

<b>Title:</b> Additional fixed fee payable on AGFS cases involving the Section 28 Youth Justice and Criminal Evidence Act (1999) Special Measure  <b>IA No:</b> MoJ049/2023 <b>RPC Reference No:</b> n/a <b>Lead department or agency:</b> Ministry of Justice (MoJ) <b>Other departments or agencies:</b> Legal Aid Agency (LAA)	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 31 <sup>st</sup> January 2023			
	<b>Stage:</b> Final			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Secondary Legislation			
<b>Contact for enquiries:</b> CriminalLegalAidConsult@justice.gov.uk				

<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> Not Applicable
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**Cost of Preferred (or more likely) Option**

Total Net Present Social Value N/A	Business Net Present Value N/A	Net cost to business per year N/A	Business Impact Target Status Not a Regulatory Provision

**What is the problem under consideration? Why is government action or intervention necessary?**

The first stage of the Criminal Legal Aid Review was announced in December 2018 and introduced some policy changes (known as the “accelerated areas”) in September 2020. In December 2020 the Government commissioned the second stage, the Criminal Legal Aid Independent Review (CLAIR), which considered criminal legal aid provision in England and Wales. On the basis of CLAIR’s recommendations and informed by the responses to the subsequent consultation, the MoJ implemented a first package of measures in September 2022, increasing fees for most of the criminal legal aid fee schemes to ensure work undertaken by criminal defence practitioners is paid more fairly.

The Government’s full consultation response to CLAIR, published on 30<sup>th</sup> November 2022, set out an extension of the September 2022 uplift to eligible outstanding cases in the Crown Court backlog. Other additional measures were announced in the Government’s full consultation response. One of those, additional fees payable to AGFS cases involving pre-recorded video evidence and cross-examination (“**Section 28 cases**”), is assessed in this Impact Assessment (IA).

Government intervention is required to increase criminal legal aid fees.

**What are the policy objectives of the action or intervention and the intended effects?**

The policy objective is to ensure that work undertaken by criminal legal aid practitioners is paid more fairly. The Government considers this measure (alongside the other measures that comprise the Government’s full response to CLAIR) necessary in helping to ensure the sustainable provision of legal aid in order to promote access to justice, better achieve the aim of reflecting, and paying for, work done as well as increasing efficiency in the legal aid market and protecting the taxpayer.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

- **Option 0/ ‘Do nothing’:** Retain the existing arrangements for criminal legal aid, which includes the policies implemented as part of the government’s interim and full response to CLAIR.
- **Option 1: Additional fee for Section 28 cases:** An additional fixed fee payable to AGFS cases involving pre-recorded video evidence and cross-examination, with a representation order date on or after 1<sup>st</sup> February 2023.

Option 1 is preferred as it best meets the policy objectives.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> After implementation				
Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?	<b>Micro</b> No	<b>Small</b> No	<b>Medium</b> No	<b>Large</b> No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		<b>Traded:</b> 0		<b>Non-traded:</b> 0

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister: \_\_\_\_\_ Bellamy \_\_\_\_\_ Date: \_\_\_\_\_ 31/01/2023 \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

Description: Additional fixed fee payable to Section 28 cases with a representation order date on or after 1<sup>st</sup> February 2023

## FULL ECONOMIC ASSESSMENT

Price Base	PV Base	Time Period	Net Benefit (Present Value (PV)) (£m)		
2022	N/A	N/A	Low: N/A	High: N/A	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price)		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	£1.8m	N/A
High	N/A	N/A	£3.7m	N/A
Best Estimate	N/A	N/A	£2.4m	N/A

### Description and scale of key monetised costs by 'main affected groups'

The additional cost to the legal aid fund estimated to be around £2.4m per annum in steady state under the central scenario, with a cost under the low and high scenarios of £1.8m and £3.7m respectively.

### Other key non-monetised costs by 'main affected groups'

Legal aid clients currently contributing towards their defence costs may have to make a higher level of contribution under Option 1.

