



16/03/22

## LAPG Member Update

Issue 7 of 2022

The Government launched two significant consultations yesterday (Tuesday, 15 March 2022):

- Response to the Independent Review of Criminal Legal Aid
- Legal Aid Means Test Review

Both consultations represent potential landmark moments for the development of legal aid policy, for criminal defence fees and fee schemes, and for client access to legal advice and representation. Below we set out a summary of the main aspects of each consultation and we are asking for your contributions to help shape our responses. This update is our initial analysis of these substantial consultations and we will provide more detailed overviews and thoughts in the coming weeks, either by Member Update or another mechanism to capture your views and seek your input. We will also seek to keep you abreast of other developments, such as any potential action taken by other membership or representative bodies in response to these consultations.

### Response to the Independent Review of Criminal Legal Aid

The Government's response to the criminal legal aid independent review and consultation on policy proposals is to be found here:

<https://consult.justice.gov.uk/digital-communications/criminal-legal-aid-independent-review-response/>

**Responses are due in by 7 June 2022.**

There are four documents in English (and two in Welsh). The Consultation is 100 pages and there



**Government's response to the criminal legal aid independent review and consultation on policy proposals**

are 106 questions. The questions are in the main body of the Consultation but also all in one place in Annex B (page 86). There is an Executive Summary, an Impact Assessment and an Equalities Statement.

From our initial reading the main points to consider are:

### **Fee Uplifts**

The government is allegedly proposing an uplift of **almost all (criminal) legal aid fees by 15% as soon as possible**. This does NOT include prison law or two elements (pages of prosecution evidence (PPE) and trial length) of the Litigators Graduated Fee Scheme (LGFS).

The Government states that “[t]his would inject an additional £115m p.a. at steady state, at our projected 2024/25 volumes of cases. A further £20m p.a. is being held for other investment including in a reformed LGFS, the Youth Court and sustainability and development of solicitors’ practice which brings the total investment to £135m at steady state.”

The government states that this uplift is in line with the [Independent Review of Criminal Legal Aid’s](#) recommendation of a 15% general uplift to the fee schemes. Reflecting on CLAIR’s recommendation, and the Government’s priority to support early engagement and resolution in the CJS, they are not proposing uplifting payments for prison law at this time.

Contentiously the report states that “[t]o avoid further embedding perverse incentives and other issues identified by CLAIR, and in line with its recommendation for reform we are not proposing to invest additional funds in the PPE or trial length elements of LGFS at this time”. So that’s not a blanket 15% increase. And of course it is not immediate as the new fees will not come in for some months. See also the [Impact Assessment](#) which makes it clear for LGFS that “[t]he purpose of this annex is to assess the distributional impacts of the Option 1 proposals on the payments made under LGFS14. Most of the proposed fee scheme changes give fixed percentage uplifts and therefore their impacts would be even across case types and across providers and are not examined further. The LGFS is the only scheme which would see a disparity in the uplifts, as funding would be increased for basic fees, fixed fees and hourly rates, but not for trial length uplifts or PPE uplifts.

This increase has been mapped onto the 2019/20 closed case data to understand how it impacts different case types and firms differently”.

The tables in Annex A show much lower increases. The last table shows regional differences which are quite stark with the Government noting that “[a]round 59% of the funds associated with immediate uplifts would be received by solicitors’ firms through the police station, magistrates and LGFS schemes. Barristers would receive 32% of the immediate uplifts. The remaining 9% of the uplifts are for expert fees”.

The Government’s aim in investing in the criminal legal aid fees is to “improve the efficiency of the criminal legal aid system by incentivising early engagement and resolution where appropriate. We also believe it would improve the sustainability and stability of criminal defence practice and increase the attraction of criminal defence practice as a career for those from non-traditional backgrounds, minorities and other underrepresented groups”.

Interestingly when Secretary of State for Justice Dominic Raab was introducing the crime consultation in the House yesterday a Conservative MP asked about income inequality for women and BAME lawyers and Raab answered that he hoped that these measures would address this issue.

### **Fee scheme reform**

The government is also **consulting on options for reform of the fee schemes**, noting that “[s]ome proposals suggest specific options – including on how to strengthen defence in the Youth Court; whilst others ask open questions – this is particularly the case for changes relating to preparatory work and s.28 cases in the AGFS, and the reform of LGFS”.

The Government has also set out that they “are making proposals in line with the recommendations in CLAIR or presenting them alongside other options. The Government wants to act as quickly as possible and so we have taken CLAIR’s recommendations forward to consultation where possible, giving alternatives where the Government has alternative options, and this is possible or helpful.

Reforms will affect all legal aid practitioners in criminal defence. The Government believes making fee structures better reflect work done

will improve the efficiency of the criminal legal aid system by incentivising early engagement and resolution where appropriate”.

It will be interesting to hear your views on the reforms. In parliament yesterday Raab said that he could not shorten the 12-week period for responses because of the legal advice he had been given. He did not want challenges if there was a 6 or 8 week period. If the changes are brought in, could they really commence before perhaps October 2022?

