



Ministry  
of Justice

# **Government Response: Criminal Legal Aid Review**

**An accelerated package of measures  
amending the criminal legal aid fee schemes**

This response was published on 21 August 2020







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of Justice

## **Criminal Legal Aid Review**

**An accelerated package of measures amending  
the criminal legal aid fee schemes**

**A consultation response produced by the Ministry of Justice. It is also available at**  
<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

# About this consultation response

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

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**Enquiries (including requests for the paper in an alternative format) to:** Email: [criminallegalaidreview@justice.gov.uk](mailto:criminallegalaidreview@justice.gov.uk)

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

# Contents

<b>Ministerial foreword</b>	<b>3</b>
<b>Executive summary</b>	<b>5</b>
Immediate next steps	6
The structure of the response	7
<b>Section 1: Introduction</b>	<b>8</b>
Summaries of the proposals at consultation	8
Summary of consultation responses	10
The government’s overall view	11
<b>Section 2: Responses related to how litigators and advocates are paid for work on unused material</b>	<b>13</b>
Government response	14
<b>Section 3: Responses related to how advocates are paid for paper-heavy cases</b>	<b>16</b>
Government response	17
<b>Section 4: Responses related to how advocates are paid for cracked trials in the Crown Court</b>	<b>19</b>
Government response	20
<b>Section 5: Responses related to how litigators are paid for work on sending cases to the Crown Court</b>	<b>21</b>
Government response	22
<b>Section 6: Economic and equalities impacts</b>	<b>23</b>
Government response	24
<b>Annex A: Special preparation hourly rates</b>	<b>26</b>
<b>Annex B: Proposed PPE thresholds</b>	<b>27</b>
<b>Complaints or comments</b>	<b>28</b>
Extra copies	28
<b>Consultation principles</b>	<b>29</b>



# Ministerial foreword

Criminal defence practitioners play a crucial role in upholding the rule of law. I greatly value the huge contribution the criminal defence profession makes to our society. I hope the policies we have decided on in this response will go some way to ensuring that the defence profession is paid more fairly for the important work they do.

These policies represent a first step towards the wider review. At the beginning of 2019, my department began a comprehensive review into the criminal legal aid fee schemes and wider market, aiming to reform the system holistically to ensure work done was fairly remunerated, that the provider market was flexible and delivered value for money for the taxpayer and that the legal aid system supports an effective and efficient criminal justice system. In light of pressing concerns from practitioners identified early on, we took the decision to fast-track consideration of some aspects of the existing fee schemes in isolation, to enable the delivery of quick wins ahead of the comprehensive review where the fundamental principles of the fee schemes could be considered in the round. These were the ‘accelerated areas’ of the review:

- 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 (which will be the subject of a separate consultation after the Attorney General’s response to consultation on amending the disclosure guidelines)

Having carefully considered consultees’ responses, I have decided to proceed with the proposals as set out at consultation, except for how litigators are paid for work on sending cases to the Crown Court. For this proposal, in light of the responses received, I am increasing the payment from 2 hours’ worth of work to 4 hours and will make payment under the magistrates’ court scheme.

Many consultation responses highlighted concerns about the sustainability of the professions, especially in light of Covid-19 which has led to a fall in cases coming before the courts. We paused the consultation on the accelerated areas to focus on our immediate Covid-19 response for legal aid practitioners, developing cash flow measures to ensure money owed in the system already was available to them during the pandemic. This necessarily delayed our response to the consultation, but now as we work collaboratively with the legal professions to get the courts back up and running, we are able to return our attention to it. Through these quick wins we can inject an additional £35 million to £51 million per year into criminal legal aid.

But the accelerated areas are only the first step towards the wider review, which we always intended would result in reforms that would support a sustainable and diverse market of practitioners. Since then, Covid-19 has thrown into sharp relief concerns about the sustainability of the market. In light of the situation we now find ourselves in, I remain convinced that our original aims were the right ones. Fundamentally, we want to ensure that the market can: meet demand now and into the future, provide an effective and efficient service that ensures value for money for the taxpayer, and continues to provide defendants with high-quality advice from a diverse range of practitioners. However, there remains a huge amount of work to do to deliver against these objectives.

Having reflected on whether our original approach to delivering the review was the right one to achieve these overarching aims, I have decided that the next phase of the Review should involve an independently-led review that 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. It will consider working practices and market incentives and how these can drive efficient and effective case progression and deliver value for money for the taxpayer. Planning is in progress and I plan to launch it as soon as possible after Parliament returns.

Alongside the independent review we will also prioritise work to ensure that the fee schemes (especially the crime lower ones) are consistent with and enable wider reforms that seek to modernise the criminal justice system, in line with our original aims for the review. Given the rapid changes in ways of working that have been adopted across the justice system to support recovery in the courts, it is essential that the criminal legal aid system actively enables the defence profession to play its role in these efforts.

I would like to thank all those who have taken the time to respond to the consultation and look forward to continuing constructive engagement as we move towards the next phase of our ambitious review.



