

## When is 15% not 15% ?

When the government announced that it was going to conduct an Independent Criminal Legal Aid Review there was the traditional, and well-earned scepticism around many in the profession who had experienced so many false dawns over their professional careers that they knew the government would find a way to snatch defeat from jaws of victory.

When the Criminal Legal Aid Review (as it was then known) was announced in December 2018 it was after the stellar work from the Law Society on heat maps had the government realising something was very wrong in the legal aid profession. What followed were meeting after meeting where newly appointed Civil Servants tried to understand the nature and scope of the problem and why the industry was literally and metaphorically dying. CLAR was it then was, was announced to much fanfare as the best way to provide the evidence base to allow proper discussions with the Ministers and the Treasury. The government said this :

*“The Criminal Justice System has transformed significantly in the last few years and our need to respond to this has, in some instances, been accelerated by the COVID-19 pandemic. We believe this is the right time to continue to consider how to build a more modern Criminal Legal Aid System that can adapt to the changing needs of defendants, practitioners and the criminal justice system of which it is such an integral part.*

*We remain committed to the sustainability of the criminal legal aid system now and in the future and to ensuring the criminal defence profession remains an attractive career proposition for future practitioners.”*

The professional associations including the CLSA, LCCSA and of course the Law Society made it plain from the outset that any review would take too long, and that urgent action as needed.

We were right.

CLAR became CLAIR and was split into the Independent Review and an internal review. We have heard very little on the latter, and as to the former, Sir Christopher was appointed, with the approval of the Treasury and government department, to review the sustainability of the Criminal Legal Aid sector.

His excellent report made the position plain :

*“I take the view that the Review is about much more than the remuneration of defence lawyers, it is also about the effectiveness of the CJS as a whole. The adversarial system of the CJS cannot function without the defence. If the providers of criminal legal aid defence were to fail or be substantially weakened, the CJS as a whole would grind to a halt, with obvious adverse consequences, not least in the context of reducing the backlog. Moreover, criminal legal aid does not merely support the defence: it is the cradle of many barristers who also prosecute, and of solicitors and others who later join the CPS, or other authorities who need criminal law expertise. Criminal legal aid also*

*provides the training ground for many who later become judges. The view has been expressed to the Review that, as it is, there are not enough criminal lawyers to go round.”<sup>1</sup>*

## What did the Review recommend ?

It is important to look at what Sir Christopher was asked to examine. The aim of the Review was :

- (1) To reform the criminal legal aid fee schemes so that they:
  - fairly reflect, and pay for, work done
  - support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce
  - support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer
  - are consistent with and, where appropriate enable, wider reforms
  - are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies
  - ensure cases are dealt with by practitioners with the right skills and experience
- (2) 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

The Report, in our view was excellent and was almost universally welcomed. The core recommendations, beyond changes to fee schemes were are follows :

1. an increase of 15% above 2019/20 spend plus the modelled increase resulting from the accelerated items. This increase in funding could be distributed in a number of ways to achieve the desired outcomes
2. a central recommendation that the funding for criminal legal aid should be increased overall for solicitors and barristers alike as soon as possible to an annual level, in steady state, of at least 15% above present levels, which would in broad terms represent additional annual funding of some £135 million per annum.
3. The report emphasises that the sum of £135 million is in Sir Christopher’s view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. It was not “*an opening bid*” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log.

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<sup>1</sup> Para 1.33 **Independent Review of Criminal Legal Aid**

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1041117/clar-independent-review-report-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf)

4. The report went on to say it *“no means exclude that further sums may be necessary in the future to meet these public interest objectives.”*

It is worth noting the report points out :

*“I emphasise that a sum of the order of a minimum of £100 million per annum does not necessarily put the criminal defence side “on a par” with the CPS in any precise sense. The private sector has to take risks and make investments. On that basis, one could legitimately argue for a higher sum than the minimum that I recommend. Moreover it is not certain that the sum I suggest will suffice. I consider £100 million to be no more than a minimum starting point, to be kept under review going forward”.*<sup>2</sup>

### Justice Select Committee

Sir Christopher’s report cannot be looked at in isolation – he also provided a detailed review in his evidence session before the Justice Select Committee on 18<sup>th</sup> January 2022 in which he said solicitors working in criminal legal aid are in a “parlous” state. Remuneration should be *“substantially increased as soon as possible”*. A 15% increase would *“be no more than a minimum starting point, to be kept under review going forward”*.

