



## **INDEPENDENT REVIEW OF CRIMINAL LEGAL AID**

### **EVIDENCE FROM 2 BEDFORD ROW**

#### **Introduction**

1. We have read the response submitted by the Bar Council and adopt and endorse it.  
What follows is intended to supplement that response.

#### **Question 1**

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).

2. The primary issue with the Criminal Legal Aid System remains gross and sustained underfunding. This is also a serious issue with all other aspects of the criminal justice system including Courts, staff in every area of support, and the Police.
3. The response by the Bar Council contains 5 headline conclusions highlighting serious problems with the Criminal Bar, each of which has either been caused or exacerbated by the sustained underfunding of Criminal Legal Aid over many years. We adopt and endorse each of these findings and the data underpinning them:

**1. Retention of experienced barristers is a significant problem.**

**2. The full practice criminal Bar has an aging population that is not being replaced.**

**3. Remuneration for junior barristers is insufficient and unsustainable, and fees and profit flat line the more experienced a junior barrister becomes.**

**4. Barristers' fees and profits have failed to keep pace with inflation – in real terms barristers' profits are lower now than in 2015/16.**

**5. Profit and fees between groups of barristers is not equitable, and women from ethnic minority backgrounds earn the least of all.**

4. There are numerous inefficiencies one could point to within the system as it operates today, such as unnecessary hearings because of correspondence missed by the CPS/defence solicitors, or conferences cancelled or unavailable at prisons, but they all come back to an abject failure of successive governments to recognise either the importance of our Criminal Legal Aid System or the need to fund it properly.
5. The case backlog was at an all-time high even before the pandemic because of a lack of Courts, a lack of staff and a lack of sitting days for Judges. This all emanates from underfunding. As a set of barrister's chambers we are of course most closely concerned with the underfunding of criminal legal aid for advocates in the Crown Courts, but the problems exists at every stage of the criminal justice process, including police stations and the Magistrate's Courts.
6. Doubtless if most voters and indeed most politicians were asked if they think it is important that people who commit crimes are arrested and prosecuted promptly, they would say yes. Doubtless too most, if asked, would agree that a fair trial and access to justice are important. Yet, as has been clearly shown by the swingeing cuts to the Ministry of Justice budget over the last ten years, the Criminal Justice System is wholly, and perhaps recklessly, undervalued by those in charge of it. This is perhaps not the place to examine why that might be, but unless this changes then there will come a time when only those who can afford it have access to a form of justice worthy of the name.
7. Criminal Legal Aid must be properly funded, and this has to start now. Whatever changes may be implemented, it will take years before the effects are felt within the system. That system is broken – it is hard to believe that that same system was once the envy of the world.

## Question 2

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.

8. In its interim response the Bar Council states:

**8. The Bar Council sees no practicable option but to work within the current fee schemes. Any wider reform would take years that we simply do not have. All our interim conclusions set out in this document are based on that premise.**

9. As disappointing as it is that we have reached this point, this must be right. We would advocate a wholesale review and reform of all of the fee structures from Police Stations representation through to Crown Court trials, but it is unrealistic to expect that from this review.
10. The present fee schemes provide insufficient remuneration in every area and for every type of case or hearing. However, the problems with guilty plea and cracked trials are particularly acute. So much so that the provision of early and realistic advice is disincentivised.
11. To go through the evidence with a defendant in conference and give them accurate and realistic advice as to their plea requires both time and skill. That defendant might be facing a first conviction, a first custodial sentence or a very long custodial sentence. At times it might be all three. How a defendant pleads initially has an enormous impact on the progress of the case not only for them, but for the system itself. If a defendant receives proper, careful and realistic advice at this stage it benefits everyone.
12. Yet the fee structure does nothing to encourage this. The fees for guilty pleas, both for advocates and litigators, are so low that the system is overly reliant on the goodwill of those working within it for the provision of good quality early advice. Properly remunerating the provision of such advice will inevitably have other

benefits, because if fewer cases are listed for trial this will not only help with the backlog but will reduce the cost of that individual case.

13. Much of the Criminal Justice System is now geared towards front loading and early engagement. The first appearance at the Magistrates Court, even for indictable only matters, is now regarded as the first opportunity to plead guilty and consequently the credit available reduces from that moment. It is now 25% at the first hearing in the Crown Court. The advent of Better Case Management, the PTPH (Plea and Trial Preparation Hearing) and the DCS (Digital Case System) were all meant to encourage early decision making. The credit available for a guilty plea once the Prosecution serves its case may now be as little as 20%. The fee for a guilty plea must reflect this and the work required before a guilty plea can be entered.
14. The fees for guilty pleas and cracked trials should also reflect that the work does not end there. Although the bar was relieved when the absurd scheme whereby no separate fee was payable for a sentence hearing was disbanded, a substantial amount of work still goes into a case with a guilty plea and sentence. Bases of plea may be necessary, sentencing notes are nowadays much more common, and all cases require an examination of both the sentencing guidelines and the authorities. The sentencing exercise, always extremely important, has never been so complicated and time consuming.
15. The case for improving these fees is clear, but through increased funding and not by deducting it from elsewhere. In time, it is highly likely that incentivising early engagement and the early provision of proper advice will in fact reduce both the backlog and costs overall.

