

Summary: Analysis & Evidence

Policy Option 1

Description: Introduce an additional £62 (+VAT) preparation fee payable for all AGFS trials and cracked trials with a representation order date on or after 17th April 2023

FULL ECONOMIC ASSESSMENT

Price Base	PV Base	Time Period	Net Benefit (Present Value (PV)) (£m)		
2023	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)
	Years			
Low	£0.2m	1	£2.8m	N/A
High	£0.7m	1	£3.8m	N/A
Best Estimate	£0.2m to £0.7m	1	£3.5m	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 £3.5 per annum in steady state under the central scenario, with a cost under the low and high scenarios of £2.8m and £3.8m respectively. The LAA will face a one-off delivery cost as a result of Option 1, which will be almost exclusively digital and will amount to between £200k and £700k, depending on the degree of validation and automation considered to be optimal.

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.

BENEFITS (£m)	Total Transition (Constant Price)		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
	Years			
Low	N/A	N/A	£2.8m	N/A
High	N/A	N/A	£3.8m	N/A
Best Estimate	N/A	N/A	£3.5m	N/A

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

This IA estimates an additional fee income of around £3.5m per annum in steady state in the central scenario for advocates working on AGFS trials and cracked trials (with a low and high scenario of £2.8m and £3.8m respectively). Of the total £3.5m per annum (£2.8m - £3.8m), it is estimated that approximately £2.9m (£2.3m - £3.1m) will go to barristers and around £0.6m (£0.5m - £0.7m) to solicitors' firms. 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 volume of trials and cracked trials in steady state. The central estimate is based on the proportion of all AGFS cases which were trials and cracked trials in 2019/20. However, there is a risk the proportion could be different. To capture this risk, low and high demand scenarios have been used to demonstrate how changes to this proportion impact on the estimated cost. These low and high scenarios are based on the lowest and highest proportions seen over the period 2011/12 to 2019/20.

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 reference¹).
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.

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

particular circumstances and this proposal would expand the categories of work covered, for example consideration of audio-visual material and written work.

10. As this IA will affect payments for preparation made under the AGFS, general background information is provided below on AGFS and special and wasted preparation.
11. 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)

12. 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 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. Claims for wasted preparation at hourly rates can be made where the advocate has committed time in good faith to preparation but is then required to return the brief for reasons beyond their control. Wasted preparation can be claimed for trials that last five or more days or cracked trials that have more than 150 pages of prosecution evidence. In both scenarios 8 or more hours of preparation must have been conducted on the case.

Special and Wasted preparation in AGFS

13. Special preparation in AGFS refers to situations where the advocate is required to conduct an activity which goes beyond the usual preparatory workload of a case. Wasted preparation in AGFS refers to situations where the advocate has committed time in good faith to preparation but is then required to return the brief for reasons beyond their control.
14. In recognition of the increase of both the scope and volume of preparation work in AGFS the Government has allocated an extra £3.3million⁸ plus VAT over the remainder of the current Spending Review (SR) period, i.e. before April 2025. Currently advocates can be paid for special and wasted work in particular circumstances. The option assessed in this IA will be an additional £62 plus VAT preparation fee to all AGFS trials and cracked trials with a representation order on or after the 17th of April 2023. This fee is in addition to any special and wasted preparation fee under AGFS.

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).

⁸ The original budget was £3m but was later increased to £3.3m to compensate for the small number of older outstanding cases that did not receive the 15% increase.

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' firms⁹
- Legal aid clients
- 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, including the policies already implemented as part of the government’s interim and full response to CLAIR.
- **Option 1/ ‘Preferred Option’:** Introduce an additional £62 preparation fee payable to all AGFS cases that go to trial and all AGFS cracked trials, with a representation order date on or after 17th April 2023. This fee is in addition to any special and wasted preparation fee under AGFS.

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 AGFS cases with special and wasted preparation.

Option 1

20. This option will involve introducing an additional fee of £62 (plus VAT) preparation fee payable to all AGFS cases that go to trial and all AGFS cracked trials, with a representation order date on or after 17th April 2023. This fee is in addition to any special and wasted preparation fee under AGFS.

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,

⁹ Solicitor advocates will benefit from this policy since they complete crown court cases that involve special and wasted preparation.