**The Rt. Hon. Robert Buckland QC MP**  
**Lord Chancellor**



## Executive summary

1. This is the government response to the consultation on proposals for amending the criminal legal aid fee schemes, outlined in Criminal Legal Aid Review: An accelerated package of measures. The consultation was published on 28 February 2020 and closed on 17 June 2020. The government received 498 responses online and conducted 7 face to face roundtables with practitioners across England and Wales.
2. We had originally intended to close this consultation on 27 March 2020. In discussion with the key representative bodies for the professions, we paused the consultation to focus on the Covid-19 pandemic, to develop measures to support cash flow for firms and individuals while the flow of work through the system was interrupted. As the courts began to move towards recovery, we agreed in consultation with the representative bodies that an essential step towards supporting the sustainability of the market was to return our attention to the review. Therefore, we are seeking to implement the proposals as quickly as possible and thereby get additional money for work done into the system, while we continue with the next phase of the review.
3. In December 2018, we announced a comprehensive review of the criminal legal aid system including all fee schemes and the wider market.<sup>1</sup> 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:<sup>2</sup>
  - how litigators and advocates are paid for work on unused material<sup>3</sup>
  - 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
4. Having carefully considered consultees' responses, we are proceeding with the proposals on the accelerated areas set out at consultation, except for how litigators are paid for work on sending cases to the Crown Court. For this proposal, we are increasing the payment from 2 hours' worth of work to 4 hours and payment will be made under the magistrates' court scheme rather than the LGFS.

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<sup>1</sup> For more information about the Criminal Legal Aid Review please refer to the website: <https://www.gov.uk/guidance/criminal-legal-aid-review>

<sup>2</sup> These areas will collectively be referred to as the "accelerated areas" throughout this document, and through the accompanying Impact Assessment and Equality Statement.

<sup>3</sup> "Litigators" refers to solicitors and legal executives who are carrying out litigation work. "Advocates" refers to both solicitor advocates and barristers.

5. Taken together, these proposals represent an additional £35 million to £51 million for criminal legal aid per annum. Further information regarding the breakdown of this cost estimate can be found in the accompanying Impact Assessment.
6. We will formalise and consult on a proposal for remuneration for pre-charge engagement following the issue of new disclosure guidelines by the Attorney General, which were recently subject to public consultation.<sup>4</sup> We intend to launch this consultation in Autumn 2020. We are grateful for the engagement from defence practitioners throughout the consultation period and during the course of the review. A large number of consultation responses highlighted concerns about the longer-term sustainability of the criminal defence profession, an issue which has always been central to the overarching aims of the review. Many called for more money to be put into the fee schemes to support sustainability. Through these proposals we are doing just that, in line with our original aims for the review which included paying fairly for work done – for example by specifically paying for unused material for the first time. Through the accelerated areas, we intended to address pressing concerns about areas where it was felt that the fee schemes did not adequately pay practitioners for the work involved. By moving quickly to implement them we can address this and move on to the next phase of the review, where issues of sustainability and the fee schemes as a whole can be considered within the context of the wider criminal justice system.

## **Immediate next steps**

7. The government will be laying a Statutory Instrument in Parliament to bring these proposals into effect as soon as possible and we expect this to be in August.
8. As set out above, we will formalise and consult on a proposal for remuneration of litigators for pre-charge engagement separately following the issue of new disclosure guidelines by the Attorney General, which were recently subject to public consultation. The Attorney General's Office are considering changes to their guidelines to encourage increased early engagement to facilitate the early resolution of evidential issues. Once the guidelines have been published, we will consult on proposals to pay litigators for work done engaging with the police or prosecution ahead of a decision to charge.
9. Alongside implementing the accelerated areas and consulting on proposals for pre-charge engagement, we will be turning towards the next phase of the review. We have reconsidered our approach to delivering the full review and will be taking forward both an independently-led review of the market of providers and work focusing on crime

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<sup>4</sup> The consultation on the Attorney General's Guidelines on Disclosure opened on Wednesday 26 February and is due to close on Wednesday 22 July. The full consultation document can be found here: <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

lower to ensure alignment with wider reforms to support a modern criminal justice system. Given how Covid-19 has highlighted concerns about the market and accelerated efforts across the justice system to adapt to new ways of working, this new approach should enable us to focus on the issues that will have the biggest impact for the wider system, now and into the future, and deliver meaningful change more quickly.

10. The independent review will focus on promoting a sustainable, efficient and quality legal aid market and will seek to provide transparency around outcomes and quality. The review will also aim to encourage a diverse and socially mobile profession that ensures quality services that offer value for money for future generations. The review will be far reaching and ambitious in scope. It will consider the criminal legal aid market holistically and will be committed to considering the wider changes to the justice, social, economic, business and technological landscape that are impacting on the criminal legal aid system and wider supplier market.
11. Alongside this, we will focus on work to align the current fee schemes around wider reform initiatives in the justice system and ensure that recovery is supported. This work will investigate incremental changes to crime lower fees and contractual requirements that can be introduced to support efficient and effective case progression, better outcomes for defendants and a more modern criminal justice system, in line with our original aims for the review.
12. Further detail in relation to both of these elements of the next phase of the Review will be announced soon. We will continue to engage widely on the future of the criminal legal aid system and will continue to have an open dialogue with the criminal defence profession throughout the next phase of the Review and beyond.

## **The structure of the response**

13. The remainder of this paper is set out over 6 sections. *Section 1* comprises an introduction which summarises the consultation paper published in February, the main themes emerging in consultees' responses, and the government's overall view.
14. *Section 2* deals with questions 1 and 2 of the consultation (how litigators and advocates are paid for work on unused material); *Section 3* with questions 3 and 4 of the consultation (how advocates are paid for work on paper-heavy cases); *Section 4* with questions 5 and 6 (how advocates are paid for cracked trials in the Crown Court); *Section 5* with questions 7 and 8 (how litigators are paid for work on sending cases to the Crown Court).
15. *Section 6* considers questions 9 to 11 (economic and equalities impacts).

