BIRMINGHAM LAW SOCIETY

one profession • one region • one voice

Response to the Government Consultation on the Criminal Legal Aid Independent Review

June 2022

Response of the Criminal Law Committee of the Birmingham Law Society to the Government consultation on the Criminal Legal Aid Independent Review

This response has been prepared by the Criminal Law Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Criminal Law Committee, whose members are specialist lawyers practising in all aspects of the criminal law and are from all branches of the legal profession.

Executive summary

In December 2018, Sir Christopher Bellamy was appointed by the then Lord Chancellor to lead an independent review of criminal legal aid (CLAIR). His final report was published in November 2021. Its central recommendation was that funding for criminal legal aid should be increased, as soon as possible, to an annual level of 15% above present levels. He states:

> *1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as "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. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.*
>
> *1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that. There is in my view no scope for further delay.*

It is clear from the context of his report that the minimum funding increase to which he refers relates to the legal aid fees received by solicitors and barristers: at 7.17, for example, he refers to 'sufficient funding to enable criminal legal aid providers to offer salaries at approximately the same level as the CPS.'

This central recommendation was welcomed by us, and indeed by most practitioners and representative bodies, reflecting as it did our serious concerns about the sustainability of the criminal legal aid market, and the profound constitutional impact of the failure of that market.

We anxiously awaited the Government's response to CLAIR, which came nearly four months later, on 15/03/2022. This response takes the form of an extensive consultation document, which sets out the various proposals to which we now respond.

In our view, it falls significantly short of addressing CLAIR's central recommendation: rather than a 15% increase in legal aid funding, its impact assessment predicts an average 9% increase in the fee income received by criminal legal aid firms. It is self-evident that such a modest increase in fee income will not enable private providers to offer competitive salaries to the CPS, nor will it be sufficient to incentivise and enable them to bring in the extensive changes that are recommended to improve the efficiency and effectiveness of the criminal justice system.

In addition to falling short of the minimum amount recommended by CLAIR, the Government's response does not appear to reflect the urgency with which the funding increase is required: to delay the funding increase while a raft of other proposals for wider reform are considered and consulted upon does not appear to us to be within the spirit of CLAIR's recommendation.

Regrettably, our assessment of the Government's response to CLAIR's central recommendation is that it is too little, too late.

An Advisory Board

1. **Do you agree with our proposal for an Advisory Board? Please give reasons for your answers.**

   We agree with the proposal for an Advisory Board in principle, for the same reasons given by Sir Christopher Bellamy, chiefly:

   - The lack of a current forum which hears and considers the views of all criminal justice system (CJS) stakeholders at a national level;

- The ability of such an Advisory Board to consider, in an holistic way, issues of CJS unmet need, funding and sustainability, and to advise Government and inform changes to the CJS from that perspective;

- The ability of such a Board to provide advice, formulated in conjunction with all CJS stakeholders, to the Ministry of Justice (MOJ), to better inform CJS policymaking.

We take the view that an Advisory Board would also prevent or mitigate the "divide and conquer" approach, adopted by successive governments in the past, of using bilateral discussions between Government and, separately, the Bar and solicitors, to hinder meaningful reform of criminal legal aid funding.

2. Do you have any views on what the Advisory Board's Terms of Reference should cover?

We propose that the terms of reference of the Board should build on the terms of reference provided to Sir Christopher Bellamy in his independent review. The Board should be charged with ensuring that the implementation of proposed fee changes arising from the review and future proposed changes to funding meet the following objectives:

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

Crucially, in our view, the Advisory Board must have the ability to advise on funding increases, including inflationary increases. The Advisory Board should have real "teeth" to advise on changes without the need for lengthy consultation. These recommendations would enable Government to be more agile in responding to funding issues, and hopefully avoid the need for crises, such as the one leading to CLAIR, occurring in future.

3. **Do you believe existing criminal justice system governance structures (such as the National Criminal Justice Board) could be utilised so a new Advisory Board was not required? Please outline your reasons.**

   The National Criminal Justice Board (NCJB) is chaired by the Lord Chancellor and has as permanent members the Secretary of State for the Home Department, the Attorney General, and relevant Minsters of State. The Chair of the Bar Council and Law Society Justice Lead are only invitees of the NCJB, rather than full members. As such, we take the view that the NCJB is unsuited to carry out its proposed function of formulating and providing *independent* advice to government on CJS issues, with input from the professions. We take the view that a truly independent Advisory Board should not have any permanent member drawn from the current government; it should have permanent members drawn from the two representative bodies; further, given the identification of regional disparities in CJS coverage and effectiveness, it should have representatives from the regions as invitees or full members. To ensure appropriate breadth of representation it submitted that the Board should contain practitioners from a range of practice types, not simply one representative from The Law Society and one from the Bar Council.

Consultation Questions- Unmet need and Innovation

4. **What are your views on our proposal to expand the PDS on a limited basis to provide additional capacity (and how much capacity) where the criminal legal aid market has potential unmet need, risk of markets failing or being disrupted or could possibly**

provide greater value for money – for example to provide remote advice in police stations, particularly in rural areas and to have a presence in the market for in more VHCCs?

The PDS is an experiment that has failed in England and Wales. It is a more expensive proposition than private legal aid providers. Its operational effectiveness is demonstrably poor, lacking the value for money, flexibility and independence of both the Bar and solicitors in private practice. The failure of the experiment is demonstrated by the withdrawal of PDS offices with resulting redundancy of staff in all bar a few remaining areas in England and Wales.

CLAIR itself (at para 7.5) found that the expansion of the PDS "*would have major constitutional, practical and cost consequences which could not be adequately considered in this Review*". Further, in the same paragraph, "*no response to the Call for Evidence and no interested party advocated [a move to the PDS], nor suggested that the present small-scale PDS should be expanded.*" It is surprising, then, that the Government has turned in the first instance to expansion of the current PDS.

In the now distant past, when criminal legal aid was properly remunerated and was wholly undertaken by private providers, there was no talk of unmet need or advice deserts. We take the view that the expansion of the PDS in any form is an unnecessary and fruitless diversion of funding that would be better spent on increasing remuneration to private legal aid providers. We believe that the best way of avoiding unmet need is to urgently and properly reform the criminal legal aid system to ensure that there is a viable market for private legal aid providers, including, where appropriate, regional variations in the funding scheme to ensure that there is a market for the provision of legally-aided services in all parts of England and Wales.

We note that successive governments have striven to increase the funding and reach of the PDS whenever the threat of "industrial action" on the part of the Bar and solicitors in private practice rears its head. Accordingly, we cannot help but view with suspicion the Government's proposal to increase PDS funding at this time, when again the professions are threatening (and indeed taking) action to urge reform of the funding system.

5. **What are your views on the benefits and disadvantages of requiring a provider to have a physical office to be a member of a duty scheme? What do you consider to be the most viable options for a future delivery model?**

The recent pandemic has caused all involved in the criminal justice system to review the method of providing services. Existing providers both in firms of Solicitors and Chambers have reacted to the difficulties of the pandemic with significant innovation. That innovation was embraced by HMCTS but sadly did not find enthusiasm or support from the NCCP.

As providers were required to close their offices and move all staff to remote working, it became apparent that office premises had become an unwelcome cost which provided little if any benefit. Many providers have come to reflect that, if it were not for the requirement that they have a fixed office in the location of the duty scheme, they may not have continued with the use of premises obtained prior to the pandemic.

