

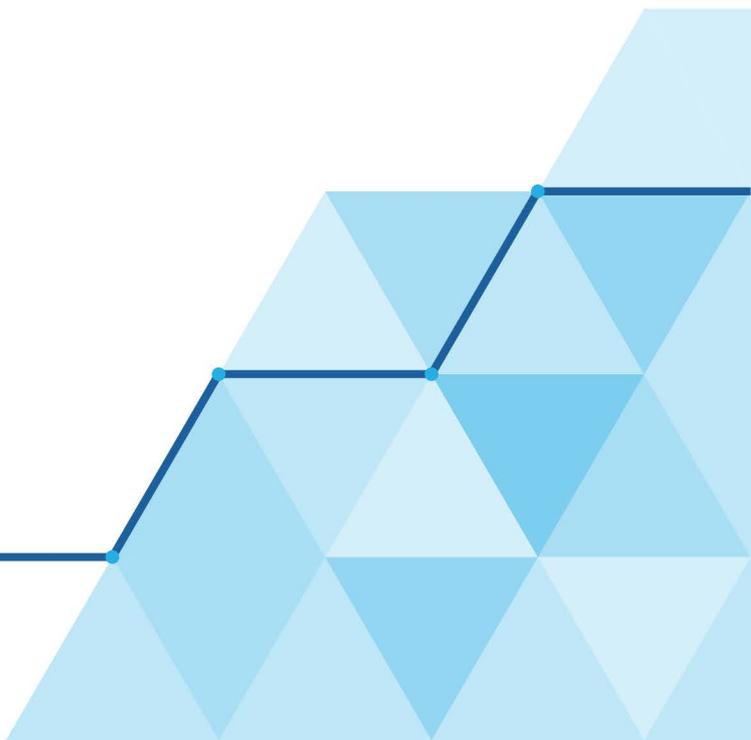


Ministry
of Justice

Government Response: Criminal Legal Aid Review

Remuneration for pre-charge engagement

This response was published on 7 April 2021





Ministry
of Justice

Criminal Legal Aid Review

Remuneration for pre-charge engagement

A consultation response produced by the Ministry of Justice. It is also available at:

<https://consult.justice.gov.uk/>

About this consultation response

To: This consultation response is aimed at anyone with an interest in remuneration through criminal legal aid fee schemes in England and Wales. This will include, but is not limited to, members of the criminal defence profession and their representative bodies, members of the judiciary, court staff, defendants, academics and others involved in the criminal justice system.

Published on: 07-04-2021

Enquiries (including requests for the paper in an alternative format) to: Email: criminallegalaidreview@justice.gov.uk

An Impact Assessment, Equality Statement and Welsh language summary are available at: <https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

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Criminal Legal Aid Review:
Remuneration for pre-charge engagement – Government Response

Ministerial foreword



2020 was a hugely challenging year for the country at large. Criminal defence practitioners have continued and will continue to play a crucial role in upholding the rule of law as we navigate the challenges of this year. The Covid-19 pandemic has done little to diminish the commitment and resilience of the profession. During these difficult times, it is important that practitioners are paid fairly for the important work they continue to do

At the beginning of 2019, the Ministry of Justice began a comprehensive review of criminal legal aid fee schemes.¹ Our approach has been to listen carefully to the views and concerns of the criminal defence profession and gather evidence to make sure the proposals that we make are based in fact and on real experiences.

In recognition of the very real concerns practitioners face, we agreed to bring forward accelerated proposals to address key issues that the criminal defence professions told us were of immediate concern, ahead of the outcome of the full review. In August 2020, following consultation, we announced implementation of a package of measures related to:

- how litigators and advocates are paid for work on unused material
- how advocates are paid for work on paper-heavy cases
- how advocates are paid for cracked trials in the Crown Court
- how litigators are paid for work on sending cases to the Crown Court

Through those quick wins we were able to inject an additional £35 million to £51 million per year into criminal legal aid.

