



House of Commons
Justice Committee

**The Future of Legal Aid:
Updated Government
Response to the
Committee's Third Report
of Session 2021–22**

Third Special Report of Session 2022–23

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Justice Committee

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Publication

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Committee staff

The current staff of the Committee are Robert Cope (Clerk), Philip Jones (Second Clerk), Sara Elkhawad (Assistant Clerk), Anna Kennedy O'Brien (Committee Specialist), Tanya Lightfoot-Taylor (Committee Specialist), Su Panchanathan (Committee Operations Officer), George Perry (Committee Media Officer), Owen Sheppard (Committee Media Officer), Jack Simson Caird (Deputy Counsel), and Melissa Walker (Committee Operations Manager).

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Third Special Report

The Justice Committee published its Third Report of Session 2021–22, [The Future of Legal Aid](#) (HC 70) on 27 July 2021. The Government's Response ([HC 843](#)) was published on 16 November 2021. At that time, the Criminal Legal Aid Independent Review and the Means Test Review were both underway and had not yet been published. Following the publication of both reviews, an updated Government Response was received on 15 August 2022 and is appended below.

Appendix: Government Response

Criminal Legal Aid

Recommendation 1: Reform of criminal legal aid must prioritise a whole justice system approach, to ensure that there are incentives for everyone to work towards the fair and timely resolution of criminal cases.

On 15 March 2022, we published our response to the Criminal Legal Aid Independent Review (CLAIR) and consultation on our policy proposals.

We agree that it is crucial to consider the criminal justice system as a whole. Strong working relationships are a cornerstone of the Criminal Justice System (CJS). The Government seeks to work together with our CJS partners to achieve tangible reform.

We recognise the importance of early engagement and have considered this as part of our response to CLAIR. With remuneration for solicitors, we want to encourage early engagement which is why we are proposing a 15% increase to the Police Station and Magistrates' Court (including the Youth Court) fee schemes along with other proposals such as training grants for solicitors' firms.

One such area in which we propose to address early resolution is Pre-Charge Engagement (PCE). CLAIR recommended remunerating preparatory work done to determine whether PCE is appropriate. The Government agrees that work should be done to explore how PCE can be remunerated in order to appropriately incentivise early engagement. We are proposing to take action in the short-term to reform remuneration for PCE to include preparatory work, subject to the outcome of the consultation.

CLAIR recommended specifically remunerating discussions between parties before the first hearing in the Magistrates' Court. This would be with the aim of incentivising more efficient case management, communication and early engagement between key parties (police, CPS, and the defence) leading up to the first hearing at the Magistrates' Court (post-charge engagement). We do not currently have the evidence needed to determine if a separate fee for this element of post-charge engagement would achieve the benefits that have been suggested. Therefore, the Government is committed to exploring this issue further with stakeholders.

CLAIR highlighted the importance of fostering a more joined-up approach to criminal legal aid across the criminal justice system both at a national and local level. We therefore

proposed the creation of a non-statutory Advisory Board, as outlined in chapter 2 of the Government response. This would bring together CJS partners at a senior level in a formalised and collective way.

Alongside the Advisory Board, the Government proposes to use existing Local Criminal Justice Board (LCJB) engagement forums to encourage greater collaboration between local defence communities and criminal justice system partners, as well as using scorecards, which will enable LCJBs to scrutinise the data in their local area and tackle performance issues.

Recommendation 2: The changes made as part of the Criminal Legal Aid Review are positive and show that the Government recognises the need to make improvements to the criminal legal aid framework. It is particularly welcome that the Government has acted on pre-charge engagement. However, much more needs to be done to make criminal legal aid sustainable.

The Government's response has considered the recommendations made in CLAIR to ensure the sustainability of legal aid is a priority now and in the future. We are proposing to boost the system with upfront investment to address the most urgent concerns, including uplifts of 15% to most legal aid fee schemes. We are proposing to increase by 15% fees for work done at the police station, for pre-charge engagement, in the magistrates' court and youth courts as soon as practicable, subject to consultation & SI implementation. In addition to these fee uplifts, we are providing £2.5m towards solicitor training contracts; up to £10m towards supporting the sustainability and development of solicitors' practice and LGFS Reform; as well as increases to the financial eligibility threshold outlined in our Means Test Review consultation.