## Section 1: Introduction

16. This paper sets out the government response to our recent consultation on proposals for the accelerated areas of the Criminal Legal Aid Review. The consultation opened on 28 February 2020 and closed after 16 weeks on 17 June 2020.

### Summaries of the proposals at consultation

17. This consultation did not propose to make any changes to the structure of the fee schemes or the wider market or address issues of sustainability which are the focus of the wider Review. Instead, the accelerated areas consultation proposed a range of targeted quick and targeted increases to fees in discrete areas to better pay for work done, as a result of concerns raised by stakeholders in the early stages of the Review.
18. This section sets out the proposals consulted on under the following areas:
- how litigators and advocates are paid for work on unused material (AGFS and LGFS)
  - how advocates are paid for work on paper-heavy cases (AGFS)
  - how advocates are paid for cracked trials in the Crown Court (AGFS)
  - how litigators are paid for work on sending cases to the Crown Court (LGFS)
19. As mentioned above, we will consult on changes to the final area (pre-charge engagement) once the Attorney General’s consultation on the review of disclosure has closed.

### **Unused material (Advocates’ Graduated Fee Scheme (AGFS) and Litigators’ Graduated Fee Scheme (LGFS))<sup>5</sup>**

20. Unused material is material that is relevant to a case (material that is capable of undermining the prosecution case and/or assisting the defence), but not used as part of the prosecution evidence presented in court. We proposed a fixed payment to litigators and advocates equivalent of 1.5 hours’ work for 0-3 hours spent reviewing unused material disclosed to the defence. This would apply to all cracked trials and trials but excludes guilty pleas.

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<sup>5</sup> The AGFS is the fee scheme for most Crown Court advocacy work undertaken by both self-employed barristers and Higher Court Advocates employed by solicitor firms. The LGFS is the fee scheme for Crown Court litigation work undertaken by solicitors.

21. For those cases where more than 3 hours is spent reviewing unused material, we proposed payment at hourly rates equivalent to the existing AGFS or LGFS special preparation hourly rates, subject to an assessment of those claims by the LAA.<sup>6</sup> This would be in addition to the fixed payment for first 0-3 hours spent reviewing unused material.
22. Special preparation rates are set out in Annex A.

### **Paper-heavy cases (AGFS)**

23. We proposed advocates would be able to claim additional payments in cases where pages of prosecution evidence (PPE) exceed a new set of page thresholds. Payments would be made at the hourly special preparation rate, subject to the assessment of those claims by the LAA. Special preparation rates are set out in Annex A and the thresholds for each offence band are set out in Annex B.

### **Cracked trials in the Crown Court (AGFS)**

24. We proposed that applicability of cracked trial fees would be expanded to all cases that crack after the first Crown Court hearing (at which a plea is entered), usually the Plea and Trial Preparation Hearing (PTPH), removing the thirds distinction from the AGFS. Currently, only cases that crack in the final third of the time between the PTPH and the date on which the case is listed for trial are eligible for a cracked trial fee, while cases which crack in the first two thirds receive a guilty plea fee.
25. In addition, we proposed to increase the cracked trial basic fee from 85% to 100% of the brief fee.
26. The changes in relation to cracked trials would only apply to the AGFS. Due to structural differences between the two schemes, the way cracked trials are paid under the AGFS does not apply in the same way to payments for cracked trials under the LGFS. To consider the treatment of cracked trials under the LGFS requires a holistic review of the structure of the scheme which is outside of the scope of the accelerated areas, which were to be quick wins that could be considered in isolation and brought forward ahead of the comprehensive Review of the schemes and market.

### **Sending cases to the Crown Court (LGFS)**

27. We proposed to pay an increase in LGFS equivalent to 2 hours' worth of work in the magistrates' court to better pay for the work done ahead of cases being sent to the

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<sup>6</sup> All references to hourly rates in the Unused Material section are the same rates as those prescribed in Criminal Legal Aid (Remuneration) Regulations 2013 for "special preparation" under each scheme. Special preparation rates can be found at Annex A.

Crown Court under the Better Case Management initiative and the Criminal Procedure Rules.

## **Summary of consultation responses**

28. A total of 498 responses to the consultation were received. The majority (72%) were from members of the barrister profession, while 24% were received from solicitors. We also received responses from the professional representative bodies and other members of the legal profession.
29. Respondents were broadly in support of our proposals regarding how advocates are paid for cracked trials in the Crown Court and how litigators are paid for work on sending cases to the Crown Court although further evidence was provided on the effort involved in this work which we have sought to address in our response. However, respondents broadly disagreed with our proposals with regards to how litigators and advocates are paid for work on unused material and how advocates are paid for work on paper-heavy cases.
30. Responses mainly focused on 4 main areas of concern which are summarised below.

### **The level of hourly payment rates**

31. While many consultees agreed in principle with the proposals, the majority felt that the fees across the LGFS and the AGFS were too low to properly remunerate for work done. This included the accelerated areas – unused material, paper-heavy cases and sending hearings in particular – but was also frequently linked to the sustainability of the professions overall.

### **The administrative burden of making special preparation (or equivalent) claims**

32. Many consultees felt that while they agreed in principle with the proposals for unused material and PPE, the implementation of the proposals would be hindered in practice. The Law Society stated “special preparation is [...] administratively very complicated and often involves lengthy disputes with the LAA in order to obtain payment for work properly undertaken. For this reason, many solicitors do not use it as the process entails large amounts of unpaid work in discussions with the LAA.”