The time has come to remove the requirement and replace it with a more flexible approach to provision of services to clients. The key is that clients are provided with the means to have independent and confidential advice, in a format which suits their needs. Many clients have embraced the opportunity to attend appointments by secure video link and to avoid the costs attendant on travelling in to the offices of firms or to meet barristers in person in chambers.

The abandonment of remote working by police forces in England and Wales has seen a return of advisers to the police station to advise in person. Many solicitors remain of the view that in person advice is preferable. As it is not expected that the Police will embrace technological advance it is likely that firms will remain situated close to the location of the police stations where they must attend. We do not therefore share the fear that removal of the requirement to have an office in the duty scheme will see a disproportionate dilution of schemes. The fees paid for attendance already disincentivise travel and firms are penalised by the waiting time caused by other parties, which is outside their control.

The removal of the requirement will enable firms to provide flexibility in provision of representation, without undermining the provision of legal advice. An alternative would be to limit the number of entrants to schemes where the Legal Aid Agency is satisfied that there is sufficient provision from firms already taking part in the duty solicitor scheme in an area.

6. **Do you have any views on how non-traditional forms of provider and new ways of working such as holistic models and not-for-profit providers might best play a part in the criminal defence market?**

   The present position is that the requirement of compliance with multiple regimes of regulation from the SRA, Legal Aid Agency and Lexcel makes the area of work unattractive to non-traditional forms of provider. The regulatory burden is significant. We are not aware of any not-for-profit organisation currently providing services in this area. The failure of the PDS to provide a cogent service at a cost acceptable to the Ministry of Justice or Treasury highlights the difficulties facing the not-for-profit sector. We are not aware of any holisitic model which provides an advantage over the independence of providers in private practice and at the Bar. We are not aware of any charity which proposes to enter the market, or how they would compete with existing providers to maintain financial viability.

Consultation Questions- Training and Accreditation Grant Programmes

7. **What are your views on a training and accreditation grant programme? How can it make it more attractive to pursue a career in criminal defence?**

   We welcome any effort to encourage existing providers to take on new trainees, or to encourage new entrants into the field of criminal practice. Any government contribution towards the salary of trainee solicitors would therefore be a positive move. We see merit in targeting this to encourage young lawyers from underrepresented groups into the profession.

However, CLAIR rightly identifies that the major driver for recruitment and retention for solicitors is the ability of firms to pay salaries broadly similar to the CPS. To preview our comments below, the Government's recommended fee changes fall far short of meeting that goal, with the result that criminal practice remains an unattractive and unremunerative proposition.

There appears to be little point in introducing training grants until fee income becomes sufficiently attractive to entice new entrants to the profession, and retain existing solicitors – and then, of course, such grants might not be necessary.

It is dispiriting to reflect that, on entrance to University, the vast proportion of undergraduates studying law express an interest in criminal law. By the point of completion of undergraduate studies that number has dwindled. Universities providing the post graduate courses note the diminishing uptake in modules directed at specialism in criminal advocacy and litigation. The pool of potential graduate candidates for employment has been diminished by the realisation of the extraordinary demands of criminal litigation in practice, its impact on work life balance, the ageing demographic of lawyers specialising in the field and limited financial prospects. Simply put grants may assist candidates to qualify in this field but will provide no assurance to firms or chambers that having qualified they will be retained within the Criminal Justice System.

In recent years there has been recognition that the Crown Prosecution Service was under-resourced and struggling to keep pace with the demands of receipts from Police forces in the jurisdiction, or to service the requirements of the disclosure regime. The injection of funding that followed enabled the Crown Prosecution Service to expand its numbers but in most areas at the cost of private practice. Firms which had spent significant resources and undertaken the risks involved in employing and training solicitors experienced attrition of newly qualified to five-year qualified solicitors, who left to join the Crown Prosecution Service. The attrition was particularly marked in female colleagues, perhaps given the additional attractions of flexible and home working offered by the public sector when compared to private practice. Firms attribute the loss of staff to a failure by successive Governments to review fee levels,

a succession of cuts to funding in real terms, the narrowing of profit margins, increased financial risk and the consequent stagnation of the salaries of employed staff. Firms found themselves insufficiently funded to compete with the Crown Prosecution Service to retain staff tempted away from defence work by higher salaries. Unless the imbalance is rectified it threatens a constitutional crisis which notwithstanding its needs has been recognised by the Crown Prosecution Service. Chief Crown Prosecutors in the Midlands area advocate for a robust defence community with which to engage to ensure that justice is served.

8. **How can the Government best support solicitors to gain higher rights of audience?**

The Government can best support solicitors to gain higher rights of audience by ensuring that firms are financially secure and consequently able to invest in their ongoing development. In the aftermath of earlier funding changes which were perceived as favouring the Bar many firms increased their involvement in higher court advocacy. We expect that trend to continue if the Government distributes funding increases in a manner which favours the bar at the cost of firms.

If firms are appropriately funded, they have the means to expand, employ a larger staff and employ specialist advocates (whether solicitors with higher rights of audience or barristers). The expansion of firms has been limited by successive cuts, increased regulation, increased risk and uncertainty arising from short term contracts and contract extensions.

Consultation Question- Investigating disparity in barristers' income

9. **In your experience do you consider that it is the case that female barristers are more likely to be assigned lower fee cases, such as RASSO? Do you have any evidence to support this?**

There is a perception among some defendants that they are better served by instructing a female advocate when charged with rape and serious sexual offending.

It is not a belief understood to be held by firms or barristers' clerks. Because of the specialist skills required to do RASSO work, and the driver of defendant preference for female advocates, we are aware that some female barristers find themselves "stuck" with a heavily RASSO-based practice. We have no evidence to suggest that female advocates, whether barristers or solicitors, are allocated cases, RASSO or otherwise, because of the lower fees paid. However, the complexity and gravity of such cases is significant and calls for review of the fees to ensure that they reflect this work type.

Diversity

10. Would training grants for criminal legal aid firms in your view help with recruitment and retention issues? If yes, how could such an initiative best be targeted to support diversity?

The sector attracts recruitment from a very broad base of applicants. Firms in this sector demonstrate significantly higher levels of diversity than equivalent practices in other fields of law in the same geographical area. This in part reflects years of stagnation in fee income such that only those truly committed to a career in the criminal justice system tend to apply. This is reflected in the protected characteristics of applicants.

Training grants and improvement in funding will undoubtedly assist firms to expand. solicitors and barristers in the field understand the business case for diverse recruitment and the potential to aid social mobility. Firms and chambers aim to reflect the community they serve but are stymied by the diminished pool of applicants who remain interested at the point of completing their post graduate studies. Applicants would no doubt be assisted in overcoming the financial barriers to qualification. The cost of obtaining the academic qualifications required is high, with no guarantee of employment. The current reality for successful applicants is a long period of paralegal employment following the attainment of academic qualifications before they can obtain pupillage or traineeship.

11. What do you think the government can do to improve diversity within the independent professions?

We refer to the answers given above. The barriers to social mobility are exacerbated by the limited numbers of pupillage and traineeship on offer due to the financial circumstances of firms and limited income at the junior bar in this sector.

12. What do you think the professional bodies can do to improve diversity within the independent professions?

For the reasons given above, we believe the solution to improving diversity in the profession starts with Universities, rather than the professional bodies themselves. The Law Society and the Bar Council both aim to promote diversity through their work, but ultimately there must be qualified entrants to the profession from Universities. As we state above, the career itself must be attractive (principally, financially attractive) to students, to incentivise entrants from diverse backgrounds.