Alongside this, we have proposed longer term reforms to the legal aid fee schemes so that they fairly reflect the way our legal professions work in the real world today – rather than when the schemes were first devised. We are committed to reform of the LGFS and investment in the sustainability of the criminal solicitors' profession. We have not proposed uplifting those fees which the review found created perverse incentives, such as the Pages of Prosecution Evidence (PPE) proxy. We are inviting views on the longer-term reform of the LGFS, to include the optimal basic structure of litigator remuneration, the role of PPE in determining fees, and what data should be collected to enable a thorough examination of litigator preparatory work.

Overall, our investment in criminal legal aid will increase by an additional £135 million a year in line with the CLAIR recommendations. Alongside investment in court recovery, this will bring total taxpayer funding for criminal defence to £1.2 billion a year – the highest level of investment in criminal legal aid in a decade.

As set out in our response to recommendation 1, we are proposing to allow preparatory work to be remunerated and are inviting views as to how this could be claimed for.

The Government wants to do more to support the sustainability of the market and is keen to see increased opportunities for CILEX professionals across the justice system – including making it easier for them to become duty solicitors to increase the sustainability and stability of the provider base and to reduce barriers to access to this work where people enter the legal professions through alternative routes. We propose to take this recommendation forward, working with the representative bodies and the LAA.

Additionally, we are also exploring new ways to deliver police station advice and propose to trial remote advice via the PDS. We propose a small expansion of the PDS's current provision including trialling remote advice, particularly in rural areas where duty solicitor schemes struggle to fill a rota. We are also interested in exploring whether the PDS could provide the defence in some Very High Cost Cases (VHCCs) and will consult on this to gather further data. In the longer term, the Government believes the PDS has an important role to play as part of ensuring sustainable and stable provision of criminal defence. We will continue to review its position in the market and will use the PDS to test and demonstrate innovative methods of service provision.

Alongside the investments we are making in the basic and hourly fees for LGFS, and investment in the police station and Magistrates' Court scheme we are consulting on other investments to support litigators, particularly training contracts and support for solicitor-advocates gaining higher rights of audience.

The Government believes that removing barriers to entry and making the legal aid system business-model neutral will help ensure that the right legal representation is available to everybody and assist in promoting greater diversity of practitioners. This is one of the reasons why the Government is proposing to review the Standard Crime Contract to consider how administrative burdens could be reduced, how more neutral business models could be adopted and will consider how other changes could drive innovation.

We note the importance of investing in technology to aid in the sustainability of criminal legal aid. COVID-19 led to an accelerated roll out of technology to support remote hearings across all jurisdictions. 70% of all courtrooms are now equipped with our Cloud Video Platform, enabling up to 20,000 cases to be heard virtually every week at the height of the pandemic. We are keen to understand the impact this has had on the criminal justice system. Separately from this consultation, we are considering further increasing video capacity in prisons, developing joint plans for direct bookings of calls to improve administration, and engaging with defence practitioners to maximise use of available capacity.

Our plans will reinforce a more sustainable market, with publicly funded criminal defence practice seen as a viable, long-term, career choice – attracting the brightest and best.

Remuneration is only one factor in improving the sustainability of the criminal legal aid market and the Government is committed to considering sustainability in the round alongside other CLAIR recommendations. Therefore, in line with CLAIR's recommendations, we are proposing that an 'engagement forum' would be the best operating model for the Advisory Board (see recommendation 1).

Recommendation 3: Without significant reform there is a real chance that there will be a shortage of qualified criminal legal aid lawyers to fulfil the crucial role of defending suspects and defendants. This risks a shift in the balance between prosecution and defence that could compromise the fairness of the criminal justice system.

Following the CLAIR recommendations, and as mentioned above, we are proposing a 15% uplift for most criminal legal aid schemes as soon as possible and have proposed making up to £2.5 million available for training grants for solicitors. These proposals are intended to help attract and retain criminal legal aid lawyers from a diverse range of backgrounds.