### **The exclusion of AGFS Offence 1 (murder/manslaughter) from amendments to how we pay advocates for paper-heavy cases**

33. Advocates felt that a new PPE threshold for AGFS Offence 1 (murder/manslaughter) should have been introduced as with other offence types. Consultees also expressed concerns that the current brief fee for murder/manslaughter does not reflect the work done or complexity of these cases.

### **The level of the brief fee in AGFS, and exclusion of the LGFS from amendments to cracked trial payments**

34. While broadly in support of the proposal, a significant proportion of barristers were of the view that a rate of 100% of the brief fee does not sufficiently reflect the work done preparing a case, or recognise the ‘work lost’ when a trial cracks leaving barristers unable to secure new work at short notice.
35. Lastly, litigators have stated their disagreement that the uplift to 100% of the trial fee should only be applied to the AGFS and not the LGFS. They believe that as the litigator will always have prepared 100% of the case, “as it arrives with counsel fully prepared for trial”, they should equally be paid 100% of the trial fee.

### **The government’s overall view**

36. Having carefully considered consultees’ views, we believe that while the views expressed highlight legitimate concerns about the fee schemes, many were outside the remit of this accelerated consultation and the intention had always been to consider these issues as part of the wider holistic Review – as described above it is our intention to change our overall approach to delivery and progress an independent review and a review of the current criminal legal aid fees and contractual arrangements in the context of the wider criminal justice system. The concerns raised about fees that related to the fundamental sustainability of the system will be considered as part of the next phase of the Review. The government’s overall response to the specific concerns are set out below.

### **The level of hourly payment rates**

37. Many respondents commented on the suitability of existing hourly rates within the fee schemes, arguing that these were too low and linking this to issues with the sustainability of the market. The sustainability of the market will be considered in the round as part of the next phase of the Review.
38. The administrative burden for making special preparation (or equivalent) claims
39. The majority of special preparation claims are assessed by the LAA on the initial information provided, and the proportion where additional information is requested has been falling year on year. In 2019-20, 13% of AGFS claims and 19% of LGFS claims for special preparation were initially refused because of missing information. This meant that the LAA went back to the provider to ask for more information, which could have been additional representations, missing documentation/disks, or a work log. This represents a significant decrease in claims initially refused from the previous year, down from 25% and 27% respectively. The LAA have in the past offered workshops to assist providers preparing claims, and are happy to consider running more of these.

40. The LAA will review its processes and update supporting guidance and forms to make submitting a claim for payment as simple as it can possibly be, in line with the regulations and its responsibility to manage public money. The LAA held a workshop with practitioners on 16 March 2020 and has been working to make the process as clear and straightforward as possible. The LAA will continue to work with practitioners in this regard, and will share the updated forms and guidance for comment and feedback.

#### **The exclusion of murder under PPE**

41. AGFS Offence 1 (murder/manslaughter) has been excluded from this proposal because if we apply the methodology on statistical major outliers to murder/manslaughter cases, it would produce a 12,000 PPE cut off point, which is higher than the existing 10,000 PPE threshold above which additional payments at hourly rates (as set out in Annex A) can already be claimed for these cases. We therefore believe maintaining the current 10,000-page threshold will ensure more cases where the amount of PPE is exceptionally high are eligible for additional payment. To consider other contributing factors of complexity at this stage would go beyond the discrete scope of the accelerated areas.
42. The overall suitability of the fee schemes and how they contribute to a sustainable market will be addressed in the next phase of the Review.

#### **The level of the brief fee in AGFS and exclusion of LGFS from amendments to cracked trial payments**

43. The suggestion that the proper AGFS fee for a cracked trial should be greater than 100% of the brief fee suggests to us that advocates believe an element of preparation work is being remunerated through the daily attendance fees paid for trial. Whether the overall balance for effective trials between brief fees and daily attendance is struck correctly is not a question we have sought to answer through the accelerated areas. The overall suitability of the fee schemes and how they contribute to a sustainable market of providers will be addressed in the next phase of the Review.
44. Due to structural differences between the two schemes, the way cracked trials are paid under the AGFS does not apply in the same way as payments for cracked trials under the LGFS. Under the AGFS the cracked trial fee is a fixed percentage of the basic trial fee. Under the LGFS the fee that is payable is linked to a number of additional factors such as the basic fee, class of offence, the number of defendants, whether the case has been transferred from another provider, or whether the case is a retrial. The comparatively simple approach to cracked trials under the AGFS was designed after a fundamental and comprehensive review of the AGFS in 2018 and we consider that a similar exercise will be required to consider this issue within the LGFS. The overall suitability of the fee schemes in supporting a sustainable market will be addressed through the next phase of the Review.



## Section 2: Responses related to how litigators and advocates are paid for work on unused material

45. As set out in the original consultation and in *Section 1*, we proposed additional remuneration for solicitors and advocates reviewing unused material in cracked trials and trials. The responses to consultation questions 1 and 2 are summarised below. Given some of the thematic similarities in consultees' responses to these questions, we provide a single government response to the concerns raised at the end of this section.