The final accelerated area – how litigators are paid for pre-charge engagement was not included in the original accelerated areas for consultation due to a dependency with the Attorney General's review of Guidelines for Disclosure, which set out the framework for pre-charge engagement. Revised guidelines have now been published² and came into force at the end of 2020. Therefore, we have sought to promptly consult on our proposals for pre-charge engagement.

¹ <https://www.gov.uk/guidance/criminal-legal-aid-review>

² <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

Having carefully considered consultees' responses, I have decided to proceed with the proposal set out in the consultation, with some limited changes relating to the need for formal agreement with the investigator or prosecutor.

Towards the end of last year, we announced further details of the Independent Review of Criminal Legal Aid³ which will consider options for ensuring the long-term sustainability of the criminal legal aid market. In addition to this, the review will seek to make recommendations that will to assist the market to continue to provide high quality legal advice and representation is provided through a diverse set of practitioners, ensure it is appropriate funding, and enable the system to remain responsive to defendant needs both now and, in the future, whilst contributing to the efficiency and effectiveness of the Criminal Justice System.

This review is chaired by Sir Christopher Bellamy QC and supported by an expert panel with a diverse set of experience across the criminal justice system. Sir Christopher Bellamy will submit his recommendations to Government later this year.

I would like to thank all those who have taken the time to respond to the consultation and look forward to continuing constructive engagement during the next phase of the independent review.



The Rt. Hon. Robert Buckland QC MP
Lord Chancellor

³ Criminal Legal Aid – Independent Review - <https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

Introduction

1. In 2018, the Attorney General’s Office published its review of the efficiency and effectiveness of disclosure in the criminal justice system.⁴ The review found that early and meaningful engagement between the prosecution team and the defence is crucial to improve the disclosure process and that a lack of pre-charge discussion between investigators/prosecutors and those representing the suspect, hampers early resolution of evidential issues, particularly where there is a large quantity of digital material.
2. The review recommended that the Attorney General’s Disclosure guidelines should include guidance on pre-charge engagement (PCE) and that the Ministry of Justice should review how such work is remunerated. Remuneration for pre-charge engagement was one of the five areas where Government agreed to accelerate progress as part of the Criminal Legal Aid Review. However, this particular element was not included in the earlier consultation as we were awaiting the outcome of the Attorney General’s public consultation on the revision of Guidelines on Disclosure, that was launched on 26 February 2020, with publication of the Government’s response on 10 September 2020.⁵
3. The Attorney General has now implemented revised disclosure guidelines including the relevant guidance on the scope and content of pre-charge engagement.⁶
4. In summary, the guidance sets out the following key features of pre-charge engagement:
 - i) It is a voluntary process of engagement between the parties to an investigation;
 - ii) It can take place any time after the first Police and Criminal Evidence Act 1984 (‘PACE’) interview and before any suspect has been formally charged;
 - iii) It can be initiated by an investigator, a prosecutor, the suspect’s representative or an unrepresented suspect;
 - iv) Information on pre-charge engagement should be provided to the suspect or their representative either before or after interview;

⁴ <https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system>

⁵ <https://www.gov.uk/government/publications/government-response-to-the-disclosure-consultation-published>

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923774/Attorney_General_s_Guidelines_on_Disclosure_2020_NOT_YET_IN_FORCE.pdf

- v) It may take place face to face or via correspondence, and does not need to be a formal process;
- vi) A full written, signed record of the pre-charge engagement discussions should be made.