### **Non-fee reform**

In addition to recommendations on fee levels and scheme structures CLAIR made a **number of non-fee recommendations** and touched, without making recommendations, on other associated areas, which have been adopted in this consultation process as follows:

- The Government is proposing to establish an Advisory Board to bring together partners in the criminal justice system to gather data to inform policy making and work collaboratively to provide a whole criminal justice system view to inform the Lord Chancellor’s decision-making on legal aid policy.
- The Government intends to work with CJS partners in the criminal justice system to trial new methods to deliver legal advice in police stations remotely to remove barriers to entering this type of practice by those with caring responsibilities (disproportionately women). They also intend to work with the professions and regulators on how they can collectively promote diversity in the professions.
- The Government believes CILEX professionals have a vital role in the criminal defence market and would like CILEX professionals to be able to become duty solicitors without needing to undertake additional qualifications.
- The Government is proposing to explore a variety of measures to support a fluid and innovative market including a review of the Standard Crime Contract. In line with CLAIR’s finding that there is a particular challenge facing the sustainability of the criminal solicitor profession this includes supporting training contracts for criminal solicitors and grants for solicitor advocates to gain higher rights of audience.

- The Government is committed to working with the regulators to ensure high quality standards are maintained and furthered whilst avoiding burdens on practitioners.
- Additionally, the Government is keen to support the use of innovation and new technology in criminal defence. In particular the Government proposes to trial expanded use of remote provision of advice in police stations and to gather views on where else new technology can be used positively.

## Press Releases

What have representative organisations said in their press releases?

See **The Law Society's** response:

<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/legal-aid-investment-welcome-first-step-to-repair-criminal-justice-system>

**The Bar Council:**

<https://www.barcouncil.org.uk/resource/the-bar-council-s-response-to-the-government-s-legal-aid-announcement.html>

The **CBA's** rather terse and admirably short statement is here:

<https://www.criminalbar.com/resources/news/statement-from-jo-sidhu-qc-chair-of-the-criminal-bar-association-15-03-22/>

The **LCCSA** earlier today tweeted: "The profession ought not to focus on the £££, but rather the time for implementation, and the broader restructuring of the fee schemes. The Ministry's focus on "perverse incentives" has always been the biggest clue as to the culture change ahead of us."

And the **CLSA** gave a cautious welcome and qualified that on Twitter: "There is however a lot of work to do and no time can be wasted in putting the profession back on a sustainable footing. We also remind the government that Sir Christopher suggested the £135m was a bare minimum to stabilise the profession and that further investment will be needed."

## Next Steps

There is a lot to digest here. LAPG colleagues and Advisory Committee members are meeting at the start of next week to start formulating our response to the consultation. We would urge

members to do their own responses particularly working out from your current caseload how this will affect your practice. If you are happy to share your responses with us, please email to [policy@lapg.co.uk](mailto:policy@lapg.co.uk). We are aware that sometimes online responses can be hard to share. We will revert on this in future. If you have any thoughts, concerns or comments on the consultation, [please do get in touch](#).

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## Legal Aid Means Test Review



### Legal Aid Means Test Review

The Ministry of Justice has published the Legal Aid Means Test Review consultation, covering its proposals to reform the civil and criminal legal aid means tests.

There are 149 pages, 109 questions and **the deadline for responses is 7 June**. Again the Ministry of Justice have stuck to a twelve-week consultation period.

There is the consultation, separate impact assessments for crime and civil and an Equalities assessment. You can find the documents here: <https://consult.justice.gov.uk/legal-aid/legal-aid-means-test-review/> along with the Welsh summary and a large print version.

There will be a series of stakeholder meetings to discuss the proposals and the response to this consultation exercise is due to be published in "autumn 2022". The dictionary definition of autumn and the MoJ definition are not always aligned.

LAPG has been involved in Means Test Review advisory group meetings for some years now. The Post Implementation Review of LASPO set up the Legal Support Action Plan and the Means Test Review was announced in February 2019.

### What are the main points?

The Government is increasing both the income and capital thresholds for legal aid eligibility. The government estimates that an extra 2 million people will be eligible for civil legal aid and 3.5 million more at the magistrates' court. They believe that the changes will lead to £20m more for practitioners.

The means test is removed completely for some civil cases including legal representation for children (under 18s including asylum-seeking children and separated migrant children), and for parents facing proceedings relating to ending life-sustaining treatment of a child.

The government proposes removing the upper disposable income threshold for legal aid in the Crown Court.

There will be changes to enable victims of domestic abuse to get more support.

Civil and criminal means assessment will be aligned “more closely”.

Council tax will be disregarded for civil cases and the proposal is to remove the highly contentious £545 per month cap on housing costs.

The existing civil work allowance will be uprated (from £45 per month to £66) and a similar allowance will be implemented in the Crown and magistrates’ court.

The government proposes deducting priority debt, student loan repayments and pension contributions up to 5%, from the disposable income assessment.