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. The estimated impacts of Option 1 are presented at expected steady state values, which have been assessed against the volumes and mix of claims (volume and proportion of total AGFS claims which are trials and cracked trials) in 2019-20 projected to 2024-25 volumes. 2019-20 data has been used as this reflects the most recent caseload prior to Covid-19.¹⁰ The projection from 2019/20 to 2024-25 attempts to capture the projected increase in volumes due to an expected increase in sitting days and police numbers. Following this approach, in the central scenario it has been estimated that there will be approximately 46,700 trials and cracked trials in 2024/25.
26. AGFS cases include trials, cracked trials, guilty pleas, committal for sentence, appeals and other¹¹. Looking at the volumes of trials and cracked trials in AGFS as a proportion of all AGFS cases over the period 2011/12 to 2019/20,¹² this proportion has ranged from 39% to 48% (it was 44% in 2019/20). This range has been applied to the estimated 2024/25 total AGFS cases to produce the low and high scenarios for the number of AGFS trials and cracked trials in 2024/25: 41,500 and 51,100 respectively.
27. It has been assumed that the volume of cases with special and wasted preparation 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.
28. 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.
29. Further details on the methodology, assumptions and risks can be found in Section F.

¹⁰ Although the latest published data on Criminal Legal Aid expenditure ([Legal aid statistics: July to September 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2022), Table 1_1) shows that the level of crime expenditure in 2021/22 has started to catch up with that in 2019/20, Q1 and Q2 2021/22 still seem to reflect some of the impacts of Covid. Therefore, we think 2019/20 is still the best available data we have to project 2024/25 volumes.

¹¹ The figures for other include Mags Committal fee, Breaches of Crown Court Orders, Hearings Subsequent to Sentence and Contempt hearings.

¹² [Legal aid statistics: July to September 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2022)

Option 1: Introduce an additional £62 (plus VAT) preparation fee payable to all AGFS trials and all AGFS cracked trials, with a representation order date on or after 17th April 2023.

Costs of Option 1

Legal aid service providers: Solicitors' Firms

30. There could be administrative costs to solicitor's firms of claiming for this additional fee; however, this is expected to be minimal particularly as there is no requirement to provide supporting evidence of the work being claimed for.

Legal aid service providers: Criminal Barristers

31. There could be administrative costs to criminal barristers of claiming for this fee; however, this is expected to be minimal particularly as there is no requirement to provide supporting evidence of the working being claimed for.

Legal aid clients

32. 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 these contributions might change, depending on their income and capital.

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

34. 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.

35. As such, we anticipate that option 1 is likely to only affect a very small proportion of legal aid clients with a maximum increase of £62 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

36. Option 1 is estimated to cost the legal aid fund an additional £3.5m per annum in steady state (inc. VAT), under the central scenario. Under the low and high scenarios the estimated cost is an additional £2.8m and £3.8m per annum respectively.

37. The LAA will also face some additional one-off delivery costs, which will be almost exclusively digital and will amount to between £200k and £700k, depending on the degree of validation and automation considered to be optimal.

Benefits of Option 1

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

38. Under Option 1, there will be additional fee income for criminal barristers and solicitors' firms working on AGFS trials and cracked trials. Table 1 below shows that under the Central scenario, barristers are expected to receive an increase of £2.9m per annum (including VAT) in steady state and solicitor advocates £0.6m per annum (including VAT). Under the Low scenario barristers are expected to receive an extra £2.3m and solicitor advocates an extra £0.5m per annum in steady state. Finally, in the High scenario, barristers are expected to receive an additional £3.1 per annum in steady state, with solicitor advocates receiving £0.7m more.

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

	Central Scenario	Low Scenario	High Scenario
Criminal barristers	2.9	2.3	3.1
Solicitor advocates	0.6	0.5	0.7
Total	3.5	2.8	3.8

Figures include VAT

Figures may not sum to totals due to rounding

39. It is expected, based on internal billing information, that a total of £3.3m plus VAT will be spent within the current SR period (i.e. before April 2025) under the central scenario, with £2.7m plus VAT going to barristers and £0.6m plus VAT going to solicitors' firms.

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 option 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 £62 plus VAT.

Wider Criminal Justice System (CJS)

42. As mentioned in the CLAIR review, there could be wider benefits if this option 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 expected number of AGFS trials and cracked trials in steady state (which varies under each scenario) was multiplied by the additional fixed fee payable to such cases (£62 plus VAT).

Volumes

44. There were 36,179 AGFS trials and cracked trials in 2019/20. The number of Crown Court cases are expected to increase by up to 29% between 2019/20 and 2024/25 due to an expected increase in sitting days and police numbers.