13. What evidence do you have of barriers different groups face in forging careers in criminal defence work generally?

The barriers facing lawyers are exacerbated in areas reliant on public funding streams. There is a well observed attrition of women at the Bar and from firms. That reflects in part the demands of the work which involves unsocial hours, high risk, a high degree of commitment and limited financial reward. Many in the sector report it to be a struggle to make the work compatible with family life or a sensible work-life balance. Research by the University of Birmingham Law School (Lee, R G, forthcoming, 'Lost to Law: Why Women Leave the Legal Profession') concludes that, across the legal profession, women form a sizeable majority of those entering the profession but are disproportionately under-represented at the top of the profession, and instead leave the profession at an earlier point than men. The research concluded that women face challenges including struggles between life and work, lack of support, and excessive

workloads often alongside other caring responsibilities. This is likely to be felt even more acutely in criminal law, due to the demanding nature of the work and the frequently antisocial hours and large workloads compared to some other areas.

14. **What evidence do you have of other barriers women face in working within duty schemes beyond those identified? How much of a difference would an increase in remote provision of advice make to improving the sex balance? Is there anything else we should be trialling to address this?**

The pandemic provided the opportunity to trial remote working in various aspects of the Criminal Justice System. Women and indeed all those with caring obligations benefited from the flexibility which arose from remote working. This continues to be particularly successful in relation to advocacy in the courts. The retention of remote means of appearance will no doubt assist all those affected to approach work with a degree of flexibility.

We are less convinced that remote working is as effective in relation to representation of suspects detained at the police station. Where police forces provided video link facilities for conferencing and interview it was clearly preferable to attendance limited to telephone contact. Although West Midlands Police had access to technology enabling solicitors to be produced into the custody environment by video link it was rarely used. Attendance by telephone was problematic given the limited connectivity possible in many custody environments. Where the suspect represented had complex needs (youths, clients with poor mental health, language barriers or the need of an appropriate adult) remote attendance commonly proved unsatisfactory. There is no doubt that more could be done by other agencies in the Criminal Justice system to support remote attendance. The stance of the NPCC during the pandemic and withdrawal of support was disappointing, though no doubt reflected limitations in police resource.

15. **What do you think might be driving the disparities in income in the criminal Bar noted by the review? What evidence do you have to support this?**

We do not believe there is any local data on gender income disparity at the criminal Bar. The data published by the BSB and Bar Council in late 2020 shows a gender pay gap in criminal legal aid work which shows women in criminal law earning around 39% less than men. The data is unfortunately skewed by the comparative lack of senior women at the Bar, which itself points to a significant problem.

16. **What more in your view could solicitor firms and chambers do to support those from diverse backgrounds embarking on careers in criminal defence?**

Locally, we do not believe that the issue is with firms and chambers failing to support diversity among entrants to the professions. The issue is with the lack of positions available at all, for the reasons given above.

Consultation Questions- Quality Issues

17. **How can the Government assist the professions to review the balance between the various quality measures to minimise the administrative cost while ensuring quality is not compromised? Do you have any views on this?**

We recognise that quality assurance is crucial to the integrity and reputation of solicitors and barristers. However, we believe that the current quality assurance arrangements place an undue burden on providers, which further reduce the profitability of the provision of legal aid criminal advice and representation. The combination of LAA audit, duty solicitor accreditation compliance, supervisor compliance, Lexcel/SQM (required under the criminal contract) and peer review places a significant unpaid regulatory burden on solicitors' firms, which diverts solicitors and staff away from fee-earning work.

We welcome an approach which seeks to reduce the regulatory burden of quality assurance, while maintaining standards. We advocate the return to recognising the work of firms to attain and maintain quality standards by ongoing internal file review. In the past that work was recognised as beneficial to firms and clients alike and was remunerated. We propose the return of payment for this element of compliance as part of the process of review and preparation of cases. Firms should be encouraged to engage in meaningful and robust review of casework by senior staff to the benefit of junior colleagues, not disincentivised as is presently the situation.

18. **How can the Government best design the qualification criteria for any Lord Chancellor's lists of criminal defence advocates to ensure that listed advocates are incentivised toward quality control, professional development and consistent availability for work?**

    Not responded to.

Technology

19. **How and to what extent does remote technology, including remote technology, support efficient and effective ways of working in the criminal justice system? support the interest of justice, including efficiency?**

    We have cautiously welcomed the use of remote hearings in appropriate cases – that is, in cases involving adult defendants with no mental health or communication difficulties, or in other cases where the defendant is not required to attend court. Our note of caution is occasioned by the fact that the sudden move to remote hearings during the COVID-19 pandemic cut short the opportunity for any proper academic research on the effects of video hearings on engagement and sentence type/length: we urge the government properly to commission such research and be guided by its findings.

The efficiency benefits of remote hearings are in reducing travel time (which is unremunerated under the current scheme) and enabling other work to be done from home/office/another court centre while waiting for cases to be dealt with.

There remains scope for remote attendance at prisons, police stations during the investigation process and court hearings at all levels with a view to reducing wasted travel, waiting and expense in disbursements.

The Criminal Justice System could benefit from standardised practices in some areas (such as all prosecutors being able to attend remotely for sentencing hearings), rather than allowing local areas to have different rules. Likewise, there should be no reason why Plea and Trial Preparation Hearings for adult defendants in the Crown Court could not be done remotely by defence advocates, so long as a conference had been held with the defendant client beforehand and there were none of the communications difficulties identified above.

There has been limited research to date into the impact of use of remote technology on defendants, particularly those detained in custody pending the outcome of their case. Our experience is that some defendants disengage from the process when produced to court remotely and there can be a perception that the hearing is taking place between a group of lawyers without reflecting the needs or input of the defendant. That perception is exacerbated when defendants are muted to avoid interruption to proceedings, or where the perception of the judiciary is that they should take part only through their advocate. Although all parties have sympathy for the judicial view when defendants are produced in person there is greater opportunity for consultation, even at the back of the court, than when produced by live video link. By necessity conferences with the defendant by remote means before hearings are limited in time. There is no means to have a conference directly after the hearing in the majority of cases.

We welcome the continuing use of remote technology in the Criminal Justice System, subject to the caveats and concerns raised above. All parties would be assisted by a consistency of approach between different court centres and flexibility.

Pre- Charge Engagement- Preparatory Work

20. Do you agree that the proposal under scenario 1 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.

We agree in principle that the Scenario 1 proposal would allow preparatory work to be paid fairly, in that it would permit pre-PCE preparation to be claimed along with the PCE where there is subsequently an agreement to engage in PCE. This seems a fairly uncontroversial suggestion. However, we take the view that the rates of payment are too low to encourage any practitioner to undertake PCE work.

21. Do you agree that the proposal under scenario 2 would allow preparatory work to be paid fairly? Please explain the reasons for your answer.

We agree in principle that the Scenario 2 proposal would allow preparatory work to be paid fairly, in that, where PCE does not go ahead, providers could claim for pre-PCE preparation upon the provision of evidence justifying the preparatory work. Again, this seems a fairly uncontroversial suggestion: the file note or other evidence explaining the need for the preparatory work to be done would ordinarily be recorded in any event. We note that some existing funding structures (Appeals & Reviews, Prison Law, freestanding advice & assistance) require engagement with the LAA over the extension of an upper funding limit. However, we repeat our view that the rates of payment are far too low to encourage practitioners to undertake PCE work.

22. Are there any other factors, beside remuneration that limit practitioners from carrying out PCE? Please explain the reasons for your answer.

We recognised the potential benefits of PCE and fully support the establishment of a system that encourages the parties to identify and resolve issues prior to charge.

