



Ministry of Justice: *Response to Independent Review of Criminal Legal Aid*

A response by CILEX (The Chartered Institute of Legal Executives)

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Contents

Page

1. Introduction	3
2. Summary of response	3
3. General points	3
4. CILEX and criminal legal aid	4
5. An Advisory Board	5
6. Unmet need and innovation	5
7. Diversity and training	5
8. Technology	7
9. Pre-charge engagement	8
10. Police station fees	9
11. CILEX members as duty solicitors	10
12. Magistrates' Court fees	11
13. Investment in AGFS and LGFS	12
14. Conclusion	12

1. Introduction

- 1.1 CILEX (The Chartered Institute of Legal Executives) is one of the three main professional bodies covering the legal profession in England and Wales. The 20,000-strong membership is made up of CILEX Lawyers, paralegals and other legal professionals. Our members are judges, advocates, partners in law firms and specialist lawyers working across every aspect of the law.

2. Summary of response

- 2.1 As evidenced in our submission to the Criminal Legal Aid Independent Review (CLAIR), CILEX continues to believe that criminal legal aid is in dire need of investment and reform to ensure that underpinning principles of our justice system are retained and that the sector continues to attract and retain the best legal talent.
- 2.2 We support the proposals contained within Government's response to CLAIR that aim to address these problems while also remaining concerned that further support will be required to guarantee the long-term viability of the criminal legal aid system.
- 2.3 The lack of effective partnership working between MoJ, representative bodies and practitioners has helped to prevent reform and should be addressed through the creation of an Advisory Board.
- 2.4 The criminal legal aid sector is suffering from a long-term recruitment and retention crisis, in large part due to low salary levels and overwhelming workloads which not only deter new entrants, but which have a direct impact on diversity. Addressing remuneration is critical to this, but so too is opening up the system to lawyers from a broad range of backgrounds by, for example, supporting their specific training opportunities through 'non-traditional' entry points to the legal profession.
- 2.5 Important lessons must be learned from the rapid embrace of technological solutions brought about by the pandemic. Remote interaction between practitioners, clients and the justice system can bring enormous benefits (though is by no means appropriate in all scenarios) but significant investment is required to make a common standard of technology accessible across the country.
- 2.6 Reducing the barriers to CILEX professionals becoming duty lawyers is a welcome move that recognises the importance of our members to the justice system.
- 2.7 The fee uplifts proposed in the consultation are a positive step towards putting criminal legal aid on a more sustainable footing, however there remains a widespread view among the profession that they are not sufficient to ensure it is seen as a viable long-term career. As such we are asking that the proposed Advisory Board be given a specific remit to conduct an impact review after 24 months and be asked for their views on whether more needs to be done to protect the criminal legal system.

3. General points

- 3.1 Finding yourself as a suspect or defendant in the criminal justice system is undoubtedly one of the most stressful challenges an individual can face. Through unfortunate

circumstance or choice, it can happen to anyone and is particularly difficult for the most vulnerable in our society.

- 3.2 Access to quality legal advice and defence is vital to not only safeguard the interests of the individuals involved, but also to uphold public confidence in the justice system and ensure that convictions are fair and safe. Criminal legal aid is a vital cornerstone of this system.
- 3.3 It is widely acknowledged that the criminal legal aid system is in a parlous state. Historic underfunding, freezes and cuts to fees, and unfair attacks on those working in publicly funded criminal defence have all led to overwhelming workloads, recruitment challenges and low morale among professionals.
- 3.4 As we noted in our evidence to CLAIR, previous attempts to reform criminal legal aid have been too piecemeal in nature and have therefore failed to provide the systemic overhaul that is so desperately needed.
- 3.5 In order to drive substantive and sustainable change, reforms to the criminal legal aid sector require systemic solutions; a focus on the system as a whole, as opposed to various initiatives targeting only parts of the puzzle. Government must ensure that criminal legal aid is sufficiently and fairly remunerated, that it is positioned as an attractive career, that all legal qualification routes are treated equally, and that unnecessary bureaucracy does not get in the way of a modern, effective system.
- 3.6 As set out below, CILEX believes that the proposals in this consultation seek to address a broad range of issues affecting criminal legal aid. However, we do express some concern that while there is a good scope of proposals, they may be insufficient in terms of scale to truly guarantee the long-term viability of the system and hence our view that there should be an impact review after 24 months.

