

## **Independent Review of Criminal Legal Aid**

### **Call for Evidence Submission – Dr Miranda Bevan, ESRC Post-Doctoral Fellow, London School of Economics and Political Science (LSE).**

This submission draws on doctoral research that I conducted into the experience of children (10-17 year olds) detained as suspects in police custody in England and Wales. The research was supported by a studentship from the LSE and ongoing dissemination work is funded by the Economic and Social Research Council (Grant No ES/V007084/1). The research aimed to explore how children experienced police custody, and, importantly for this call for evidence, the extent to which young participants felt able to participate effectively in the investigatory process, including exercising their defence rights. The provision of legal advice is a key protection for children in police custody and an essential component in facilitating their effective participation.

The fieldwork on which this submission principally draws was conducted in late 2016 and throughout 2017. This included semi-structured interviews with 41 children and young people with recent experience of detention as a 'juvenile' in police custody (identified by pseudonym). The interviews were supplemented with 192 hours of observations conducted in 6 police custody blocks across three force areas. These forces comprised a major regional metropolitan force (F3), and two county forces: one serving a mixed rural and urban catchment (F1), the other with more substantial areas of significant urban deprivation (F2). The observations involved tracking all young suspects ('YS') passing through the block (n=47), observing processes and conditions within the block, and holding face to face conversations with police officers and staff (n=96), healthcare practitioners (n=14), appropriate adults (AAs) (n=11), solicitors and police station representatives (n=9) and Independent Custody Visitors (n=3). In addition, subsequent semi-structured interviews were carried out away from the police station with additional AAs (predominantly family members acting as AA ('familial AA') (n=11), solicitors and police station representatives ('Sol') (n=4) and Independent Custody Visitors (n=3).

My full doctoral thesis, *Children and young people in police custody: an exploration of the experience of children and young people detained in police custody following arrest, from the perspective of the young suspect*, is available at <http://etheses.lse.ac.uk/3951/>.

This submission is also informed by my experience of practising as a criminal barrister (2000-2012), Chambers of Jonathan Laidlaw QC, 2 Hare Court.

- 1. What do you consider are the main issues in the functioning of the Criminal Legal Aid System? Please highlight any aspects or stages of the criminal justice process relevant to your response (including in the police station; preparation for first appearance; proceedings at the Magistrates' Court; proceedings at the Youth Court; preparation for trial at the Crown Court or any subsequent proceedings).**

I consider that the single fixed fee for police station advice and assistance, and the extremely low level at which this is set, is a really substantial issue for the fair functioning of the criminal justice process, particularly where child suspects (10-17 year olds) are concerned. The issues arising in respect of legal aid for child suspects in the police station are of critical importance for the efficient and effective functioning of the youth justice system as a whole. The child suspect in police custody is in a uniquely vulnerable position. There is arguably no other moment in the youth justice system where the welfare needs of the child are more pronounced, or their legal jeopardy greater. The product of the custody process, the police interview, is of 'fundamental importance for the development and the outcome of the case',<sup>1</sup> indeed frequently it is determinative of it.<sup>2</sup> The importance of good quality legal advice and assistance in such a situation can scarcely be overstated.

The quality of advice, and the degree of trust a child suspect has in their adviser, has a marked impact on the future conduct of the case. Good quality advice, expertly given, is liable to reduce the number of cases advancing unnecessarily to prosecution and to represent savings in the overall legal aid budget. Poor quality legal advice conversely is not only liable to extend legal proceedings and costs, but runs the risk of masking miscarriages of justice.

**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.**

Observations relate to payments for legal advice and assistance in police station work.

Psychological studies have consistently shown that children, particularly 10-14 year olds, lack adequate understanding of their legal rights and demonstrate misconceptions about important aspects of legal proceedings.<sup>3</sup> North American research has identified that children tend not to understand the role of a solicitor in advocating for them, nor to appreciate fully the concept of legal privilege, particularly how it functions in relation to parents, police and the courts.<sup>4</sup> As a result children are less likely than adults to engage with their defence rights and legal protections. Importantly, children of minority groups have been found to be less likely to trust in their legal representative and to provide full disclosure to them.<sup>5</sup>

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<sup>1</sup> E. Cape, J. Hodgson, and T. Spronken, *Suspects in Europe* (Antwerp: Intersentia Ltd, 2007), pp.19-20.

