

## **Criminal Legal Aid Review: Remuneration for pre-charge engagement**

**A Response by**

**The Chartered Institute of Legal Executives (CILEx)**

**[January 2021]**



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## **1. Introduction**

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. This includes more than 1,250 practitioners specialising in Criminal Law, of which over 700 have indicated working as defence practitioners.
- 1.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 1.3. This response includes contributions from CILEx members working in criminal legal aid as defence practitioners, and therefore representing the beneficiaries of the consultation proposals.

## 2. General Points

- 2.1. Substantive change, capable of realising sustainable reform of our criminal legal aid system, requires that funding increases be looked at holistically with the aim of securing fair pay for work done at all stages of the criminal law process. CILEx has long advocated that this principle necessitates effective models for remunerating efforts at earlier stages of representation and investigation (such as police station work), and not simply at the later stages of case progression (such as in the context of AGFS and LGFS payment schemes).
  - 2.1.1. With this in mind, CILEx is pleased to see efforts being attributed to the pre-charge engagement stage, notwithstanding that this did not feature as part of the previous accelerated areas review (as consulted on back in 2020).
- 2.2. In order to ensure holistic reform however, the Ministry of Justice (MoJ) may wish to be mindful of the ways in which various reform projects on Criminal Legal Aid intersect and interplay with each other. For example, whilst pre-charge engagement is a specific element of the criminal law process, it cannot be evaluated in isolation from wider reforms and more generalised resourcing needs underpinning the criminal justice system as a whole.

## 3. **Q1. Do you agree with our proposed approach to paying for pre-charge engagement? Please state yes/no and give reasons.**

- 3.1. CILEx welcomes the principle behind the MoJ's proposals in recognising the need for securing fair pay for work done. From discussions with CILEx members it is clear that the pre-charge engagement stage already involves substantial time and efforts that are not, to date, effectively remunerated. This includes a vast array of responsibilities such as travel to and from police stations, liaison with clients (particularly as the initial pre-charge stage sees defendants seeking greater support and assurance as to process and procedures), as well as coordinating correspondence and fulfilling administrative responsibilities. That these proposals seek to recognise this work and remunerate practitioners, is thereby welcome in principle.
- 3.2. However, CILEx is concerned that these proposals, in practice, could operate to adversely affect the sway of justice in favour of the prosecution; with requirements for remuneration relying heavily on prior agreement from all relevant parties to be obtained. Members have cautioned that this dependency risks seeing police/prosecuting authorities acting *ultra vires* (over and above the scope of investigation), and in turn prejudicing the defence's position in strengthening an otherwise weak case. This is because of the likelihood for such an approval process to inadvertently incentivise prosecuting authorities to extract as much information as possible from a suspect, as a means of determining whether pre-charge engagement would be necessary from the outset. The risk here, is that by subverting the usual process (and by extension the burden of proof), defendants may be exposed to undue pressure for providing further information that was not forthcoming during initial interview stages; or equally to undergo further interviews, even after the client has already exercised their right to silence outside of the formal PACE interview setting.
- 3.3. Similarly, CILEx foresees that this requirement could well place expectations upon clients and their defence practitioners to participate in pre-charge engagement in instances where this may not be suitable, on the basis that in the absence of doing

so, they might otherwise be unable to “*avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.*”<sup>1</sup> Indeed, as the proposals provide very little incentive for a defendant to agree to pre-charge engagement, it is important that parties involved are freely able to opt out of this stage where they see fit, and that this in no way compromises their position during the criminal proceeding; such as by providing means of inviting adverse inference at a later stage.

3.4. Against this backdrop, CILEx would like to reiterate the vital role that defence practitioners play in the criminal justice system; ensuring that the innocent are acquitted, and that proper charges are imposed to reflect any crimes committed. This not only achieves justice for all parties, but also saves a vast sum of money for Treasury. In advising clients as to the appropriate steps that should be taken in having their case heard, many instances will necessitate that early resolution of a case, outside court place settings, would not be in the best interests of the client. With this in mind it needs to be recognised that the extent of pre-charge engagement suitable for the proper administration of justice will differ from case to case.

3.4.1. In fact, CILEx members have indicated that early resolution of cases where appropriate, might be more usefully and better achieved if fuller disclosure is provided by the police/prosecuting authorities prior to initial interview stage. Anecdotal evidence tells us that interviews, particularly for extremely serious alleged offences, can often suffer from limited disclosure prior to initial interview as the police seek to test the truthfulness of any account provided.

**4. Q2. If you do not agree with our proposed approach to paying for work associated with pre-charge engagement, please suggest an alternative and provide a supporting explanation.**

4.1. In order for any proposed approach for paying for work associated with pre-charge engagement to be successful, it is paramount that this remains sensitive to the reality of work undertaken. Unfortunately, however, the proposals, as currently stated, are not clear as to what elements of pre-charge work would actually be encapsulated within the remuneration model. Indeed, as acknowledged by the consultation document “*the volume of work associated with pre-charge engagement is unclear,*”<sup>2</sup> making it difficult to properly evaluate whether this approach would be effective in providing fair pay for work done. CILEx would be interested to learn more on this point, particularly with regards to the following:

4.1.1. **Parameters for remuneration:** the approach is unclear as to which specific activities could be charged for under these proposals; would payment extend to individual letters, phone calls, time spent in police station attendance, travel etc.? In certain instances, additional undertakings may also be required. For example, in cases where identification is an issue, it is often the case that an identification parade becomes necessary; this may be considered part of pre-charge engagement, and indeed is not yet currently remunerated for, however whether the MoJ envisages such processes to fall within the parameters of these proposals is yet to be ascertained.