Scope of pre-charge engagement⁷

5. Pre-charge engagement may take place whenever it is agreed between the parties that it may assist the investigation; however, it should not be used as a replacement of a further interview with a suspect.
6. The Attorney General's review of disclosure was in part announced because of the difficulties arising from the large amount of digital material generated by police investigations, especially in complex cases such as serious fraud. However, the review became more pressing when a series of sexual assault and rape cases were halted as a result of disclosure failures.
7. The Attorney General's public consultation on revisions to the Guidelines on Disclosure envisaged that pre-charge engagement will only take place in a minority of cases. It was anticipated that the types of cases where pre-charge engagement would be appropriate would be cases where, for example, allegations of sexual assault has been made but the suspect in question is able to provide information that has a bearing on the allegation that points away from the suspect.
8. Pre-charge engagement may involve, but is not limited to:
 - Giving the suspect the opportunity to comment on any proposed further lines of inquiry.
 - Ascertaining whether the suspect can identify any other lines of inquiry.
 - Asking whether the suspect is aware of, or can provide access to, digital material that has a bearing on the allegation.
 - Discussing ways to overcome barriers to obtaining potential evidence, such as revealing encryption keys.
 - Agreeing any key word searches of digital material that the suspect would like carried out.
 - Obtaining a suspect's consent to access medical records.
 - The suspect identifying and providing contact details of any potential witnesses.

⁷ Paragraphs 5- 9 are direct extracts from the Attorney General's pre-charge engagement guidance published here: <https://www.gov.uk/government/publications/consultation-on-revisions-to-the-attorney-generals-guidelines-on-disclosure-and-the-cpia-code-of-practice>

- Clarifying whether any expert or forensic evidence is agreed and, if not, whether the suspect's representatives intend to instruct their own expert, including timescales for this.
 - Pre-charge engagement is encouraged by the Code for Crown Prosecutors and may impact decisions as to charge.
9. There are a number of potential benefits that may arise from pre-charge engagement:
- Suspects who maintain their innocence will be aided by early identification of lines of inquiry which may lead to evidence or material that points away from the suspect or points towards another suspect.
 - Pre-charge engagement can help inform a prosecutor's charging decision. It might avoid a case being charged that would otherwise be stopped later in proceedings, when further information becomes available.
 - The issues in dispute may be narrowed, so that unnecessary inquiries are not pursued, and if a case is charged and proceeds to trial, it can be managed more efficiently.
 - Early resolution of a case may reduce anxiety and uncertainty for suspects and complainants.
 - The cost of the matter to the criminal justice system may be reduced, including potentially avoiding or mitigating the cost of criminal proceedings.

The structure of the response

The remainder of this paper is set out over 4 sections –

10. *Section 1* comprises an introduction which summarises the consultation paper published in December 2020, the main themes emerging in consultees' responses, and the government's response to the views of consultees.
11. *Section 2* deals with questions 1 and 2 of the consultation (Do you agree with our proposed approach and if you do not agree with our proposed approach, please suggest an alternative and provide a supporting explanation)
12. *Section 3* deals with the economic and equalities impacts found in questions 3 and 4 of the consultation. (Do you agree with the assumptions and conclusions outlined in the Impact Assessment? And from your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?)
13. *Section 4* deals with the immediate next steps as we have now published our response.

Section 1: Introduction

14. This paper sets out the government response to our recent consultation on proposals for the remuneration for Pre-Charge Engagement of the Criminal Legal Aid Review. The consultation opened on 14th December 2020 and closed after 6 weeks on 25th January 2021.

Summaries of the proposals at consultation

15. Like the other accelerated areas of the Criminal Legal Aid Review, this consultation did not propose to make any changes to the structure of the fee schemes or the wider market or address issues of sustainability which are the focus of the independent Criminal Legal Aid Review. Instead, the remuneration for pre-charge engagement consultation proposed to introduce new remuneration arrangements for work associated with engagement with prosecution authorities at the pre-charge stage, as outlined in the AGO's guidelines.

This section sets out the proposal consulted under the following areas:

- how defence practitioners are paid for pre-charge engagement

Pre-charge engagement Remuneration

16. Pre-charge engagement is where the prosecution and the defence engage in meaningful dialogue/ engagement of disclosure. The current lack of pre-charge discussion between investigators/prosecutors and those representing the suspect, can hamper early resolution of evidential issues, particularly where there is a large quantity of digital material.