The LAA will also face some minimal additional costs as a result of Option 1, resulting from the administrative work involved in processing Section 28 cases. In addition, there are expected to be some minimal costs associated with implementing an appropriate digital solution.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	N/A	£1.8m	N/A
High	N/A	N/A	£3.7m	N/A
Best Estimate	N/A	N/A	£2.4m	N/A

### Description and scale of key monetised benefits by 'main affected groups'

This IA estimates an additional fee income of around £2.4m per annum in steady state in the central scenario for advocates working on Section 28 cases (with a low and high scenario of £1.8m and £3.7m respectively). Of the total £2.4m per annum (£1.8m - £3.7m), it is estimated that approximately £0.3m (£0.2m - £0.5m) will go to solicitors' firms and around £2.1m (£1.5m - £3.2m) to barristers. Figures may not sum to totals due to rounding.

### Other key non-monetised benefits by 'main affected groups'

Legal aid clients will benefit from a better functioning and more sustainable legal aid market that provides a good quality service. A better functioning legal aid market might have a positive impact on the wider Criminal Justice System (CJS).

### Key assumptions/sensitivities/risks

N/A

The main risk around the estimates included in this IA is the assumption with regards to the number of Section 28 cases. To capture this risk, Central, High and Low demand scenarios have been used to demonstrate how changes to the volume of Section 28 cases impacts on the estimated cost.

It has been assumed that the volume of Section 28 cases will not be affected by the additional fee introduced under Option 1.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs: N/A	Benefits: N/A	Net: N/A	

# Evidence Base

## A. Background

1. In December 2020 the Government commissioned the [Criminal Legal Aid Independent Review \(CLAIR\)](#), which considered criminal legal aid provision in England and Wales. The Review was undertaken by the former Sir Christopher Bellamy KC (Now Lord Bellamy KC), a former judge with a wealth of legal experience.
2. CLAIR was the second part of a wider review of criminal legal aid announced in December 2018. The first part of the review considered opportunities for reforming criminal legal aid throughout the life cycle of a case and gathered data (published in the Data Compendium) and addressed certain “accelerated areas”, reforms which took effect in August 2020. The accelerated areas looked at:
  - how litigators and advocates were paid for work on unused material
  - how advocates were paid for work on paper-heavy cases
  - how advocates were paid for cracked trials in the Crown Court
  - how litigators were paid for work on sending cases to the Crown Court
  - how litigators were paid for pre-charge engagement
3. The first part of the review focused on priority areas for reform, identified in partnership between the Government and defence practitioners. CLAIR was set up to consider the criminal legal aid system in its entirety, the service being provided, and how it is procured and paid for, with particular reference to five themes: resilience, transparency, competition, efficiency and diversity (as set out in the terms of reference<sup>1</sup>).
4. CLAIR had two main objectives:
  - a. To reform the Criminal Legal Aid fee schemes so that they:
    - fairly reflect, and pay for, work done.
    - support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce.
    - support just, efficient, and effective case progression; limit perverse incentives, and ensure value for money for the taxpayer.
    - are consistent with and, where appropriate, enable wider reforms.
    - are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies; and
    - ensure cases are dealt with by practitioners with the right skills and experience.
  - b. To reform the wider Criminal Legal Aid market to ensure that the provider market:
    - responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer.
    - operates to ensure that Legal Aid services are delivered by practitioners with the right skills and experience.