4. CILEX and criminal legal aid

- 4.1 At the time of writing, there are currently around 1,140 CILEX members working in criminal law. Nearly two-thirds of these members identify as female, while almost one in five is from an ethnic minority.
- 4.2 Most of these members work in private practice for SRA-regulated firms, while a small number work elsewhere in the criminal justice system.
- 4.3 CILEX operates a Specialist Reference Group (SRG) of members working in criminal law. We have engaged extensively with this group to inform both our input to this consultation and our evidence to CLAIR. This has included discussions with specialist advisers, focus groups and direct engagement between our members and Ministry of Justice officials.
- 4.4 We have also surveyed members working in, or with an interest in, criminal law on a range of proposals contained in this consultation; capturing the views of a broad range of professionals from those who are highly experienced duty lawyers through to recent graduates.

5. An Advisory Board (Consultation questions 1-3)

- 5.1 CILEX agrees that there is limited scope for collaborative partnership working between MoJ, representative bodies and criminal defence practitioners under current arrangements. While bilateral relationships are often strong and productive, and should not be discarded, a forum for key stakeholders in the criminal justice system should lead to more effective collective working and intelligence sharing.
- 5.2 We therefore support the creation of an Advisory Board, on the proviso that it actively engages a focused group of stakeholders (including CILEX) to share information and data, continually review the issues identified by CLAIR and to provide meaningful feedback that demonstrably influences decision making.
- 5.3 The Criminal Justice Board has a specific remit which does not cover many of the issues identified in CLAIR. It would require a significant change in focus to serve as an Advisory Board. While acknowledging the risk of adding further complexity to the system, we therefore believe this Board ought to be a wholly new group, rather than a repurposing of an existing forum.
- 5.4 We are particularly keen that the finally constituted Advisory Board is given a specific remit to conduct an impact review after the implementation of the proposals contained in the consultation to test whether, as implemented, they have delivered what was envisaged and whether as a result the criminal legal system is now considered sustainable or if more is required to be done (e.g. further review the fees for specific activities)

6. Unmet need and innovation (Questions 4 – 6)

- 6.1 Current requirements for legal aid providers to have a physical office to be a member of a duty scheme are outdated and compound the problem of low service levels in specific geographical areas such as deprived or rural communities. This issue was comprehensively identified by the House of Commons Justice Committee¹ among others.
- 6.2 As set out below, technology is enabling the remote delivery of quality legal advice and representation in a way that significantly reduces travel time and positively impacts practitioners' workloads. The benefits of this have been extensively demonstrated during the pandemic.
- 6.3 While it is not always appropriate, especially in cases involving vulnerable people, the use of remote technology frequently negates the need for providers to have a physical presence. This should be reflected in any future delivery model.

7. Diversity and training (Questions 7 – 16)

- 7.1 Feedback from CILEX members working in criminal legal aid demonstrates that while there is a strong moral and professional satisfaction derived from playing such a vital role in the justice system, low levels of remuneration and unsustainable working practices act

¹ House of Commons Justice Committee: [The Future of Legal Aid \(parliament.uk\)](https://www.parliament.uk/publications/2019/06/the-future-of-legal-aid/)

as a major deterrent towards new entrants to the sector. Similarly, those who have recently begun working in criminal legal aid, or are actively considering doing so, continually raise concerns about the longevity of their career and the relative appeal of working in more financially rewarding areas of the law.