There is a useful summary from page 6 of the consultation.

For **civil legal aid**, the government is proposing:

- a significant increase to the income thresholds, using a cost of living-based approach for example increasing the annual gross income threshold to £34,950 for a single person (a 10% increase)
- increases to the disposable capital thresholds and the equity allowance. The lower capital threshold would be £7,000 and the upper capital threshold £11,000. The equity disregard would increase from £100,000 to £185,000
- to disregard compensation, ex-gratia and damages payments for personal harm, and backdated benefit and child maintenance payments, from the capital assessment
- to disregard property which is the subject matter of dispute in the case the individual is applying for legal aid for
- to disregard inaccessible capital, while putting a charge on the asset in question



- with the aim of recovering the legal aid costs
- to exempt recipients of certain welfare benefits who are not homeowners from the capital assessment
- to require recipients of Universal Credit with household earnings above £500 per month to go through an income assessment, rather than being passported as at present. (For a very pithy response to this you should be following @spikemullings on Twitter)
- a time cap of 24 months on the maximum length of time for which income contributions are payable
- to remove the means test for civil representation for children under the age of 18 and for parents or those with parental responsibility whose children are facing the withdrawal or with-holding of life-sustaining treatment
- to remove the means test for legal help in relation to inquests which relate to a possible breach of ECHR rights (within the meaning of the Human Rights Act 1998) or there is likely to be a significant wider public interest in the individual being represented at the inquest. An application will have to be submitted to the LAA but no means information will be required.

For **criminal legal aid**, the government is proposing:

- to increase the income thresholds for legal aid at the Crown Court and the magistrates' court, to take into account increases in the cost of living and private legal fees. The proposal is to increase the Cost of Living Allowance to £713 per month up from £473 per month.
- to remove the upper disposable income threshold for legal aid in the Crown Court
- to increase the maximum contribution period for income contributions at the Crown Court to 18 months, and implement a tiered contribution rate (40%/60%/80%)
- to continue passporting all recipients of relevant means-tested benefits (including Universal Credit) through the income assessment
- to remove the current exemption from paying a capital contribution for homeowners convicted at the Crown Court who are in receipt of passporting benefits
- to align the criminal advice and assistance and advocacy assistance means tests with the proposed new civil means test.



## When will any changes take place?

It is hoped that the non-means tested changes will be brought in by the end of 2022, followed by civil means test changes and then criminal. However changes to the digital systems at the LAA are very challenging and could cause delays beyond what the MoJ hope.

Under transitional arrangements, all existing legal aid recipients will be able to apply for reassessment under the new arrangements if more advantageous for them. It might seem that everyone should apply for a reassessment but if paying contributions it might be advantageous to stay under the current regime (shorter time period at present for instalments in criminal cases).

A major disappointment is that the MoJ say they will review income and capital thresholds 3-5 years after implementation. They do accept however that they will need to consider the implications of the cost of living crisis as part of the consultation response. If responding do include this point as it is so important.

One issue that the MoJ simply seem to have overlooked is if asylum support would be a qualifying benefit. LAA's lead on this left at the end of last year and they seem to have dropped the ball. It is not in the consultation. Again, you might like to put this in your response – it is very sensible.

Representative bodies have attended a lot of meetings and given a lot of input into these proposals. Obviously not every point was agreed by the MoJ but the team there has been extremely thorough. It was good to feel that they understood the issues. However there seemed to be considerable concern about the difficulties posed by making changes to the digital systems.

## What has the response been?

**The Law Society** say this is “a substantial step in the right direction” while flagging up the unnecessary bureaucracy on eligibility when people are on universal credit:

<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/expanded-legal-aid-eligibility-welcome-but-access-must-be-ensured>

**The Bar Council's** response was brief and mainly referred to the CLAIR consultation but they did

say “The Bar Council supports the Government’s commitment to provide legal representation to all children, the raising of the means test thresholds, and the offer of free representation to parents in child life-support cases and to families at some inquests. These proposals will help the most vulnerable have access to justice.”

LAPG will be looking at the documents in greater detail and working with our Advisory Committee to draft a response. If you are preparing a response please do share it with us, or feel free to feed into our response by [contacting us here](#). We know that this is an extensive exercise and not every aspect of the consultation will be relevant to your area of work - you can submit a response that just addresses some of the questions i.e. concentrate on the areas of legal aid you work within.

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So there we have it - two of the most substantial and significant consultations on proposals to reform legal aid in a decade. Both contain some very progressive ideas, particularly given the recent history of government 'reform' of legal aid. But our alarm bells are already ringing about some of the detail, about timing and implementation, and about what is missing from these proposals and from the Ministry of Justice's policy and reform programme more broadly (such as any view on civil legal aid fees...).

[Please do feed in any comments or concerns](#) about these two consultation processes. This is a big moment for the profession and we need to maximise the benefits for clients and for all of you at the legal aid coalface.

Many thanks also to Carol Storer for producing these excellent summaries within a matter of hours of publication of the two weighty consultations.

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