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**Response to Ministry of Justice Independent review of
criminal legal aid: Call for Evidence**

May 2021

Independent Criminal Legal Aid Review – Call for Evidence April 2021

Response by the Criminal Law Committee of Birmingham Law Society

The Criminal Law Committee consists of members drawn from throughout Birmingham and surrounding areas. Its co-opted members include representatives of the judiciary and the Legal Aid Agency, as well as HMCTS staff, probation officers, prosecutors, and others.

The Committee liaises with prisons, police and the courts about issues affecting all of our members. It also responds to consultations and lobbies on behalf of members and their clients.

1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System?

Police station attendance fees

Police station fees are regarded as a loss-leader. The low fees paid mean that, frequently, police station attendances are a loss in real terms, rather than a loss of notional profitability, due to the use of police station agents. Previously, solicitors were incentivised to do the work because of the prospect of converting a proportion of police station cases into proceedings, which were more profitable. However, there are two issues with that approach in the current market: first, long periods of release pending investigation (RPI) mean that it is harder to keep hold of cases and retain clients in between the police station stage and court; second, proceedings themselves are in the main less profitable than they ever have been, and so it is harder to justify making a loss in the initial stages. The current system does not encourage quality, as it does not pay enough to attract quality advice. It is not sustainable, for the above reasons. The police station fee scheme encourages ‘efficiency’ in the sense that it encourages lawyers to do as little work on a case as possible, but that is a false sort of efficiency – see the changes to the AG Guidance on Disclosure, Annex B, which recognise the benefits of lawyers doing more, not less, work at the investigation/pre-charge stage.

When fees moved from hourly rates to fixed fees the theory was that there would be “swings and roundabouts”. In other words, the positive return on some cases would compensate for the loss on other cases. The reality has been that most cases take far longer than was envisaged as comprising a “quick” case, but exceptional fees are rarely paid and, when claimed, attempts are made to mark them down, involving firms in costs appeal and further work in administration. The true reflection of the introduction of fixed fees is a significant cut in the value of police station work to practitioners. There is growing evidence of firms avoiding cases which are perceived to be challenging as the work involved is simply not properly remunerated. That has consequences for those arrested for the most serious offences, who may find themselves represented by an unregulated agent, with less experience than the solicitor who would traditionally have been applied to the case. Cases involving the most vulnerable in society (youths, those whose first language is not English/requiring an interpreter, those suffering with complex mental health issues) are unprofitable. The current fee system does not incentivise firms to accept such cases. Firms struggle to justify the use of senior solicitors at the police station due to the inadequate payment.

Police forces and Crown prosecutors are now encouraged to engage in pre-charge dialogue with the defence. The potential benefits are clear. We have responded to an earlier

consultation with our views regarding the need to properly remunerate that work. A consultation response has been published but, as yet, funding changes have not been made. The need to engage is present and requires urgent action on the part of Government to make immediate changes to the funding regime to enable this important work to take place.

Preparation for first appearance.

Practitioners/defendants are now, rightly, encouraged by the courts to attend at the first hearing fully prepared for plea or allocation and, where appropriate, sentence. There is incentive for that within the fee structure in some cases (summary cases, guilty pleas) under the current legal aid scheme; because there is a fixed fee, if a short case can be done in a single hearing, it increases any profit to be made from the fixed fee. In more complex and/or serious cases, preparation for the first hearing is not incentivised under the current scheme: in cases destined for the Crown Court, a defendant may not be eligible for legal aid until the case has left the magistrates' court (despite the inevitability of the case going to the Crown Court and the defendant becoming eligible for legal aid in due course). The very low-income limit for legal aid in the magistrates' court excludes any defendant who is not in receipt of welfare benefits from assistance prior to transfer to the Crown Court.

Proceedings at the Youth Court.

This Committee raised concerns in previous consultations about ensuring quality advocacy in the Youth Court. The Youth Court frequently hears serious cases involving complex matters of evidence and law, and/or cases with vulnerable witnesses and defendants. The current scheme does not pay enough to attract experienced advocates or to justify specialist training that is (and should be) required. The same low fixed fees and escape fees apply to the Youth Court as for summary adult matters.

