Criminal Legal Aid Review - An accelerated package of measures amending the criminal legal aid fee schemes

Law Society response

March 2020

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Overview

1. We support the government's objective of improving the functioning of the criminal justice system. We have long been concerned that it is close to collapse. However, we are concerned that the proposals in this consultation will undermine the government's objectives. They will do nothing to prevent the collapse of criminal defence, meaning that in future both the accused and will go without justice.

2. We welcomed the Ministry's commitment to working towards a solution to the current crisis in the availability of criminal legal aid to those accused and are committed to continuing our engagement with the review.

3. The Law Society has been engaged with the Criminal Legal Aid Review (CLAR) since its inception. Over the course of this work, we have endeavoured to make clear to the MoJ the depth and the scale of the crisis facing the criminal defence profession. There are duty schemes that are unlikely to survive the year. At least five high profile criminal defence firms have closed over the past year. Our heat maps demonstrate that there are far too few young lawyers coming into criminal defence work. The investment in the CPS, and their subsequent recruitment drive, is seeing an exodus from the defence side to the prosecution side.

4. In this context, it is therefore extremely disappointing to see that these interim proposals go nowhere near far enough to stem the impending catastrophe that is looming in the provision of criminal legal aid to those who need it.

5. Whilst we understand that the MoJ's current offer is not intended as the final answer to the crisis, it will not even stop the crisis from worsening significantly pending the outcome of the final review.

6. To stop the crisis from worsening, the Ministry of Justice must enhance the package of immediate measures; if not in the context of this consultation then as part of a follow-up consultation earlier than the final report of the Criminal Legal Aid Review.

7. We have repeatedly warned that the existence of criminal defence practitioners – and thus the availability of legal advice to accused persons - is under threat. There has been no increase to fees for over 20 years, and in that time there have been many cuts, most recently in 2014 an across the board cut of 8.75%, while the cost of living and the costs of running a legal aid firm have increased.

8. In 2014 Andrew Otterburn[1] warned that criminal legal aid firms were already operating at the margins of profitability or were making no profit at all. The situation can only be worse now – which is evidenced by the number of apparently successful criminal legal aid firms that have gone out of business in recent years. These include:

    - Warrens
    - Gurney Harden
    - One Legal
    - Guney, Clark & Ryan
    - Kyles
    - Carter Moore
    - CK Law in Ashford, Kent.

9. If the package cannot be improved, there could soon be large areas of the country with no defence solicitors even before the end of the review. This will place the functioning of the criminal justice system in jeopardy.

10. This will inevitably be accelerated by the current situation caused by coronavirus, with many cases being delayed, and the police and courts both reducing significantly the volume of cases they are dealing with. Given that we don't know how long this situation will last, firms are in even more need of short-term assistance. They are extremely anxious about the lack of cashflow which this crisis will create, and the reduction in business income which will never be recovered, the effect of which could very well lead to the collapse of the criminal defence community in the short term.

11. Fewer new solicitors are choosing to enter criminal law and are opting instead for other areas of legal practice as this is simply more sustainable as a career choice. We understand from our Junior Lawyer's Division that even some young solicitors who had initially chosen to go into crime are changing their minds and opting for a career path that is more reliable instead.

12. The duty solicitor 'heat map'[2] which we published in 2018 shows many areas of the country with a majority of duty solicitors over the age of 50, and very few under the age of 35. The situation can only have worsened in the two years since the map was produced, as very few young solicitors are choosing criminal law as a career.

13. Surveys of undergraduates and graduates in law at Durham University and the University of Law in London show clearly that whilst many students would be interested in a career in criminal law they choose not to pursue this mainly for financial reasons, citing low fees for legal aid work.

14. A recent boost in funding for prosecutors means that many defence lawyers are taking jobs with the Crown Prosecution Service, where they can get fairer

[1] https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf

[2] https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-lawyers/

remuneration and a work-life balance that is very hard to achieve as a defence practitioner. This further reduces the pool of people entering and remaining in the defence profession.