He said this to the Select Committee :

*“We have a situation where fees have remained unchanged for 14 years except to go down by 8.75%. Some fees have had no increase for over 30 years. The number of firms is in decline. It is very difficult to recruit new blood. There are almost no trainees. Duty solicitor schemes are in deep trouble in various parts of the country. There is evidence of deskilling in certain respects, particularly in trial preparation in the Crown court.”*

*“The private profession has fallen behind the Crown Prosecution Service in terms of the salaries it can offer and has therefore been losing a great deal of talent to the public prosecutor - that gives rise to a serious problem as regards the equality of arms.”*

*“In all those circumstances, there must be a serious question mark as to how long the private provision of solicitors’ services can feasibly continue.”*

He went on to say :

*“The solicitors have seen no increase in their fees and only cuts for as long as anyone can remember. If you are appearing in a London magistrates’ court, you will get less in cash terms in 2022 than you did in 1996. That must be a very unusual situation for*

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<sup>2</sup> Para 7.23 **Independent Review of Criminal Legal Aid**

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1041117/clar-independent-review-report-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf)

*those providing public services. And for all the reasons I've just mentioned, recruitment and retention is extremely difficult”*

## What is the Government Proposing ?

In Parliament, the Deputy Prime Minister said this :

*“Covid-19 has been exceptionally challenging across our justice system. We owe our whole legal profession—the solicitors, the barristers, the judges and the court staff—an enormous debt of gratitude for keeping the wheels of justice turning over the past two years. Thanks to their efforts, we are driving down the court backlog and returning to a more normal way of working—in the interests of victims, witnesses, and of course the wider public. I thank Sir Christopher Bellamy for his comprehensive and invaluable review, along with his panel of experts and everyone else who contributed their views.*

*As I said, this is a crossroads moment. Our legal aid system needs investment if defendants are to have access to the highest-quality advice and advocacy, and if we are to ensure a sustainable criminal legal profession right into the future. To that end, Sir Christopher made two headline recommendations in his review. **First, he proposed an increase of 15% in the various criminal legal aid fee schemes. I have accepted this in almost all respects**, except where it risks introducing perverse incentives—for example, if it were to be applied to the rate of pages of prosecution evidence.*

***Secondly, Sir Christopher recommended an overall increase in investment in criminal legal aid of £135 million. Our package of reforms, announced today, matches that recommendation.** As part of that, we will hold £20 million aside each year for longer-term investment, including reform of the litigators graduated fee scheme, the youth court, and the wider sustainability and development of solicitors’ practice, so that the system pays more, and more fairly, for the work actually done”<sup>3</sup> [emphasis added]*

## The Devil is in the Detail

It is with regret, but not surprise, that we have to state the detail suggests the Government’s proposals in practice fall well short of matching not only the modest ambition of CLAIR to provide the ‘minimum necessary’ to stabilise the patient, but the Government’s own rhetoric.

A review of the Impact Assessment<sup>4</sup> the proposals do not amount to a 15% increase.

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<sup>3</sup> Hansard, 15<sup>th</sup> March 2015,  
<https://hansard.parliament.uk/commons/2022-03-15/debates/0435F135-9CE7-45E1-9425-23AEB2B8B448/LegalAid>

<sup>4</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060348/clair-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060348/clair-impact-assessment.pdf)

For starters, the proposed LGFS changes amount to just 4%.<sup>5</sup> AGFS increases proposed amount to 15%.<sup>6</sup> LGFS income for most firms (and indeed as total LAA spend) is the largest single component of fee income. The 4% is less than inflation since the 2018 announcement which averaged 2.7% per year<sup>7</sup>. For the final 3 months of this year, the Office for Budget Responsibility forecasts inflation could hit 8.7%, and is currently exceeding 6%. In real terms, fee income has fallen by significantly more than the 4% since Review began. The government are therefore proposing and continued real terms cut in LGFS, far short of the 15% suggested.

As for Police Station, and Magistrates Court fees, the proposals amount to a 15% increase, but the total £135m figure proposed overall by Sir Christopher not achieved. In fact total fee changes amount to just £68m.<sup>8</sup>

*Table 7: Steady State General Uplifts Expenditure, excluding disbursements, £m*

	Total Baseline Spend	% Change	Steady State Costs based on:	
			2019-20 Volumes	2024-25 Volumes
<b>Crime Lower</b>				
Police	120	15%	18	20
Magistrate Court	100	15%	15	16
Prison Law	13	0%	-	-
Other – CL	1.4	15%	0.2	0.2
<b>Crime Lower total</b>	<b>235</b>	<b>14%</b>	<b>34</b>	<b>37</b>
<b>Crime Higher</b>				
LGFS	350	0%	-	-
AGFS	230	15%	34	44
VHCC – Litigators	0.5	15%	0.1	0.1
VHCC – Advocates	2.3	0%	-	-
Court of Appeal	2.4	15%	0.4	0.4
Other – CH	5.3	0%	-	-
<b>Crime Higher total</b>	<b>590</b>	<b>6%</b>	<b>35</b>	<b>44</b>
<b>Total</b>	<b>825</b>	<b>8%</b>	<b>68</b>	<b>81</b>

The balance of increased spent to the announced £135m comes from increases to the PDS budget, training grants, and expert fees (whilst the latter is welcome, it does nothing to help sustainability and cannot reasonably be said to be part of the solution Sir Christopher had in mind given he expressly referred to provider income and not legal aid spent) and an increase in volume which will follow by 2024/5 as a result of extra sitting days. This is in our view not as envisaged by the Review and is frankly disingenuous of the Government to suggest otherwise.