45. Under the central scenario, it is assumed that the distribution of cases by outcome in 2024/25 will be similar to that in 2019/20 (i.e. 44% of all AGFS cases will end up being either a trial or cracked trial). Therefore, it has been estimated that there will be 46,700 AGFS trials and cracked trials in 2024/25 in the central scenario.

46. The published billing statistics on AGFS shows that the percentage of trials and cracked trials as a proportion of all AGFS cases has ranged from 39% to 48% during the period 2011/12 to 2019/20. Therefore, under the low scenario, it has been assumed that 39% of AGFS cases in 2024/25 will be trials and cracked trials, that is 41,500. Under the high scenario, it has been assumed that 48% of AGFS cases in 2024/25 will be trials and cracked trials, that is 51,100.

47. For the central and high scenarios it has been assumed that all eligible claims will apply for this additional fee. This is because the claims process will be designed to be straightforward whereby all AGFS trials and cracked trials will be automatically eligible. This means that claimants making an AGFS legal aid claim will need no additional supporting evidence to claim this new fee. For the low scenario, we have factored in a lower claim rate of 90%.

48. Based on the above, it has been estimated that there will be 46,700 claims for the new AGFS special and wasted preparation fee per year in steady state, with a low scenario of 37,400 and a high scenario of 51,100.

49. Importantly, it has been assumed that the number of AGFS cases with special and wasted preparation 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

50. The new additional preparation fee for AGFS cases was derived so that £3.3m plus VAT could be spent over the remaining of the SR period under the central scenario.

51. Internal billing information suggests that, on average across the year, around 27% and 86% of the annual Crown Court steady state spend is achieved in the first and second year respectively following implementation. We do not have similar information by number of cases. Therefore, it has been assumed that 27% and 86% of AGFS trials and cracked trials will receive this additional preparation fee income in the first and second year respectively following implementation. That translates, under the central scenario, to around 12,600 and 40,200 trials and cracked trials in the first and second year respectively following implementation. That is, a total of around 52,800 claims over the remaining of the SR period.

52. Therefore, to spend £3.3m plus VAT over the remaining of the SR period, when it has been estimated that a total of around 52,800 AGFS cases will be eligible for the new preparation fee over that period, each of these cases will have to receive a fixed fee of £62 plus VAT.

53. To assess the appropriateness of this fee we have looked at comparable fees. The current bolt-on fee for consideration of unused material is £67.95 plus VAT (junior advocate). This covers the first three hours of work and is the most comparable existing fee. Therefore, compared to the unused bolt-on fee, £62 plus VAT for this new fee seems reasonable.

Risks

54. 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

Area	Assumptions	Risks
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 82% of the additional AGFS funding resulting from Option 1, will be earned by criminal barristers, with the remaining 18% being earned by solicitor advocates.	This assumption may underestimate or overestimate the fee income earned by either criminal barristers or solicitors' firms as AGFS cases with work that will qualify under the new special and wasted preparation fee 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.	There is the possibility that the identified digital solution for Option 1 will require software vendors to change their systems. This cost of delivery could be passed on to legal aid providers.
Advocate claim rate	In the central and high scenarios it has been assumed that all cases that are eligible for the additional fee would apply.	For the central and high scenario this is the maximum possible as such, in reality, the claim rate may be lower. However, as the claims process is designed to be straightforward whereby all AGFS trial and cracked trial would automatically be eligible, this means claimants will already be making an AGFS claim, and no additional supporting evidence is required for this new fee. Therefore, it is estimated that take-up rates will be very high. To capture risk, under the low scenario, a claim rate of 90% has been assumed.

G. Wider Impacts

Equalities

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

Families

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

Better Regulation

57. 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

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

Welsh Language

59. 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

60. 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 September 2023 has been proposed.

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

61. 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 £44m (17%) 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
Estimated baseline fees prior to CLAIR changes	261	751
Additional fees from CLAIR Interim response measures	39	63
Additional Section 28 fee	2.1	0.3
Additional Special and Wasted preparation fee	2.9	0.6
Total additional fees from CLAIR measures to date	44	64
Percentage uplift from CLAIR measures to date	17%	9%

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

62. In addition to the fee income detailed in Table 3, the Government laid a Statutory Instrument on November 30th 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.¹³ 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.

¹³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121120/clair-consultation-full-response-ia.pdf