15. The government has an opportunity to pull us back from the brink by improving this package. We have proposed various measures, including a higher fee for sent cases; payment for cracked trials at 100% of the fee as is proposed for AGFS; and an across the board fee increase in line with inflation, in order to stem the tide of defence solicitors leaving the profession and to help prevent more firms that provide this service from collapsing. *Something* is needed; and if the measures we have proposed are not possible for some reason, the onus is firmly on the MoJ to come up with other alternatives.

The value of the package

16. The consultation paper states that "these proposals represent an additional £32m-£50m for criminal legal aid. We estimate that this new spend will be split broadly evenly between solicitor firms and barristers".

17. This however ignores the fact that there are far more criminal litigators than advocates, and that payments to advocates represent a much smaller proportion of the overall spend. Proportionately, far more of the package will go to advocates – of which of course we represent solicitor advocates – but nevertheless in percentage terms the amount going to solicitors overall is substantially less than that being directed towards the Bar:

18. The value to litigators is £12-21 million – in percentage terms (based on July-September 2019 data), this equates to just 2.1-3.7%.

19. The value of this package to advocates is approximately £20-£29 million – equating to 9.7-14.1%. This is on top of a similar sum that was put into the AGFS last year, meaning that advocates will have received increases totalling over 20% at a time when solicitors are getting under 4%.

20. The CPS and prosecuting advocates have been given an interim increase of 10% and a promise of annual reviews, with the full review of the scheme still continuing.

21. There has also been a significant cash injection for the CPS, which is now recruiting hundreds of new lawyers, the vast majority of whom are defence practitioners who are leaving private practice to take up these roles, and cannot be replaced.

22. We remain supportive of increased investment for the CPS and advocates, but the crisis in the criminal justice system will only be addressed with increased funding across the board. A commitment from the government to defence litigators is vital if the system is not to be damaged beyond repair.

Proposals

Unused material – AGFS and LGFS

- *Excluding guilty pleas, every Crown Court case that solicitors and advocates are involved in would be paid the equivalent of 1.5 hours' work at special preparation rates for 0-3 hours reviewing unused material.*
- *Trials and cracked trial cases with more than 3 hours' work spent reviewing unused material would be remunerated at the relevant special preparation rate. The reasonableness of the work undertaken would be subject to an assessment by the Legal Aid Agency (LAA).*

Question One: Do you agree with our proposed approach to paying for work associated with unused material?

23. Having a band of 1-3 hours seems reasonable as a starting position, but we do not agree with only paying for one and a half hours work when more time has been spent on the work, nor with using the existing rates for special preparation which are derisorily low. This proposal cannot work without an increase in rates for special preparation.

24. We understand that the proposed rate is an amalgam of the different rates applicable in special preparation claims. If this is correct then it should be the highest rate available that is applied to these claims, given that it will be disproportionately more senior solicitors working on these cases.

25. Special preparation is also 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 bother to use it as the process entails large amounts of unpaid work in discussions with the LAA.

26. This proposal cannot work while the LAA has apparently unlimited discretion to refuse to pay for work done. There will need to be a significant change in approach on the part of the LAA, if the system is to be effective in paying fairly for the work solicitors have to undertake on cases.

27. It is also costly for both firms and the LAA to have to undertake lengthy arguments over almost every claim, and we question whether this 'culture of refusal' on the part of the LAA is actually saving any money for the public purse, or could in fact be costing more in administrative costs. Even if it is saving money in the short term, its corrosive impact on the relationship between firms and the LAA, and the effect that has on solicitors' willingness to continue undertaking this work, outweighs any short term benefits to the LAA.

28. We are also concerned that the evidence base behind this proposal may be flawed. Defence practitioners have no incentive to spend much time considering the unused material, nor to record the amount of time spent on it, since they are not paid for it, so whatever data was obtained from defence solicitors may be unreliable.

29. In addition, the evidence from the CPS file review may be flawed, given that the CPS fail to serve the unused material properly in many cases. We are aware that a number of serious cases have fallen through due to the failure of the CPS to serve the evidence.

Question Two: 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.

30. For the above reasons we would prefer to see an hourly rate structure for payment rather than using special preparation.

31. If there is to be an 'escape' after three hours work, then this should operate as a proper escape, with all the work done being included in the fee, not minus one and a half hours which remains unpaid.

32. If a move to special preparation is retained, we think that this proposal would work better and would remunerate this work more fairly if there was another band above the three hours before it goes to special preparation.

