lccsa
London Criminal Courts Solicitors' Association

The LCCSA's response to the Crime Lower consultation

- Police Station fixed fees

1. Which option (1 or 2) do you think would be best to implement during the next financial year (2024/25). Please explain the reasons for your answer.

   Option 2

   As a professional association which represents the interests of criminal defence solicitors working in London, this is the option (out of the two) that best aligns with that aim because it is the only option that increases the fees for the London schemes.

   Given the fact that an option is contemplated that does not benefit the London schemes at all, we think it appropriate to re-state the case for police station fees being higher in London than the rest of the country. In summary, the London fees were historically set at a higher rate than the rest of the country because much of the work in London was deemed to be more serious and complex. There is no evidence that this has ceased to be the case. There is also the incontrovertible fact that the costs of living, working and running a business in London are higher than in the rest of the country, therefore the fees should be higher.

2. Which option (1 or 2) do you think would better achieve meeting CLAIR's recommendations mentioned in paragraphs 13 and 21? Please explain the reasons for your answer.

   The CLAIR recommendations referred to in paragraphs 13 and 21 are, respectively, (1) the restructuring of the police station fees scheme into standardised fees in order to better pay for work done and by paying more where more work is required and (2) "harmonisation" of the 245 fee schemes so as to phase out the different rates (as a precursor to the introduction of standardised fees).

   As to recommendation (1) above, this question is rather nonsensical because both options involve continuing payment of a single fixed fee for each police station case regardless of the amount of time spent at the police station, the complexity of the case, or the amount of work that is done outside the police station attendance between the interview and the ultimate disposal decision. Neither option therefore goes any way towards restructuring the police station fees scheme in the way recommended by CLAIR. The options essentially do the same thing, but slightly differently.

   As to recommendation (2) above, option 2 best achieves the objective of harmonisation of fees because it harmonises the fee of the greatest number of schemes.

3. Do you agree with our approach to amending the escape threshold for the affected schemes? Please explain the reasons for your answer.

   We have no strong views on the proposed approach to amending the escape fee threshold, other than to say that it seems reasonable. The proposed approach, however, completely fails to address the fundamental problem with the escape fee i.e. that any work done in excess of the fixed fee in order to reach the escape fee threshold is unremunerated.

4. Are there any other views or observations you would like to share?

   Whilst the introduction of any new money into the system is a welcome development, the proposed increases to the police station fixed fees (under both options) are in reality so negligible that they will not make any real difference to the overall financial health of most firms providing publicly funded criminal defence services.

   The LAA's position in relation to recommendation (1) is that they currently lack sufficiently reliable data to implement a standard fee model because the structure of the current fee scheme does not incentivise accurate reporting by firms of time spent on police station cases. The LAA's position essentially, therefore, is that the current system (fixed fees) is preventing it from implementing a new, better, system (standardised fees). This begs the question whether the LAA will ever be in a position to implement a standard fee model, or any model, that reflects the work actually done on these vital cases if the barrier of a lack of data is such an insurmountable one. If, as it seems to us, the answer to that question is "no", we suggest that the LAA either devises a proposal that is not so dependent upon data provided by firms or develops scheme to overcome this obstacle.

   The LAA's approach to data-gathering was recently considered by the National Audit Office in its report Government's management of legal aid dated 6th February 2024. One of the reports key findings at paragraph 16 was as follows:

   "MoJ cannot routinely identify emerging market sustainability risks, which undermines its ability to ensure the sustainability of legal aid. MoJ aims to assess the sustainability of legal aid through periodic large-scale reviews but does not do this regularly or routinely. Outside of these reviews, it relies on information from LAA to identify and respond to risks to market sustainability. However, while there are routes for LAA to raise risks with MoJ, LAA lacks routine financial and other data to help it raise sustainability risks early. For example, it lacks routine data on the profitability of legal aid work for providers. Until MoJ and LAA address weaknesses in their understanding of the demand for legal aid, capacity among providers, and whether providers are sufficiently incentivised to stay in the market, neither can sufficiently understand or assess short- or long-term sustainability risks (paragraphs 3.6, 3.9 and 3.14)."

   This passage makes it clear that the onus is on the MoJ and the LAA to address the weaknesses in their understanding of the demand for legal aid, capacity among providers and whether providers are sufficiently incentivised to stay in the market. They must therefore be clear on the data points they say they need in order to improve their understanding of these issues and devise a scheme for gathering that data effectively. However, the LAA have for too long relied upon a lack of data as a reason for not implementing further and better increases to legal aid fees. Meaningful increases to legal aid fees should not be further delayed while the LAA devises and implements such a scheme. Much more money needs to be invested into the system now if firms providing legal aid are to remain financially viable. This means that in the interim the LAA needs to grasp the nettle

and implement a meaningful fee increase that is not so reliant upon the data points that the LAA say they do not have, and at the moment seem to lack the means to obtain.

