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The All-Party Parliamentary
Group on Legal Aid

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Bulletin from the APPG on Legal Aid June 2022



Dear **Parliamentarian**,

Two years on from the start of the pandemic and with unrest spreading through the public sector, the June sunshine has brought with it a summer of discontent. As well as rail workers, teachers, NHS staff, care workers and criminal defence practitioners, disquiet has been building amongst other professions for some time. This, coupled with a cost of living crisis the likes of which has not been seen for decades in the UK, makes for a troubling mix.

This week has seen hundreds of barristers on the picket line protesting the need for urgent investment in criminal legal aid outside London's Old Bailey and other courts throughout England and Wales. Representative bodies for criminal defence solicitors and barristers have been campaigning for a reversal of the 2014 cuts and fees to be raised by 25% in line with inflation. So this month, by way of something a little different to our usual bulletin, we have set out the the background to the dispute below together with some initial thoughts on today's announcement from the Ministry of Justice.



The Criminal Legal Aid Review in a nutshell

CLAR was first announced in December 2018 by the Ministry of Justice when it provided its response to amending the Advocates' Graduated Fee Scheme (AGFS). In February 2019, the MoJ incorporated CLAR into the publication of its Post-Implementation Review of LASPO, a review of legal aid for inquests and the Legal Support Action Plan. Its aim was to review the entire 'criminal legal aid cycle', from fixed fees in the police station and magistrates' court, to graduated fees in the Crown Court (AGFS and the Litigators' Graduated Fee Scheme (the LGFS)), so that criminal legal aid fee schemes 'fairly reflect, and pay for, work done; support the sustainability of the market and the efficient operation of the criminal justice system'.

In 2019, the Criminal Bar Association (CBA) balloted its membership with regards to AGFS Scheme 11 & prosecution fees. Its membership voted in favour of industrial action; 2586 (94.90%) voted for action in respect of prosecution fees, and 2567 (93.86%) voted for action in respect of the AGFS.

The government responded to this threat of action by proposing a joint package offer. This included an increase in prosecution fees, and a promise to accelerate certain aspects of CLAR. The CBA recommended that its membership accept the Government's offer before putting the decision to the vote. On 28 June 2019, a total of 2607 voted, and 1583 (60.72%) voted to suspend action, with the Plan for Accelerated Work being published on 23 July 2019.

The accelerated work included: (1) unused material; (2) cracked trials in the Crown

Crown Court.

The accelerated items came into force in September and October 2021, with headlines reporting them to be an injection of £51 million. Much of this money is yet to reach the system, however, as reported by Minister Cartledge in our January 2022 meeting on the Criminal Legal Aid Review as a result of “the inevitable way in which it takes time for money to be paid out in the system and because having a backlog, having less work meant it took time for the system to gear up and for cases to be completing again”.

In December 2021, the Criminal Legal Aid Independent Review was published. Sir Christopher Bellamy, its Chair, is oft-quoted as describing the situation facing criminal solicitors as ‘parlous’ in his evidence to the Justice Select Committee in January 2022. His report recommended “that the funding for criminal legal aid ... be increased overall for solicitors and barristers alike as soon as possible 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 £135million per annum”. This represented the “minimum necessary” to nurse the criminal legal aid sector back to health after years of neglect. For context, we should add, “the present levels” refers to the 2019/2020 levels, i.e. those prior to the pandemic. This equated to approximately £100m for solicitors and £35m for the Criminal Bar. The reception to these proposals was mixed. While most practitioners felt the report accurately set out the issues facing criminal defence, many felt anger and impatience at proposals that are likely to take over a year to trickle through, particularly those who felt that Sir Christopher should have recommended more investment for the Bar.

The Government’s response

On 15 March the Government announced that an extra £135 million will be spent on the sector every year to match the recommendation made by the Bellamy review. This would be in addition to £200 million each year to speed up the courts system, which would take taxpayer funding for criminal defence to £1.2 billion a year. For the record, this amount lies somewhere between the amount that was cut from criminal defence in 2014 and the 25% it would cost the government if fees were raised in line with inflation (which is what we **recommended in the Westminster Commission report**). This investment was intended to address twenty-five years of real terms cuts which have seen the number of criminal legal aid firms almost halved since 2007.