**Question 1: Do you agree with our proposed approach to paying for work associated with unused material? Please state yes/no and give reasons.**

46. Around 32% of respondents agreed with the proposed approach to paying for work associated with unused material, with around 57% of respondents disagreeing. The remaining respondents did not answer the question. However, regardless of their "yes/no" response, many respondents were concerned that the proposed fees were still inadequate to properly remunerate work done. The government has been clear that the level of hourly payment rates was not within the scope of the accelerated areas and this consultation.
47. Putting the issue of fees aside, while respondents broadly agreed in principle to the proposed approach around 24% raised concerns about the administrative burden associated with claiming for work done reviewing unused material over 3 hours. This included a number of responses which raised concern about heavy scrutiny of claims by the LAA, and suggestions that too much time was taken up in appealing LAA decisions.
48. Some consultees questioned the rationale of paying a fixed fee equivalent of 1.5 hours' worth of work for the first 3 hours spent reviewing unused material, arguing that this did not represent paying for work done.

**Question 2: If you do not agree with our proposed approach to paying for work associated with unused material, please suggest an alternative and provide supporting evidence.**

49. Regardless of whether they had answered “yes/no” to Question 1, consultees used their responses to this question to highlight wider concerns about the inadequacy of the fees under both the LGFS and the AGFS. For example, one consultee responded “I do not disagree with the approach per se. The amounts are however derisory.” Around 38% of respondents proposed the hourly rate should be increased.
50. Where consultees were concerned about the administrative burden, some argued that an additional band with a fixed fee should be introduced above the 0-3 hour band. This was reflected in The Law Society’s submission which suggested the proposal would be more “effective [...] if there was another band above the 3 hours before it goes to special preparation”.

## **Government response**

51. The government carefully considered the views of respondents concerning the proposed approach to paying for work associated with unused material and intends to proceed with the proposals presented at consultation. While we note the concerns about the level of fees raised by consultees, this was not within the scope of the accelerated areas. We will consider hourly rates as part of the independent Review, especially in the context of the sustainability of the wider market.
52. As detailed in *Section 1*, in relation to the administrative burden of submitting special preparation type claims to be assessed by the LAA, the LAA has offered to work with practitioners to make the process as clear and straightforward as possible. The LAA will review its processes and update supporting guidance and forms to make submitting a claim for payment as simple as it can possibly be, in line with the regulations and its responsibility to manage public money.
53. Our analysis identified that in the majority of trials including cracked trials (86% overall), it is estimated litigators and advocates each spend up to 3 hours’ work reviewing unused material. As such, our proposal for a fixed fee for the first 3 hours was intended to avoid the necessity for small claims, which would be onerous for both practitioners and the LAA. Within the 0-3 hours band, providers were estimated to spend up to 1.5 hours reviewing unused material in 74% of cases and between 1.5 and 3 hours in 12% of cases. Looking at the distribution of time spent on unused material, we believe that a fixed payment of 1.5 hours for the first 0-3 hours is reasonable.

54. We considered introducing a second fixed fee from 3-10 hours work reviewing unused material, but as the vast majority of cases in the CPS sample (86%) are estimated to have less than 3 hours' worth of unused material, we do not have enough data to set a flat fee that would fairly reflect the work involved, on average, in the small number of cases (10%) estimated to contain 3-10 hours' worth of material. Instead, the proposed approach will more fairly remunerate the work involved on individual cases. However, to reduce the administrative burden, the LAA will undertake a proportionate assessment of claims, review its processes and update supporting guidance and forms to make submitting a claim for payment as simple as it can possibly be, in line with the regulations and its responsibility to manage public money.

## Section 3: Responses related to how advocates are paid for paper-heavy cases

55. As set out in the original consultation and in *Section 1*, we proposed that advocates will be able to claim payments in addition to the current AGFS fee in cases involving an unusually high amount of served evidence. The responses to consultation questions 3 and 4 are summarised below. Given some of the thematic similarities in consultees' responses to these questions, we provide a single government response to the concerns raised at the end of this section.

### **Question 3: Do you agree with our proposed approach to paying for paper-heavy cases? Please state yes/no and give reasons.**

56. Around 34% of respondents agreed with the proposed approach to paying for work associated with paper-heavy cases, with around 47% of respondents disagreeing. The remaining respondents did not answer the question. Around 44% believed the level of the hourly rates were too low. As one consultee responded: "The existing scheme – albeit with a number of flaws – is on balance reasonable as it is. The proposal is tinkering around at the edges without addressing the fundamental problem of abysmally low rates of pay."
57. Around 21% of respondents disagreed that murder should be excluded from a new page count threshold with one consultee commenting: "bearing in mind how much pressure is on practitioners dealing with such cases, and the time they take to prepare, the brief fees are wholly inadequate."
58. Around 23% of respondents raised concerns about the administrative burden associated with making special preparation claims and a further 30% disagreed with the level at which the thresholds were set with many believing they were set too high.

### **Question 4: If you do not agree with our proposed approach to paying for paper-heavy cases, please suggest an alternative and provide supporting evidence.**

59. Around 9% of consultees raised the issue of whether PPE was a suitable proxy for complexity, with some suggesting a return to the treatment of PPE under scheme 9, i.e. payment increasing per page up to a maximum of 10,000 pages.