33. For the longer term, we are also unclear why PPE and unused material are treated differently. For the defence solicitor this is all evidence that they have to read. The whole point about unused is that it is only 'unused' for the prosecution, but the defence will need to go through all of it as it may contain evidence that is crucial to their client's defence.

34. We understand that at the inception of the LGFS, the time spent considering unused material was supposed to be built into the base fee. This was however based on claims data from 2005/2006, which is now 14 years old. Quite apart from this, the nature of evidence has undergone a massive transformation since then, with far more electronic evidence, and significantly higher volumes.

35. It would make more sense and would simplify matters to just pay for 'evidence' – whether unused or PPE.

Paper heavy cases - AGFS

- *Allow additional remuneration to be claimed for cases we consider to be 'statistical major outliers' in terms of the volume of PPE. We propose allowing cases access to special preparation if a set threshold for the volume of evidence is exceeded.*
- *Around 15% of this extra funding would go to HCAs rather than barristers.*

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

36. This is not a question that has a clear 'yes/no' answer, and the proposal is not one on which we have strong views. We do have some concerns about murder cases which do not often fall within the paper heavy category but which should still be funded adequately.

37. The same concerns apply regarding special preparation as with the unused material proposals; the rates are very low, and payment is always subject to LAA discretion, which often seems to err on the side of refusal.

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

38. As with the previous proposal, either an alternative payment structure to special preparation needs to be devised, or the LAA will need to reconsider how they assess claims in serious cases.

Cracked Trials - AGFS

- *An increase in cracked trial basic fees to 100% of the brief fee (currently 85%); and expanding cracked trial fees to all cases that crack after the Plea and Trial Preparation Hearing (PTPH) (currently, only cases that crack in the final third of the time between the date on which the case is listed for trial and the first day of trial are eligible for a cracked trial fee).*
- *This means that all cases that are listed for trial and subsequently crack (for whatever reason) will be paid the same basic brief fee as the advocate would have been paid had the trial gone ahead.*

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

39. We do not disagree with paying 100% of the trial fee for a cracked trial under the AGFS, but this proposal makes no sense unless the litigator can also claim 100% of the trial fee.

40. There is no logic in the proposal that this uplift should be applied only to the AGFS and not to the LGFS. The litigator will always have prepared 100% of the case, as it arrives with the advocate fully prepared for trial, given that at the time of preparing the papers the litigator will be unaware of any likelihood of the case cracking.

41. The advocate on the other hand may have only partly prepared the case if it cracks at an early stage. If it cracks before the first hearing, the litigator – who has fully prepared the case – will be left unpaid for a significant amount of the work they have undertaken. In a serious case this could represent a loss of over £20,000 for the litigators' firm, yet under this proposal the advocate – who may not even have attended one hearing – will be paid the full trial fee.

Question Six: 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.

42. If it is proposed that the advocate in the case is able to claim 100% of the trial fee then quite clearly the same logic should apply to the litigator.

43. We welcome the commitment to looking at the LGFS payments in relation to cracked trials as part of the wider review, however this will do nothing to help hard-pressed litigators now, given the reporting date for the full review appears to be many months

away, and it will be at least 12-18 months before our members start to see even the first trickle of additional payments from the recommendations of the final report.

44. We do not accept the MoJ's assertion that it would be too complicated and time consuming to examine data on LGFS claims in order to work out the cost of making the same change to the LGFS as part of the accelerated items work. The MoJ already holds all of the data relating to the LGFS, which is in fact simpler than the AGFS, where the advocate is currently paid different amounts according to what stage the trial cracks.

45. We suggest that if this clear inequity really cannot be resolved as part of this consultation, it could be looked at as part of any consultation on the proposals for payment for early disclosure, or as part of an 'Accelerated Items Mark 02' paper. We have expanded on this in our conclusion below.

Sending cases

- *The MoJ propose to pay for the 'additional new work' that was not historically included within the remuneration under the LGFS.*

- *The MoJ propose an addition in LGFS fees equivalent to 2 hours worth of work in the magistrates' court (£45.35 (excluding VAT) per hour) to cover the additional work.*

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

46. We do not accept the proposition that solicitors should only be paid for the 'new work' that has arisen since the fee was removed. It is palpably untrue that the removal of the fee was justifiable on the grounds of the work involved or that it was already included in the LGFS.