### Question 3

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?

16. Every interaction between participants in the Criminal Justice System is hampered by sustained and systemic underfunding. The lack of funding means that staff levels are insufficient for purpose in the Police, the CPS, the Judiciary and Court staff. The statistics in the Bar Council response demonstrate the difficulties that the Criminal Bar has both in retaining experienced practitioners and attracting new practitioners from diverse backgrounds. Criminal Legal Aid solicitors face the same issues.
17. Furthermore, the buildings in which the participants work and the facilities they are using are of such a poor standard that most, if not all, participants in the Criminal Justice System feel grossly undervalued. This in turn affects morale and impacts levels of quality and efficiency.
18. Emails and phone calls to Courts, CPS and Solicitors regularly go unanswered, leading to time consuming attempts to resolve matters, and frequently to unnecessary hearings.
19. Whether directly or indirectly, this all emanates from a significant lack of investment over a prolonged period of time. This must be addressed and reversed before it is too late, if indeed that time has not already come.
20. The increased and successful use of technology for remote hearings during the pandemic is one of the few positives for the Criminal Justice System in recent years. It not only saves time and money, but improves efficiency in case management terms, allowing advocates with a knowledge of the case to appear at hearings that might otherwise have required cover. It is to be hoped that the use of remote hearings continues well beyond the end of social distancing.

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 [Q4]

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?

#### Question 4.1

1. The Criminal Bar is in crisis<sup>1</sup> as a result of a sustained series of cuts, delayed and piecemeal reforms and the direct result of the pandemic. The current funding arrangements are in urgent need of reform with an increase of fees for all categories of offences.
2. The reasons for this response are explored in detail within the Interim Bar Council Response and the following 4 key conclusions they draw<sup>2</sup>:
  - a. **Retention of experienced barristers is a significant problem<sup>3</sup>**
  - b. **The full practice criminal bar has an aging population that is not being replaced<sup>4</sup>**
  - c. **Remuneration for junior barristers is insufficient and unsustainable, and profit flat lines the more experienced a junior barrister becomes<sup>5</sup>.**
  - d. **Barrister's profits have failed to keep pace with inflation – in real terms barristers' profits are lower now than in 2015/2016<sup>6</sup>**
3. Those conclusions are supported by the detailed CLAR dataset within the Bar Council Interim report.
4. It is also supported by "*exodus from the middle of the profession*"<sup>7</sup>. Such an exodus in the short term reduces the total capacity of the Criminal Bar to tackle the anticipated higher caseloads as the rate of Jury trials increases<sup>8</sup>.
5. In the medium to long term, the consequences are clear for career progression in the following key aspects:
  - a. Being able to progress to more serious cases as Junior Counsel;

<sup>1</sup> See paragraph 20 of the Interim Bar Council Report (hereafter "IBCR")

<sup>2</sup> See paragraph 13 IBCR

<sup>3</sup> See paragraph 18 IBCR (pages 6-7)

<sup>4</sup> See paragraph 18 IBCR (pages 7-8)

<sup>5</sup> See paragraph 18 IBCR (pages 8-9)

<sup>6</sup> See paragraph 18 IBCR (page 9)

<sup>7</sup> See paragraph 16 IBCR (page 4)

<sup>8</sup> See paragraph 20 IBCR (page 13)

- b. Being able to progress to Leading Junior work,
  - c. Being able to demonstrate the necessary ability and experience to apply for the rank of Queen's Counsel,
  - d. Being able to demonstrate the necessary ability and experience to apply for part time Judicial posts including Recorder of the Crown Court,
  - e. Applications to full time Judicial posts.
6. "Sustainability" should be considered both in the context of the above paragraph 5 in addition to financial remuneration. The extent of the cuts are demonstrated by the following<sup>9</sup>:
- "The data reveals a criminal Bar that is barely sustainable after a decade in which funding for the criminal justice system in England and Wales has been cut by 29% per person in real terms, and legal aid spending has been cut by 37% per person in real terms"**