- 7.2 Further evidence is provided below of the need to tackle a broad range of issues that limit the attractiveness of, and diversity within, criminal legal aid careers. However, we agree with the Government position that a training and accreditation grant programme, if properly targeted, could be an effective tool in addressing recruitment and retention issues.
- 7.3 Such grants must be available to support all forms of relevant legal training. This means not just enabling solicitor training but also the training of CILEX members. CILEX practitioners play a crucial role across all areas of criminal legal aid. Our qualifications provide a greater degree of flexibility in terms of entry and study route than 'traditional' entry points into the legal profession, resulting in a more diverse workforce. We therefore urge Government to design a grant programme that recognises the need for such flexibility.
- 7.3.1 Due to the nature of the training they undertake, CILEX practitioners are specialists with a dedicated focus on a particular aspect of the law. Solicitors' training enables them to obtain a 'General Qualification'²; CILEX's specialist qualification focuses on only the qualification necessary to practise in a given area of law.
- 7.4 Any training grant must offer sufficient incentive to new entrants to drive them towards the profession and recognise the often difficult nature of legal aid work. Conversely, such a scheme must also be designed in a way that ensures a long-term commitment from trainees to legal aid work and avoids abuse by those who may utilise it simply to access subsidised training before swiftly changing career paths.
- 7.5 We also encourage Government to consider how training grants or similar learner support can be provided to those who are self-funding their qualifications and who may not yet be in relevant employment.
- 7.6 Engagement with our members strongly suggests that while many new entrants are motivated by the strong, almost vocational, desire to 'do the right thing' by supporting the functioning of an effective criminal justice system, they are often tempted away towards better remunerated areas of the law later in their careers.
- 7.7 We make recommendations regarding proposed fee increases and remuneration below. Within this, we call on Government to keep levels of funding and their impact on salaries in criminal legal aid, relative to broader market trends and those offered by the CPS, under constant review to ensure it remains a viable and attractive long-term career.
- 7.8 The criminal justice system must reflect the society it is there to serve. As has been noted several times, not least of all by CLAIR, there are significant issues with recruiting and retaining people into the legal aid system who represent one or more protected characteristic as set out in the Equality Act. The most serious repercussion of this is a lack of faith among defendants and victims of crime that the system recognises and reflects their backgrounds and needs. Efforts to improve overall recruitment into the

² Licence to practise in all reserved legal activities.

system must focus heavily on improving diversity across all characteristics.

7.9 While they acknowledge that the nature of criminal legal work will inevitably involve unsociable and unpredictable working patterns, feedback from our members argued that this is often unnecessarily compounded by the various processes and actors involved. This places a disproportionate burden on those with young families or other caring responsibilities and acts as a deterrent to them furthering a career in the sector.

7.10 Workload pressures, low salaries and unfair attacks on the profession have been allowed to undermine the image and reputation of criminal legal aid. Yet, as the foreword to the Government response states, publicly funded criminal defence is essential for:

*“the benefit of the victims of crime, and everyone in our society who relies upon a robust and effective criminal justice system”.*³

7.11 Addressing the issues identified above, while ensuring that legal aid practitioners are fairly remunerated for the important, difficult, and stressful work that they do, will go some way towards addressing perceptions of the career. This would allow Government, alongside professional bodies and legal firms, to conduct far greater promotion of careers in criminal defence as an integral part of a healthy justice system.

7.11.1 Such activity must promote all methods of entry and qualification, not just the solicitor route, and should be heavily targeted towards underrepresented protected characteristics and those from disadvantaged socio-economic backgrounds.

7.12 The consultation raises the possibility of solicitors gaining higher rights of audience and asks what can be done to support this. As we contend throughout this response, suitably qualified CILEX professionals are every part the equal of solicitors in their chosen area of law when it comes to skills, expertise and professionalism. However, there are too many artificial barriers placed in their way that prevent widespread parity of esteem. Therefore, any efforts to grant solicitors higher rights of audience should also be extended to fully qualified CILEX professionals.

7.13 Further to this, we urge Government to consider its use of language when it refers to legal professionals. Our members are proud to be CILEX qualified and the frequent use of ‘solicitor’ as a catch-all term is both confusing and undermines the unique nature of the CILEX qualification route. ‘Solicitor’ ought to be used only when referring to those who are registered as such with the Solicitors Regulation Authority, with a broader term such as ‘lawyers’ used when referring to the profession as a whole.