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<sup>1</sup> [terms-of-reference.pdf \(publishing.service.gov.uk\)](#)

- operates to ensure the right level of Legal Aid provision and to encourage a diverse workforce.
- In July 2022, the government published its interim response to the CLAIR, which included a wide array of policies to be implemented on cases with a representation order date<sup>2</sup> from 30<sup>th</sup> September 2022 onwards. These policies cover most areas of criminal legal aid and can be summarised as follows:
    - General uplift of 15% to expert, police station, magistrates', other Crime Lower, Advocates' Graduated Fee Scheme (AGFS), Very High Cost Cases (VHCC) for Solicitors and the Court of Appeal fee schemes;
    - Pre-charge Engagement (PCE) - ensure that solicitors are appropriately remunerated for preparatory work, which will be brought within the scope of legal aid;
    - Litigators Graduated Fee Scheme (LGFS) – Uplifts of 15% to LGFS basic fees, fixed fees and hourly rates;
    - Elected Either Way Guilty Plea Fixed Fee - abolish the fixed fees, to increase the fees to those paid under the usual LGFS and AGFS.
  - An Impact Assessment<sup>3</sup> (IA) was published alongside the government's interim response<sup>4</sup> to CLAIR and the consultation on the associated policy proposals. The IA estimated the additional steady state spend of these policies to be between £95m and £115m per annum.
  - Following further discussions with stakeholders, the MoJ proposed additional funding for criminal barristers and solicitors' firms, mainly centred around the cases in the Crown Court backlog that would not be eligible under the aforementioned uplifts. On 30<sup>th</sup> November 2022, an IA<sup>5</sup> was published to assess this change, that is, applying the relevant uplifts implemented in September 2022, excluding expert fee uplifts, to eligible outstanding cases in the Crown Court backlog. Alongside this the Government published its full response to CLAIR.<sup>6</sup>
  - This IA assesses the economic impact of introducing an additional fixed fee, payable to Advocates Graduated Fee Scheme (AGFS) cases involving pre-recorded video evidence and cross-examination (hereafter referred to as "Section 28 cases").
  - As this IA will affect payments made under the AGFS, general background information is provided below on this fee scheme, along with more specific information relating to the Section 28 provision.
  - Annex A, which can be found at the end of this IA, shows the combined impact of Option 1 and the other CLAIR measures implemented thus far on the steady state fee incomes of criminal barristers and solicitors' firms.

## **Advocates' Graduated Fee Scheme (AGFS)**

- Remuneration for Crown Court advocacy under the AGFS consists of a basic fee (determined by which "band" the offence falls into, the seniority/role of the advocate, and how the case resolves – guilty plea, cracked trial, contested trial). Should the case proceed

<sup>2</sup> Date of determination for legal aid following an application

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1092151/clair-response-impact-assessment.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092151/clair-response-impact-assessment.pdf)

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1092023/clair-interim-response-consultation-july-2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092023/clair-interim-response-consultation-july-2022.pdf)

<sup>5</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1121120/clair-consultation-full-response-ia.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121120/clair-consultation-full-response-ia.pdf)

<sup>6</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1121148/clair-consultation-full-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121148/clair-consultation-full-response.pdf)

to trial, the advocate may also claim a Daily Attendance Fee for the second day, and any subsequent days, at Court. In addition, advocates may claim a fixed (daily) fee for separate pieces of work (for example, preliminary hearings and sentencing hearings), as well as for ancillary proceedings (e.g. confiscation). Claims for special preparation at hourly rates can be made under limited circumstances, for example where the pages of prosecution evidence exceeds the (prescribed) level deemed to be covered by the basic fee.

## **Section 28**

12. Section 28 of the Youth Justice and Criminal Evidence Act 1999 made provision for vulnerable and intimidated victims and witnesses to give evidence and to be cross-examined or re-examined via pre-recorded video, supporting them to give their best evidence. It enables those eligible to have their cross examination pre-recorded on video at a separate hearing ahead of the trial. This video is then played back during the trial. The aim is to enhance the quality and reliability of evidence by improving witness experiences of cross-examination and enhancing event recall by reducing the time between complaint and cross-examination.
13. Section 28 has been available for vulnerable witnesses (those under the age of 18 or suffering from a mental or physical disorder or impairment that would diminish the quality of their evidence) in all Crown Courts since November 2020, and as of September 2022 is available for complainants of sexual and modern slavery offences in all Crown Courts.
14. Cases featuring Section 28 currently attract a graduated fee for a trial, with attendance at pre-recorded cross-examination hearings claimed as daily attendance fees, and the appropriate fee for any preceding Ground Rules hearing. In the event of a lengthy gap between the Section 28 hearing and the trial, advocates can make a claim for an interim payment through the hardship provisions if they meet the criteria.