60. For paper-heavy cases, the Criminal Bar Association suggested that defence practitioners keep, and submit to the LAA, a simple work log to specify the served material that has been read and the amount of time required – but others pointed out that this would need to be complex to truly reflect work done, and that volume was not the only proxy to indicate complexity. One consultee responded “keeping a log of work once a threshold number of pages has been passed does not reflect how case preparation occurs. It does not always involve reading from page one in a linear way to the end of the evidence. Some parts of the evidence will need to be read first, and other parts later. Some parts will need to be looked at multiple times, others only once, and not always in the sequence in which the evidence is served.”
61. Of respondents who disagreed with the thresholds we used, some suggested “more detailed PPE bands” and many adopted the Bar Council suggestion, that we should set the threshold at the amount of PPE the top 7% of cases had, so we would cover the same proportion of cases in each category. Around 22% of consultees proposed as an alternative approach that the hourly rate be increased. A common response to this question was “lower the PPE thresholds and raise the hourly rate.”

## Government response

62. The government carefully considered the views of respondents concerning the proposed approach to paying for work done in cases with an unusually high level of pages of prosecution evidence.
63. Prior to AGFS Scheme 10, all previous versions of the AGFS included PPE as a proxy for complexity; each additional page (up to a maximum of 10,000) increased the overall fees paid to advocates. When AGFS Scheme 10 and 11 were designed, it was under the assumption (shared by representative bodies at the time) that pages of prosecution evidence were no longer a fair proxy for case complexity for the vast majority of cases, although we recognised it still had a role in relation to drugs and fraud cases. Scheme 11 removed PPE as a proxy for complexity for most offences.<sup>7</sup> It resulted in an increase in some payments under the AGFS, particularly for junior advocates.
64. We do however, understand that there are a variety of factors beyond sheer volume of PPE that contribute to the complexity of a case. Although PPE is not generally a good proxy for complexity, the billing data shows there are outlier cases with exceptional volumes of evidence. This proposal aims to address this issue.

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<sup>7</sup> PPE thresholds only applied to certain fraud and drugs offences.

65. The PPE thresholds that are used in this option were derived using a statistical definition of an outlier, this is explained further in the Impact Assessment. We pursued this option as opposed to a flat percentage across all categories to capture the variety in PPE volumes that we saw across the different categories. To ensure that the proposed thresholds are sufficiently robust, we have looked at the impact of re-estimating them using 2019-20 billing data which confirms that they would be very similar. Further details can be found in the Impact Assessment. The thresholds are set out at Annex B.
66. We have addressed the level of hourly rates in Sections 1 and 2. These will be considered as part of the independent Review.
67. As detailed in the introduction, AGFS Offence 1 (murder/manslaughter) has been excluded because if we apply the methodology on statistical major outliers to murder/manslaughter cases it would produce a 12,000 PPE cut off point which is higher than the existing 10,000 PPE threshold above which additional payments at hourly rates (as set out in Annex A) can be claimed for these cases. We therefore propose to maintain the current 10,000-page threshold as the point at which murder cases are eligible for additional payment at the hourly rates in Annex A.

## Section 4: Responses related to how advocates are paid for cracked trials in the Crown Court

68. As set out in the original consultation and in *Section 1* we proposed expanding the applicability of cracked trial fees to all AGFS cases that crack after the first Crown Court hearing and to increase the cracked trial basic fees from 85% to 100% of the brief fee. The responses to consultation questions 5 and 6 are summarised below. Given some of the thematic similarities in consultees' responses to these questions, we provide a single government response to the concerns raised at the end of this section.

**Question 5: Do you agree with our proposed approach to paying for cracked trials under the AGFS? Please state yes/no and give reasons.**

69. Around 59% of respondents agreed with the proposed approach to paying for work associated with cracked trials, with around 25% of respondents disagreeing. The remaining respondents did not answer the question.
70. Aside from concerns regarding the general level of fees, the most common concern raised (by around 24% of respondents) was around the level of the brief fee. While broadly in support of the proposal, a significant proportion of barristers were of the view that a rate of 100% does not sufficiently reflect the work done preparing a case, or recognise the 'work lost' when a trial cracks leaving many barristers with empty diaries at short notice.
71. Additionally, around 10% of respondents disagreed that the uplift to 100% of the trial fee should only be applied to the AGFS and not the LGFS.

**Question 6: If you do not agree with our proposed approach to paying for cracked trials under the AGFS, please suggest an alternative and provide supporting evidence.**

72. While the majority of respondents agreed in principle to the proposed approach under the AGFS, they felt that the LGFS should be given the same treatment "as [the case] arrives with counsel fully prepared for trial". Most respondents who highlighted this argued that litigators should be paid 100% of the brief fee under the LGFS scheme. There were alternative suggestions however, with one respondent

suggesting that LGFS pay '95% of the normal fee for the expected trial length because the loose ends are easier [than for advocates]'.

73. Around 9% of respondents suggested that the brief fee under AGFS should be increased in recognition of the work lost when a trial cracks. These respondents tended to suggest that this be increased to 150% of the brief fee, in line with the Criminal Bar Association's proposal. This would remunerate the barrister for work done up until the trial's cracks and factor in the loss of new work. A small number of respondents suggested that this go further and represent 200% of the brief fee.