The Chair of this Committee addressed the Regional Disclosure Forum recently on the topic of PCE. It was notable that the attendees at the forum, including senior police officers and prosecutors, were aware of the encouragement to use PCE in the Attorney-General's guidelines, and could see the benefits of doing so, but it was clear that there were no policies in place to ensure that steps are being taken to engage with defence practitioners at the investigation stage, and no standard practice had developed as to how to engage.

Despite the existing PCE funding regime being in place since June 2021, we believe that the take-up of PCE work by providers locally is virtually nil. Anecdotal evidence from our members suggests that the principal reason for this is the poor level of remuneration for PCE work, but also the following:

- Not simply that the work is poorly remunerated, but that the aim of the work is to avoid or reduce the more lucrative payments that might flow from proceedings in due course – the practitioner is in effect being invited to do work that is poorly paid in order to try and avoid the need for, or shorten, a criminal trial, in the knowledge that a trial is the only profitable element of the process. This is of course a perverse incentive, and one which must be addressed in the proposed wider review of the funding scheme.

- The lack of ownership of cases on both sides: police/prosecution and defence, at the investigation stage.

- A sense by defence practitioners that PCE will not be effective, and that any representations made will be ignored by the police/CPS.

- The long drift of cases at the investigation stage, with suspects released pending investigation for months or years without an outcome or meaningful progress report. This state of affairs cannot be conducive to engagement of any sort.

- Sensible pre-charge engagement requires an appropriate level of disclosure to enable practitioners to obtain instructions and identify areas for investigation.

All too often disclosure in the sorts of cases where PCE would apply is strategically limited, placing the suspect and his/her advisor at a disadvantage.

23. In our Impact Assessment we have indicatively assumed that preparatory work would be paid at an average of two hours per case with an uptake of up to 6% (or up to 32k cases). Do you agree that these are reasonable assumptions? Please explain the reasons for your answer.

As stated above, our experience locally is that there has been virtually no take-up of PCE on the part of either the defence or the prosecution/police. We do not know the basis on which Government has proposed these figures but suggest that they cannot be more than a wild guess. If PCE is properly incentivised, we can see that it would be of benefit in many cases: serious fraud, involving consideration pre-charge of financial and accounting material; sexual and domestic abuse offences, for example, involving disclosure and consideration of relevant phone communication, or third party records; offences involving youth suspects or suspects with mental health or neurological conditions, where expert evidence may need to be obtained to inform relevant public interest considerations. It is of note that in all of the above suggested cases, two hours is likely to be insufficient even to begin the PCE process.

Pre- Charge Engagement- Sufficient Benefits Test

24. Do you agree with the proposed amendments to the 'Sufficient Benefits Test'? Please explain the reasons for your answer.

We agree in principle – preparatory work should be claimable where it is undertaken to determine whether it would be beneficial to the client to undertake PCE under one of the categories identified in the Attorney General's Guidelines.

25. Do you have alternative proposals for amending the 'Sufficient Benefits Test' under scenario 2?

No.

26. Do you think paragraph 4 of Annex B of the Attorney General's 'Guidelines on Disclosure' also reflects the type of preparatory work likely to be undertaken ahead of a PCE agreement?

Broadly, yes.

27. Are there any other types of preparatory work that you think should be funded prior to the PCE agreement?

We would add:

- Making representations on behalf of the suspect regarding the evidential or public interest charging tests.
- Seeking pre-charge disclosure on behalf of the suspect of material held by the police.
- Seeking defence expert material in cases in which representations as to public interest are based on the suspect's fitness to plead or stand trial.

Investment in Police Station Fees

28. Do you have any views on our proposal to increase police station fees by 15%?

CLAIR recommended an immediate increase in fee income to providers of at least 15%, or £100million+ annually. CLAIR considered this the bare minimum necessary to stabilise the profession.

From the Government's proposals to increase fee income across the spectrum of criminal work, it is clear that what is being suggested does not amount to a 15% increase globally, nor anything approaching £100million.

The Government's own impact assessment envisages a £68million investment in fee income based on 2019-20 volumes, and an £81million investment based on projected 2024-25 volumes – we note the latter is far from an 'immediate' increase, and in any event still falls far short of the minimum recommended now.

Annex B of the CLAIR Impact Assessment confirms that, for nearly every firm practising crime, the increase in fee income from the proposals will be 8-9%. Here in the West Midlands, the increase will average 9%. This is clearly significantly less than the minimum investment urged by CLAIR.

On the Government's own analysis, therefore, the suggestion that it is following the recommendations of CLAIR is wrong.

The principal reason for this is the Government's refusal to recommend an immediate 15% increase in LGFS fees across the board, including initial fees, PPE and trial length proxy payments. The rationale for this is that such an increase will exacerbate the perverse incentives inherent in the LGFS scheme. That may be so. However, that system, with its perverse incentives, has been in place for many years, and for most solicitors' firms represents the largest share of their fee income. This is why, by refusing to increase it in the immediate term, the net increase in fee income to firms is estimated at only 8 or 9%. The solution appears to be either to immediately increase all LGFS fees by 15%, along with other fees, pending wider structural reform of the system, or to increase other fee income by significantly more than 15% so that the global projected fee income, based on current caseloads, amounts to 15%.

Further, we have concerns that at the time of writing the 15% recommended by CLAIR is no longer enough to stabilise the market. The rate of inflation currently stands at 9%, and is expected to significantly exceed 10% by the end of the year – the Institute of Fiscal Studies predicts a 14% rate following the increase in the energy price cap. When CLAIR was commissioned in 2018, the inflation rate was just over 2%. Although

we do not have the data or expertise to provide a detailed analysis of the ramifications on this for providers, it seems to us common sense that an increase of 15% to criminal legal aid fees will be insufficient to fund the improvements envisioned by CLAIR; we fear that, rather than energise the market, an increase of 15% will simply slow the rate of market failure by the time these proposals are put into effect.

We urge the Government to do at least the bare minimum recommended by CLAIR to stabilise this failing market, and to give serious consideration to a higher increase that would offset the increased rate of inflation since CLAIR was published.

We make the further observation that the hourly rates used in many cases as a metric for calculating fixed fees have fallen below the hourly rates applicable even to other publicly funded work such as family work. We urge the Government to increase these hourly rate to at least match those paid under other publicly-funded schemes.

Specifically in relation to police station fees, the 15% increase does not reflect the weighting of the fee increase towards the police station stage, recommended by CLAIR (at para. 8.18).

Standardised Police Station Fees

29. If we were to pursue option 1, what features of a case do you think should be used as an indicator of complexity: (a) time spent; (b) case type – e.g. theft, murder; (c) case type – e.g. summary only, either way; indictable; (d) anomalous complexities – e.g. vulnerable client, drugs problems; (e) a combination of the prior; (f) other? Why?

We recommend time spent be used as the principal indicator of complexity, as this tends to be the single biggest indicator that a case is complex. However, we agree with CLAIR that this would be insufficient to attract experienced and skilled representatives to deal with cases which, although shorter, have additional complications such as vulnerable clients or which have particularly serious implications for the client. Historically, duty solicitor cases were remunerated at

differing rates depending on whether the offence was indictable only or not. A return to a scheme which remunerated particularly serious cases such as murder or rape at a higher rate than less serious cases would encourage appropriately experienced practitioners to deal with those cases at the police station.

30. **Would you need to change your current recording and billing processes in order to claim for standardised fees which are determined by reaching a threshold of 'time spent' on a case?**

    No. Providers are already required under the contract to record attendance time accurately in police station cases.