<sup>2</sup> F.P. Belloni and J. Hodgson, *Criminal injustice: an evaluation of the criminal justice process in Britain* (Basingstoke: Macmillan, 2000).

<sup>3</sup> See for example: Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* (Plenum Press 1981); Michele Peterson-Badali and Rona Abramovitch, 'Children's knowledge of the legal system: Are they competent to instruct legal counsel?' (1992) *Canadian Journal of Criminology* 130.

<sup>4</sup> Michele Peterson-Badali and others, 'Young people's experience of the Canadian youth justice system: interacting with police and legal counsel' (1999) *17 Behavioral Sciences & the Law* 455; Jodi L. Viljoen, Jessica Klaver and Ronald Roesch, 'Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals' (2005) *29 Law and human behavior* 253.

<sup>5</sup> Christine Schnyder Pierce and Stanley L. Brodsky, 'Trust and understanding in the attorney–juvenile relationship' (2002) *20 Behavioral sciences & the law* 89; Viljoen, Klaver and Roesch, 'Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals'.

This has been borne out in my own research. Young participants showed high levels of distrust, limited appreciation of the confidentiality of their discussions with their legal adviser and reluctance to be forthcoming in providing full instructions. As a result, children often misunderstood their legal rights and the advice they received, struggled with legal decision-making and some felt dictated to by their legal adviser. A significant number reported that they would, as a result, make ‘no comment’ in interview – a tactic which can significantly raise the prospect of prosecution rather than diversion. However, notably, it was also clear that young participants responded well to legal representatives who were experienced and skilled in representing young people. Solicitors who took the time to build rapport, to explain their role and duties straightforwardly to child suspects and give well-informed advice specific to the youth court jurisdiction could gain their trust and trigger positive outcomes.

However, it was apparent from the wider research data that legal representatives rarely had sufficient time to engage effectively with their child clients and often lacked the skills to do so effectively. Parents attending as appropriate adults (AA) also remarked on feeling rushed in their engagement with the solicitor. It is plain that the low, fixed rate of legal aid was a significant driver of reduced attendance periods and the prevalence of inexperienced representatives fulfilling the role for children. Several solicitors commented directly on the impact of the current legal aid structure on their attendance: ‘I don’t stay for charge. In the old days I would, but now I don’t – fixed fee. We’re not paid to wait.’ (Solicitor 2). Similarly Solicitor 10 observed: ‘the cuts in legal aid don’t help because all the incentive is to get there and get away, because firms lose money on covering police station work.’

Reduced periods of attendance not only impacted on their engagement directly with the child suspect, and their AA, but also on the representative’s ability to uphold the child’s legal rights at other stages in the process. Importantly solicitors tended not to challenge the decision to authorise detention of the child in the police station (Police and Criminal Evidence Act 1984 (PACE) s37) – a decision which has been repeatedly criticised for being a ‘rubber-stamping’ exercise, including for child suspects.<sup>6</sup> However, although ‘necessity’ grounds were not always made out, to raise an issue about the basis for authorisation on arrival six or so hours after the child was first detained, and when interview and release await, would arguably be counterproductive. The delayed arrival of the solicitor neuters their capacity to engage with that issue.

As a result of their limited attendance, solicitors were rarely present for reviews of detention (PACE s40). During observations none of the reviews that I observed involved representations being made by legal representatives. In general reviews tended to be somewhat perfunctory and notably no child suspect that I tracked on observation was released as a result of a review.<sup>7</sup> Additionally, representatives rarely remained or returned for charge and release of the child suspect. Those representatives interviewed indicated that they would advise their clients before

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<sup>6</sup> See for example Roxanna Dehaghani, ‘Automatic Authorisation: an exploration of the decision to detain in police custody’ (2017) *Criminal Law Review* 187.