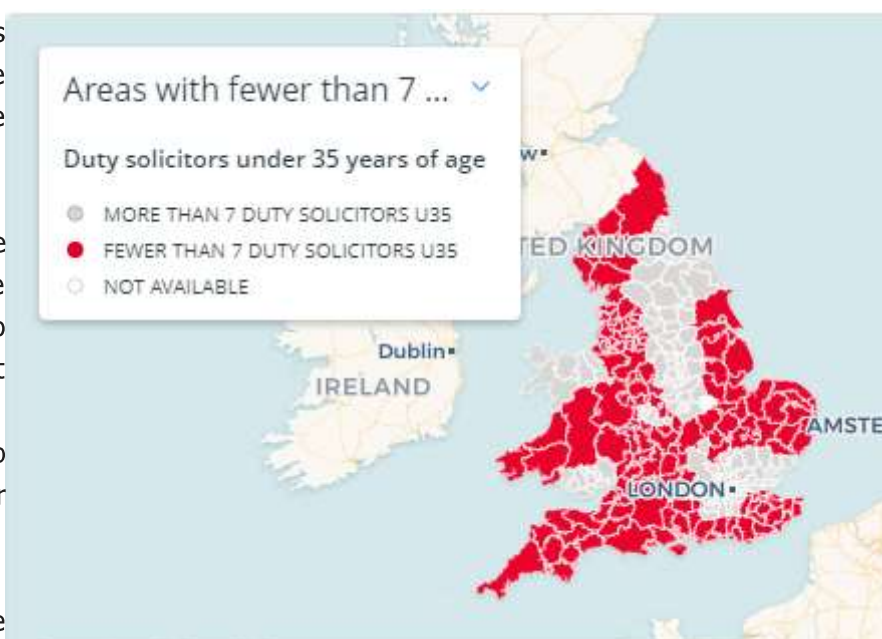
The government has also decided to put together an independent Advisory Board to represent all parts of the profession and keep various areas of policy in criminal legal aid under review. This was something else that we suggested in the Westminster Commission, however, there are concerns that the body being proposed will have limited power to implement change.

An important point of contention was that this increase to fees specifically excluded prison law, which would receive no uplift to fees. Further analysis of the **MoJ’s**

point, £20m has been reserved for 'longer-term investment', such as reforming the Litigators Graduated Fee Scheme which may take years. A further £2.5m has been reserved in order to fund training grants within the sector.

Sir Christopher advised that £100m of the £135m be used to remunerate criminal legal aid firms so they can invest in recruitment, compete for talent, maintain quality, provide training and ensure retention. The Law Society published a heat map showing the distribution of criminal duty scheme solicitors around England Wales and their average age. It is worth noting that not all criminal legal aid solicitors are duty solicitors but the vast majority of them are qualified in this way. Thus the health of the duty schemes around the country is indicative of the health of criminal legal aid firms themselves.

This reflects evidence that we heard as the Westminster Commission about defence firms lacking the resources to recruit, to set competitive salaries and to invest in their internal infrastructure and back office functions. Sir



Christopher clarified that this injection of £100m would not necessarily put defence firms, which the **MoJ's Data Compendium** shows have lost talent to the better-funded Crown Prosecution Service (CPS), on a par with the prosecuting agency, but would place them on a more even keel. However, the Impact Assessment (see link above) for the proposed reforms states that solicitors' firms will receive an annual uplift of only £58m-£66m (with barristers being allocated just £30m-£39m).

This reflects evidence that we heard as the Westminster Commission about defence firms lacking the resources to recruit, to set competitive salaries and to invest in their internal infrastructure and back office functions. Sir Christopher clarified that this injection of £100m would not necessarily put defence firms on a par with the better-funded Crown Prosecution Service. The **MoJ's Data Compendium** shows the sector has consistently lost talent to the better-funded CPS. However investment would place firms on a more even keel. The Impact Assessment (see link above) for the proposed reforms states reveals that investment falls well below that recommended by Sir Christopher, with solicitors' firms due to receive an annual uplift of only £58m-£66m and

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The Impact Assessment also states that most of the proposed fee scheme changes give fixed percentage uplifts and therefore their impact would be even across case types and providers. '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 [pages of prosecution evidence] uplifts,' the document says.

Grouping litigators graduated fee scheme cases by solicitor offices that complete the work, the impact assessment states that only 10% of the 1,640 offices would see a 12.5%-15% uplift.