Both options for police station structural reform

31. **Do you agree we should explore the types of structural reform proposed above, within the same cost envelope, in order to more accurately remunerate work done in the police station?**

    We agree in principle with exploring structural reform to the police station fee scheme, and indeed our members gave evidence to the CLAIR roundtable to very similar effect. CLAIR, rightly in our view, concluded that police station work is too important to be treated as a 'loss leader' and that the current fee scheme is unremunerative and fails to attract appropriately skilled fee-earners to police station work.

    The objection we have to this proposal is that the structural reform should only be considered "within the same cost envelope". For the same reasons we give for PCE, above, if the aim of the funding scheme is to incentivise early engagement, including PCE, then it must be at least as financially attractive, on a pro rata basis, as trial work. A 15% uplift in the police station fixed fee, or any restructuring of the system to provide an increase broadly in line with 15%, is not going to incentivise that sort of quality engagement at the start of an investigation. A 15% increase in the standard

police station fixed fee, which may cover several interviews and/or hours of attendance on a vulnerable client, is still worth less than an hour's work for a partner on locally-approved guideline rates.

32. If you agree we should explore this reform, which option (1 or 2) do you think would better achieve the aims of better remunerating work done by differentiating case complexity, while reducing administrative burden? Why? Do you have any other ideas for reform?

We would prefer Option 1, as Option 2 does not sufficiently reflect the other complexities that require more skilled and experienced representatives at the police station.

33. To enable any structural reforms, we would need to collect a substantial amount of information from providers about time spent and other case features. As a provider, would you be able to provide this information from your existing systems, or by adapting your record keeping? Are there any particular barriers you foresee in providing this information reliably?

We are unsure as to why the Government believes that provider data on time recording and other case features may not be reliable. Providers have been required for years to keep accurate data in respect of all cases, notwithstanding that cases are largely remunerated by way of fixed fees. The LAA generally reviews these records on audit. There is often a disconnect between what providers accurately record by way of time spent, and what time the (unqualified) LAA assessor thinks ought to have been spent, but that is not the same as saying that the time recording is not reliable.

We are confident that providers will be able provide the information sought. We are concerned that providers are not subjected to yet further unfunded regulatory demands which are costly in terms of time better spent representing clients.

34. Do you think that the lower fee (under either option 1 or 2, either the lower standard fee or the fixed fee respectively) should account for 80% of cases? Why?

Not responded to.

Practitioner Seniority and Harmonisation of Fees at Police Stations

35. How could the police station fee scheme be reformed to ensure complex cases get the right level of input by an adequately experienced practitioner?

In order to attract the right level of input from adequately experienced practitioners the fee scheme needs to reflect the seniority of the person in attendance. In past schemes distinction was made when a duty solicitor attended a suspect detained for an indictable offence. Whilst the fees provided did not provide a suitable level of remuneration it provided some assistance to firms when fielding qualified solicitors and partners to undertake such work. In the VHCC scheme there has long been recognition of different rates of pay applicable to A, B and C category fee earners, enabling firms to agree in advance and then parcel out the preparation of cases to staff with appropriate levels of qualification and experience.

An option is to incentivise attendance on suspects detained in complex investigations, for indictable offences, or where the client's vulnerabilities indicate a higher level of experience is necessary by an uplift in the fee paid.

36. Should there be more incentives for a senior practitioner to undertake complex cases in the police station? Why? What impacts would this have?

Yes. The fixed fee scheme has created a perverse disincentive to firms. The fixed fees in all geographical areas were set at a rate so low that firms were disincentivised from sending senior staff as they made a loss on the solicitor's time engaged. Experienced solicitors were better applied in the Magistrates' and Crown Court or litigating serious

and complex cases attracting higher payments due to the applicable proxies. When the same fee applies irrespective of the person in attendance firms are incentivised to make use of accredited representatives not more qualified staff. In some areas, particularly London, this has led to an over reliance on unregulated freelance police station representatives, agents and consultants.

Where the firm retains ownership of the case and sends a member of staff invested in the investigation outcome and how the process may impact on success at trial, or trigger early disclosure, there are benefits to all parties. The investigation stage can prove fruitful in identifying the key focal issues in contested cases from the outset, enabling all parties to better prepare for trial. There is undoubtedly a difference in approach by a qualified solicitor with trial experience compared to the investment made by a hired agent who will have no further input in the case. In our submission incentivising the return to the police station of senior qualified staff would assist in early identification of the issues, better engagement and a reduction in the number of cases listed for trial.

37. Do you agree that the reformed scheme should be designed at harmonised rates, rather than existing local rates? This may be at national level or London/non-London rates. Please also provide reasons why.

Not responded to.

Longer-term reform for early engagement - Subsuming PCE into the Police Station Fee Scheme

38. Do you agree that in the longer-term, PCE should be remunerated under the police station fee scheme as a specific element of police station work? Please explain the reasons for your answer.

We agree that the two schemes should be harmonised, in order to encourage greater ownership of cases and continuity of personnel at the investigation stage, and for the

reasons given in CLAIR. However, we are concerned that harmonisation may prove to be the means to reduce the overall fees paid for both elements of work, rather than appropriately ring fencing what comprises representation at the investigation stage and PCE as separate items of work, post interview but pre-charge.

39. How do you think PCE could best function within the police station fee scheme for example, as an in-built or separate fee, and based on hours spent or not, noting our options for broader reform?

We recommend that PCE be treated as a separate fee, additional to the police station fee, and based on hours spent, in a similar way to preparatory work in the magistrates' court. Our concern is that a move to a single fixed fee will in practice mean that PCE is remunerated as a notional fee uplift to police station attendance, which does not properly remunerate the time spent on PCE.

Improving the Uptake of Legal Advice in Custody

40. Which cohorts of users would benefit most from being part of an extended roll out of the trial / what should we prioritise?

Any suspect with an identified mental health or neurological condition, or learning difficulty, should be prioritised in an extended roll-out.

CILEX members as duty solicitors

41. Do you agree CILEX professionals should be able to participate in the duty solicitor scheme without the need to obtain Law Society accreditation? If not, why not? If yes, what, if any, accreditation should they require to act as a duty solicitor

Locally, duty solicitor schemes are oversubscribed, such that the value of a duty solicitor 'slot' is barely worth the administrative cost in maintaining duty solicitor compliance. For this reason, and with the greatest respect to our CILEX colleagues,

we would be reluctant to see the admission of yet further duty 'solicitors' onto the scheme.

Nationally, in areas in which the duty scheme is undersubscribed, we see the force in opening the scheme to CILEX professionals to address an unmet need and to mitigate the threat of advice deserts.

Defence Solicitor Call Centre

42. How else could we improve the DSCC, for example would greater digitisation and automation of LAA processes increase the quality of service?

We recommended at the CLAIR roundtable that the DSCC and Criminal Defence Direct should be scrapped, and that the money currently spent on running them should be diverted to increasing fee income for providers. We remain of that view. In our view, both services are cumbersome, costly and add little or nothing to the process of ensuring efficient and high-quality police station advice. Our members report fairly frequent errors on the part of the DSCC, including serious errors that have led to cases being diverted away from firms who should receive them. The DSCC provides nothing that an updated online portal could not easily and more cheaply replicate, or that police custody staff could do by direct contact with the duty solicitor, without the need for an intermediary.

Post-Charge Engagement

43. Do you think changes need to be made to the way work is remunerated between the period after charge and the first hearing at the Magistrates' Court? Please explain the reasons for your answer.

