

**Terms of Reference
for the Independent Review of Criminal Legal Aid**

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Purpose and Background

1. The Ministry of Justice (MoJ) launched the Criminal Legal Aid Review in December 2018 in response to stakeholder concerns about the long-term sustainability of Criminal Legal Aid. The Criminal Legal Aid Review is a comprehensive review into the Criminal Legal Aid fee schemes and the market of Criminal Legal Aid providers (barristers, solicitors and legal executives).
2. The Criminal Legal Aid Review has two main objectives:
 - a) 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; and
 - ensure cases are dealt with by practitioners with the right skills and experience.
 - b) 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. During the Criminal Legal Aid Review's first phase, the MoJ fast-tracked consideration of certain aspects of the fee schemes (the 'accelerated areas') that stakeholders had indicated needed urgent review. These accelerated areas were considered ahead of a more comprehensive review of the entire Criminal Legal Aid system (including the fee schemes).
4. In August 2020, MoJ implemented the accelerated areas injecting an additional £35 - 51 million per year into Criminal Legal Aid. This covered the aspects of the schemes governing: 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 and payment for litigators sending cases to the Crown Court.
5. The Government response to the consultation on the accelerated areas announced that the next phase of the Criminal Legal Aid Review would include an independently-led review of the Criminal Legal Aid market. The review was to conduct analysis of the market as a whole; its procurement, its delivery and the way it is administered.
6. Previous independent reviews of Legal Aid have focused on specific aspects of procurement and delivery. The Carter Review of Legal Aid Procurement (2006) made proposals relating to the delivery of reforms around the approach to procuring Legal Aid services. The Jeffrey Review of Independent Criminal Advocacy (2014) considered the provision of independent advocacy services for criminal defendants in the courts

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of England and Wales. In contrast, the Independent Review of Criminal Legal Aid is far more ambitious in scope, aiming to assess the entire Criminal Legal Aid system.

7. In this document the terms "Criminal Legal Aid Market" ("the Market" hereafter) and "Criminal Legal Aid System" are used. "Criminal Legal Aid Market", refers to the body of private actors who provide Criminal Legal Aid services (including both individuals and firms). The "Criminal Legal Aid System" refers to the Market the Government processes and organisations used to procure, administer, and remunerate those providers in the public interest.

Outcomes

8. The ultimate objective of the Criminal Legal Aid System is to provide legal advice and representation to those who most need it, in line with the Lord Chancellor's statutory duty to ensure that legal aid is made available, and to uphold and ensure the constitutional right to access to justice. This objective will provide the foundation for all analysis and recommendations.
9. In order to achieve this overarching objective, the Independent Review will seek to make recommendations that will ensure the Criminal Legal Aid System:
 - a. provides high quality legal advice and representation;
 - b. is provided through a diverse set of practitioners;
 - c. is appropriately funded;
 - d. is responsive to user needs both now and in the future;
 - e. contributes to the efficiency and effectiveness of the Criminal Justice System;
 - f. is transparent;
 - g. is resilient; and
 - h. is delivered in a way that provides value for money to the taxpayer.
10. The recommendations will also need to align with wider reforms being made across the Criminal Justice System ("CJS" hereafter).

Scope

11. The review will consider the Criminal Legal Aid System in its entirety; the service being provided, how it is procured and how it is paid for.
12. In order to conduct this analysis, the review will consider the following themes:
 - a. resilience,
 - b. transparency,
 - c. competition,
 - d. efficiency; and
 - e. diversity.

13. Through these themes, consideration will be given to ensuring the services provided to defendants are of high quality, providers are appropriately rewarded for their expertise, and improve outcomes for society.

14. **Theme 1: Transparency**

The review will consider whether the operation of the Criminal Legal Aid System can be made more transparent for all parties: helping Government to make more informed procurement decisions, helping defendants make more informed choices about their representation, and helping providers plan their businesses more effectively. The review will approach this topic as broadly as possible, however it will specifically consider:

- a. **Quality** – How quality is measured and ensured in other public service markets (e.g. doctors, dentists, and schools) and whether any lessons could be applied to Legal Aid. The review will consider whether peer-review is the best method for maintaining high-quality litigation services; whether randomised checks of advocacy quality would be workable or cost-effective; and whether Legal Aid contracts requiring advocates to join an ‘approved advocacy scheme’ or undergo a revalidation process would be workable.
- b. **Information** – How Government (and taxpayers) can be assured that public funds are being spent fairly and on high-quality providers. How the LAA can access, assess and action sufficient information about Legal Aid providers to make informed purchasing decisions; whether the LAA could improve the information it has about the quality and quantity of work done by providers (firms and individual solicitors and barristers). The review will also consider how providers can be given greater visibility of administrative and policy decisions so that they are able to plan their business effectively.
- c. **Users** – How defendants can be helped to understand how the process operates, how the service is being provided and how defendant (user) feedback be collected and used to improve Legal Aid provision.