As set out above, we are proposing to make it easier for Cilex professionals to work as duty solicitors and reviewing the Standard Crime Contract to see if administrative burdens can be reduced.

We welcome views and suggestions on other steps that can be taken to improve retention and encourage individuals to pursue a career undertaking publicly funded criminal work.

Recommendation 4: There appears to be a growing imbalance between the ability of criminal defence firms to recruit and retain staff and that of the Crown Prosecution Service. It is fundamental to our adversarial justice system that criminal defence services have sufficient resources to provide highquality representation to suspects and defendants. We recommend that the Government consider linking legal aid fees to the rates of pay of the Crown Prosecution Service.

CLAIR found that criminal legal aid firms find it difficult to attract new entrants into the field because the fee levels restrict the salaries that can be offered and cannot retain experienced practitioners because of the higher salaries offered by the CPS.

CLAIR recommended that the remuneration of criminal legal aid firms under the Regulations should be substantially increased as soon as practicable and that the fee schemes for the police station and LGFS should be restructured moving from being fixed to a standardised system of lower standard, higher standard and nonstandard fees.

As mentioned in recommendation 3 above, we are seeking views on whether Government funded solicitor training contracts for those starting careers in criminal defence could help firms with recruitment and retention issues. We are also proposing a 15% uplift, in line with the recommendations in CLAIR, for most schemes as soon as possible.

Recommendation 5: The lack of any increase to criminal legal aid fees for solicitors over the past 20 years needs to be addressed. Sir Christopher Bellamy's current review, commissioned by the Government, gives an opportunity to do this. Thereafter, fees and rates should be regularly reviewed in line with inflation, otherwise the gap will build up over time and become harder to address

As mentioned above, we are proposing a 15% uplift, in line with the CLAIR recommendations, for most schemes as soon as possible.

Regarding the restructuring of the LGFS, we are inviting views on longer term reform to include the optimal basic structure of litigator remuneration, the role of PPE in determining fees, and what data should be collected to enable a thorough examination of litigator preparatory work. We recognise the need to conduct a wholesale review of the LGFS and the AGFS and implement reforms which will better cater for the practices expected of criminal litigators and advocates in future. We propose that further investment of up to around £10m p.a. in Crown Court litigator remuneration would accompany implementation of a future fee scheme, once the optimal model has been determined.

We are seeking, during and beyond consultation, to collaborate with advocates, their representative bodies, and potentially the proposed Advisory Board, to establish what data should be collected to build a picture of the demands of modern advocacy. Equally, we are inviting respondents to consider the conceptual basis of the AGFS. We wish to

understand whether there is any consensus regarding the optimal structure of a scheme in the long-term which balances fair remuneration for work properly conducted with the need to minimise the administrative burden for all parties.

Decisions on the future allocation of public funds within the criminal justice system are an important matter of social, economic and fiscal policy and will always remain with Ministers accountable to Parliament. However, the advice of the Advisory Board will play an important part in this consideration.

Recommendation 6: The criminal justice system will be stronger if able and experienced advocates at the criminal bar are able to do publicly funded legal aid work. The gap between private and public rates has grown substantially in the past decade, and while a significant gap is to be expected, we agree with the Criminal Bar Association's interim submission to the Independent Review of Criminal Legal Aid that there needs to be a connection between the two. Further, in assessing the fees paid to advocates, it is important to remember that the total fees do not translate directly to earnings, as barristers have to pay considerable overheads, expenses and chambers fees out of the gross fee. The Government should take this into account when considering how to reform the criminal legal aid system.

Criminal barristers deserve immense praise for keeping the wheels of justice turning during the pandemic and driving down the backlog.

In response to the CLAIR recommendations, we are proposing a 15% increase in the Advocates Graduated Fee Scheme for:

- a) all basic (brief) fees (trial/cracked trial, guilty plea).
- b) All trial daily attendance fees.
- c) All fees for confiscation hearings.
- d) Basic consideration fees for unused material.
- e) Per-day payment rates for contempt hearings.
- f) All fixed fees.

This is in addition to the investment of up to £51m (a year) in the AGFS and LGFS, made in 2020 through implementation of the accelerated measures and an earlier investment of £23m (a year) in the AGFS specifically.