## **B. Rationale & Policy Objectives**

15. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or failures with existing government interventions (e.g., waste generated by misdirected rules). The new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and distributional reasons (e.g., to reallocate goods and services to more deprived groups in society).
16. The principal policy rationale behind the option assessed in this IA is equity. The Government considers the reforms necessary to ensure the sustainable provision of legal aid in order to promote access to justice, better achieve the aim of reflecting, and paying for, work done, increasing efficiency in the legal aid market and protecting the taxpayer.

## **C. Main Stakeholder Groups, Organisations and Sectors**

17. The option assessed in this IA will directly affect the following groups:
  - Legal aid service providers:
    - Criminal Barristers
    - Solicitors' firms<sup>7</sup>
  - Legal aid clients

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<sup>7</sup> Solicitor advocates will benefit from this policy, since they complete crown court cases that involve a Section 28 hearing.

- The Legal Aid Agency (LAA)/Ministry of Justice (MoJ)

## D. Options under Consideration

18. To meet the above policy objectives the following options are considered in this IA:

- **Option 0/‘Do nothing’:** Retain the existing arrangements for criminal legal aid, which includes the policies implemented as part of the government’s interim response to CLAIR:
- **Option 1/ ‘Preferred Option’:** An additional fixed fee payable to AGFS cases involving pre-recorded video evidence and cross-examination, with a representation order date on or after 1<sup>st</sup> February 2023.

### Option 0

19. Under this option no further increases would be made to criminal legal aid practitioners’ fee incomes, on top of what was announced in the Government’s interim and full response to CLAIR. In particular, under Option 0 providers would receive no additional fee income for working on Section 28 cases.

### Option 1

20. This option will involve paying an additional fixed fee of £670 + VAT to Section 28 cases with a representation order date on or after 1<sup>st</sup> February 2023.

## E. Cost and Benefit Analysis

21. This IA follows the procedures and criteria set out in the IA guidance and is consistent with the HM Treasury Green Book.

22. This IA identifies impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society will be from implementing the above measure. IAs place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised which might include how the policy impacts differently on particular groups of society or changes in equity and fairness.

23. The costs and benefits of each option are usually compared to the ‘do nothing’ or baseline option (Option 0), to demonstrate the potential impacts of reform. In this case the ‘do nothing’ option is making no changes to the criminal legal aid fee schemes, beyond those already announced (and implemented) in the Government’s interim and full response to CLAIR. This ‘do nothing’ option is a useful baseline for comparison purposes as it demonstrates where additional expenditure will be targeted.

24. The costs and benefits in this IA are presented in nominal prices in steady state and include VAT. High and low scenarios are presented alongside the central scenario to capture some of the uncertainty surrounding the estimates. For more detail, please see Section F.

25. It has been assumed that the volume of Section 28 cases will not be affected by the additional fee introduced under Option 1. Therefore, the additional funding under Option 1 amounts to a transfer between the LAA and legal aid providers. As such, net present values (NPV) have not been included in this IA.

26. A full year's worth of data on the number of Section 28 cases is not yet available as the full roll-out was only completed in September 2022 and, since then, the volumes have been impacted by factors such as a barristers' strike and the reduction in sitting days over the Christmas period. In order to estimate the cost of Option 1, this IA therefore uses the following data to estimate the number of Section 28 cases:
- a. A cohort of cases started in the Crown Court in 2021 where a vulnerable witness had a Section 28;
  - b. Estimates on the number of cases where an intimidated witness had a Section 28, based on MoJ pilots from 2016 and 2021; and
  - c. Number of sexual offence cases per year.
27. Based on the above, it has been initially estimated that, in steady state, **the number of Section 28 cases will range from 2,200 to 4,600 per year, with a central scenario of 3,000 cases per year.**
28. The wide range above reflects a high degree of uncertainty regarding the expected number of Section 28 cases per annum in steady state.
29. The expenditure estimates in this IA have been rounded: estimates below £10m have been rounded to the nearest £100,000, any other figures have been rounded to the nearest £1m. Consequently, some totals may not agree due to rounding. Percentages are calculated based on unrounded figures and then rounded to the nearest whole percent.
30. Further details on the methodology, assumptions and risks can be found in Section F.