Taking into account changes, expert fees a nominal £2.5m in training grants, the total spent increases by £97m, and even with the additional anticipated volume, to just £115m.<sup>9</sup>

The total package is worth 9%, not 15%. And not £135m.

<sup>5</sup> Table 3, Impact Assessment

<sup>6</sup> Table 4, Impact Assessment

<sup>7</sup> <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator>

<sup>8</sup> Table 7, Impact Assessment

<sup>9</sup> Table 2, Impact Assessment

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060348/clair-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060348/clair-impact-assessment.pdf)

Table 23: *Estimated percentage change in fee income, by specialisation in crime*

<b>Criminal specialisation</b>	<b>Percentage change fee income, from Option 1</b>
No / little criminal work	10%
Some criminal work	9%
Mainly criminal work	9%
<b>Total</b>	<b>9%</b>

### Government's Reply : A Report Card

Our members are well used to KPIs in their day to day dealings with the red tape production factory based at Petty France, so in the interests of setting out 'score' the government has achieved with its proposals we set out below each of the recommendations as a Key Performance Indicator.

<b>KPI</b>	<b>Grade</b>	<b>Comment</b>
<b>Aims</b>		
(1) To reform the criminal legal aid fee schemes so that they:		
<ul style="list-style-type: none"> <li>fairly reflect, and pay for, work done</li> </ul>	FAIL	Must try harder
<ul style="list-style-type: none"> <li>support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce</li> </ul>	FAIL	Must try harder
<ul style="list-style-type: none"> <li>support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer</li> </ul>	D	Needs to apply itself in future. Lacking in focus.
<ul style="list-style-type: none"> <li>are consistent with and, where appropriate enable, wider reforms</li> </ul>	D	Needs to apply itself
<ul style="list-style-type: none"> <li>are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies</li> </ul>	C	Some improvement, needs to apply itself better

<ul style="list-style-type: none"> <li>ensure cases are dealt with by practitioners with the right skills and experience</li> </ul>	D	No concrete progress made since last report
2) To reform the wider criminal legal aid market to ensure that the provider market:		
<ul style="list-style-type: none"> <li>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</li> </ul>	D	Needs to apply itself
<ul style="list-style-type: none"> <li>operates to ensure that legal aid services are delivered by practitioners with the right skills and experience</li> </ul>	E	Must try harder
<ul style="list-style-type: none"> <li>operates to ensure the right level of legal aid provision and to encourage a diverse workforce</li> </ul>	Fail	Must try harder
<b>Recommendations</b>		
1. an increase of 15% above 2019/20 spend plus the modelled increase resulting from the accelerated items.	FAIL	9% < 15%.
2. in steady state, funding increase of at least 15% above present levels, which would in broad terms represent additional annual funding of some £135 million per annum.	FAIL	Not good enough. Target missed
3. The report emphasises that the sum of £135 million is in Sir Christopher's view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect.	FAIL	Not good enough. Target missed.
4. The report went on to say it <i>"no means exclude that further sums may be necessary in the future to meet these public interest objectives."</i>	FAIL	No guarantees of any future funding or any sense that further changed beyond £20m might be available.  Must try harder

## Conclusion

By its own admission, a 15% increase was the minimum necessary to stabilise the ailing legal aid profession. The government's proposals amount to just 9%, and that appears to a 'final offer'. This will do nothing to help achieve the aims of the Review. Firms will remain uncompetitive compared with the CPS, the brain drain will continue, and more and more firms will disappear from our High Streets across the land, whether that be because they cannot afford to continue, or because they will have lost their staff to the CPS. Sir Christopher saw this a genuine equality of arms problem. He was right: the government are failing to deliver on a basic premise of a democracy and the rule of law, a basic human right – parity with the Crown. The impact? Reduced access to legal advice, increased waiting for justice for witnesses, defendants and victims alike, and a backlog which will be going up and not down.

A government committed to free enterprise, and more still, to levelling up, cannot and should not be presiding over who swaths of advice deserts.

It must do better. Actions must show the ambition of the spin.

In the meantime, we will continue our regular meetings on our members behalf with the Bar, and in particular, the Criminal Bar Association about how we can jointly support each other in making plain the government's proposals simply do not begin to tackle the scale of the problem.

## When is 15% not 15% ?

The answer appears to be : 'when it is announced in Parliament'. The package, as proposed is worth closer to 9%, which means it fails even to keep in line with inflation since the 2018 CLAR announcement.