## Government response

74. The government carefully considered the views of respondents concerning the proposed approach to paying for work done by advocates on cracked trials in the Crown Court.
75. While we recognise the concerns of litigators, due to structural differences between the two schemes, the way cracked trials are paid under the AGFS does not apply in the same way as payments for cracked trials under the LGFS. Under the AGFS the cracked trial fee is a fixed percentage of the basic trial fee. Under the LGFS the fee that is payable is linked to a number of additional factors such as the basic fee, class of offence, the number of defendants, whether the case has been transferred from another provider, or whether the case is a retrial. When the LGFS scheme was introduced in 2008 fees for trials, cracked trials and guilty pleas were set with reference to actual payments that had been made prior to 2008 when claims were paid at hourly rates. Looking at the treatment of payment for cracked trials in the LGFS in isolation is therefore inherently more complex than in the AGFS. The comparatively simple treatment of cracked trials under AGFS was introduced when the AGFS was reformed holistically in 2018. We believe it would require a similarly comprehensive look at the LGFS in its entirety to consider concerns about its treatment of cracked trials, which is not in keeping with the aims of the accelerated areas (to identify quick wins that could be brought forward *ahead* of the comprehensive Review of the schemes and market). We will therefore take these concerns forward during the next phase of the Review.
76. The suggestion that the proper fee for a cracked trial should be greater than 100% indicates to us that advocates believe an element of preparation work is being remunerated through the daily attendance fees paid for trial. The next phase of the Review will consider the overall suitability of the fee schemes including how they contribute to a sustainable market of providers. With regards to 'work lost', the principle of the fee schemes is pay for work done so we do not agree with the suggestion that additional payment should be made to cover this eventuality.



## Section 5: Responses related to how litigators are paid for work on sending cases to the Crown Court

77. As set out in the original consultation and in *Section 1* we proposed paying an increase in LGFS fees to better pay for the work done ahead of cases being sent to the Crown Court. The responses to consultation questions 7 and 8 are summarised below. Given some of the thematic similarities in consultees' responses to these questions, we provide a single government response to the concerns raised at the end of this section.

**Question 7: Do you agree with our proposed approach to paying for new work related to sending hearings? Please state yes/no and give reasons.**

78. Around 42% of respondents agreed with the proposed approach to paying for work associated with sending cases, with around 28% of respondents disagreeing. The remaining respondents did not answer the question. Around 17% of respondents believed the hourly rate was too low.
79. Around 10% of respondents raised concerns around the 2-hour assumption for amount of work done, with many pointing out that this did not reflect the amount of time spent on this work. Consultees highlighted a number of factors which contributed to the time spent on this work, including reviewing sometimes lengthy Initial Details of the Prosecution Case bundles, holding meetings with clients and the additional time taken when defendants required interpreters or mental health support.
80. A small number of respondents (around 7%) also drew a comparison between the proposed approach and the fee (a £318 bolt on to the LGFS) previously paid for sending cases which was abolished in 2011. Many commented that the removal of this fee was purely an "austerity measure" and that the work had remained but has since been unremunerated.

**Question 8: If you do not agree with our proposed approach to paying for new work related to sending hearings, please suggest an alternative and provide supporting evidence.**

81. Some respondents agreed in principle with the proposal but believed 2 hours was too low an estimate for the work done (on average) and suggested payment of 4 hours was more appropriate. Some also suggested that the fee should be paid under the magistrates' court scheme and not via the LGFS, as this would lead to swifter payment.
82. The Law Society's submission argued that prior to being cut in 2011, the sending fee was £318. Rather than the work no longer being required, they suggest that the fee was cut "as part of a series of general cost-saving cuts". In their view, £318 should be the "starting point" for a fee to take into account inflation. This view was reflected by other respondents. The Law Society also provided evidence that sending hearings can typically take up to a full court day.

## **Government response**

83. The government carefully considered the views of respondents concerning the proposed approach to paying for new work associated with sending cases to the Crown Court.
84. Since 2011 there has been no separate fee paid for the committal/sending hearing. This work is included in remuneration under the LGFS. We therefore do not believe that the former fee of £318 (that was abolished in 2011) should be the starting point for a fee. Many respondents detailed work that needs to take place prior to sending. Almost all of that work had been routinely undertaken since 2011, though some of that work now takes place ahead of sending, whereas it might have taken place after sending in the past. Our proposal is therefore limited to the additional work that the Better Case Management initiative now emphasises should be done as early as possible.
85. Having considered the responses, in particular the Law Society's view that sending hearings typically take up to a full court day, we recognise that the amount of work done equates to more than 2 hours on average. As such, we will now remunerate for the equivalent of 4 hours work done at magistrate's court hourly rates. This represents an estimated £6 million in additional funding per annum.
86. Overall rates including hourly rates and the link between payment and the sustainability of the market will be considered in the next phase of the Review.

## Section 6: Economic and equalities impacts

87. The final section of the original consultation document considers the economic and equalities impacts of the proposals, and whether the proposals would impact on the delivery of publicly-funded criminal advocacy through the medium of Welsh. The section summarises the responses to these questions and provides the government response.

**Question 9: 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.**

88. Around 35% of respondents agreed we had correctly identified the range of impacts of the proposals, with around 23% of respondents disagreeing. The remaining respondents did not answer the question or gave a caveated “yes/no” answer. Echoing themes appearing across consultation responses, many respondents considered fees and hourly rates payments were too low to properly remunerate work done and this would have negative consequences for the sustainability of the profession.
89. A small number of respondents raised concerns around the conversion ratios used to estimate how much time providers spend reviewing different types of unused material. In particular, the assumption that providers spend 1 minute reviewing every page of documentary material, and 1.5 minutes reviewing each minute of video evidence, which was considered unrealistic.

**Question 10: 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.**

90. 109 consultees responded to question 10. One of the themes underpinning the response to this question was the fact that ultimately, despite the monetary increase the overall policies would provide the profession, the low level of fees across the AFGS and the LGFS serve to disproportionately affect BAME and female members of the profession. The consensus was that low remuneration is having a detrimental effect on the sustainability of the profession which results in less diverse entrants undertaking criminal legal aid work.