17. We proposed a new unit of work with an upper limit for advice and assistance associated with pre-charge engagement. We proposed that defence practitioners would be remunerated where it has been agreed between the relevant parties (prosecutors and/or investigators, suspects and suspect's legal representatives) that pre-charge engagement may assist the investigation and a full written record of the discussions is made.

Summary of consultation responses

18. A total of 12 responses to the consultation were received. Whilst all responses received were from the legal profession. 66% of responses were from private individuals and 33% were from representative bodies such as The Law Society, The Chartered institute of legal executives (CILEx) and the Young Legal Aid Lawyers (YLAL). We also received a response from the Big Firms Group.
19. The main themes throughout the responses focused on the requirement of a “written agreement” between the relevant parties before pre-charge engagement can be provided. Additionally, we heard from consultees about the role of the police in this agreement.
20. A broad range of consultees also expressed some concerns with our estimation of cases. The view was that the department has underestimated the yearly number of cases which could potentially trigger pre-charge engagement.

Section 2: Responses related to remuneration for pre-charge engagement

21. As set out in the original consultation and in *pages 9 – 12*, we proposed a new unit of work for advice and assistance associated with pre-charge engagement, as outlined in the Attorney General’s guidelines. The defence practitioner will be remunerated where it has been agreed between the relevant parties (prosecutors and/or investigators, suspects and suspect’s legal representatives) that pre-charge engagement may assist the investigation and a full written record of the discussions is made. It can be initiated by either party.
22. The responses to consultation questions 1 and 2 are summarised below. Given some of the thematic similarities in consultees’ responses to these questions, we provide a single government response to the concerns raised at the end of this section.

Question 1: Question One: Do you agree with our proposed approach to paying for pre-charge engagement? Please state yes/no and give reasons.

Question 2: 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.

23. Of the 12 responses we received, 50% of consultees agreed with our proposed approach for paying for pre-charge engagement. Most respondents had concerns that the fees proposed for this type of work was low and not sufficient, which was the reason for 50% of respondents disagreeing with the proposals.
24. Some of the 50% of respondents who agreed with our approach for paying for pre-charge engagement, expressed some concerns that our consultation had not made clear that any final pre-charge engagement fee will be exclusive of VAT. Other respondents agreed with the proposal but raised issues about the scope of this work in the absence of an agreement with the investigator or prosecutor.
25. Others, such as the Young Legal Aid Lawyers (YLAL), suggested that “*letters of representation be specifically stated to be included in the scope of pre-charge engagement.*”

26. Another common theme expressed by many of the consultees was the concern around the need to provide “written agreement.” 50% of respondents brought up this matter in some form in their response. Some consultees noted that the Attorney General’s guidelines do not specify the need for a formal “agreement” and only require a record of the discussion.
27. The Law Society for example stated “...*the requirement for a separate ‘written’ agreement to engage would create an additional layer of unpaid and superfluous bureaucracy.*” They agree that there should be a detailed note on the file of any engagement with the police or prosecution but believe this note should suffice as “*clear evidence that there was agreement between the parties to engage*”. Consultees also felt that work would need to be done, e.g. taking instructions from the client, ahead of any agreement with the investigator and that this work should also be remunerated.
28. The overriding view was that requiring an “agreement” ultimately creates an uneven power dynamic between the defence and police officers should they refuse to agree to pre-charge engagement. Other consultees felt such a requirement would create an unnecessary administrative burden for practitioners and even if no agreement was reached, it was unfair to not remunerate them for potential work carried out.
29. The Chartered Institute of Legal Executives (CILEx) in their response along with others raised concerns about how remuneration would be paid where a client changes their legal representation part way through the pre-charge engagement stage.

Government response

30. The government carefully considered the views of respondents concerning remuneration for pre-charge engagement. In terms of the level of hourly rates, the government was clear in the original consultation that this was not in scope for consideration and any changes to the structure or remuneration levels in the fees schemes would be a matter for the Criminal Legal Aid Independent Review to consider. However, in addition, as this is a new fee we will in due course undertake an evaluation of the work involved, volumes of work and whether the proposed hourly rates and the upper limit fairly pays for the work done
31. A number of consultees raised concerns about the potential for increased bureaucracy associated with obtaining written agreement for pre-charge engagement. We have therefore concluded that agreement can be informal. In order to ensure that payment for pre-charge engagement work can be made, the LAA will require a file note detailing an oral or written agreement on which a pre charge engagement fee is to be claimed.