We recognise that we need to consider any expenses or fees barristers have to pay when factoring any fee uplifts however, there are some costs that are outliers beyond the influence of Government, for example chamber's fees. The 15% increase in the AGFS is considerably more favourable than any other public sector pay rise - daily rates for trials would range from £460 to £667.

Recommendation 7: There are serious problems with the current fee schemes for criminal legal aid. The fees and rates do not reflect the work required. The schemes should be reformed to ensure that they offer a fair rate for the work required and are subject to regular review.

As stated in our response to recommendation 1, we are seeking views to determine whether reform is required to enable preparatory work to be included in PCE and we are gathering evidence to determine if a separate fee for post-charge engagement would achieve the suggested benefits. Our view is that the PPE elements of LGFS need reform, however investment in those areas now would further embed the ‘perverse incentives’ that were identified by CLAIR.

We accept CLAIR’s case for increases to fee schemes and, as mentioned above, we are proposing a 15% uplift for most schemes as soon as possible. This means injecting an additional £115 million a year into the system. In addition, we will hold £20 million a year for longer term investment, including reform of the Litigators’ Graduated Fee Scheme (LGFS), the youth court, and the wider sustainability and development of solicitors’ practice. Overall, this will increase our investment in criminal legal aid by up to £135 million a year in line with CLAIR recommendations. Alongside investment in court recovery, it will bring total taxpayer funding for criminal defence to £1.2 billion a year – the highest level of investment in criminal legal aid in a decade.

Our accompanying reforms will also ensure we can put our legal aid system on a stable and sustainable footing for the future. This includes reform of fee schemes, so they fairly reflect the way our legal professions work in the real world today – not when the schemes were first devised.

Recommendation 8: The justice system needs talented lawyers from all backgrounds to choose to practise criminal law and for the professions to be able to retain them. In 2018, our predecessor Committee stated “that current difficulties in recruitment to the Criminal Bar could have a negative impact on future recruitment to, and diversity within, the judiciary—in particular for judicial office holders in the criminal courts”. This inquiry’s evidence has reaffirmed those concerns.

CLAIR concluded that an increase in the level at which criminal legal aid fees are paid would help solicitor firms attract the best talent from any background and alleviate the challenges that barristers from ethnic minority backgrounds face in forging a career at the Bar. However, the report confirms that there is much more to do if the systemic barriers to progression within the professions are to be tackled. We are consulting on whether funding training grants could help solicitor firms recruit and retain staff and how such an initiative might best be targeted to support those from diverse backgrounds.

The Government considers that much of this work naturally falls to the professions themselves, the regulators and the representative bodies and we are aware that a lot of good work is being undertaken in this area. We will engage chambers and firms on this challenge and want to work with them on how they and we will respond to the recommendations in the report and what more they can do to improve diversity (see chapter 2: The future of the criminal legal aid professions of the government response).

Recommendation 9: The predominance of inadequate fixed fees in the current framework is problematic. The structure of the fees does not reflect the complexity of the work required, nor does it incentivise firms to take on the most difficult cases at an early stage. The Government should reform the fee structure to prioritise quality over quantity and to allow criminal defence lawyers to spend more time on the most difficult cases at the earliest possible stage. There is a risk to the fairness of the criminal justice

system if lawyers are not willing to take on the most complex cases because of the low rates of pay. There are also clear benefits for the operation of the criminal justice system if more work can be done at an early stage to make progress on a case.

We are consulting on CLAIR's recommendations to restructure most of the fee schemes to a standardised system of lower standard, higher standard and nonstandard fees as part of its longer- term reforms. We are also consulting on proposed alternative structures for some fee schemes. By making changes to the framework, this will help ensure the fees better reflect the seriousness and complexity of the work done.

Recommendation 10: The Committee's inquiry on court capacity has focused on the Crown Court where the delays are the most acute. In that context, it is imperative that the criminal legal aid system should be structured to facilitate resolution of cases at the earliest possible stage in the process.

Please refer to our response to recommendation 9 regarding early resolution of cases.