4.1.2. **Extended payments:** the proposals suggest that remuneration under this approach would have “*an upper limit of £273.75 beyond which providers will be*

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<sup>1</sup> Ministry of Justice, “*Criminal Legal Aid Review: Remuneration for pre-charge engagement*” (December 2020) p.7 para 16: reference to the benefits of these proposals.

<sup>2</sup> See footnote 1, p.10, para 22.

required to apply to the LAA for an extension,<sup>3</sup> however it is unclear as to the criteria that will be required in order for defence practitioners to claim for extensions correctly, nor what, if any, limitations would exist in this regard.

4.1.3. **Claims for remuneration where only partial pre-charge engagement takes place:** Whilst the proposals vaguely outline processes for making remuneration claims, it is unclear whether these processes could adequately account for situations in which only partial pre-charge engagement work has been undertaken. For example, in situations where a client chooses to change their legal representative part way through the pre-charge engagement stage, could multiple claims be made to remunerate both practitioners/firms for their respective input to the case? Equally, should any relevant party choose to disengage with the pre-charge engagement stage mid-way through the process, could claims be made for payment to remunerate work already undertaken?

4.2. Notwithstanding additional clarity around the above, CILEx remains yet to be convinced that should a proper cost-benefit analysis be conducted, the proposed approach would be capable of realising the intended aim of remunerating practitioners fairly. This is on the basis of two crucial factors:

4.2.1. Firstly, in the interests of ‘cost’: requirements for a “*full written record of the discussions*”<sup>4</sup> to be provided for by the defence, introduces additional administrative burdens within the process; the impact of which has not been fully considered or contextualised for practitioners. This runs the risk of undermining the MoJ’s efforts to see fair pay for work done realised.

For example, CILEx practitioners pointed to the level of work currently undertaken even in the simplest of cases in fulfilling preparatory and administrative requirements, with more complex cases giving rise to an even greater level of workload. Against this reality, it was feared that placing further administrative burdens, such as the need for a full written record, alongside the additional explanations that practitioners would inevitably need to provide to defendants to obtain relevant agreement to the process, risks adding insult to injury in generating yet greater time and resource burdens for practitioners. The net result could see defence practitioners placed under even greater strain than they currently experience.

4.2.2. Secondly, in the interests of ‘benefit’: CILEx is concerned to see a deliberate omission with respect to the level of fees payable for this work. Whilst we recognise that “*fee schemes will be considered in the context of the sustainability of the wider market as part of the upcoming independent review*”<sup>5</sup> without an open discussion as to the level of remuneration payable, it is difficult to voice support or otherwise, for these proposals that by their very nature are looking to discuss remuneration.

4.2.3. In summary, in the absence of a greater assessment by the MoJ as to the volume of work associated with pre-charge engagement and the level of administrative burden that these proposals would further generate, as compared with the level of payment expected; the proposals will be unable to assure practitioners, at this time, that the approach taken is sufficiently able to remunerate legal aid work effectively.

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<sup>3</sup> See footnote 2.

<sup>4</sup> See footnote 1, p.10, para 19.

<sup>5</sup> See footnote 1, p.11, para 25.

4.3. A wider point of note is the need for any approach taken to be sensitive to the current climate against which criminal legal aid practitioners and firms are operating. Notably, the impacts on cashflow as court case backlogs continue to rise, and as the number of cases Released Under Investigation simultaneously increase. The effect of both of these factors is to delay payment from the Legal Aid Agency, making it increasingly difficult for firms to manage and maintain healthy cashflow. Methods and timing related to billing are therefore paramount to ensuring longevity of firms and protecting the criminal legal aid provider base. As such, CILEx calls on government to consider alternative frameworks for billing such as remuneration being automatic at the point of inception of any pre-charge engagement work (thus being claimed in advance and not in arrears), and the possibility of the 'fixed fees' model being replaced with reasonable hourly rate payments that would meaningfully cover all work done at pre-charge engagement. It is hoped this would help to address current deficiencies in the system in which complexity is rarely reflected within remuneration payable.

**5. Q3. 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.**

6.1 In the absence of greater detail as to the parameters of these proposals, including relevant process and fee levels, CILEx does not believe that the assumptions and conclusions as outlined within the Impact Assessment will be comprehensive enough to account for any impacts on equality for either client or practitioner.

6.2 For example, when considering fees payable, it is still unclear as to whether the proposed remuneration model accounts for any necessary disbursements in instances where due to client vulnerability and/or minority background, additional work and safeguarding measures need to be undertaken as part of the pre-charge engagement stage.

6.3 Equally, from a practitioner perspective, embedded processes within the pre-charge engagement scheme may not be sensitive to the wider needs of individuals, as demonstrated by the inequalities already present in today's criminal justice system. For example, pre-charge engagement work, the bulk of which takes place as police station work, is notable for taking place outside of usual working hours. Not only does this require that practitioners frequently undertake pre-charge engagement work during antisocial hours, with subsequent impacts to mental health and wellbeing (particularly at a time where social needs and wants are already constrained from the wider climate created by COVID-19), but acute impacts are further felt by those with caring responsibilities (another fact which has been intensified by COVID-19 as a greater need for home-schooling arises alongside the need to care for loved ones and dependents, particularly when suffering from illnesses such as the effects of long-COVID).

**For further details**

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