summary is available at: <https://consult.justice.gov.uk/digital-communications/clar-remuneration-for-pre-charge-engagement>

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Ministerial Foreword



Criminal defence practitioners play a crucial role in upholding the rule of law. As a former criminal barrister, I greatly value the huge contribution the criminal defence profession makes to our society and commend the resilience and commitment the profession has continued to show during the Covid-19 pandemic. I understand the pressures you are under and the need to ensure that you are paid fairly for the work you do.

At the beginning of 2019, the Ministry of Justice began a comprehensive review of criminal legal aid fee schemes.¹ Our approach has been to listen carefully to the views and concerns of the criminal defence profession and gather evidence to make sure the proposals we make are based in fact and on real experiences.

In recognition of the very real concerns practitioners face, we agreed to bring forward accelerated proposals to address key issues that the criminal defence professions told us were of immediate concern, ahead of the outcome of the full review. In August, following consultation, we announced implementation of a package of measures related to:

- how litigators and advocates are paid for work on unused material
- how advocates are paid for work on paper-heavy cases
- how advocates are paid for cracked trials in the Crown Court
- how litigators are paid for work on sending cases to the Crown Court

Through those quick wins we were able to inject an additional £35 million to £51 million per year into criminal legal aid.

The final accelerated area - how litigators are paid for pre-charge engagement – could not be included in the consultation earlier in the year as the Attorney General was consulting on revisions to their Guidelines on Disclosure, which provides the framework for pre-charge engagement. Revised guidelines have now been published² and come into force at the end of the year, which enables this consultation to proceed.

Early and meaningful engagement between the prosecution team and the defence is crucial to improve the disclosure process and aid swift case progression which benefits suspects, complainants, the defence, prosecution authorities and the criminal justice

¹ <https://www.gov.uk/guidance/criminal-legal-aid-review>

² <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

system as a whole. This consultation sets out our proposal for remuneration for pre-charge engagement, to ensure practitioners are fairly paid for this important work.

While the accelerated areas represent significant investment into the fee schemes, they were always intended as a first step towards wider reforms to ensure the sustainability of the criminal legal aid sector. As such, the next, independently led, phase of the review will be ambitious and far reaching in scope, assessing the criminal legal aid system in its entirety, and will aim to improve transparency, efficiency, sustainability and outcomes in the legal aid market while ensuring value for money for the taxpayer.

I look forward to the views of all of those who read this consultation.



The Rt. Hon. Robert Buckland QC MP
Lord Chancellor

Introduction

1. In December 2018, we announced a comprehensive review of the criminal legal aid system including all fee schemes and the wider market.³ The then government recognised that the nature of the criminal justice system had changed in recent years. While the number of cases coming through the system had reduced, the cases had become more complex and time consuming for all involved in the criminal justice process, including police, prosecutors, defence practitioners and the courts. Looking forward, the landscape of the criminal justice system will continue to evolve as part of the Government's focus on law and order, including plans to recruit an additional 20,000 police officers. Against this backdrop, it is important we do what is necessary to ensure there is an efficient and effective criminal legal aid system that is sustainable for the long term.

2. The aims of the Criminal Legal Aid Review are:
 - To reform the criminal legal aid fee schemes so that they:
 - fairly reflect, and pay for, work done;
 - support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce;
 - support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer;
 - are consistent with and, where appropriate, enable wider reforms;
 - are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies;
 - ensure cases are dealt with by practitioners with the right skills and experience.
 - To reform the wider criminal legal aid market to ensure that the provider market:
 - responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer;
 - operates to ensure that legal aid services are delivered by practitioners with the right skills and experience;
 - operates to ensure the right level of legal aid provision and to encourage a diverse workforce.

3. To support these aims, a robust and wide-ranging evidence base is required. To that end we have engaged widely with front line practitioners and agreed to share data

³ For more information about the Criminal Legal Aid Review please refer to the website: <https://www.gov.uk/guidance/criminal-legal-aid-review>

extensively between the professional representative bodies, the LAA and the Crown Prosecution Service (CPS) to build a detailed picture of the criminal legal aid system.

4. In June 2019, in collaboration with professional representative bodies including the Law Society, the Bar Council, the Young Barristers' Committee and the Criminal Bar Association, we agreed to bring forward consideration of the following areas:
 - how litigators and advocates are paid for work on unused material
 - how advocates are paid for work on paper-heavy cases
 - how advocates are paid for cracked trials in the Crown Court
 - how litigators are paid for work on sending cases to the Crown Court
 - how litigators are paid for pre-charge engagement
5. We ran a consultation on proposals for the first four areas above between 28 February 2020 and 17 June 2020, receiving 498 responses online and conducted 7 face to face roundtables with practitioners across England and Wales. We published our response on 21 August 2020, announcing we were taking forward proposals which represented additional funding of between £35m and £51m for criminal legal aid and were implemented from 17 September 2020.
6. The fifth area (pre-charge engagement) was subject to the Attorney General's consultation on revising their Guidelines on Disclosure which ran between 26 February 2020 and 17 September 2020 and provides the framework for pre-charge engagement. Revised guidelines⁴ have now been published and will come into force at the end of the year.
7. This consultation sets out proposals to introduce new remuneration arrangements for work associated with engagement with prosecution authorities at the pre-charge stage, as outlined in the AGO's guidelines.
8. This consultation is aimed at anyone with an interest in remuneration through criminal legal aid fees schemes in England and Wales. This will include, but is not limited to, members of the criminal defence profession and their representative bodies, defendants, police station staff, academics and others involved in the criminal justice system.
9. An Impact Assessment and Equality Statement accompany this document and should be read in conjunction with it. Comments on these documents are welcome.