Recommendation 12: The current criminal legal aid system does not provide enough incentives for legal representatives to take early action to progress cases through the system as quickly as possible. The legal aid fee structure should incentivise early engagement between defence lawyers and the police and the CPS. The current system does not do enough to recompense lawyers for taking on complex cases at the police station and at the magistrates' court. Investing more in early engagement will lead to savings to the public purse, as cases would be resolved at an earlier stage, which could free up capacity across the criminal justice system.

Please refer to our response to recommendation 9 above.

Recommendation 13: The Government needs to ensure that the legal aid framework is able to respond and adapt to changes in volume and practice over time in the criminal justice system.

As addressed above in our response to recommendations 1 and 2, we believe that the proposed reforms to the LGFS and pre and post-charge engagement will enable a move towards a system that pays for preparation and the early resolution of cases rather than trials.

CLAIR highlighted the need for an Advisory Board comprising stakeholders from the Police/CPS and the Courts to promote joined-up working. We support the creation of an Advisory Board and believe this will help to identify when the legal aid framework needs to be adapted to fit the current state of the criminal justice system.

The Advisory Board would bring together criminal justice system partners at a senior level in a formalised and collective way. However, we are not proposing that the advisory board should be put on a statutory basis – this will ensure that it remains flexible and can adapt to changing needs and conditions.

We are proposing that an 'engagement forum' would be the best operating model for the Advisory Board and are seeking views on its remit and composition. The Advisory Board will be central to our commitment to modernising the criminal justice system in order to achieve greater stability and efficiency.

We believe that the creation of an advisory board will help prioritise a whole justice system approach.

Recommendation 14: Our 2019–21 Report on the effect of Covid-19 on the legal professions discussed measures taken to provide additional income during the early stages of the pandemic. The impact of Covid-19 means, however, that the need to take action to improve the criminal legal aid framework is now even more urgent than it was when the Government set up the Criminal Legal Aid Review in 2018.

The Government introduced several measures to ensure legal aid firms could continue to operate during the Covid-19 pandemic. These included:

- Introducing hardship measures, which included reducing the threshold for work done in Crown Court cases from £5000 to £450.
- Halting the pursuit of debts to the Legal Aid Agency.
- Encouraging firms to access financial support via the Self-Employed Income Support Scheme, the Coronavirus Job Retention Scheme, the Coronavirus Business Interruption Loan Scheme and the Bounce Back Loan Scheme.
- The Legal Aid Agency has already made some changes permanent which originated during the pandemic and continues to keep under review others which are still in place.

Additionally, the rapid roll out of video technology via the Cloud Video Platform enabled up to 20,000 cases to be heard virtually each week at the height of the pandemic.

We have expedited the delivery of fee uplifts and propose to introduce increases as soon as the consultation and legislative process allows – by the autumn. Beyond the immediate fee uplifts, we are also proposing to inject up to £20 million pounds to:

- Deliver the longer-term reform required in the litigators' fee scheme – to move away from reliance on the number of pages of prosecution evidence;
- Increase spending in the youth court, with two options for consultation:
 - 1) to make a certificate for counsel automatically available for all indictable only offences heard in the youth court, or
 - 2) to introduce an enhanced youth court fee for indictable only and triable either way cases;
- Offer training grants for solicitor firms' and support for solicitors seeking rights of audience to appear in the higher courts;
- Invest in the Public Defender Service to test new ways of working and ensure advice is always available - for example in rural areas.

The Legal Aid Means Test

Recommendation 15: The Government should evaluate whether the money saved by the means test is justified when weighed against its impact on the fairness of criminal justice

system. If the means tests for the magistrates' court and the Crown Court are to remain then the current eligibility thresholds should be addressed and thereafter automatically updated every year in line with inflation.

On 15 March, we published detailed proposals in relation to the legal aid means test, with the aim of ensuring access to justice in the short, medium and long term. As set out in the consultation, we consider that for most types of legal aid, legal aid should be targeted at those with fewer financial resources available to them, who are therefore unlikely to be able to pay privately for legal advice or representation. This helps to ensure effective use of taxpayer resources. Our proposals include significant increases to all income thresholds for legal aid and the removal of the upper disposable income threshold at the Crown Court. This means that all Crown Court defendants will be entitled to legal aid, with higher-income defendants paying contributions to the cost of their defence for up to 18 months. We are also proposing a regular review of the means test thresholds in future years.