91. The London Criminal Courts Solicitors association in their response stated that as London has a high proportion of BAME solicitors and partners than the rest of England and Wales, solicitors should be given a London weighting to "...avoid penalising London Solicitors who have no choice but to pay the cost of having offices in the capital and homes nearby."
92. A common theme in the responses we received to question 10 was centred on fee levels generally and the impact on junior advocates. Several consultees noted that female and BAME advocates are represented more heavily in this group as compared to QCs, for instance. The consensus was that these groups and the lack of significant increase in junior advocate and solicitor fees generally has an adverse impact on the pipeline for diversity as the lack of significant remuneration makes it harder for those with less independent wealth or those who have child caring responsibilities to make a reasonable living.

**Question 11: 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.**

93. 85 consultees responded to questions 11. A number of consultees responded that those with mental health needs will be affected by our proposals as most firms do not have the time and are also not paid for much of the extra work that these groups of individuals may require. This will potentially affect the type of service they receive and the most effective way to mitigate against this would be to invest in the criminal legal aid system.

## **Government response**

94. As set out in the consultation Impact Assessment, the assumptions about the time taken to review documentary and video evidence were based on a range of sources of evidence including the operational experience of the LAA, surveys of solicitors and barristers and a series of focus groups. From the consultation responses we see no strong evidence to change these assumptions. Note, these assumptions will not necessarily influence how the LAA will assess actual claims.
95. We do not believe that our policies adversely affect BAME individuals, women or any other groups with protected characteristics. Some legal aid practitioners will benefit more than others from the delivery of these proposals. In addition, it is possible that the legal aid practitioners who particularly benefit from the proposals might be more likely to share a protected characteristic. We anticipate that junior advocates and solicitor advocates are more likely to undertake the work that will be impacted by these

proposals than QCs. As a result, junior advocates and solicitor advocates will receive proportionately more than they currently do of annual AGFS spend. Junior advocates, as demonstrated in Table 1 in the accompanying Equalities Statement, are more likely to be BAME and female. Solicitors are more likely to be BAME and female than barristers, which might suggest that solicitor advocates are also more likely to be BAME and female, although we would need more data to say for certain. However, we do not believe that these uneven impacts will result in any disadvantage for any other groups of practitioners who share a protected characteristic. This is because the proportionate increase in annual spend that they will receive does not represent any decrease to another group of practitioners. Therefore, we do not believe that these uneven impacts amount to indirect discrimination.

96. As we said in our original Equalities Statement, we believe that some legal aid practitioners will benefit more than others from the delivery of these proposals. In addition, it is possible that the legal aid practitioners who particularly benefit from the proposals might be more likely to share a protected characteristic. We anticipate that junior advocates and solicitor advocates are more likely to undertake the work that will be impacted by these proposals than QCs.
97. As a result, junior advocates and solicitor advocates will receive proportionately more than they currently do of annual AGFS spend. Our data shows that junior advocates are more likely to be BAME and female. Additionally, solicitors are more likely to be BAME and female than barristers, which might suggest that solicitor advocates are also more likely to be BAME and female.
98. In Table 4 of the Impact Assessment, we have shown how the additional spend for AGFS for all advocate types benefits more favourably the junior and led-junior advocates. Our AGFS additional policy measures will result in between £19 million and £26 million additional spend for these advocate types.
99. In a number of responses to question 10 the issue of London weighting is one way in which consultees believe our policy proposals will affect individuals with protected characteristic, especially for BAME professionals as there is a higher proportion of this group based in the capital. AGFS and LGFS fees have always applied equally across England and Wales. However, this is an issue that will be explored as part of the independent review.
100. Even if the proposals did cause particular disadvantage to people with certain protected characteristics, we believe it is a proportionate means of achieving our legitimate aim to ensure we pay fairly for work undertaken by criminal defence practitioners.
101. The proposals may have a disproportionate impact on a small number of clients (Crown Court defendants) who are required to make a contribution to their defence costs.

## Annex A: Special preparation hourly rates

**Table A: AGFS special preparation rates**

<b>Grade</b>	<b>Rate (per hour)</b>
Junior alone or led junior	£39.39
Leading junior	£56.56
QC	£74.74

**Table B: LGFS special preparation rates**

<b>Grade</b>	<b>Outside London (per hour)</b>	<b>London (per hour)</b>
A – Senior solicitor	£48.36	£50.87
B – Solicitor, legal executive or fee earner of equivalent experience	£41.06	£43.12
C – Trainee or fee earner of equivalent experience	£27.15	£31.03

## Annex B: Proposed PPE thresholds

**Table C: Proposed PPE thresholds by offence type**

<b>AGFS offence<sup>8</sup></b>	<b>Proposed PPE thresholds (in number of pages)</b>
1	10,000
2	750
3	700
4	750
5	650
6	N/A
7	550
8	600
9	N/A
10	800
11	350
12	750
13	750
14	350
15	150
16	300
17	100

N/A = not applicable as PPE thresholds already exist for these offences.

<sup>8</sup> For more detail on the AGFS offence types please refer to Banding of Offences in the Advocates' Graduated Fee Scheme. Available at: <https://www.gov.uk/government/publications/banding-of-offences-in-the-advocates-graduated-fee-scheme>

## **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 online at <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

Alternative format versions of this publication can be requested from [criminallegalaidreview@justice.gov.uk](mailto:criminallegalaidreview@justice.gov.uk)



# 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1__.pdf)







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