8. Technology

8.1 As noted in our submission to the CLAIR call for evidence, the introduction of technology to allow for remote delivery of legal aid provision (largely brought about by the pandemic) has been a welcome change.

8.1.1 Significant benefits have been noted in instances where there is a pre-existing relationship between lawyer and client and/or where there is a strong likelihood of a swift admission of guilt. In these cases, allowing participants to interact remotely enables both the efficient application of justice and supports practitioners who are managing large and complex caseloads.

³ [Response to Independent Review of Criminal Legal Aid - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/independent-review-of-criminal-legal-aid)

- 8.1.2 However, our members also believe that remote technology is not always an effective substitute for face-to-face interaction. This is especially true for complex cases, first-time offenders and vulnerable clients.
- 8.2 We have also heard mixed reports of the extent to which different stakeholders have actively embraced effective remote solutions, with the availability of technology varying hugely between police forces, stations and courts.
 - 8.2.1 For example, members have stated that even within one geographic region, different police forces have adopted different interpretations of 'remote'; ranging from only permitting a voice phone call through to full use of video solutions such as Microsoft Teams.
 - 8.2.2 This not only presents challenges in terms of ensuring client confidentiality, but also represents something of a 'postcode lottery' for both practitioners and clients; leading to inconsistencies in terms of access to justice based entirely on geography.
- 8.3 Use of remote technology should continue to be embraced and encouraged, subject to the agreement of all interested parties.
 - 8.3.1 This should be accompanied by an insistence on achieving a high degree of consistency across all areas of the justice system in the use of high quality, secure, and confidential technology in the near future.

9. Pre-charge engagement (Questions 20 – 23)

- 9.1 CILEX agrees there is little incentive currently for practitioners to undertake pre-charge engagement (PCE) work, with any preparatory activity unremunerated.
- 9.2 Allowing for preparatory work to be fairly paid is essential if Government wishes to see an increase in the uptake of PCE. The majority of our members working in criminal law believe that remunerating preparatory work would likely lead to an increase in PCE, although the scale of this increase is uncertain.
 - 9.2.1 Feedback from our members suggests that difficulties in reaching an agreement between both sides to engage in PCE are extremely common and therefore deter them from considering it (and undertaking any preparatory work). Scenario 2, as proposed in the consultation, would at least ensure preparatory work is remunerated, even if the police or CPS refuse to engage.
- 9.3 Remuneration is not the only factor that limits practitioners from carrying out PCE.
 - 9.3.1 A number of our members have cited a lack of willingness on the part of the police and CPS to engage or discuss cases prior to charging as a fundamental block on PCE.
 - 9.3.2 For PCE to work properly, disclosure practices need to be improved and more widely adopted to ensure that discussions are fair and transparent.
 - 9.3.3 Members also cited concerns regarding inferences being drawn from PCE at a later date which would undermine the 'golden thread' of the Woolmington Principle that it is the duty of the prosecution to prove guilt.
 - 9.3.4 Our members also identified administrative barriers to PCE; most notably the length and complexity of the paperwork required. If this process could be streamlined, it would further encourage uptake of PCE.