<sup>7</sup> See for similar Layla Skinns, *Police custody: governance, legitimacy and reform in the criminal justice process* (Willan Publishing 2011).

departing on what was likely to occur. However, where for a child there is the prospect of an out of court disposal (or referral to the Youth Offending Team for that to be explored) legal advice at the time of the decision being made is key. Often young participants seemed not to have appreciated the full ramifications of a caution,<sup>8</sup> and more than one reported that they had on subsequent arrests been surprised to discover that they had a caution on their record of which they had had no knowledge. The imposition of bail conditions is also a point at which the presence of a solicitor could assist. Again, representatives interviewed suggested that they would often make representations on bail before leaving the station. However, I encountered a number of cases in which the bail conditions imposed on children were arguably unworkable, and several of those young suspects that I tracked were arrested for breaching what were arguably unreasonable bail conditions. More consistent presence of legal representatives in the later stages of custody would be likely to reduce the imposition of unworkable bail conditions and the expensive and unnecessary detention of children as a result.

The legal aid structure was also, on occasion, a driver of delays in custody. It is understandable that solicitors may look to recoup costs by accepting a number of cases at one time in police custody. However this could cause difficulties. In all three force areas in which I conducted observations AAs and officers complained of duty solicitors taking on numerous cases at once, leading to lengthy delays. One AA complained about a particular duty solicitor who did this frequently, 'On one occasion he had 9 cases – took them all on without asking for help. I asked why and he said he wouldn't get paid if he passed any on to a colleague.' (PAA4). Custody officers often felt powerless to intervene, 'you can be waiting 3-4 hours for duty solicitor to be available ...you can call the centre and ask for a second duty solicitor to come down but sometimes they refuse. You can't make a solicitor release a case so sometimes there can be long delays.' (CO17). I observed this one evening in F2 where I noted: 'Increasing difficulties with the duty solicitor – there are several cases which cannot be progressed because they are waiting for the duty solicitor – including a man on constant watch because he needs advice re an intimate sample.'

### **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?**

Custody officers tend to try to arrange for legal representatives to attend on a young suspect in detention to coincide with the investigating officer being ready for interview and the arrival of the AA – especially where the AA is not a family member. This is driven by a range of factors – including solicitor working practices triggered by the low and fixed legal aid fee, the scarcity of trained AAs and the limited resourcing of that service, and the busy and physically crowded nature of some custody suites. However, as a result, delays to any one function could result in lengthier detention periods for children before they encountered their legal representative. This often

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<sup>8</sup> Consistent with findings in HMIC, *The welfare of vulnerable people in police custody*, 2015. <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf>

had the knock-on effect that the child was already exhausted and overwhelmed by the process before they were required to provide instructions or assimilate complex legal advice. Young participants reported disengaging or being unwilling to answer their representatives' questions, meaning that the solicitor's ability to provide vital legal advice was severely limited.

During my fieldwork, cases in which pre-charge advice was needed from the Crown Prosecution Service, often resulted in long delays in the child being released or charged. There was no evidence of prioritisation to accommodate the reduced stamina of child suspects or their right to be detained only for the 'as a last resort' and for the 'shortest appropriate period' (United Nations Convention on the Rights of the Child, Article 37). This further reduced the chances of a solicitor being present to give legal advice in person at the point of charge or release.

**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 socioeconomic backgrounds, or on the ethnic or gender diversity of the profession, to which you would wish to draw attention?**

As indicated above, it is vitally important that advice and assistance for children in police stations is provided by an individual who has specialist training in representing children and in youth justice processes. The current levels of legal aid funding do not support the creation of a cadre of suitably experienced and trained legal professionals to support child suspects. Similar problems arise in relation to legal representation for youth court proceedings. There is, as with police station work, a need for representatives to be experienced and specially trained to represent children in the youth court. Rightly, youth courts are increasingly retaining jurisdiction for serious charges. However, the low levels of funding for representing children in the youth court (in comparison to Crown Court work) mean that those appearing for children tend to be less experienced and levels of funding do not incentivise young representatives to seek out and develop expertise in youth court work. As a result, inadequate legal aid funding for youth court work means that a child defendant is likely to be disadvantaged in terms of legal representation in comparison with an adult facing an offence of similar severity in the Crown Court. This is unjustifiable, particularly considering the prevalence of developmental disorders, learning disability, communication disorders and childhood adversities experienced by this extremely vulnerable cohort.<sup>9</sup>

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

See answers 1, 2 and 4 above in relation to the failure of the current legal aid structure to meet the needs of child suspects and defendants.