47. The work in the magistrates' court on cases which went to the Crown Court was never included in the LGFS, not least because at the time the LGFS was designed, cases were committed to the Crown Court and there was a category of fee in the magistrates' court for such cases.

48. When committals were abolished the fee disappeared and was replaced by a fixed fee bolt on to the LGFS of £318 for sendings. At that point this fee was considered correct for the work being done.

49. The sending fee was removed entirely in 2011 as part of a series of general cost-saving cuts, and not because the work was no longer required. Indeed nothing in the work had changed to justify that cut, and nothing has changed since then with regard to the tasks required, except that additional work is now required on top of this.

50. Since 2011 solicitors have thus not been paid for any of the essential work that is required to be undertaken in the magistrates' court before a case is sent to the Crown Court. Being paid for this work was the rationale for re-instating a fee for the work done in the magistrates' court.

51. Annex A sets out the detail of the work undertaken in sendings. There can be a huge amount of time spent and work involved in sendings, which in some cases can amount to an entire day, for example bail applications. New work such as advice on credit for early guilty plea also increases the time spent on these hearings.

52. The suggestion that just two hours work is normal in such cases is highly unrealistic. We were not asked during the pre-consultation period to set out the detailed work involved, however had we been asked we could easily have provided this information.

53. There is no explanation in any of the documents as to how the two hour timeframe was arrived at, although in meetings we were told by the MoJ that the PDS was asked their view. We are somewhat surprised that the practitioner groups were not asked whether or not they agreed with this figure.

Question Eight: 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.

54. The fee of £318 should clearly be the starting point for any new fee, with the extra work that solicitors now undertake and inflation taken into account on top of this. During our discussions with the MoJ a fee of £500 was proposed by the representative bodies for this work, which we continue to believe to be an appropriate amount.

55. The evidence for this is in **Annex A**.

Pre-charge engagement

56. We understand the reasons why the MoJ could not include a proposal for payment for pre-charge engagement in this package. It is important to note however that any payment for consideration of early disclosure would not represent an additional payment for solicitors, as this is new work which is not currently being undertaken. Any fee for this work therefore would simply be a payment for the new work required to be undertaken.

57. Unless adequate remuneration is offered for this new work, this could even constitute a loss and not a benefit to firms. Being asked to do more work at rates that are already loss-making will simply have the effect of increasing the scale of the losses. Judging by the rates being offered in this consultation this is of real concern to practitioners.

58. The Attorney General’s consultation on this work says that it is "not envisaged that pre-charge engagement will take place in many cases" and it is therefore unlikely to represent a significant amount of money from the legal aid fund in any case.

Impact Assessment

Question Nine: 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.

59. As we have pointed out above, we do not agree with a number of the assumptions made in the paper, including:

Unused material:

- As explained above in response to question 7, we are concerned that the evidence base behind this proposal may be flawed. Practitioners do not generally record the time spent on considering unused material since it is not paid for, so there is a possibility that the assumptions made with regard to the time involved in this work may be an underestimate. This is borne out by the statement that 'the majority of cases in the sample generally contained low volumes of unused material', which we find surprising.
- Paragraphs 30 and 31: Providers already spend a significant amount of unpaid time in disputes with the LAA simply in order to get paid for the work they have done. If the current system is to be extended to claims for consideration of unused material this will only add to the additional costs that they will have to incur in order to recover the money owed to them

Sendings:

- We have made clear to the MoJ that a significant amount of work is involved in these hearings, however we were not asked to provide an estimate of how much time is involved for the purposes of this consultation paper. Had we been asked, the time estimate could have been more accurate.
- Instead the two hour estimate for the work on sendings was apparently provided by the PDS, who are paid a fixed salary and so do not have any interest in ensuring that the fees for specific items accurately reflect the work involved.

Question Ten: 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.

60. There doesn't appear to be a very accurate or detailed assessment of the impact of the proposals on BAME lawyers, who often serve specific communities. There can be additional pressures arising from this as a result of language barriers and the need to use interpreters, which takes additional time.