Given that the LAAs view is that the only approach currently possible is to increase fixed fees (rather than implement a standard fee system) and sufficient data existed in 2008 to allow the LAA to set a bespoke fixed fee for every police station scheme in England & Wales, we suggest a reasonable approach would be to use the 2008 fixed fees as a starting point and then increase each one using publicly available Consumer Price Index inflation data, which can be done here: https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

In order to make this approach consistent with the objective of CLAIR of harmonising the police station fees, whilst also reflecting the need for fees in London to be higher, we suggest that the highest London and non-London fixed fee should be adjusted according to the Consumer Price Index inflation data, and then that should be the fixed fee for every case in that respective area.

The highest London fee is the fee for Heathrow, currently set at £ 315.86. Adjusted according to the CPI inflation data, this fee should now be ***£ 488.79****. According to our proposal, this should now be the fixed-fee for all cases in London.*

The highest non-London fee is for Stanstead, currently set at £ 295.93. Adjusted according to the CPI inflation data, this fee should now be ***£ 457.75****. According to our proposal, this should now be the fixed fee for all non-London cases.*

We regard this proposal a strong starting point from which to build the further increases needed in order to make this vital work to continue to be financially viable.

We also believe it is a point worth making that CLAIR was published in November 2021. It recommended a 15% increase to criminal legal aid fees generally, equivalent to an additional £ 100 million of investment into the criminal legal aid scheme. This increase was expressed as being a "bare minimum" that was required "immediately" in order to ensure the continued sustainability of the market for criminal legal aid providers. The government's initial response was to increase fees by a mere 9%. The proposed sum of £ 21.1 million to be invested following this consultation will increase fees by 11%, which is still short of the bare minimum that CLAIR recommended was required to be invested immediately in November 2021. We are now in March 2024. It has been two years and 3 months since CLAIR's recommendations were published and the government is still far off implementing them in full. Since November 2021 the economic environment in the UK has deteriorated, with the cost of living having increased sharply during 2021 and 2022. According to the CPI, goods and services costing £ 100 million in 2021 cost £ 118 million today. This demonstrates that the economic realities are now different to those that existed at the time CLAIR was released. The LAA / MoJ now therefore need to put forward proposals for increases to legal aid funding that reflect those changes. Rather than simply seeking to still implement the bare minimum recommended by CLAIR, therefore, the LAA / MoJ need to start thinking less in terms of the investment that is required immediately in order to prevent complete market failure, which is simply a fire-fighting strategy, and to start thinking about and making proposals for the long-term investment the criminal legal aid system needs in order to have a sustainable future.

- Pre-charge Engagement

5. Have you previously claimed for pre-charge engagement work? Please state yes or no.

Given that this response is being submitted by a committee, it does not make sense to answer this question as it envisages a response by an individual.

Our understanding, however, is that PCE is not often claimed for.

6. If no, please explain why?

The fees are too low and the regulatory burden of claiming too high in order to provide any incentive to make claims.

7. If yes, please share your experience of engaging with this work including:

a) your experience of engaging with the police and prosecution;

We understand, anecdotally, that the introduction of a fee for pre-charge engagement work has not materially altered the experience of engaging with the police and prosecution at the pre-charge stage. The experience very much depends upon the particular police officer or prosecutor dealing with the case. Some will be amenable to engaging with the defence pre-charge on issues such as disclosure, others will not.

b) your experience of claiming payment.

We understand, anecdotally, that the experience of claiming payment is cumbersome and time-consuming. It therefore acts as a disincentive to making claims.

8. Have you experienced or witnessed any limitations in carrying out this work?

The main limitation on pre-charge work for those firms acting under legal aid is the low fees that are paid for it.

- Youth Court

9. Do you agree with having a separate Youth Court fee scheme outside of the current magistrates' fee scheme? Please explain your answer.

Yes – Youth Court work is highly specialised and this should be reflected in a separate fee scheme.

10. Do you agree with the enhanced fee proposal for the Youth Court? Please explain your answer.

The following response is predicated upon the assumption that the proposal does not in any way alter or interfere with the current system for applying for Certificates for Counsel and the system for claiming fee enhancements for Youth Court / Magistrates' Court cases that have been conducted with exceptional care and skill (per paragraph 10.99 of the Crime Contract Specification).

We welcome the acknowledgement that the Youth Court is both specialist and complex and as such should have its own fee scheme.

A bolt-on of £ 658 (including VAT) is welcomed given the parlous state of the finances of legal aid firms. However, a bolt-on should be the minimum starting point. Further consideration should be given to ways in which to enhance the quality of representation in the Youth Court. This might include a system of enhanced rates and/or an increase in the current hourly rates for solicitors to ensure that we are being properly remunerated for dealing with some of the most vulnerable defendants in the system. Such a fee scheme would promote quality and ensure that children are being represented by specialist lawyers given the complex and serious nature of this area of law.