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<sup>9</sup> See for discussion Jessica Jacobson and others, *Punishing disadvantage: A profile of children in custody*, 2010, <http://www.prisonreformtrust.org.uk/portals/0/documents/punishingdisadvantage.pdf>

In general terms where the needs of suspects and defendants are not adequately met by legally-aided representatives this is liable to have a negative impact on victims and witnesses. To return to children in police custody, where a child is unable to engage effectively with their representative or the advice they are given by that person, this is liable to lengthen the process and may necessitate victims and witnesses attending court when that could have been avoided.

## **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?**

Under the *'Interview Protocol between the National Police Chiefs Council, Crown Prosecution Service, Law Society, the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association'* children in police custody have been receiving legal advice and being represented in interview virtually since April 2020. My research data highlights the significant challenges that child suspects experience engaging with their legal representative even when they attend custody in person. In addition, the majority of young participants in the research described their police interview in extremely negative terms, and provided compelling evidence that their engagement was severely challenged by their physical and emotional state, and by the very adult, and often oppressive, interviewing techniques that many encountered. My findings suggest that limiting legal advice to the virtual sphere would be likely to make engagement with legal advice significantly harder, and dramatically reduce the ability of a legal representative to support a child suspect fully in interview. I have not conducted research during the Covid pandemic, but anecdotal reports tend to confirm those fears, particularly where solicitor input in the interview is reduced to 'audio only'. The recent Equality and Human Rights Commission report, *'Inclusive justice: a system designed for all'*,<sup>10</sup> also raises concerns about the impact of virtual hearings, particularly for those with communication impairments. I welcome indications that the protocol will not continue to be in place for children and vulnerable adults in police custody moving forwards.

It may be that there is a place for remote legal advice for adults in police custody who do not have additional vulnerabilities and would like to receive legal advice without waiting for a solicitor to attend. However, I would be very concerned if the prospect of remote legal advice for children in police custody were to be proposed for the future.

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

For the reasons outlined above I would suggest that the legal aid structure for police station advice and assistance should be fully reviewed. At the very least, where the

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<sup>10</sup> <https://www.equalityhumanrights.com/en/publication-download/inclusive-justice-system-designed-all>



attendance is for a child, I would suggest that payment should be increased to support more experienced, preferably youth justice trained, professionals to attend children in police custody. I would also suggest that some measure of the payment should reflect time spent in custody, or allow for a return visit, so that more of the custody episode can be covered and to ensure sufficient time for the representative to engage fully with the child and their AA.

I have elsewhere argued for a change to the law in respect of the requirement for children to request legal advice.<sup>11</sup> Quantitative research into the uptake of legal advice by young suspects in this jurisdiction in 2009 found that 43 per cent of children who went on to be charged did not request to see a solicitor, and that 10-13 year olds were the least likely of all age-groups (including adults) to request and receive legal advice.<sup>12</sup> My own research findings suggest that low uptake continues to be a significant problem and that children waive legal advice for a wide range of reasons, most commonly their desperation to leave custody and their belief that requesting advice will delay their departure, but also including misconceptions about the value and purpose of legal advice, as well as concerns around its impartiality and confidentiality. The Taylor Review<sup>13</sup> recommended that legal advice in police custody should be 'opt out'. My own view is that such an approach is unlikely to improve the position, leaving children's legal rights substantially unprotected. Plainly for either an 'opt in' or a mandatory call-out provision for children to be effective (and not trigger significant delays in processing child suspects) there will need to be an increase in funding for police station advice and assistance.

**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.**

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

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<sup>11</sup> Miranda Bevan, 'Young suspect perspectives: An exploration of the factors affecting the uptake of legal advice by children in police custody' (2020) 8 Criminal Law Review 686.

<sup>12</sup> V. Kemp, P. Pleasence, and N.J. Balmer 'Children, young people and requests for police station legal advice: 25 years on from PACE.' (2011) Youth Justice 11(1), pp. 28-46. Kemp et al's study analysed 30,921 custody records, taken from 44 stations across four force areas, including 5153 records of 10-17 year olds.

<sup>13</sup> Charlie Taylor, *Review of the Youth Justice System in England and Wales*, 2016, <https://www.gov.uk/government/publications/review-of-the-youth-justice-system>