15. **Theme 2: Resilience**

The review will consider whether the Criminal Legal Aid System can be made more resilient and how Government can ensure that: the provider base is stable and able to respond to changing market conditions; providers can enter and leave the Market in an orderly fashion without jeopardising service delivery; a career in the publicly funded criminal defence profession is seen as attractive; and the number and distribution of providers is sufficient to meet the demand for the service and maintain access to justice throughout England and Wales. The review will approach this topic as broadly as possible, however it will specifically consider:

- a. **Criminal Justice System Impacts** – How a more resilient provider base could increase resilience in the justice system and promote access to justice.
- b. **Market Composition** – Why the provider base (on both sides of the profession) is ageing and why solicitors’ firms are leaving the Market. The review will consider what number and mix of firms (size, specialisation and geographical distribution) would provide the highest standard service provision across the country whilst maintaining access to justice, and whether there is anything the Government can do to encourage this mix. The review will also investigate whether the uptake by providers of alternative business models might improve Market resilience.

- c. **The Provider Pipeline** – How many new arrivals each year (and what retention rates) are required to maintain a stable provider base. The review will consider what the Government could do to ensure that adequate provider recruitment and retention rates are maintained.
- d. **Profitability** – What average profit margins (and hourly rates of pay) are for providers and how this compares with providers in other public service markets (considering income, expenses and time dedicated to service provision).
- e. **Market entry and transaction costs** – How the Government can reduce market entry and transaction costs (through subsidised training schemes for future criminal defence practitioners or administrative reforms).

16. Theme 3: Competition

The review will consider how competition operates within the Market and whether it currently contributes towards the efficiency of the Market. The review will consider previous attempts at reform and the lessons learned from these attempts. The review will also consider how providers can be incentivised to enter the market, motivated to innovate and rewarded for providing a high-quality service. The review will approach this topic as broadly as possible, however it will specifically consider:

- a. **Public Sector Markets** – How mechanisms for introducing and regulating competition operate in other essential public service markets (whilst remaining mindful of the unique characteristics of Criminal Legal Aid). The review will seek to establish whether best practice for using competition to promote sustainability and quality in those markets can be applied to Criminal Legal Aid.
- b. **Consumer choice** – How can defendants and the Government (in its capacity as purchaser) be empowered to make more informed choices.
- c. **Fee Review** – Whether a mechanism to review fees might ensure they are flexible, can adapt to changing market conditions, encourage new providers to enter the market and incentivise providers to continuously improve the quality of their services.

17. Theme 4: Diversity

The review will consider how greater diversity within the provider market would promote fairness within the CJS (for defendants, witnesses and providers) and improve the quality of the service provided. The review will also consider how greater diversity within the system might promote increased confidence in the CJS. The review will approach this topic as broadly as possible, however it will specifically consider:

- a. **Barriers** – What the barriers to entry, retention and career advancement within the Criminal Legal Aid profession are for individuals with protected characteristics or from lower socio-economic backgrounds or for individuals operating within particular parts of England and Wales.
- b. **Provider Diversity** – Methods for encouraging diverse participants to enter the market – including scholarships. The review will remain mindful of how provider diversity impacts the rest of the CJS (and the diversity of the judiciary in particular).
- c. **Defendant Outcomes** – The review will consider how the Criminal Legal Aid System meets the needs of individuals with protected characteristics and whether further measures could be taken to assist these individuals. The review will give particular consideration to the Lammy Review recommendations around client choice and access to early advocate advice.

18. Theme 5: Efficiency

The review will consider the extent to which Criminal Legal Aid contributes towards the efficiency of the CJS. The review will attempt to identify the most efficient way to ensure defendants receive high-quality and timely advice and how the Government could achieve this outcome. The review will approach this topic as broadly as possible, however it will specifically consider:

- a. **Administrative burdens** – How administrative requirements affect providers. How this compares to other comparable sectors (doctors, dentists, counsellors, etc.) and whether the underlying policies be revised to reduce Government and provider administrative costs. The review will also consider how systems and contracts could be made more flexible to allow providers to innovate or adapt to changing market conditions.
- b. **Market Efficiency** – Whether the structure of the Criminal Legal Aid System incentivises or enables modern and proportionate methods of service delivery. The review will consider whether changes to when and how advice is provided could increase efficiency in the CJS. It will explore whether contractual requirements could be adjusted to enable providers to explore new methods of providing advice and representation. The review will also consider whether the adoption of alternative provider business models would promote efficiency.
- c. **CJS Procedural Adjustments** – Whether the efficiency of providers' services could be improved or complemented by proportionate adjustments to CJS processes and procedures (and if so, what these changes might be).