32. We considered views raised surrounding work done ahead of an agreement being reached, however, there is a possibility, that paying for “pre-agreement work” might incentivise claims for work in cases where pre-charge engagement was not in line with the Attorney General’s guidelines and therefore, we propose to maintain the requirement for agreement (even if informal) before a provider can claim for work done under this new unit of work.
33. In terms of the issue raised by consultees regarding clarity about VAT. The government confirms that the figures documented in the original consultation were exclusive of VAT. The criminal legal aid regulations will also make this clear.
34. A number of consultees raised whether letters of representation were in scope of pre-charge engagement. It is our view that a free-standing letter written to the CPS to persuade them not to proceed with the case would not fall within this unit of work if the individual had already been charged. A letter written prior to the individual being charged would also be outside the scope of this work if there was no agreement between the investigator and the defence that the case was suitable for pre-charge engagement.
35. In terms of the transfer of cases to a different firm, we see no reason in principle why fees for pre-charge engagement cannot be claimed by both firms when cases transfer from one solicitor firm to another provided that the claim accurately represents the proportion of work completed by each firm and that there is no double charging for the same work. However, we would expect that these types of changes would be the exception and will be subject to the usual LAA rules around transfer of cases.

Section 3: Economic and Equalities Impacts

36. The final section of the original consultation document considers the economic and equalities impacts of the proposals. The section summarises the responses to these questions and provides the government response.

Question 3: 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.

37. 25% of respondents agreed we had correctly identified the range of impacts of the proposals, with around 75% of respondents disagreeing.

38. A common theme expressed by consultees that disagreed with the assumptions and proposals was the view that the average time spent on pre-charge engagement is estimated at 1 to 2 hours, which they considered to be unlikely to be realistic.

One consultee explained, “*This does not reflect the level of work that will be required in terms of taking instructions from the client and considering reasonable lines of enquiry.*” And another stated “*An average of 1-2 hours is unlikely to be realistic given the need for agreement. It should not be the case that this work should be unremunerated where no agreement is reached.*”

39. The Law Society also disagreed with the assumptions and proposals in the Impact Assessment. The Society believes the policy objectives will not be met if the fee only covers the narrow scope of the work involved in the engagement with the prosecution or police. They further explained, that “*the engagement with the client which leads directly to PCE or relates to PCE must be paid for along with any exploratory work to determine whether PCE will assist in progressing the case or not.*”

40. For those respondents that agreed with the Impact assessment, 20% agreed but did not provide any specific reasons or empirical evidence as to why they came to this view. For other consultees like the Young Legal Aid Lawyers (YLAL) they believed the estimated proposal to add a further £0.3-1.8m per year in payments to providers was welcome funding for those working in criminal legal aid.

Government response

41. As set out in the consultation Impact Assessment assumptions about pre-charge engagement, we estimated it would take place in 1% to 3% of police station attendance cases and that time spent on engagement would be around 1 to 2 hour(s) per case. Respondents felt that we had underestimated the number of cases. In addition, we have heard the views of other consultees, who believe the 1 to 2 hour(s) is unlikely to be realistic given the need for agreement.
42. While the Attorney General's consultation did not rule in or out any specific case types, it said that engagement would be appropriate in a minority of cases and highlighted serious fraud and sexual offences as the types of case where engagement might be most beneficial. We estimated, following discussions with the AGO about the types of cases that might be appropriate for pre-charge engagement, that it would take place in 1% to 3% of police station attendance cases and that the average time spent on pre-charge engagement is anticipated to take around 1 to 2 hour(s) per case.