**Option 1: An additional fixed fee payable to AGFS cases involving pre-recorded video evidence and cross-examination, with a representation order date on or after 1<sup>st</sup> February 2023.**

## **Costs of Option 1**

*Legal aid service providers: Solicitors' Firms*

31. There will be no costs to solicitor's firms under Option 1.

*Legal aid service providers: Criminal Barristers*

32. There will be no costs to criminal barristers under Option 1.

*Legal aid clients*

33. Clients will still have access to the same criminal legal aid services as they do now, provided the interests of justice and means tests are satisfied. However, where defendants facing trial proceedings in the Crown Court are currently required to pay contributions, the amount of contributions might change, depending on their income and capital.

34. Given the lack of available data, we have been unable to undertake detailed analysis of the impacts on clients; however, these are likely to be limited.

35. Annually, about 8,000 to 9,000 defendants at the Crown Court are required to pay an income contribution order (ICO). In many cases, the income contributions do not meet the full defence costs of the case and therefore the client's income contributions will not be affected by an increase in fees. Approximately 1,500 to 2,000 capital contribution orders

(CCOs) are also issued each year, representing between 2% and 3% of the legally aided population at the Crown Court, and with an average value of £15,000.

36. As such, we anticipate that our measures are only likely to affect a very small proportion of legal aid clients with a maximum increase of £670 plus VAT to the total value of their contributions. Furthermore, since the contribution levels are subject to means testing and are intended to recover a proportion of the cost of providing legal aid services, we consider any differences in impact to be proportionate to the legitimate aim of paying fairly for work done.

*Legal Aid Agency/Ministry of Justice*

37. Option 1 is estimated to cost the legal aid fund an additional £2.4m per annum in steady state, under the central scenario. Under the High and the Low scenario the estimated cost is an additional £3.7m and £1.8m per annum respectively.

38. The LAA will also face some minimal additional costs as a result of Option 1. These costs will be comprised both of one-off digital costs associated with updating IT systems, as well as some small ongoing staff costs associated with processing claims and recovering any monies due via issuing Capital and/or Income Contribution Orders. Ongoing service maintenance will be covered under the system maintenance costings. The LAA digital team will assess the one-off costs of introducing a Section 28 fee in February 2023. These costs are expected to be minimal and to be incurred in 2022/23 and 2023/24.

**Benefits of Option 1**

*Legal aid service providers: Barristers and Solicitors’ Firms (solicitor advocates)*

39. Under Option 1, there will be additional fee income for criminal barristers and solicitors’ firms (solicitor advocates) working on Section 28 cases. Table 1 below shows that under the Central scenario, barristers are expected to receive an increase of £2.1m per annum (including VAT) in steady state and solicitor advocates £0.3m per annum (including VAT). Under the High scenario barristers are expected to receive an extra £3.2m and solicitor advocates an extra £0.5m per annum in steady state. Finally, in the Low scenario, Table 1 shows barristers are expected to receive an additional £1.5m per annum in steady state, with solicitor advocates receiving £0.2m more.

**Table 1 – Estimated additional steady state fee income per annum for criminal barristers and solicitors’ firms; Central, Low and High scenarios (£m)**

	<b>Central Scenario</b>	<b>Low Scenario</b>	<b>High Scenario</b>
Criminal barristers	2.1	1.5	3.2
Solicitor advocates	0.3	0.2	0.5
<b>Total</b>	<b>2.4</b>	<b>1.8</b>	<b>3.7</b>

*Figures include VAT*

*Figures may not sum to totals due to rounding*

*Legal Aid Clients*

40. The key aim of Option 1 (along with all the other measures comprising the government’s response to CLAIR), is to improve the sustainability and efficiency of the legal aid market. It is envisaged this policy will have a positive effect on legal aid clients for whom a well-functioning and sustainable legal aid market, which provides a good quality service, is vital. However, these potential benefits are non-monetised.