44. Do you routinely carry out post-charge engagement? Do you record this work in order to claim for a fee under the Magistrates' Court scheme?

45. Do you face any issues which limit you from carrying out post-charge engagement ahead of the first hearing at the magistrates' court? Please elaborate on the kind of issues.

46. If you have experienced issues with PCE, what kind of solutions do you think could be put in place? What changes do you think needs to be made and by whom?

In practice, there is little scope for post-charge engagement. Such engagement can only be meaningful after the defence are provided with the IDPC. The IDPC is also, in practice, required by the defence before an application can be made for legal aid in the magistrates' court. Given that target time for the service of IDPC is five days before the first hearing, and in many cases is served on the day of the first hearing, this leaves little or no time for meaningful engagement between prosecution and defence post-charge.

Added to this is the difficulty that practitioners frequently experience with engaging their clients and taking their instructions – in many cases, the first and only opportunity practitioners have to take their client's instructions and provide advice is when they attend court for their hearing. Solicitors are creatures of their instructions, and therefore meaningful post-charge engagement cannot take place without a willing client who has engaged with the process and provided instructions.

Further, we do not believe that the CPS has sufficient resource to engage in meaningful post-charge disclosure prior to first hearings. Steps are apparently being taken to address this, and we have attended and been invited to address the CPS-led Regional Disclosure Forum, at which various improvements and engagement strategies have been outlined, but in practice, these are rarely observed.

Investment in Magistrates' Court Fees

47. **We are proposing to increase Magistrates' Court fees by 15%. Do you have any views?**

We have made general comments on the 15% increase proposals at question 28, above.

Consultation Question- Structural Reform of the Magistrates' Court Fee Scheme

48. **Do you agree that the Magistrates Court fee scheme does not require structural reform at the current time? Please give reasons for your answer.**

We do not propose structural reform of the magistrates' court fee scheme but advocate for increase in the fees. We refer again to the comments made on the proposed 15% increase in fees above.

Investment in criminal legal aid fee schemes

49. **Do you agree with our proposed approach of short-term investment in the LGFS and AGFS as they currently stand, followed by further consideration of longer-term reform options? Please give reasons for your answer.**

50. **Do you agree with our proposed 15% uplift to LGFS basic fees, fixed fees, and hourly rates , noting the further funding for LGFS reform? Please outline your reasons.**

51. **Do you agree with Government proposals to apply a flat 15% increase to all remuneration elements covered by the AGFS ? Please outline your reasons.**

We have made general comments on the 15% increase proposals at question 28, above.

We are particularly concerned that any future reform of the LGFS system should take place within the current costs envelope plus a further investment "*of up to around £10m p.a.*", which we note falls short again of the 15% uplift prescribed by CLAIR as the bare minimum necessary to ensure the survival of the market.

52. Do you agree that the fixed fee payable for "Elected not proceeded" cases under the LGFS and AGFS should be abolished, with the result that these cases will attract the relevant guilty plea or cracked trial payment? Please outline your reasons.

We agree that the fixed fee should be abolished. In many if not all cases, this fixed fee has had a punitive effect on providers for giving proper advice to their clients.

Enhancing the LGFS' effectiveness in remunerating substantive matters

53. Do you consider replacement of basic fees within the LGFS with a standard fee structure, akin to the Magistrate's Court scheme, to be, in principle, a better way to reflect litigators' preparatory work and reduce reliance on the PPE proxy? Please outline the reasons for your answer.

We agree in principle with this structure of standard fees, based as it is in the magistrates' court on time spent on the case. We recommended as much at the CLAIR roundtable in Birmingham. It appears to us to be the best way of reflecting the complexity of cases and incentivising good preparation within a largely fixed-fee structure, while moving away completely from PPE as a proxy for work done.

54. Do you consider that PPE requires reform and should be considered further once we have established an evidence base? Please outline your reasons.

We agree with CLAIR that PPE is the principal weakness within the current system, and we consider that it should be abolished once a suitable alternative system based on time spent is introduced.

55. In your view, how should the LGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?

It is our view that the LGFS should be restructured to better reflect the work undertaken by providers. The LGFS is not the appropriate vehicle to produce early engagement which is reliant on a suitable level of disclosure from the prosecuting authority and the co-operation of the defendant. It would not be sensible to seek to use the fee scheme to incentivise early resolution of cases which may create a conflict between the provider's financial interests and the defendant's wider interests in ensuring that justice is achieved.

Improving the service and assessment of PPE

56. What improvements would you like to see made in relation to the way in which evidence (especially electronic) is: - Served on the defence? - Defined in Regulations? - Quantified at assessment?

Improvements should be aimed at providing certainty for providers that they will be properly remunerated for work undertaken. The issue is not how the material is served on the defence but the recognition by the Legal Aid Agency of what the evidence comprises and its link to the work undertaken. The present system is geared to challenge and reduce page count and has proved fertile ground for costs litigation. There is a need for understanding that when evidence and unused material are served on the defence, irrespective of the format, the provider is required to analyse in order to assess the relevance of that material not only to the context of the prosecution case but whether it may assist the defence. At present where the provider is in practical terms required to peruse the material in full to identify content which is relevant to the defence or undermines the prosecution, the entirety of the material has to be perused. The provider is then remunerated only to the extent of the material found. This is particularly the case when it comes to the analysis of telephone evidence served in .pdf and .xlxs format. The most pertinent lines of data may be accepted as comprising relevant material, ignoring the need to identify that material in context.

We submit that there needs to be recognition of the duty placed on providers to review both the served case and unused material in appropriate detail in order to advise the defendant and instruct the advocate.

Confiscation Proceedings

57. Do you agree with our proposal to increase confiscation fees by 15%?

In confiscation proceedings, solicitors are remunerated at an hourly rate, which (although far less than a fair market rate) is at least proportionate to the time spent on such matters. However, the advocate receives only a small additional fee to that payable for the substantive case under the Advocate Graduated Fee scheme. Frequently, confiscation proceedings are legally and factually more complex than the original criminal proceedings; they require different disciplines to those required for the main proceedings; these factors would ordinarily justify a change of instructed advocate to a more specialised advocate. None of this is remotely feasible under the current funding regime and a 15% increase in the fees will not address this. The system currently does not attract sufficient expertise or quality and this proposed increase will not change that. Mistakes are frequently made. The criminal justice system is left to pick up the pieces at a later stage, with unenforced confiscation orders and appeals. Defendants are committed to prison for failing to pay confiscation orders they are simply unable to pay. The current system of funding, particularly in respect of advocacy fees, encourages neither sustainability, quality nor efficiency. Given successive governments' focus on confiscation proceedings as a way to make convicted criminals pay back their gains, this part of the system should be properly funded, there should be significant structural reform and a significantly increased costs envelope for confiscation matters.

Standard fees for appeals to Crown Court and committals for sentence

58. Would you welcome replacement of LGFS fixed fees for appeals to the Crown Court and committals for sentence with a standard fee arrangement, akin to the Magistrates' Court scheme? Please give your reasons.

For the reasons given at question 53, above, we agree with the introduction of a standard fee arrangement.

Understanding Crown Court litigator work

59. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of litigators in preparing Crown Court cases and facilitate refinement of the LGFS? Do you record this data, and would you be willing to share it with us?

Birmingham Law Society is a representative, membership body and does not record sensitive commercial data from its members. We are therefore unable to comment on our members data recording or willingness to share that data with Government. However, we make the observation that the criminal contract requires providers to record the sort of data it is envisaged will be needed: time spent, with an explanation of what has been done and why it is justified.