Subsequent proceedings.

In confiscation proceedings, solicitors are remunerated at an hourly rate, which (although modest) is at least proportionate to the time spent on such matters. However, the advocate receives only a small additional fee to that payable for the substantive case under the Advocate Graduated Fee scheme. Frequently, confiscation proceedings are legally and factually more complex than the original criminal proceedings; they require different disciplines to those required for the main proceedings; these factors would ordinarily justify a change of instructed advocate to a more specialised advocate. None of this is remotely feasible under the current funding regime. As a result, the system does not attract sufficient expertise or quality. Mistakes are frequently made. The criminal justice system is left to pick up the pieces at a later stage, with unenforced confiscation orders and appeals. Defendants are committed to prison for failing to pay confiscation orders they are simply unable to pay. The current system of funding, particularly in respect of advocacy fees, encourages neither sustainability, quality nor efficiency. Given successive governments' focus on confiscation proceedings as a way to make convicted criminals pay back their gains, this part of the system should be properly funded.

2. *Do the incentives created by the current fee schemes and payments encourage sustainability, quality, and efficiency? Please explain your answer and specify which fee scheme or payment you are referring to.*

No. We do not accept that the current fee schemes contain such incentives. When we were consulted on the changes, it was indicated that they would bring with them greater

certainty, reduced administration, and bureaucracy. Although those benefits may have been enjoyed in some areas of the Ministry of Justice and Legal Aid Agency they have not been provided to practitioners. Current reporting requirements still include the need for time recording of matters which are fixed fee. Although the process of calculating fees has been simplified by production of fixed fee bills notwithstanding the time engaged firms have not been able to row back on the complexity and scale of document production and financial management systems. On the contrary, practitioners have been required to implement yet more sophisticated systems including the move to paperless working and digital communication across the Criminal Justice System. The much-vaunted benefits at the time of launch did not materialise in the sense of a meaningful reduction in the administrative burden placed on practitioners.

3. *Are there any interactions between different participants within the Criminal Justice System, or ways of working between participants (for example, the Police, the CPS, and the Courts), that impact the efficiency or quality of criminal legal aid services?*

There are inefficiencies between the CPS and defence. These are likely to be more as a result of too few people dealing with too many cases on both sides. On the defence side, that arises because legal aid is so unprofitable, that economies are sought by employing as few staff as possible. That leaves insufficient time for fee-earners to devote to meaningful engagement with opponent. This has an inevitable impact upon the quality of criminal legal aid services.

During the pandemic, the move to remote working and re-alignment of the resources of all participants within the Criminal Justice System has highlighted some of the difficulties arising in communication in an already over-stressed system.

Direct engagement with the CPS from an early stage is often stymied by the time involved in obtaining a response. E-mail and letter-based communication is not dealt with promptly by HMCTS, CPS or the defence due to a lack of personnel. It is apparent from our contact through multi-agency groups that the police lack resources to investigate the vast number of cases pending, with the resulting increase in reliance on release of suspects under investigation and not subject to bail. This backloads the system and stores arrears of cases which, by the time charges are brought, are already of an unacceptable age. Even before the pandemic, members experienced suspects spending three years release under investigation prior to charge – and the backlog caused by the pandemic threatens to make periods of this length more commonplace. In recent months, the media have reported on delays in bringing cases to trial, figures which mask the issue as arising post-charge when, in reality, the delays arise from investigation onwards and are exacerbated by the limited resources available to all agencies.

Rarely have we witnessed a time when it has been so clear that the fellow feeling and empathy of all agencies involved in meeting to resolve the issues of the system derives from mutual understanding of the impact of decades of underfunding. It was traditionally felt that the Defence suffered most significantly from a lack of financial investment, but that sector has now been joined by every agency in the system.