10. Police station fees (Questions 28 – 39)

- 10.1 Many of the issues facing criminal legal aid practitioners stem from historic, chronic underfunding, with the fees currently paid to law firms reflecting neither the importance of legal aid work nor the broader context in which practitioners operate.
- 10.2 CILEX supported the recommendations of CLAIR regarding fee increases and so the proposal to uplift fees by 15% is welcome and one we believe will support the goal of putting the system on a more sustainable footing.
- 10.3 However, it must be noted that there are widespread views among practitioners that while more money going into the system is an inherently good thing, 15% may not adequately repair the damage done by previous freezes and cuts to fees. The levels proposed will provide a short-term benefit but may fail to address the long-standing issues affecting the system such as recruitment and retention. We would draw the government's attention to two concerns that in our view should be the subject of our proposed impact review:
- 10.3.1 Evidence from our members suggests that even the proposed uplift may not sufficiently reflect the increasing complexity of both the cases practitioners are required to work on and the often chaotic personal situations of their clients.
- 10.3.2 There is also scepticism among CILEX practitioners as to the proportion of the proposed fee increases that they will receive in the form of enhanced remuneration. In the period of time that has elapsed since fees were last uplifted, there have been significant increases in business overheads, meaning that firms may use some of the proposed increase to improve their balance sheets. This will be especially pronounced in the case of specialist legal aid firms working in deprived areas, where the opportunity to subsidise legal aid with more lucrative work is limited. When the cost of living is rising fast, this is a critical concern for our members, who see counterparts working in other areas of the law (or even the CPS) being far better remunerated.
- 10.4 Of the two options presented for reforming police station fees, following our internal consultation our members prefer the proposed option to align the structure with that of the Magistrates' Court; allowing higher fees to be claimed when a threshold of work done is surpassed (Option 1).
- 10.4.1 Fee thresholds within this structure ought to be set according to time spent on the case, which would create a far stronger link between reward and work done. This would also avoid the flaw in the alternative model (in which different types of cases attract different fee levels) whereby cases which appear simple from the outset can ultimately become complex and time consuming, with additional work going unrewarded.
- 10.4.2 Members have noted that standards in client care can be put under extreme pressure as a result of the current fixed fee model, as lawyers are effectively incentivised to turn cases around as quickly as possible in order to maximise the fixed fee, rather than properly assessing their clients' situations. Consideration must be given to this in remunerating time spent on a case.
- 10.5 Moving to this model will inevitably have an initial administrative and cost impact on firms, with changes to case management and billing systems the most prevalent. Support should be made available to aid this transition and prevent too much of the proposed fee increases being consumed by administrative updates.

10.6 We agree that the lack of harmonisation in relation to fees and working practices across different geographies is anachronistic and leads to unnecessary complexity in the system. A harmonised national fee scheme would be simpler, providing this is implemented in the spirit of 'levelling up' those areas where fees are lowest, rather than as an opportunity for further cost saving (while also acknowledging the argument for a separate funding rate for London to account for the higher cost of living/doing business).

10.6.1 We also re-state the position we submitted to the CLAIR call for evidence that the requirement for legal aid firms to hold a physical office in the postcode area as part of the LAA contract has quickly become obsolete in light of COVID-19 and digital transformation efforts across the justice system. Legal aid firms should be provided with the choice of both physical and virtual office: virtual offices would be the central case management system and would accord with wider transformations across the sector (including changes to public infrastructure such as reduced court and tribunal buildings, increased use of CVP etc.)

10.6.2 This would have instant cost benefits, with savings on rates, rents, buildings, contents insurance for those who wish to adopt the virtual model; however, the option to retain a physical office would still remain, safeguarding high street firms and those who wish to retain traditional working models.

10.7 In relation to subsuming PCE into the police station fee scheme, noting our comments above on the general operation of PCE, our members favour this taking the form of a separate fee based on the complexity of the work involved in undertaking preparatory work, which can vary hugely from case-to-case and is not always directly connected to hours spent.

11. CILEX members as duty solicitors (Question 41)

11.1 CILEX practitioners play a vital role in the criminal justice system; demonstrating outstanding levels of expertise, professionalism and commitment to public service.

11.2 There is a national recruitment and retention crisis in criminal law, as well as significant challenges in improving the diversity of the profession to better reflect the communities it serves.

11.3 Many of our members already act as duty 'solicitors', having successfully undertaken the Law Society Criminal Litigation Accreditation Scheme. This consultation response is reflective of extensive engagement undertaken with those members and with others working in, or considering a career in, criminal law.

11.4 However, we believe the qualifications required by The Law Society to gain CLAS accreditation represent an unnecessary hurdle for CILEX members to jump when they have already demonstrated their skills and competency through our qualification route. To gain that accreditation, a practitioner needs to be a member of the Police Station Representatives Accreditation Scheme (PSRAS) AND hold the Magistrates' Court Qualification.

11.5 CILEX contends that the CILEX Professional Qualification (CPQ) and advocacy practice rights course equip members with the necessary knowledge and skills to operate independently as duty lawyers and make them the professional equal of solicitor counterparts.