Out of Scope

19. The review concerns the Criminal Legal Aid market and will not consider the sustainability of Civil and Family Legal Aid, although the review will note where issues affecting Civil and Family Legal Aid may affect the sustainability of the Criminal Legal Aid System.
20. Current work on eligibility for Criminal Legal Aid will not be considered as part of the Independent Review, except where changes to financial eligibility might underpin or interact with a substantially different model for delivering Criminal Legal Aid.
21. The review should consider whether the fee structures are broadly appropriate for the work undertaken by providers and whether the structure and operation of the fee schemes support the outcomes in paragraph 9. The review should not make specific recommendations on individual fees.
22. The review will only consider the provision of Criminal Legal Aid in England and Wales, although systems and reforms in other jurisdictions may be considered where they provide a useful indication of how reforms might affect the provision of Criminal Legal Aid in England and Wales.

Process

23. The Independent Review will seek to develop proposals and draw conclusions from evaluation of a wide array of sources.
24. The review will seek to draw on existing evidence where possible, including: Legal Aid Datasets and the information obtained during the first phase of the Criminal Legal Aid Review (including feedback from focus groups and the quantitative data obtained from

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the Law Society of England and Wales, the Bar Council, and the Crown Prosecution Service through the Data Share agreements).

25. The review will collect new evidence, where necessary, to ensure that the recommendations are informed by an analysis of the market. New evidence may be gathered through a variety of methods, including (but not limited to):
 - a) drawing together and evaluating existing academic research, reports, surveys and databases on the provision of Criminal Legal Aid.
 - b) commissioning surveys of defendants;
 - c) engagement with key interested parties including: the sector regulators, the sector representative bodies, consumer organisations, and the Legal Ombudsman; and
 - d) further in-depth qualitative interviews, surveys and focus groups with practitioners (where appropriate).
26. The review will also seek to collect and consider information on the operation of other public service markets that might provide models for consideration and comparison.
27. The review will reflect on previous reviews of the Legal Aid sector and previous attempts at reform and will ensure that lessons learned from these experiences are reflected within its policy thinking.

Chair and Expert Panel

28. Sir Christopher Bellamy has been appointed by the Lord Chancellor to chair the review. The Chair will lead a dedicated review team within Government and will have close oversight of the work to ensure it meets these terms of reference and delivers robust, evidence-based recommendations.

The Chair is accountable to the Senior Responsible Owner (SRO) for the delivery of the review (see paragraph 34).

29. As part of the review, the Chair and review team will undertake a structured approach to stakeholder engagement to ensure a thorough understanding of the issues affecting the Criminal Legal Aid System.
30. Sir Christopher Bellamy will also chair the Expert and Advisory Panel (hereafter 'the Expert Panel'). The Expert Panel will provide support by testing and challenging the review's emerging findings and recommendations.
31. The Expert Panel will be composed of senior figures and experts with a variety of backgrounds and expertise, including: an academic specialist in Legal Aid; an academic specialist in legal services regulation; an economist; a retired judge; an individual with experience of representing consumers' interests; an individual with expertise on regulating public sector markets; an individual with procurement expertise; an individual with practitioner experience in Youth Justice; an individual with expertise advocating on diversity issues in Criminal Legal Aid; and five spaces reserved for individuals nominated to attend *ex officio* from key representative bodies (who will provide expertise as practitioners).
32. The Chair will hold monthly meetings with the Expert Panel where the review's findings, analysis and proposed next steps will be shared.

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33. Papers relating to upcoming meetings will be shared with Panel members ahead of the meeting. Panel Members must take all practicable steps to ensure the security and confidentiality of all and any information to which they have access during their appointment.

Governance

34. Fiona Rutherford (Director, Access to Justice Policy) is the SRO for the review and is accountable for the governance of the review and ensuring the Chair delivers the review in compliance with these Terms of Reference.
35. The Chair will report to the SRO of the review (and through them to the Lord Chancellor) and will meet them monthly to provide an update on the progress of the review. The Chair will direct the work of the review team to ensure that it complies with the terms of reference.
36. The SRO will report to the Lord Chancellor at regular intervals on the progress of the review so that the Lord Chancellor may keep their Cabinet colleagues regularly updated on the review's progress.
37. The SRO will chair a Cross-Whitehall Board to keep key interested Departments updated on the progress of the review. The Board will meet monthly over the course of the review. The SRO will provide updates to the Project Board outside of the monthly meetings by exception only.

Reporting and Outputs

38. The review's final output will be a report which will be presented to the Lord Chancellor. The report will set out recommendations for reform of the Criminal Legal Aid system.
39. The MoJ will work with other interested Government Departments to determine timelines for the report's publication. The MoJ will aim to publish the report alongside the Government's response on GOV.UK before the end of 2021.
40. The report will be followed by a consultation on any proposed reforms to the Criminal Legal Aid System.
41. The review may also seek to produce an interim report which will provide an update on the work carried out and initial findings. The MoJ will aim to publish this report on GOV.UK.
42. The review may also seek to publish summaries of any additional evidence gathered during the course of the review.