⁴ <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

Background

10. In 2018, the Attorney General's Office published its review of the efficiency and effectiveness of disclosure in the criminal justice system.⁵ The review found that early and meaningful engagement between the prosecution team and the defence is crucial to improve the disclosure process and that a lack of pre-charge discussion between investigators/prosecutors and those representing the suspect, hamper early resolution of evidential issues, particularly where there is a large quantity of digital material.
11. The review recommended that the Attorney General's Disclosure guidelines should include guidance on pre-charge engagement and that the Ministry of Justice should review how such work is remunerated. Remuneration for pre-charge engagement was one of the five areas we agreed to accelerate as part of the Criminal Legal Aid Review but was not included in the earlier consultation as we were awaiting the outcome of the Attorney General's public consultation on revising their Guidelines on Disclosure, which was launched on 26 February 2020.⁶ A response was published on 10 September 2020.⁷
12. The Attorney General has now published their revised disclosure guidelines including pre-charge engagement guidance⁸ which should be considered in parallel to our proposal.
13. In summary, the pre-charge engagement guidance sets out the following key features of pre-charge engagement:
 - a. It is a voluntary process of engagement between the parties to an investigation;
 - b. It can take place any time after the first Police and Criminal Evidence Act 1984 ('PACE') interview and before any suspect has been formally charged;
 - c. It can be initiated by an investigator, a prosecutor, the suspect's representative or an unrepresented suspect;
 - d. Information on pre-charge engagement should be provided to the suspect or their representative either before or after interview;

⁵ <https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system>

⁶ <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

⁷ <https://www.gov.uk/government/publications/government-response-to-the-disclosure-consultation-published>

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923774/Attorney_General_s_Guidelines_on_Disclosure_2020_NOT_YET_IN_FORCE.pdf

- e. It may take place face to face or via correspondence, and does not need to be a formal process;
- f. A full written, signed record of the pre-charge engagement discussions should be made.

Scope of pre-charge engagement⁹

- 14. Pre-charge engagement may take place whenever it is agreed between the parties that it may assist the investigation, however, it should not be considered a replacement to a further interview with a suspect.
- 15. Pre-charge engagement may involve, but is not limited to:
 - Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
 - Ascertaining whether the suspect can identify any other lines of inquiry.
 - Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
 - Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
 - Agreeing any key word searches of digital material that the suspect would like carried out.
 - Obtaining a suspect's consent to access medical records.
 - The suspect identifying and providing contact details of any potential witnesses.
 - Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.
 - Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.
- 16. There are a number of potential benefits that may arise from pre-charge engagement:
 - Suspects who maintain their innocence will be aided by early identification of lines of inquiry which may lead to evidence or material that points away from the suspect or points towards another suspect.
 - Pre-charge engagement can help inform a prosecutor's charging decision. It might avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.
 - The issues in dispute may be narrowed, so that unnecessary inquiries are not pursued, and if a case is charged and proceeds to trial, it can be managed more efficiently.

⁹ Paragraphs 14 – 16 are direct extracts from the Attorney General's pre-charge engagement guidance published here: <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

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- Early resolution of a case may reduce anxiety and uncertainty for suspects and complainants.
- The cost of the matter to the criminal justice system may be reduced, including potentially avoiding or mitigating the cost of criminal proceedings.

Remuneration for pre-charge engagement proposal

17. The Attorney General's Review of Disclosure practices highlighted that disclosure should, where possible, be carried out at the earliest stage possible to aid effective and efficient case progression, and enabling effective and efficient case progression is also a key objective of the Criminal Legal Aid Review. The amended Disclosure guidelines seek to promote this objective through pre-charge engagement.
18. Work undertaken by defence practitioners in relation to pre-charge engagement is not currently remunerated separately through the fee schemes. Table 1 summarises the units of pre-charge work remunerated through the Standard Crime Contract and Criminal Legal Aid Remuneration Regulations 2013.