We understand that consideration is being given to a quality mark for those undertaking Youth Court work. If such a scheme is introduced, we would suggest that enhanced rates and/or an increase in the current hourly rates could be an option on top of the bolt-on fee for firms that have been awarded the quality mark. Under such a scheme, practitioners would be incentivised to attain the quality mark by the reward of enhanced fees for those who attain and maintain it. The quality mark should be voluntary, require a foundation course with ongoing training provision and seek to encourage best practice to improve standards without reducing access to justice for children in urgent need of representation. We suggest a quality mark as opposed to formal accreditation, so that no one is excluded from being paid more per case, but it exists to incentivise excellent practice in those who wish to adopt it.

It should also be noted that many children entering the criminal justice system in London are often "looked after", meaning Local Authorities are in charge of their case and/or location. Children are often placed long distances from their solicitor and advocate. This involves a lot of travelling in order to meet and interview the young person, which is not currently remunerated because London is "designated" area. Children who have been moved far from home will often require additional care, support and attention from their lawyers to ensure that they are able to provide instructions and effectively participate in their case. The extra time and travel required can be expensive, and reimbursement is often challenged and justification heavily scrutinised. This is equally the case with children being placed on remand in the secure estate, which has decreased dramatically in the last decade meaning that most children are placed many miles from home. There is only one secure establishment for children in London (Feltham, which only holds boys aged 15 to 17). Therefore, London lawyers are constantly travelling. The situation is particularly dire for girls and very young children.

It is of particular note that young people are often placed outside of the lawyer's designated area and may go on to incur further charges in that area. The chosen lawyer who has represented them throughout is in the best position to represent them and to ensure that the various criminal matters are dealt with in a coherent and consistent manner. They have the specialist knowledge and skill set, they understand the young person and are aware of their background and needs. It should not be the case that they instruct an agent to attend, but run risk not having disbursements reimbursed.

The current 'bolt-on' proposal does not address the above.

Whilst the 'bolt-on' is a starting point, we would invite the Government to discuss further changes to the fee system for youth court work with the LCCSA and the Youth Practitioners' Association, both associations who regularly represent young people and would very much welcome further discussions.

11. Do you agree with the enhanced fee being targeted towards the most serious offences (i.e. indictable only and triable either way offences)? Please explain your answer.

It is beyond doubt that all indictable only and triable either way offences should attract the new additional payment. We also take the view that serious consideration should be given to an option to provide an enhanced fee in cases that are summary only, but also complex. Children facing summary only offences without the guarantee of specialist and expert representation. It is also of note that the age of criminal responsibility in England and Wales is 10 years old. Representing very young defendants for summary only offences, can be just as complicated as some of the more indicatable only offences and the experience and outcome can have a profound impact on the child's life. Young people often have complicated family backgrounds, mental health and learning difficulties, which are often not diagnosed until they enter the criminal justice system. Therefore, it is important to ensure that every child benefits from high-quality representation, especially as all cases involving children are serious for the child concerned, regardless of offence categorisation. As mentioned above, many children entering the criminal justice system are in care, this is an additional layer of complexity and often means holding the CPS and the police to a higher standard of accountability.

- Prison Law & CCRC Fees

12. Do you agree with our proposal to not make changes to the Prison Law and CCRC fee scheme at this stage?

No, we do not agree.

We understand that the reference to the CCRC fee scheme in the above question also includes advice on criminal appeals from newly instructed lawyers (i.e. those that did not act at first instance) under the same fee scheme (Advice and Assistance).

Prison Law and CCRC work require highly skilled and specialised lawyers. The fees for this work should be increased to a level which makes practising in these areas financially viable.

With respect to CCRC work and advice on criminal appeals from newly instructed lawyers, in addition to a fee increase which makes practising in this area financially viable, we support:

1. *A continuation of the current funding scheme with a reform which would enable practitioners to apply to the LAA at the outset of a case for an agreed enhancement (an uplift) in "exceptional cases". Such cases would be conducted by senior lawyers and concern cases of the utmost seriousness and/or complexity.*

2. *Reform of the Standard Crime Contact to allow for interim payments in such cases of both disbursements and solicitors' fees in lengthy cases.*

Very few practitioners undertake this type of work given that it is so poorly remunerated. The number of practitioners doing this work is also decreasing. Currently only 3% of applicants before the CCRC are legally represented. This is a real concern. In addition, an increasing number of litigants in person are submitting unmeritorious applications for leave to appeal against conviction and/or sentence to the Court of Appeal, Criminal Division and we understand such applicants have not had the benefit of obtaining advice from newly instructed lawyers.

Reforming the fee scheme for this vital work is a priority.

Equalities analysis

- Police station proposals

13. From your experience are there any groups or individuals with particular protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.

    No

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

    There are no equalities impacts when across the board fee-increases are proposed, even ones as meagre as those proposed in this consultation.

- Youth Court proposals

15. From your experience are there any groups or individuals with particular protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? Please include which groups/individuals and explain your reasons. We would welcome examples, case studies, research or other types of evidence that support your views.

    No

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

    None

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