

Jo Sidhu QC and Kirsty Brimelow QC
Criminal Bar Association
Sent via email

8 August 2022

MoJ ref: ADR98967

Dear Jo and Kirsty,

CRIMINAL LEGAL AID – PAYMENTS TO CURRENT CASES

Thank you for your letter of 30 July setting out the CBA's position. Whilst I acknowledge the additional demands you make in the letter, I will primarily focus on the specific request to apply the 15 percent uplift to certain, existing cases and the associated questions around why we have not chosen to do this.

The Government position

The central recommendation of the CLAIR Report was that "funding for criminal legal aid should be increased overall for solicitors and barristers as soon as practicable to an annual level, in steady state, of at least 15% above present levels, which would, in broad terms, represent additional annual funding of some £135 million per annum"¹. In relation to the Criminal Bar, we have followed this central recommendation and, in doing so, delivered the biggest uplift in criminal legal aid rates in a decade. We have done it at the earliest opportunity with the new fees due to come into force on 30th September. We will publish the next phase, including a timetable for further fee reform which will respond to your additional demands and the remaining recommendations of the CLAIR Report, in the autumn.

Future retained work - legal and operational issues

As you will be aware from previous correspondence with my officials and the Government Legal Department, existing powers in LASPO do not explicitly allow for retrospective application, but we believe it is possible – from a legal perspective – to apply new fees to any work done after a certain date (with a further Statutory Instrument (SI) to achieve that). This subset of cases is described by both of us as 'future retained work'.

Whilst payment for future retained work is legally possible, paying uplifted fees on future retained work causes a number of significant operational issues. For example, in order to pay fees on future retained work, the Legal Aid Agency would have to seek - and verify - further information from advocates about when and what work was done, before manually calculating the value of work on a case undertaken both before and after an SI that achieves this can be brought into force.

Furthermore, and as I am sure you and your members are aware, the AGFS and LGFS operate on specific defined indicators (such as length of trial) which are used as proxies for work done after the representation order, and does not directly consider when work has been done. Given this, moving to paying a fee based on the date of work done would require significant and fundamental changes to both the AGFS scheme and operations.

¹ Independent Review of Criminal Legal Aid - Report (publishing.service.gov.uk)

The Legal Aid Agency has given detailed consideration to how uplifted payments could be made to existing cases. The way that the AGFS and LGFS operate, and the IT infrastructure designed to support those schemes, does not allow for a simple fix. Instead, a large increase in manual interventions would be required which makes errors and incorrect payments more likely.

The highly manual nature of calculation and additional evidence required presents a significantly higher risk of incorrect payments being made and an increased administrative burden on both the LAA and individual barristers and chambers. As you may know, we have a responsibility to ensure good management of public expenditure, including ensuring that we operate within acceptable bounds of error in making payments. The National Audit Office audits the LAA accounts to a materiality level of 1% in error on payments.

Financial issues

I can confirm that your understanding of the financial consequences of making payments on future retained work is correct. Over the 22-25 spending review period, it would cost a total of up to £35m for te AGFS, £18m for the uplifted elements of the LGFS and £2m each year for LAA operations for them to administer a manual payments scheme. Whilst you have declared these sums to be relatively modest, diverting public funds in this way would mean that funds may not be available for other measures such as support for victims, court maintenance and for legal aid including investment for the LGFS, which the CLAIR found urgently requires reform; or phase 2 of CLAIR reform where a number of your other demands, such as payment for written work and s28 hearings, will be addressed.

You also ask why we cannot spend the £240m 'saved' through the reduction of AGFS payments at the height of the pandemic. Firstly, we do not recognise this figure given that criminal legal aid expenditure on the AGFS scheme was £132m during 2020/21, only £76m less than at pre-pandemic levels in 2019/20, due to the impact on the Crown court.² However, regardless of the value, as I hope you will appreciate, these cannot be considered 'savings' as the statutory liability to pay out these funds remains. These payments are simply delayed rather than denied so cannot be diverted in this way.

Furthermore, I would also wish to point out that the Government has invested an additional £477m³ in the criminal justice system during this 2022 – 2025 spending review period to provide additional sitting days, Nightingale courts, video hearing technology, covid safe working environments, additional HMCTS staff, funding for victims as well as amendments to the hardship scheme for barristers. This £477m builds on the additional investment already made to defence fees for both barristers and solicitors in 2018 and 2020 of some £74m, £49m of which relates to the AGFS scheme. We estimate £30m⁴ (62%) of this additional £49m funding allocated to AGFS has reached the profession in the year to May 2022. Put simply, there is no standing sum that the Government can simply call on to uplift fees in this way.

We recently laid the Statutory Instrument which will increase AGFS fees by 15% for cases with Representation Orders granted on or after 30 September. This uplift was recommended by CLAIR and we are delivering this at speed. We have consistently said that the approach we have taken is realistically the quickest way possible to get money into the system and this is still the case.

Both solicitors and barristers will begin to see the pay rise before the end of 2022. For example, payments for Crown Court guilty pleas – which attract a new fee of between £420 and £9,873⁵ – could begin to be claimed this calendar year. We also estimate that when considering current advocate billing behaviour, over two thirds of the additional annual funding for the AGFS will be in the system by September 2023; my officials will write to you further on this point setting out the supporting calculations. All other numbers and calculations associated with the CLAIR report including barrister numbers and the average £7,000

² Legal aid statistics: January to March 2022, bulletin 4.3 (<https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2022>)

³ BUDGET 2021: Protecting the jobs and livelihoods of the British people (publishing.service.gov.uk) Section 4.29

⁴ The 30m includes 7m from accelerated measures (Legal aid statistics: January to March 2022 - GOV.UK (www.gov.uk) – CLAR Accelerated Measures, June 2021 to May 2022, AGFS only) and £23m delivered to AGFS in 2018 (agfs-response-impact-assessment.pdf (justice.gov.uk)), which is now in a steady state.

⁵ The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022 (legislation.gov.uk)

increase before expenses for the typical barrister can be found in the CLAIR impact assessment and supporting data compendium.⁶

The Criminal Bar and justice system

I share your concerns about the performance of the criminal justice system and the diversity of the Bar. In response to this, we have removed the cap – for the second year in a row - on sitting days in the Crown Court and delivered the largest criminal legal aid fee increase for a decade. You have chosen to undertake disruptive action and, once again, I urge you and your members to reconsider and work with us to recover the CJS from the pandemic and to devise and implement the next stage of legal aid reform through the advisory board. Crucially, the impact on victims is of paramount importance, and the wider ramifications of this disruption on victims are of deep concern. The only outcome of the ongoing action is delayed justice and further distress for more victims.

I am more than happy to have a meeting with you, and the Government is always willing to engage and listen to the views of all our stakeholders; however, for the reasons above, neither I, nor the Lord Chancellor are prepared to negotiate the settled terms for the first phase of the CLAIR reforms.

Yours sincerely,

SARAH DINES MP

⁶ https://consult.justice.gov.uk/digital-communications/criminal-legal-aid-independent-review-response/supporting_documents/clairimpactassessment.pdfhttps://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092151/clair-response-impact-assessment.pdf