Under the proposals, regionally, the north-east and south-west would see a 7% increase, and London just 3%. No regions listed would see a 15% increase.

The consultation

On 15 March 2022, the Government launched a consultation on its response to the Independent Review of Criminal Legal Aid. The consultation closed on 7 June and received 205 responses, as reported by Minister James Cartlidge, speaking to the Law Society Gazette. The Minister explained that civil servants had been busy analysing the feedback and responses and that the Government hoped to lay a statutory instrument in parliament before 21 July, to begin the process of implementing increases to fees to come into effect by the end of September.

The Minister added that, 'from the outset of [his] engagement with practitioners, there has been a consensus call for [the Government] to "unbundle" the consultation - implementing fee increases as soon as possible, with other reforms following at a later date. Once [the Government has] responded to the consultation on the fee increases and the confirmation of those increases is before parliament, it will be followed by a full consultation response on the wider proposals in the autumn'.

So what are criminal barristers doing?



On Sunday 13 March, the CBA reported that 94% of its members voted in favour of industrial action over Ministers' failure to raise fees in line with recommendations of a government-commissioned report. You may have seen individuals signalling their support for action over social media.

Since April, hundreds of barristers have adopted 'no returns' as part of a push for the government to uplift rates by 25%. As mentioned in our previous bulletin, 'no returns' means that participating barristers no longer take on cases passed to them by other barristers when a trial overruns. It occurs after multiple votes to take action which have been paused and four years of waiting for CLAR to conclude.

The main driver behind the action has been rates of pay: **new criminal barristers earn a median pre-tax profit of just over £12,000 compared to £30,000 as a national median household income**, and the Criminal Bar Association has argued that real incomes have dropped 28% since the turn of the millennium.

On Friday 17 June, CBA balloted its members about escalating action, including:

- court walkouts
- refusing to accept new instructions
- no returns

Its membership voted overwhelmingly (81.5%) in favour of days of strike action from 27 June 2022, escalating their protest to the Government's proposals on criminal legal aid.

We refer to the Secret Barrister's handy guide to the action, which can be **found here**. Briefly, the profession is taking part in 'Days of Action', in which those barristers who have been instructed to defend in legally-aided criminal cases will not go into court if they have one of those cases listed. That means that if a trial is listed to begin on a day of action, the defence barrister will not be at court. If a sentence hearing is listed on a day of action, there will be no defence barrister. If there is any other kind of hearing, there will be no defence barrister.

incrementally increase over the coming weeks. This week, criminal barristers took action on Monday and Tuesday. Next week, it will be Monday, Tuesday and Wednesday. The week after, they will take action from Monday to Thursday. And after that, it's a full week out of court, and so on for every other week thereafter, indefinitely.



Barristers are also declining to take on any new cases. So if somebody is charged with a serious criminal offence and appears at the Crown Court for the first time after the strike began on 27 June, there will be no defence barrister available. They will also continue not to accept "returned" cases when other barristers become unavailable.

A little more detail on rates of pay

Until recently, there has been a certain opacity when it has come to salaries within the legal aid sector. Otterburn and Ling explored the profitability of criminal legal aid firms back in 2014, but salaries varied considerably from firm to firm and this was even more apparent at the Bar, where it varies from individual to individual. In the past year however, a huge amount of work has been undertaken to obtain figures around earnings within criminal defence work not least through Sir Christopher's review, the Westminster Commission and the Legal Aid Census.

This week a junior barrister has made public their earnings to address the misconceptions held about barrister pay. They explain that a one-year access course to university and a three year qualifying law degree cost in excess of £50,000. The fees for the one year bar qualification course (the BPTC) were £19,700. The tenant describes needing to be supported by their parents and partner despite winning substantial scholarships. Excluding VAT, and including £4,800 of private client work, the tenant describes earning less than £20k gross fee income out of which they pay: chambers rent (10% as a pupil and 15% as a tenant), clerks fees, travel to court, insurance, practicing certificate costs and their books.