4. *Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?*

4.1. *Please explain the reason for your response to question 4. (above).*

4.2. *Are there any particular impacts on young lawyers, lawyers from particular socio-economic backgrounds, or on the ethnic or gender diversity of the profession, to which you would wish to draw attention?*

Pre-COVID, there were already significant concerns about the lack of new entrants to criminal practice, for both solicitors and barristers. One does not have to probe very deeply to find out why that is:

- Poor rates of remuneration compared to nearly any other area of law;
- Frequent unsocial hours;
- Often mentally and emotionally damaging work, for which there is little support;
- Poor work/life balance;
- High demands of regulatory compliance;
- The low standing of criminal defence lawyers in public discourse.

In the West Midlands, as in other regions, this is reflected in the ageing profession: The Law Society's 2018 research showed 42% of duty solicitors in the West Midlands were aged over 50, while only 9% were aged under 35. The average age of a Duty Solicitor nationally was 47. We strongly suspect those depressing figures have only worsened since 2018. The figures themselves present a bleak outlook for sustainability in the profession.

At the Bar, there are similar recruitment issues, with entire cohorts of pupil barristers at some local chambers electing not to practise in crime after completing a common law pupillage – despite in some cases having been drawn to the profession to do criminal work. In both professions, the best and brightest are being drawn elsewhere.

What of those already in the profession? It is our experience that more solicitors than ever are seeking to exit criminal practice early. The routes vary, but include:

- Early applications for judicial roles;
- CPS;
- Other areas of law, e.g. regulatory law;
- Leaving the law entirely. This appears to be a particular factor affecting female solicitors who are disproportionately affected by the impact of the issues under discussion.

The first three of these routes have factors in common – better pay, better conditions, better job security.

At the Bar, increasingly only those who are financially independent can afford to practise in crime. This has an obvious detrimental effect on diversity within the profession. The Criminal Bar Association Young Bar committee is inundated with concerns from its members that if things continue as they are, they will not be able to remain in criminal practice. Many barristers at the beginning of their career did not qualify for the Government's pandemic support package for the self-employed.

A further factor influencing sustainability is that the traditional firm model requires junior solicitors to buy equity in their firm. In crime, junior lawyers have little incentive to buy into their firm:

- The capital cost and financial risk of buying into the firm may not be offset by the increased profits of equity partnership;

- There is a significant risk, laid bare by recent proposed changes to criminal contracting, that unilateral changes in legal aid contracting could make the investment in equity worthless;
- The opportunity for profit is decreased still further by the increased costs and burden of regulation and technology, discussed below.

The upshot of this disincentive to equity partnership is that there are a growing number of ageing solicitors here within the West Midlands whose firms will simply cease to exist without a proper succession plan. According to research by The Law Society, the number of crime firms has fallen nationally by 10% within the last year alone and this trend is likely to continue as the full effects of the pandemic are felt.

Presumably, in part at least, as a result of these pressures, the market has seen a growth in non-traditional practices such as solicitors' chambers. In theory, freelance solicitors may also expand into the market, although the Committee has seen little evidence of this locally. While these practices can meet a need for advocacy and police station cover on an agency basis, it is difficult to see them fully supplanting the traditional firm model: given the regulatory burden on those operating in the legal aid market, self-employed solicitors simply do not have capacity to do the fee-earning work and also meet their regulatory and contractual obligations.

5. *Does the present structure of Criminal Legal Aid meet the needs of suspects, defendants, victims and witnesses? Please explain your answer.*

It does not. For the reasons developed above, the criminal legal aid system does not attract quality legal advice and representation; it pays lawyers as little as possible on the basis that they will do the bare minimum to service their cases. It does not incentivise meaningful dialogue between parties. It does not reward thorough case preparation (although the effect of the unused material fee scheme remains to be seen and has the potential to improve this). As a result, suspects and defendants are at risk of receiving a lower standard of advice and representation than that to which they are entitled.

We are of the view that the interests of victims and witnesses are only served if every part of the system operates effectively. For the reasons above, the current system actively inhibits the effectiveness of its participants and therefore falls short of meeting the needs of victims and witnesses – for example, through delayed trials, unnecessary trials, and disclosure issues which can lead to trials collapsing.