60. Which factors influence the time you spend preparing for substantive Crown Court proceedings, appeals to the Crown Court, and committals for sentence?

In general terms:

- Volume of prosecution evidence and exhibits;
- Volume of unused material;
- Volume of material produced by the defendant client;
- The nature and complexity of the above material;
- Client's demeanour – this is a major factor although difficult to quantify – many clients have learning or communication difficulties, which mean that longer attendances will be required and adjustments, such as regular breaks, need to be taken during appointments; some clients will happily wait for updates etc; other clients will call and email on a daily basis and seek to micromanage their case, which can be a significant drain on resources;
- The need to instruct independent expert analysis of complex material served, whether in response to prosecution expert evidence (medical, psychiatric,

reconstruction or presentational) or because separate analytical skills are required (forensic accountancy).

Fundamental AGFS Structure

61. Do you consider the current AGFS model to be optimal for remunerating Crown Court advocacy ? What changes would you like to see? Please outline your reasons.

We do not advocate radical reform of the AGFS. The AGFS was substantially reformed more recently than other fee schemes considered in this consultation, following lengthy negotiations between the Government and the Bar. There are individual anomalies within the scheme that we believe should be addressed – for example, the low fees for certain categories of case such as burglary or perverting the course of justice, which do not reflect the work involved in such cases and make it difficult for appropriately qualified counsel to accept instructions in them. Surprisingly, even some categories of very serious offence, such as murder, are poorly paid under the current scheme. Our members observed that every category of case is simply not paid enough to make it commercially attractive to undertake advocacy work, save in a very narrow range of cases.

62. We propose to deliver reform within the existing cost envelope. To ensure we achieve our objectives, we would welcome views on which elements or tasks within Crown Court advocacy should be prioritised for funding.

Once again, the proposal to deliver reform within an existing cost envelope fails to recognise the need for investment identified by CLAIR. If there is to be a review within a fixed envelope this risks favouring the Bar with consequent restriction on the increases received by litigators. The proposal gives rise to the present "no returns" action taken by the Bar. It also has the potential to feed unsustainable conflict between the professions which is likely to be to the detriment of both the Bar and

solicitors in the long term. The junior Bar in particular has been affected by the increasing trend towards firms conducting advocacy in house, rather than instructing the Bar as was the traditional model. That trend in part arose from earlier funding changes which favoured the advocate over the litigator. Such division is not in the long term interests of the Bar.

Supplementing the basic or hearing fee where preparatory work required exceeds the norm

63. Do you consider broadening the availability of Special Preparation payments to be the best method of remunerating cases (or hearings within cases) where preparation required of the advocate exceeds the norm? Please tell us the reasons for your answer.

We agree with the principle of Special Preparation claims and support broadening the availability of such claims. However, we refer to our comments about the hourly rates payable generally, including for Special Preparation claims, which have fallen far behind inflation, have been cut in real terms, and are far lower than the hourly rates payable even under other legal aid schemes. This makes Special Preparation claims financially unattractive, especially when considering the administrative work involved in making them. We urge the Government to increase the hourly rates at least in line with other publicly funded advocacy. Further, we urge the Government to simplify the claims process in order to avoid the frequent disputes over claims with the LAA.

64. Do you agree with the recommendation that fixed fee payments for interlocutory hearings should benefit from the possibility of enhancement? If so, under what circumstances should an enhancement be applicable?

We agree that enhancements should be available for fixed fee payments in appropriate cases. We suggest that enhancement should be claimable in circumstances broadly similar to those available under the Family Advocates Scheme. E.g:

- Enhancements for hearings involving topics of expert evidence (possibly including intermediaries in the context of criminal proceedings).
- Enhancements for hearings where legal arguments take place, but the hearing is otherwise an interlocutory hearing when the standard fee only can be claimed.
- Potentially a page count enhancement.
- Vulnerable Defendant enhancement.

65. Would you welcome introduction of a fee scheme for advocacy which reduces the weighting accorded to basic fees in favour of remuneration where complexity criteria are satisfied and /or discrete procedural tasks have been completed ? Please outline your reasons.

66. Do you think that fairer remuneration of outlier cases could be achieved by way of amendments to the existing AGFS, e.g. adjustment to PPE thresholds beyond which Special Preparation can be claimed or the relative level of basic fees? If so, for which offence classes do you consider current provisions to be anomalous?

67. Are there any models for Crown Court advocate remuneration you feel we have not yet considered? Please give details.

Not responded to.

Further data and research

68. What new data would you recommend the MOJ should gather to build a picture of the tasks and time required of advocates in preparing Crown Court cases, and facilitate reform of the AGFS? Do you record this data, and would you be willing to share it with us?

Not responded to.

69. **Which factors increase the complexity of the advocate's work in Crown Court proceedings?**

    We suggest the following factors are most common indicators of complexity:

    - Vulnerable witness/Defendant;
    - Page count, including both served and unused material;
    - Legal arguments

70. **In your view, how should the AGFS promote earlier engagement and case resolution without introducing incentives which could compromise the interests of justice?**

    Not responded to.

Enhanced payment for Effective PTPHs/FCMHs

71. **Do you think advocates should be able to claim a higher fee for attendance at a PTPH or FCMH where meaningful case progression has been achieved? If so, what criteria, in your view, should be satisfied for this type of hearing to be considered effective? Please outline your reasons.**

    Not responded to.

Wasted Preparation Payments

72. **Do you support the principle of making Wasted Preparation available in more instances ? If so, under what circumstances should it be claimable? Please provide reasons.**

73. In your view, which case criteria should be satisfied for a Wasted Preparation claim to be allowable (e.g. duration of trial, volume of PPE, hours of preparation conducted)?

We support the principle of widening the scope for Wasted Preparation claims. In our view, the fairest criteria for permitting a Wasted Preparation claim would be the hours spent on preparation. However, we caveat this with some concern, as expressed by our members, that the LAA's natural tendency is always to "mark down" the hours spent.

Consultation Questions- Section 28 pre-recorded cross-examination

74. Would you be willing to help us gather data on the additional work involved in a case with a s.28 hearing?

We would be happy to canvass our membership for data about this, but suspect that the professional bodies (the Law Society & Bar Council) would be better placed to assist.

75. How do you think the fee scheme should be remodelled to reflect s.28 work?

Not responded to.

Consultation Questions- Youth Court Fees

76. Considering the fee proposals above in paragraphs 187 to 188, which do you think would better reflect the seriousness and complexity of some Youth Court work and deliver improvements to legal advice for children, whilst ensuring good value for taxpayers?

77. Which proposal do you think would provide better quality legal representation for children before the Youth Court?

78. If you oppose the outlined options or want to propose an alternative, please explain your proposal, the rationale and evidence behind it, and include any unintended consequences which you think could arise.

Option 1, expanding the application of certificates for assigned counsel, will divert Youth Court work that is currently undertaken by solicitors to the independent Bar. At the rates that currently apply to assigned counsel, our experience is that these are sufficient only to attract very junior members of the Bar: many barristers are reluctant to take on such work, considering it insufficiently remunerated given the risks involved. This option would in our view lead to counsel being instructed in an increasing number of cases, which would lead to the perverse outcome that highly experienced and competent solicitors would be replaced increasingly by the most junior and inexperienced barristers in Youth Court trials.