Witnesses at both the Westminster Commission's Publicly Funded Bar and Future of the Legal Aid Workforce evidence sessions commented on the financial hurdles faced by juniors at the bar. They told us that it takes up to a decade of university, postgraduate training and work before young barristers can start to see a reasonable income and have a decent standard of living. **The Bar Council cite the average age of those who begin to earn a return on the huge debt levels they have built up as being 33 years old.** For the years that precede this, individuals incur all of the risks of the economic investment in a career at the self-employed legal aid bar, with no insurance in

'The real difficulties begin to be seen at the junior end of the bar. For example, if I have conducted a serious criminal trial, but I cannot return and do the sentence for a reason beyond my control, in that situation I return the brief for sentence and a more junior barrister will probably get the brief. The junior has to read all the paperwork and consider all relevant factors for sentence, they have to get to court, which can take multiple hours. The conference may last an hour with a vulnerable person who needs reassurance. They will then perform the advocacy, see the client after to make sure they understand the sentence. Travel back and report the sentence. They will be paid £126 for all of that. If it is a local court, they will have to pay their travel, food, percentages to chambers, and they are not left with enough to make a living. Those hearings are what junior barristers pick up daily, it is one example of many showing that professionals dealing with the liberty of other human beings are being asked to work for fees that simply do not reflect any of those factors.'

Joanna Hardy

'I started pupillage in 2014/15, I had a £12,000 pupillage award. £6,000 in my first six months and £6,000 guaranteed earnings in my second six months. During my second six, I did a lot of Magistrates work at extremely low fee rates which have not changed since then. The rates were £75 for a half-day trial, £150 for a full day trial and £50 for all other hearings. If you were in court for 3 hours or for a hearing other than a trial you may be lucky to get £100.'

Natasha Shotunde

The Secret Barrister goes on to make the point that these fees should be seen within the context of a criminal justice system that has undergone years of cuts and chronic lack of investment. From 2010, the criminal justice system lost **21,000 police officers; a quarter of Crown Prosecution Service** employees and **twenty per cent of court staff. Forty three per cent of courts (239 in total according to figures from The Bar Council) nationwide** were closed and/or sold off. Of the courts that remained, restrictions were put in place regulating how many days each year they were allowed to open, which caused a huge backlog in the Crown Courts, long before COVID came along. Legal aid has been removed from swathes of the population, and the rates paid to barristers and solicitors have been repeatedly cut.

We spoke to some of the barristers at the Old Bailey on 27 June. The mood was one of great sadness and frustration coupled with real fear for the future. We were told that taking action went against every instinct that they had to be in court and to do their best for their clients, but that those striking felt that they had no alternative.

What about the solicitors?

low-paid work - such as burglary and assault on emergency workers - in magistrates' courts. LCCSA's President, Hesham Puri, warned that the action, which started 25 May, could lead to a collapse in the magistrates' courts due to defendants not having legal counsel. Crown courts would experience further disruption as cases tried 'either way' - such as harassment and stalking - would be unable to proceed.

An LCCSA bulletin to members last month explained solicitors' contractual obligations to both clients and the LAA, stating that under the provisions of the current 2017 Crime Contract, only duty work is obligatory. Other work may be refused on the grounds that it is uneconomic.

'The rejection of instructions on the basis that the work is not properly remunerated or cannot be properly resourced given the funding available under the Legal Aid Agency scheme is compliant with the principles set by the Solicitors Regulation Authority. It's a matter for you to establish the nature of the work that's not adequately remunerated under the contract,' the bulletin said.

The LCCSA conducted a survey after several practitioners who attended a legal aid consultation 'training session' last month **signalled** their appetite to join the criminal Bar in escalating action.

Speaking to the *Law Society Gazette* outside the Old Bailey on the criminal Bar's first 'day of action' about what next for solicitors' own action, Hesham Puri said that some members were talking about walkouts.

The Law Society and practitioner groups cannot call for solicitors to take collective action as doing so could breach competition law.

Both LCCSA solicitors and barristers are asking for a 25% fee uplift.

And the judges?

The Lord Chief Justice Lord Burnett of Maldon has said it 'may amount to professional misconduct' if lawyers fail to turn up to scheduled hearings despite previously agreeing to represent a defendant.

He added that 'cases in which there is non-attendance should be referred to the Senior Presiding Judge's Office to consider whether to involve [watchdog] the Bar Standards Board. The question whether a failure to attend amounts to professional misconduct will then be a matter for [a] disciplinary process'.