11.5.1 This is supported both by strong member feedback from those who have

substantial experience in criminal legal aid and benchmarking exercises demonstrating the equivalence of our qualifications with the Magistrates' Court Qualification (MCQ).

11.6 We therefore support the premise of the consultation that it should be made easier for suitably qualified CILEX professionals to become duty lawyers.

11.7 Feedback from our members suggests that a significant level of prejudice still exists in the system, with CILEX professionals often not seen as the equivalent of solicitors by police, magistrates, or defendants.

11.7.1 Therefore, either some form of accreditation may still be helpful in allowing them to demonstrate that they have undertaken training at the same standard as solicitors and are fully authorised to act as duty lawyers, or recognition of equivalence should be enshrined in the legal aid contract, amending it to explicitly state that CILEX members who hold PSRAS and CILEX criminal practice rights are able to become unsupervised Duty Lawyers.

12. Magistrates' Court fees (Questions 47 – 48)

12.1 As with the proposed uplift in police station fees, CILEX welcomes the additional funding for Magistrates' Court fees outlined in the consultation.

12.2 CILEX recognises the need to ensure value for money from the system and to balance the impact on the public purse. More money going into criminal legal aid is undoubtedly a positive step, but these proposals may not fully fix problems that have built up over decades. As with police station fees, we urge Government to task the proposed Advisory Board with a remit to conduct an impact review after 24 months of implementation to ensure that any adverse impact or unresolved issues are highlighted and raised with the government for consideration.

12.3 Feedback from our members suggests a significant level of disagreement by practitioners with the Government's view that the Magistrates' Court Fee Scheme does not require structural reform at the current time.

12.3.1 In particular, members feel that the current structure does not fairly compensate for the time spent working on cases or in court itself. Fixed fees mean that lawyers are frequently working at effective hourly rates substantially below other areas of law. This inevitably creates workload, morale and, ultimately, recruitment issues in the sector. There is, therefore, a need to not only increase fee levels but to also ensure their structure reflects the actual work done by lawyers. A return to hourly rates is popular option, but other methods of reform should be considered.

12.3.2 There are also issues with the complexity of the fixed fee system and the administrative processes involved in billing for Magistrates' Court cases. This adds an unnecessary time burden on to overworked lawyers and further reduces We urge Government to work with the legal sector to review these processes and implement changes that enable an efficient and modern approach to claiming fees.

12.3.3 We also believe there is a need for reform relating to broadening the scope of activities for which fees can be claimed. As examples, at present there is no provision for consideration of unused material, nor any fee uplift for cases involving expert evidence which invariably require further consideration and/or advice. Both of these issues add to the workload of practitioners without adequate reward.

13. Investment in AGFS and LGFS (Questions 49 – 52)

13.1 CILEX's position on the proposed uplift to AGFS remuneration follows those outlined for police station and Magistrates' Court fees. We welcome the commitment to additional funding for criminal legal aid, while remaining concerned that measures are taken to monitor and ensure the long-term viability about the system and the appeal of it to potential new entrants (either firms or lawyers) and along with the impact of the changes in the other two areas should be the subject of an impact review after 24 months.

14. Conclusion

14.1 There is no single 'quick fix' for the challenges facing the criminal legal aid system. Underfunding, recruitment/retention issues and outdated processes all stand in the way of building a modern, efficient and effective system that enables access to quality representation and advice for those who need it most.

14.2 We welcome both the recognition of this broad range of issues and the efforts made in these proposals to address them.

14.3 However, given how entrenched many of these issues are, it is essential that measures intended to tackle them are kept under regular review. We therefore urge Government to give the proposed Advisory Board a specific remit to conduct an impact review after 24 months, with a commitment to listen to its recommendations and make further improvements if needed to ensure the long-term sustainability of criminal legal aid.

14.4 CILEX professionals are crucial to both the current and future operation of the criminal legal aid system. We welcome and support the proposals to make it easier for suitably qualified CILEX members to play an even greater role in the system. We also call on Government to go further in ensuring parity of esteem for CILEX members by granting higher rights of audience and through a more inclusive use of language.

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