61. This also applies to anyone dealing with clients with mental health issues, or child/youth clients.

62. In any system where work is paid by fixed or graduated fees, this inevitably means that solicitors dealing with such clients will be paid proportionately less in relation to the work required than when undertaking work for other clients. The fee is the same

for clients with protected characteristics, however the time taken to deal with their cases is much longer.

63. That said, many clients who find themselves in the criminal justice system need considerable time spent with them because, understandably, they can have great difficulty comprehending complex legal concepts; the laws of evidence; legal privilege and the consequences of waiving that privilege in order to complete a PET/PTPH form. Unfortunately the legal aid remuneration scheme is aimed at limiting the 'perverse incentive' of paying a lawyer to spend additional time with a client who does not fully understand their situation. It remunerates a lawyer for telling a client once. If they don't understand it, there is no payment for the solicitor to spend more time with them. The current proposals do nothing to improve this situation.

Question Eleven: 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.

64. The impacts of all of the proposals on those with protected characteristics is likely to be the same as with other legal aid work. As long as practitioners have to continue undertaking work for unsatisfactory fees, and with no uplift for the longer time taken to deal with these clients, the higher the risk is that these clients will find it harder to access justice. Financial pressures on firms are such now that they will have to make difficult choices about the work that they take on.

65. To the extent that those with protected characteristics are disproportionately represented within the criminal justice system, this will therefore have a disproportionate effect. For example, given that BAME people are over-represented among defendants, BAME people will be disproportionately disadvantaged by any decline in the quality or availability of criminal defence services.

66. In terms of mitigation, we have proposed below that an uplift is introduced for clients with mental health issues and disabilities; youth court work, and clients requiring an interpreter. This would ensure that these very vulnerable clients are able to access justice as easily as anyone else.

Conclusion and alternative proposals

67. We have already set out in this response why criminal defence practitioners urgently need a real injection of funds to sustain the availability of criminal legal advice until the end of the main review, and why the current proposals simply do not do this.

68. Given the delay already experienced in the timetable for the main review, and the likelihood that it will now report later than summer 2020 as planned, we believe that it would be beneficial for the MoJ to consult on a second phase of 'accelerated items' proposals ahead of the final report stage.

69. There will presumably need to be a further consultation on any proposals for pre-charge engagement arising from the Attorney General's review. This could be used as an opportunity to rectify some of the imbalance in this consultation, such as the inequity between the AGFS and LGFS in respect of cracked trials.

70. It could also be used to take forward proposals which do not require the extensive data collection planned in order to undertake the longer term work on sustainability.

71. The following would be of real benefit to criminal defence solicitors, and we invite the MoJ to consider these if not as an alternative to the proposals in the consultation paper, as proposals for inclusion in an 'Accelerated Items mark 02' consultation paper:

    - An across the board increase to assist with the current financial impacts of the Covid-19 virus.
    - Paying litigators as well as advocates 100% of the trial fee in cracked trials;
    - An across the board uplift for police station work;
    - A fee structure that incentivises senior solicitors to attend the police station in the most serious cases, with realistic escapes;
    - An uplift for representing under-18s;
    - Consideration of re-introducing payments for travel and waiting. Court closures have increased travel times for many solicitors, and waiting times have also increased due to inefficiencies in the court system. These are costs that firms have to bear themselves and somehow cover out of fees that have not increased in over 20 years.
    - Payments on Account for any approved disbursements in Appeals and Review cases. This is an anomaly that could be resolved very easily, as payments on account are allowed in all other work, however the Standard Crime Contract at 11.41 provides no mechanisms for payment until end of the case in Appeals & Reviews and related advice.
    - We have previously raised this with the LAA who acknowledged that it was inconsistent and should be addressed. Solicitors undertaking these cases sometimes have to wait for years until the end of the case in order to be able to pay experts they have instructed. As a result some are now finding that certain experts refuse to work for them.
    - An uplift for dealing with vulnerable clients; clients with disabilities, and those whose first language is not English and therefore an interpreter is required. It can often take at least twice as long to deal with these clients. Vulnerable people are being adversely affected by the Ministry's failure to recognise their needs and the additional time needed by the solicitors who represent them. This raises equality issues that may be actionable.

The Law Society

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