Table 1: Units of work covered under the Standard Crime Contract 2017¹⁰

Class of work		Unit of work
Criminal Investigations	Work conducted at the Police Station	Police Station Advice and Assistance
	Work conducted outside the Police Station	Free Standing Advice and Assistance
		Advocacy Assistance on a warrant of further detention provided under section 15(2)(b) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the Act")
		Advocacy Assistance for armed forces custody hearings provided under section 15(2)(b) of the Act
		Advocacy Assistance in the magistrates' court in connection with an application to vary police bail conditions provided under section 15(2)(b) of the Act
		Advocacy Assistance in the magistrates' court in connection with an application to extend pre-charge bail provided under section 15(2)(b) of the Act

¹⁰ <https://www.gov.uk/government/publications/standard-crime-contract-2017>

19. We propose a new unit of work for advice and assistance associated with pre-charge engagement, as outlined in the Attorney General's guidelines. The defence practitioner will be remunerated where it has been agreed between the relevant parties (prosecutors and/or investigators, suspects and suspect's legal representatives) that pre-charge engagement may assist the investigation and a full written record of the discussions is made by the defence. It can be initiated by either party. Examples of the type of work this may involve are given in paragraph 15 above. Claims for this work will be subject to the standard audit process applied by the LAA for all other Contract Work.
20. As much of this work may take place in the police station, we propose that, like Police Station Advice and Assistance, pre-charge engagement is not means tested; there will be no requirement to make a determination in respect of an individual's financial resources. It would not be pragmatic to delay the investigation in order to apply the means test in these circumstances and would undermine the key objective of the policy: effective and efficient case progression. In common with all other Contract Work, a sufficient benefit test will be applied by the LAA. The sufficient benefits test for pre-charge engagement will be: Advice and assistance associated with pre-charge engagement, as outlined in the Attorney General's guidelines, may only be provided where there is written agreement between the relevant parties that pre-charge engagement may assist (be sufficiently beneficial to) the investigation.
21. We propose that this work be paid at an hourly rate and at the same rate as the current Police Station Advice and Assistance rates (£51.28 in London, £47.45 outside London¹¹). We have chosen to introduce fees equivalent to police station work because they are currently used to remunerate similar work in the police station.
22. As this is a new unit of work, the volume of work associated with pre-charge engagement is unclear, so at this time we propose an upper limit of £273.75 beyond which providers will be required to apply to the LAA for an extension. This is set at the same level as the other form of pre-charge advice and assistance currently paid at hourly rates, Free Standing Advice and Assistance.
23. As this is a new fee, in due course we will undertake an evaluation of the work involved, volumes of work and whether the proposed hourly rates and the upper limit fairly pays for the work done.
24. Under this proposal, providers will be delegated the function to self-grant legal aid and record on file similar to other pre-charge work. Pre-charge engagement work will be billed together with all other Contract Work as part of a provider's monthly contract report form submission. However, the provider will be required to retain on file written

¹¹ <https://www.legislation.gov.uk/ukxi/2016/313/schedule/3/made>

proof that all relevant parties have agreed to take part in the pre-engagement process and a full record of the engagement.

25. We recognise practitioners' concerns around the current level of the hourly rates in the fee schemes and the impact this has on the sustainability of the profession. However, we have been clear that the level of hourly rates was not in scope of the accelerated areas work and the general level of fees and operation of the fee schemes will be considered in the context of the sustainability of the wider market as part of the upcoming independent review.

Question One: Do you agree with our proposed approach to paying for pre-charge engagement? Please state yes/no and give reasons.

Question Two: If you do not agree with our proposed approach to paying for work associated with pre-charge engagement, please suggest an alternative and provide a supporting explanation.

Impact Assessment, Equality and Welsh Language

Impact Assessment

26. The Impact Assessment accompanying this consultation document provides monetised details of the anticipated impacts of implementing these proposals. We would welcome information and views on this to help us improve the quality of our assessment.
27. We will publish a government response to this consultation in due course which will set out those reforms we intend to implement. At this stage we will also publish a revised Impact Assessment setting out revised estimates in light of any changes to the proposals following the consultation.

Question Three: 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.

Equality

28. The Equality Statement accompanying this consultation document considers the likely equality impacts on defence practitioners and suspects from the proposal set out in this consultation.
29. For this proposal we have indicated, on the basis of the latest available evidence, what the likely impacts on equality are. The specific equalities questions below are designed to invite stakeholder feedback on this proposal and its impact in this consultation. Following the results of the consultation, we will review the impacts and update this Equality Statement where necessary.

Question Four: 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.

Question Five: 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.

Welsh Language Impact Test

30. We are not proposing to restrict the advocacy or litigator markets, nor treat them differently in Wales than we do in England. Pre-consultation, we do not consider these proposals will have an impact on legal services through the medium of Welsh. Please see the accompanying Impact Assessment for more information.
31. In accordance with our Welsh Language Scheme we have also issued the Executive Summary of our consultation in Welsh. The translation can be found here <https://consult.justice.gov.uk/digital-communications/clar-remuneration-for-pre-charge-engagement>

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Question One: Do you agree with our proposed approach to paying for work associated with pre-charge engagement? Please state yes/no and give reasons.

Question Two: If you do not agree with our proposed approach to paying for work associated with pre-charge engagement, please suggest an alternative and provide a supporting explanation.

Question Three: 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.

Question Four: 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.

Question Five: 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.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by Monday 25th January 2021 to:

Email: criminallegalaidreview@justice.gov.uk

Criminal Legal Aid Review team
Ministry of Justice
102 Petty France
London SW1H 9AJ

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested from criminallegalaidreview@justice.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published and made available on-line at <https://consult.justice.gov.uk/>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the Department publishes a response to the consultation in accordance with the access to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if the Department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

Consultation principles

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

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



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