## *Legal Aid Agency*

41. Under Option 1 legal aid clients currently contributing towards their defence costs may have to make a higher level of contribution, which would represent a benefit to the legal aid fund. Given the lack of available data this cannot be monetised. However, as noted above, the number of clients likely to be affected is very small, and the maximum additional contribution would be £670 plus VAT.

## *Wider Criminal Justice System (CJS)*

42. As mentioned in the CLAIR review, there could be wider benefits if this reform helps facilitate a more efficient and better functioning CJS, able to respond to forecast increased demand levels, and to reduce the backlog.

## **F. Methodology, Assumptions & Risks**

### **Methodology & Assumptions**

43. To estimate the cost of Option 1, the method simply involved multiplying the expected number of Section 28 cases in steady state (which varies under each scenario), by the additional fixed fee payable to such cases (£670 plus VAT).

### Volumes

44. As mentioned above, a full year's worth of data on the number of Section 28 cases is not yet available as the full roll-out was only completed in September 2022 and since then volumes have been impacted by factors such as the barristers' strike and the reduction in sitting days over the Christmas period. Therefore, this IA uses the following data to estimate the number of Section 28 cases per year in steady state:

- a. A cohort of cases started in the Crown Court in 2021 where a vulnerable witness had utilised the Section 28 provisions;
- b. Estimates on the proportion of cases where an intimidated witness utilised the Section 28 provision, based on MoJ pilots from 2016 and 2021, and;
- c. Number of sexual offence cases (against an adult) per year.

45. Assumptions were made on how many sexual offence cases will involve the Section 28 provisions:

- a. Under the Low scenario the proportion of all sexual offence cases that made use of Section 28 provisions for intimidated witnesses in the 2021 pilot (in Leeds, Liverpool and Kingston upon Thames Crown Court) is applied to the whole sexual offence caseload across all courts;
- b. Under the Central scenario it is assumed that the proportions observed from the 2016 pilot with vulnerable witnesses applies to sexual offences against adults across all courts;
- c. Finally, under the High scenario it is assumed that all trials with a sexual offence against an adult make use of the Section 28 provisions.

46. Based on the above data, it has been initially estimated that, in steady state, the number of Section 28 cases will range from 2,200 to 4,600 cases per year, with a central estimate of 3,000 cases per year.

47. Importantly, it has been assumed that the volume of Section 28 cases will not be affected by the additional fee introduced under Option 1. As such, no behavioural changes by criminal legal aid practitioners have been modelled in these scenarios.

### Fee

48. This fee was proposed during discussions with stakeholders but was subsequently reviewed. This was done by looking at existing fees paid in similar cases. The average daily attendance fee for offence bands 3,4,5,13 and 14 is £576 (excluding VAT); cases with these offence bands are the most likely to utilise the Section 28 provisions. Assuming two hours of preparation to reflect the additional work associated with working on Section 28 cases, and remunerating this at the standard wasted/special preparation rates, leads to an additional £90.60 (excluding VAT). These two figures summed together and rounded up to the nearest £5 leads to a fee of £670 (excluding VAT). As such, the proposed fee of £670 plus VAT is deemed to be at an appropriate level.

### **Risks**

49. There is uncertainty surrounding the main assumptions used to estimate the main costs and benefits described in this IA. Table 2 below shows the main assumptions and explores the associated risks.