Option 2, the payment of enhanced rates for Youth Court work, will in our view better ensure that youth defendants are given effective representation. In our experience, solicitors who regularly work in the Youth Court are often best placed to provide effective, quality representation. Indeed, their experience in routinely dealing with vulnerable youths and their families, familiarity with the Magistrates' Courts generally, and the close bond that they able to form with vulnerable youths, put them in an ideal position to appear in that court. Enhanced rates would ensure that more senior advocates, both solicitors and barristers, are attracted to do this work.

Youth court accreditation

79. Do you agree that accreditation should not be made a formal condition of lawyers receiving increased fees for youth work? Please explain.

We agree. It appears to us that it is unnecessary to require advocates to hold a particular accreditation to deal with Youth Court cases and claim the attendant enhanced fees. No responsible solicitor advocate or barrister would undertake work

that they are not competent to do. There appears to be no clear evidence that solicitors are failing in their professional obligations in this regard. Our experience is that the judiciary in this region will routinely question whether advocates proposing to represent clients in cases involving young/vulnerable witnesses have completed appropriate training, such as the Advocacy and the Vulnerable training, developed jointly by the Law Society and the Bar. We are not aware of a body of evidence to suggest that the judiciary have cause to intervene in cross examination, or indicating that advocates do not possess the relevant knowledge/skills required in this area of work.

Investment in VHCCs

80. We propose increasing fees for litigators conducting VHCCs by 15%. Do you have views? Please explain your reasons.

We refer to our earlier response with regard to the 15% uplift in fees.

Individual Fixed Fee Offers (IFFOs): CLAIR'S Recommendation

81. Do you support the further clarification of IFFOs in Regulations? Why?

82. Would you find a dispute resolution mechanism, prior to signing a contract, useful? If so, what form do you consider such a mechanism could take ? Why?

Not responded to.

Individual Fixed Fee Offers (IFFOs): Reverting to the Contractual Provision

83. Would you support reverting to the individual case contract provision for VHCCs, instead of the IFFO scheme? Why?

84. Would returning to the contractual provision benefit the conduct and effective case management of these cases? Why?

85. **Would you consider any changes to be required to the individual case contract provision before reverting back? If so, which changes?**

    Not responded to.

Individual Fixed Fee Offers (IFFOs): Adapting the Scheme

86. **What principles need to be changed under the current provision in order to fairly reflect the work done?**

87. **If the IFFO provision is to be retained, what do you consider a reasonable approach to the negotiation and payment of fixed fees?**

    Not responded to.

Subsuming VHCCs into Fee Schemes

88. **Would you support VHCCs being subsumed into the LGFS/ AGFS once reformed if based on proxies that better reflect work done in order to pay for it more fairly? Why?**

89. **Are there specific considerations regarding VHCCs which are needed when reforming the LGFS/AGFS? Which ones?**

    Not responded to.

Investment in Fees for CRRC Work

90. **We propose increasing fees for litigators conducting CCRC work by 15%. Do you have views?**

    We refer to our comments about fee increases generally at Question 28, above.

A longstanding member of the Committee is a partner in a firm that has a long reputation for Appeals & Reviews work. That firm has recently stopped taking on legally-aided work in this area, including CCRC work. The reasons for that firm doing so are the poor rates of pay when considering the complexity and risk inherent in taking on such cases, and the time-consuming, unremunerated difficulties in negotiating with the LAA over such things as fee upper limits and disbursements, including counsel's fees.

A 15% increase in the basic hourly rate, when one considers increases in the cost of living and the extremely low existing hourly rates, would not attract firms such as that one to return to this category of work.

Structural Reform of Fees for CCRC Work

91. Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why?

The fee scheme itself is already fairly attractive in principle, as it pays providers for the work actually done on cases. This is rare within the global criminal legal aid market. What is in urgent need of reform, in our view, are the hourly rates payable for the work, which are too low to attract quality practitioners and have driven away existing providers in the West Midlands area.

92. If you already undertake CCRC applications work, what are some of the challenges with this work?

- Obtaining relevant paperwork – this has improved as relevant papers are increasingly available on DCS, but many appeal cases pre-date DCS and not all cases (e.g. murders) use DCS. Not all material relevant to the case is uploaded to DCS, though this has improved with changes in the service of unused material.

- The low initial upper limits mean that almost every stage of work must be accompanied by detailed applications to the LAA to extend the funding limit: on occasion, it feels like the work must be done twice in order to get paid once.
- There are a higher number of challenging clients in appeals work, compared to work at first instance.

93. Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones?

94. Is there a clear demarcation of work which should be done by the provider of legally aided services and that which should be done by the CCRC?

95. Do you routinely and accurately record time spent on this work?

Not responded to.

CLAIR's recommendation on CCRC reform

96. Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why?

We take the view that introducing standardised fees to CCRC work is unnecessary and would be counterproductive. CCRC work is one of the few areas in which providers are paid for time actually spent, and this in itself would make it attractive to providers, if the hourly rates paid were remotely reflective of the skill involved in undertaking such work.

97. Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why?

No, for the reasons given above.

Retain the Existing CCRC Provision with Uplifted Fees

98. Do you consider that retaining the existing fee scheme once the fees have been uplifted would incentivise providers to take on this work? Why?

For the reasons given at question 97, above, we would support the retention of the existing fee scheme if the fees were uplifted sufficiently to make them attractive to providers. This would require a greater uplift than 15%.

Investment in Prison Law Fees

99. Should the Government focus on the early stages of the criminal process and not uplift prison law at this stage? Please explain your reasons.

No. Prisoner rights work is poorly remunerated but involves an important and significant adjunct to the criminal process. Work in this area is under resourced and reflected in the relatively low number of firms specialising in the area. The Government is advised to improve funding to attract a higher level of specialist representation in this area.

Prison Law Work

100. What more could be done by the Government to address problems around access to clients in prison?

Access to clients in prison is an acute issue not just in prisoner rights work but in relation to clients either serving custodial sentences or remanded in custody. There is presently insufficient resource to enable prisons to meet the demand for in person and remote link visits to clients detained in custody. The problem has been exacerbated by the pandemic which has impacted on the movement of prisoners

within the custodial environment. In some prisons visits both in person and by video link are booked months in advance with the result that application has to be made to delay the criminal process simple to enable instructions to be obtained before arraignment. The problem appears to be particularly acute in prisons located in London but is not exclusive to that city.

The inefficiency of some prisons in providing access to detainees is staggering. The West Midlands area contains a number of prisons with a remarkable difference in approach. HMP Birmingham has suffered from poor management, been placed into special measures and clearly suffers with low staff morale. It provides a stark example of inconsistent approach to admission of legal visitors, policing of security requirements and at times appears institutionally incapable of honouring legal and professional visit time frames. By way of example it is extraordinary to attend a prison prior to the first visit of the day to find there are no staff allocated to the admission of professional visitors until after the allocated time for the visit has passed.

Providers would benefit from a standard process for booking visits, authorisation of computer equipment, admission with paperwork, visitor schedules and identification requirements. Firms expend a vast amount of time fulfilling the criteria required by each different prison even in the locale of the duty solicitor scheme. The Government could assist by introducing standards expected of prisons and by streamlining the applications process across the prison estate.

101. Do you agree with the proposal to restructure the fee scheme for advice and assistance in prison law cases?

102. What data would need to be taken to implement this reform?

Not responded to.

Other Criminal Legal Aid Fees

103. Do you agree with our proposal to increase the fees for these other areas by 15%?

We refer to our comments about fee increases generally at Question 28, above.

Impact Assessment

104. 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.

Not responded to.

Equalities

105. 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.

106. 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.

Not responded to.