However, a spokesman for the Judiciary added: 'The Lord Chief Justice has issued a statement reminding judges that the judiciary is not a party to the dispute between the Criminal Bar Association and the Government....The judiciary will not enter into the

Lisa Roberts QC, the leader of the Northern Circuit, echoed the sentiments of many lawyers throughout England and Wales and reminded readers that no one relishes the idea of crossing the picket line and that the Circuit's members had some difficult decisions to make in respect of action. She added that she sadly could not prevent the judges from doing what [she] sincerely hope[s] they will not. [She] can simply remind them, as [she has] throughout, that this was them not so very long ago.

Breaking News



NEWS RELEASE

Criminal barristers to receive 15 percent fee rise in September

Today, the Ministry of Justice released the following announcement:

Criminal barristers to receive 15 percent fee rise in September

- Fee rise will see typical criminal barrister receive £7,000 extra a year
 - Solicitors will receive 15 percent increase for work in magistrates courts and police stations
 - Response brought forward so new fees reach pockets before the end of the year
- Criminal barristers will receive a 15 percent fee rise from the end of September, the Government has confirmed today (Thursday 30 June).

It follows the recommendation made in an independent review of the criminal legal aid system and will see the typical criminal barrister earn £7,000 more a year.

Criminal solicitors will also receive a 15 percent increase for their work in police stations and magistrates' and youth courts, with further multi-million-pound reforms to solicitors' pay still under consideration.

The fee increase is being fast-tracked with the legislation required being laid in July so that legal professionals begin to see the pay rise before the end of 2022.

The remaining proposals in the recent consultation on criminal legal aid will be responded to later this year, with potential further increases for solicitors and other legal professionals as part of longer-term reforms, with £20 million set aside for this work.

We asked criminal defence practitioners for their initial impressions about the announcement. They remain concerned that the announcement adds nothing further to the discussion, nor does it meet Sir Christopher's minimum 15% threshold necessary to stabilise the sector, regardless of headlines. It is unclear from today's announcement whether there will be any change in the figures detailed in the Impact Assessment, which (as set out above) clarified that actual fee increases are much lower than the 15% recommended and varied depending on the region.

Stephen Davies of Tuckers Solicitors goes further in saying that the Government's proposals will increase overall 'spend' as opposed to legal aid 'rates' in 2024/25. This is based on the prospective case load in 2024/25 being higher than 2019/20. This higher number of cases may be due to a multitude of reasons, such as an increase in the number of police officers and the inclusion of Crown Court cases taken from the existing pool of Release Under Investigation cases. Thus, the 15% is based on a projected increase in the volume of work in 2024/2025. In theory, legal aid spend increases, but so does the workload, and as the fees paid per case do not increase by 15%, this fails to address issues around profit margins, staff welfare and recruitment.

In other legal aid news



And finally, our warmest congratulations to Sir Christopher Bellamy QC on his appointment as a Parliamentary Under Secretary of State for the Ministry of Justice in the House of Lords. We worked with Sir Christopher over the course of the Westminster Commission and met several times during the development of the Legal Aid Census. His work on the Criminal Legal Aid Review was widely accepted by the profession as an accurate reflection of the issues and concerns affecting the criminal defence sector and he is a welcome addition to the Ministerial team. Our understanding is that he will be recusing himself from issues around criminal legal aid and focusing his attentions on civil legal aid.

We hope that you've found this special edition useful. Do let us know if you have any

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Rohini Teather
Head of Parliamentary Affairs
30 June 2022

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About the APPG on Legal Aid

The All-Party Parliamentary Group on Legal Aid aims to promote parliamentary and public understanding of the importance of the role of publicly funded legal services. It is chaired by Karen Buck MP. Secretariat support is provided jointly by the Legal Aid Practitioners Group (LAPG) together with Young Legal Aid Lawyers (YLAL) with funding from The Legal Education Foundation.

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About the APPG Plus Project

LAPG and the APPG on Legal Aid have been funded by The Legal Education Foundation to engage with MPs and councillors and their caseworkers to ensure that there is a good understanding of what is left in legal aid in the wake of LASPO, and to offer constructive advice, resources and training on how busy MPs and their caseworkers can engage better with lawyers and advice charities in the legal aid sector. In doing so, we aim to assess current access to justice issues facing the public and to help inform future decision making at a policy level.

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