Question 4: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

43. 75% of consultees responded to question 4. One of the themes underpinning the response to this question was the fact that respondents felt that vulnerable groups and those with mental health disorders would be affected by these proposals if they are not supported by appropriate adults and solicitors with enough time to take instructions and communicate on their behalf. Additionally, individuals who required the use of interpreters could be potentially disadvantaged as the extra work involved in this type of case will take longer. One respondent stated,
- “Work that requires an interpreter, mental health professional or appropriate adult is going to take significantly longer and therefore practitioners are likely to be less able to ‘take a punt’ as it were, that they might get paid at the end of it.”*
44. The consensus was vulnerable groups, those under 18, foreign language speakers and those with mental health disorders require more work to take instruction and communication on their behalf.
45. Some respondents suggested that the proposals could create inequality between privately and publicly funded suspects, in that those paying privately could instigate pre-charge engagement without the agreement of the police because these clients are not reliant on legal aid. As one respondent put it, “this creates an imbalance and adversely affects those without means.”

46. One respondent suggested there was a risk that the police/CPS in some areas may adopt a discriminatory approach and may not provide agreement for pre-charge engagement in respect of certain suspects, and certain offences, whereas other police forces/prosecutors might provide agreement.
47. The response from The Law Society did not highlight any specific groups with protected characteristics who may be disproportionately impacted by these proposals.

Government response

48. We agree that for some cases, pre-charge engagement will take longer than others because of the needs of individuals who might require interpreters or, for example, appropriate adults. While there is an upper limit on pre-charge engagement that can be self-granted, claimants will be able to apply for an increase to this limit via the LAA where appropriate.
49. We have heard from consultees who expressed concerns that these proposals disadvantage those without means and further reinforce the disparity in the system where privately funded clients have the means to pay for their criminal defence, thus creating further imbalance in the system.
50. The government understands these concerns. The disclosure guidelines require at least informal agreement in all cases, whether publicly or privately funded. We believe that we need to see a record of informal agreement for pre-charge engagement to ensure that it is only undertaken where it is appropriate. There is a risk that without this requirement we might see some claims for pre-charge engagement in cases where it was not in line with the Attorney General's guidelines.
51. Lastly, the AG Guidelines place an obligation on the police and prosecutors that they must provide agreement to PCE where it is appropriate to do so, irrespective of any person's protected characteristic. Therefore, we do not consider that MoJ's application of the policy in respect of remuneration for PCE would result in indirect discrimination.

Question 5: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

52. 67% of consultees responded to this question. A number of consultees felt that an appropriate way of mitigating against any adverse equality impacts would be to remunerate solicitors for all the work they undertake, e.g. ahead of any agreement for pre-charge engagement being in place. Other consultees suggested that if solicitors could authorise the use of interpreters and mental health professionals without having

to apply beforehand to the Legal Aid Agency (LAA) this may mitigate some of the potential impacts to disadvantaged groups.

53. Other respondents expressed the view that publicly funded defence solicitors would be explicitly disadvantaged as, in order to be remunerated, agreement will need to be reached between the relevant parties. The concern raised was that there is potential for the investigating officer's discretion to result in a difference in treatment in cases with broadly similar circumstances.

Government response

54. Whilst we agree that it is important for individuals with particular needs to not be disadvantaged in any way by our proposals, the government is of the view that in common with other areas of public funding we have a reasonable limit for payments. However, we acknowledge that in those cases where additional time is needed, it is important we use the robust systems the LAA have in place to authorise extra funding on a case by case basis.
55. We note that consultees also raised concerns about potential police reluctance to engage in pre-charge engagement. The Attorney General's guidelines place an obligation on the police to engage in pre-charge engagement where it is appropriate to do so.

Section 4: Immediate next steps

56. The Legal Aid Agency will carry out a further consultation with the crime contract Consultative Bodies on amendments to the crime contract which would be required to implement these proposals.
57. The government will then lay a Statutory Instrument as soon as parliamentary time allows for this.

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Alternative format versions of this publication can be requested from criminallegalaidreview@justice.gov.uk

Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf



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