6. *Some working practices within the Criminal Justice System have changed due to the Coronavirus pandemic.*

- 6.1. *Are there any new working practices you would want to retain, and why?*

- 6.2. *Is there anything you wish to highlight regarding the impact of the pandemic on the Criminal Legal Aid System, and in particular whether there are any lessons to be learned?*

Despite this Committee's previous misgivings, CVP/video link has been shown to work well in appropriate cases. In the absence of further research into the effects of video hearings on engagement and sentence, we cautiously welcome the retention of use of video link hearings. They have the benefit of reducing travel time (which is unremunerated under the current scheme) and enables other work to be done from home/office while waiting for cases to be dealt with.

Similarly, the use of remote attendance upon suspects detained at the police station has not been of universal benefit but has provided some scope for increasing efficiency. Forces which have embraced remote working have partnered with the defence to ensure an appropriate level of representation. We have misgivings about the apparent desire of the West Midlands Police and other forces nationwide to abandon the potential to make use of remote attendance at the first opportunity. We disagree with the view espoused by the National Police Chiefs Council that there should be an immediate return to attendance in all cases before the pandemic is deemed appropriately under control. That appears to us to clash with the Government's stated desire to exercise caution and appropriate infection control. It had been hoped that some of the effective systems created to ensure the efficient progress of cases during the pandemic could be retained at the discretion of all agencies in the Criminal Justice System in the broader interests of justice. It will prove a lost opportunity if agencies return to slavish adherence to the traditional ways of working in ignorance of the progress made over the last year.

There remains scope for remote attendance at prisons, police stations during the investigation process and court hearings at all levels with a view to reducing wasted travel, waiting and expense in disbursements. We encourage a thorough review of the gains made during the last year such that a system fit for the coming decades emerges.

A precipitous rush to return to working practices pre-pandemic would be short-sighted. Indeed, the Criminal Justice System could benefit from standardised practices in some areas (such as all prosecutors being able to attend remotely for sentencing hearings), rather than allowing local areas to have different rules. Likewise, there should be no reason Plea and Trial Preparation Hearings in the Crown Court could not be done remotely by defence advocates, so long as a conference had been held with the client beforehand.

7. *What reforms would you suggest to remedy any of the issues you have identified?*

We accept that it is unrealistic to expect a return to payment on a time spent basis, although that is the only way to accurately match remuneration to the amount of work done.

In almost every other area of publicly funded professional life, there has been a recognition of the need for income to be reviewed with regard to inflation and changes in the cost of living. The Legal Aid budget appears to have been immune to that process. We have warned for the past two decades at every turn and in response to every consultation paper that neglecting investment in the Criminal Justice System would undermine the quality of justice and sustainability of practice. We continue to sound those warnings. It is of no consolation to hard pressed practitioners to have been proven right time and time again. The present review provides opportunity for a root and branch review of the current system. With over 50,000 jury trials presently in arrears, and many tens of thousands more summary trials pending, this significant review is to the benefit not just of practitioners but of complainants, suspects, defendants, witnesses, and all concerned with the process of upholding the rule of law in England and Wales.

8. *The Review will be conducting other exercises to gather data on the profitability of firms undertaking Criminal Legal Aid work and the remuneration of criminal defence practitioners. However, we would also welcome submissions on this subject as part of this call for evidence.*

Birmingham Law Society is not placed to provide data relating to the profitability of firms. The Society is a representative and membership organisation which does not collect

sensitive commercial data of that nature. However, we can report the anecdotal evidence of our member firms that they have seen significant reduction in profitability, notwithstanding rounds of staff redundancy, changes in premises, the move to agile, paperless, and more efficient working practices as well as investment in IT infrastructure.

It must be clear from the change in the demographic of firms undertaking specialist criminal services that publicly funded work has become commercially unattractive. Few if any of the jurisdiction's leading commercial practices contain a criminal law department. That is true not just of the City of London, Greater London, and large metropolitan areas but of our smaller cities and towns. Through our connection to the law faculties of universities in Birmingham, we are aware that on entry to university at undergraduate level large proportions of prospective lawyers profess an interest in criminal law but a tiny percentage go on to practice in the area. This trend speaks volumes for the future of advocates practising in the criminal courts.

9. Is there anything else you wish to submit to the Review for consideration? Please provide any supporting details you feel appropriate.

No