**Table 2: Assumptions and risks associated with Option 1**

<b>Area</b>	<b>Assumptions</b>	<b>Risks</b>
Split of additional AGFS fee income between criminal barristers and solicitors' firms	Based on 2019/20 LAA billing data it has been assumed that around 87% of the additional AGFS funding, resulting from Option 1, will be earned by criminal barristers, with the remaining 13% being earned by solicitor advocates.	This assumption may underestimate or overestimate the fee income earned by either criminal barristers or solicitors' firms, as Section 28 cases can be completed by either barristers or solicitor advocates.
Additional administration costs to criminal barristers and solicitors' firms	It is assumed there will be a negligible impact on providers regarding an additional administration burden.	It is uncertain whether Option 1 will require software vendors to change their systems and, were this to happen, whether they would pass on any extra cost to legal aid providers.
Additional LAA staff costs to process claims	Minimal.	Under the planned current scope of Option 1, the volumes of cases are relatively low (3,000 per annum in central scenario). However, should the scope be expanded in terms of which cases are eligible for the Section 28 provisions, then this could lead to increased LAA staffing costs.
Additional LAA staff costs for implementing a digital solution	Minimal.	Digital costs may rise if it proves necessary for a specialised designer to be brought in to assist in implementing these changes.

## **G. Wider Impacts**

### **Equalities**

50. An Equality Assessment is being published alongside this IA that gives further details on the equalities impacts.

## **Families**

51. We have no evidence to suggest that families will be disproportionately adversely affected by this measure.

## **Better Regulation**

52. As this measure represents changes to the procurement of legal aid, it is out of scope of the Government's business impact target to reduce the regulatory burden on business.

## **International Trade**

53. The measure assessed in this IA has no implications for international trade.

## **Welsh Language**

54. We are not proposing to restrict the advocacy or litigator markets, nor treat them differently in Wales than we do in England. We do not expect this measure to have any impact on legal services through the medium of Welsh.

## **H. Monitoring & Evaluation**

55. The MoJ will proactively monitor the impact of the proposed change, in terms of costs, and behavioural changes, from the point of implementation. A review point in June 2023 has been proposed.

## Annex A: Cumulative steady state impact from all CLAIR measures implemented thus far

56. This annex shows the combined impact of Option 1 in this IA and the other CLAIR measures implemented thus far on the steady state fee incomes of criminal barristers and solicitors' firms. Table 3 below shows that in steady state, 2024/25 volumes, criminal barristers are expected to receive an extra £41m (16%) and solicitors' firms an extra £64m (9%) from the CLAIR policies to date.

**Table 3: Total estimated additional steady state fee income per annum for criminal barristers and solicitors' firms from CLAIR policies to date, 2024/25 volumes**

<i>Steady state cost per annum, £m</i>	Criminal barristers	Solicitors' firms
<b>Estimated baseline fees prior to CLAIR changes</b>	<b>263</b>	<b>715</b>
Additional fees from CLAIR Interim response measures	39	63
Additional Section 28 fee	2.1	0.3
<b>Total additional fees from CLAIR measures to date</b>	<b>41</b>	<b>64</b>
<b>Percentage uplift from CLAIR measures to date</b>	<b>16%</b>	<b>9%</b>

*Figures include VAT and exclude disbursements*

*Figures may not sum to totals due to rounding*

*Steady state is based on the expected number of cases by 2024/25*

57. In addition to the fee income detailed in Table 3, the Government laid a Statutory Instrument on November 30<sup>th</sup> that extended the relevant uplifts that came into force in September 2022, excluding expert fee uplifts, to most of the outstanding cases in the Crown Court backlog. An IA was published to assess the impact of these changes.<sup>8</sup> It was estimated that these changes would lead to an additional fee income of £36m arising from LGFS and AGFS. Of the total £36m, it was estimated that approximately £13m would go to solicitors' firms and around £23m to barristers. As set out in the IA, this additional fee income would be spread over several years i.e. until all cases that met the criteria were concluded, but it did not affect the steady state estimates. Therefore, they are not included in Table 3 above.

<sup>8</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1121120/clair-consultation-full-response-ia.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121120/clair-consultation-full-response-ia.pdf)