Technology and Access to Justice

Recommendation 18: The Government should consider how technology can be used to increase the accessibility of legal advice to suspects and defendants. The Government should also consider developing a scheme to enable criminal legal aid providers to upgrade their digital capacity.

Although the use of remote technology in courts did not fall under the remit of CLAIR, the review notes the potential impact of this on the efficiency of the criminal justice system. CLAIR notes that remote technology could save costs and time, and could encourage case ownership, particularly for administrative matters.

The Government sees this consultation as an opportunity to gather views from all parts of the criminal justice system on the use of remote technology to support the efficiency of the criminal justice system, but particularly where use has expanded during the pandemic. The Government is seeking information about the experience of using remote technology, to support the Judiciary to ensure remote hearings are used in the most effective way. To complement this, the Government will also separately be undertaking an assessment of the impact remote hearings have on criminal justice system efficiency, building on the qualitative analysis that HMCTS published last year.

Our LawtechUK programme, now concluding its second year, has helped innovators to overcome barriers to developing new products that can transform legal service delivery and unlock efficiencies. As part of our commitment to supporting the growth of the Lawtech industry and the long-term sustainability of the criminal legal aid market, we will look for more opportunities to engage with and support innovators who are targeting this part of the sector.

Please see recommendation 2 regarding the government's investment in technology.

Recommendation 19: Successive governments have prioritised efficiency and costs over the quality of the criminal justice system. The Committee's inquiry into Court Capacity has highlighted the difficult situation facing the courts at the start of the pandemic. Unless there is significant change to criminal legal aid, there is a real risk that the balance

between defence and prosecution, which is at the heart of our adversarial justice system, will be unfairly tilted in favour of the prosecution. The fairness of criminal justice system depends on a criminal legal aid system that is properly funded and that is structured to enable lawyers to provide high-quality work on the most complex cases at every stage of the process. The Government's response to the independent review of criminal legal aid must ensure that criminal lawyers are paid for all the work they do to represent their clients and that fees and rates are regularly reviewed so that the profession can remain sustainable for the long-term.

Please refer to our response to recommendations 2, 3, 7 and 9.

The Means Test

Recommendation 29: We welcome the decision to remove the £100,000 cap. However, we regret that it was ever necessary for a victim of domestic violence to have to litigate to obtain legal aid because of the Government's failure to ensure that the means test is regularly updated.

We have just concluded an extensive and detailed review of the legal aid means test. We are currently consulting on our proposals, which include a proposal to increase the allowance for equity in the main residence from £100,000 to £185,000, and to disregard all disputed property for civil legal aid eligibility purposes where it is the subject of the legal aid case. This, alongside our significant proposed increases to the income thresholds, will make it easier for domestic abuse victims to access legal aid.

Recommendation 30: We welcome the Government's decision to review the means test for both civil and criminal legal aid. There is a strong consensus among witnesses that any revised means test for civil legal aid should be simpler, for example by using passporting, should be set at an objectively defined poverty line and should be regularly updated. The vast majority of taxpayers are not eligible for civil legal aid, and for those that are, it is often difficult to access.

Our proposals will increase thresholds for legal aid significantly, meaning that an extra 2 million people in England and Wales will be eligible for civil legal aid, 3.5 million more will be eligible for legal aid at the magistrates' court, and all individuals will now be eligible for legal aid in the Crown Court. We are also proposing some changes which will make the means test simpler, such as the removal of the capital assessment for all applicants for civil legal aid in receipt of passporting benefits who don't own property. Our proposal to continue passporting recipients of Universal Credit where they have earnings up to £500 per month represents a good balance between passporting individuals who would be very likely to pass the means test, while not putting Universal Credit recipients at an advantage compared to other legal aid applicants.

We have worked closely with legal aid providers and the Legal Aid Agency to understand the administrative load of the current means test for providers, applicants and the LAA, and to ensure that our proposals reduce administrative complexity whenever possible and keep it to a minimum. However, there is sometimes a tension between this aim and ensuring the means test is fair and allows for the complexity of people's individual situations. We have balanced these aims throughout the review.