#### Question 4.2

- 7. The Criminal Bar requires a high level of academic and vocational training. The average debts for those starting in 2019/2020 were in the range of £20,000-£29,000<sup>10</sup>. In the first three years of practice the average pre-tax profit was £18,400<sup>11</sup>.
- 8. The issues for young practitioners are exacerbated by the nature of the tax to be paid on account to HMRC. This requires the tax to be paid and a further amount on account in January. The balancing payment follows in July. The nature of payments fluctuates creating considerable and continuing degrees of uncertainty.
- 9. In the absence of independent financial means, young practitioners may rely on (further) bank loans, credit cards and overdrafts to make ends meet. This creates the scenario identified by the Bar Council, namely of junior criminal barristers taking on second jobs.
- 10. A career at the independent bar requires a high level of commitment, hard work and often working late into the night<sup>12</sup>. None of these requirements are consistent with having sufficient time to take on a second job and frankly, they should not have to.
- 11. The fifth conclusion of the Bar Council is<sup>13</sup>:
 

**"Profit and fees between groups of barristers is not equitable, and women from ethnic minority backgrounds earn the least of all"**
- 12. The data supporting this set out in detail by the Bar Council<sup>14</sup>. This should be examined carefully by CLAR.

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<sup>9</sup> See Paragraph 14 IBCR (page 4) and Annex 1 (page 17)

<sup>10</sup> See paragraph 18 IBCR (page 8)

<sup>11</sup> See paragraph 18 IBCR (page 8)

<sup>12</sup> See paragraph 19 (b) IBCR (page 12)

<sup>13</sup> See paragraph 13 IBCR (page 4)

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

### Question 5

#### Suspects & Defendants

13. The short answer is no. Means testing and relatively low thresholds mean that substantial contributions can be imposed on a suspect during the course of criminal proceedings. Those who are self-employed can struggle with the procedural requirements in arranging the grant of legal aid.
14. There are instances where the level of contributions has meant that seeking private representation on an agreed fee was more cost effective for a suspect.
15. The limits on recovery of defence costs for an acquitted defendant is a decidedly unfair feature of the present funding rules for those who pay privately for their defence.
16. Those whose assets are restrained in substantial alleged fraud cases are unable to seek Court permission to use those assets in their criminal defence. Sensible reform of this provision would reduce the number of substantial fraud cases funded by Legal Aid.

#### Victims and Witnesses

17. The skilful and appropriate cross examination of alleged victims and witnesses saves time, reduces the risk of confrontation between an alleged victim/witness with the suspect and assists the Jury resolve cases of the utmost seriousness. The law recognises the value of preventing cross-examination in person by the power to appoint an advocate for cross-examination only.
18. Specialist advocates proficient in vulnerable witness training have a direct impact on the experience of alleged victims and witnesses.
19. In this sense, the provision of legal aid for the effective representation of defendants also ensures both that the profession is viable and directly benefits those without whom the Criminal Justice system could not function.

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<sup>14</sup> See paragraph 18 IBCR (pages 10-12)



### Question 6

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?

20. The acceleration of remote hearings for non-trial hearings has been a welcome development to the Criminal Justice System. With the return to higher case volumes<sup>15</sup>, this development should be retained to enhance the efficiency of the system where appropriate.
21. Certain hearings where “face to face” is necessary must be retained. However, for administrative hearings where a defendant is not required, the default position should be remote attendance for the following reasons:
- a. It increases the likelihood that Trial Counsel can attend;
  - b. It increases the likelihood that barristers can cover more of their own cases when not in trial,
  - c. It saves the Legal Aid Agency travel costs for those cases where instructed Counsel are off circuit and the costs of travel are very high

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?

22. The pandemic has accelerated the systemic problems which already existed<sup>16</sup>:
- a. The five conclusions identified by the Bar Council;
  - b. The effects of the restriction on sitting days created the back log before the pandemic struck,
  - c. The decision to sell off many purpose built court buildings has made the problem of tackling the backlog far worse,
  - d. The previous fee reforms were designed to remunerate effective trials and time spent in Court. The lockdown dramatically reduced the volumes of Jury trials which could take place. It meant a dramatic reduction in income for a profession unable to do trials,

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<sup>15</sup> See Paragraph 20 IBCR (page 13)

<sup>16</sup> See also Annex 3 IBCR (pages 22 and 23)

- e. The limitations to the available government support<sup>17</sup> for the independent self-employed bar, coupled with the payment on account tax provisions, have compounded the effects of the pandemic,
- f. The previous fee reforms were negotiated on an artificial basis<sup>18</sup>, namely that the overall costs would remain the same but distributed differently. The time has come for the approach to be what is necessary for the system to function to the highest standards.

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

23. The Criminal Justice System needs appropriate funding from the ground up to restore years of cuts and limited reforms for each of the component parts of the system:
- a. The Police;
  - b. The Crown Prosecution Service,
  - c. The Probation Service,
  - d. Funding for the Criminal Prosecution Bar,
  - e. Funding for the Criminal Defence Bar,
  - f. Funding for the Criminal Defence Solicitors,
  - g. The Court Service,
  - h. The Judiciary,
  - i. The Prison Service.
24. For too long, the component parts have been looked at in isolation and this review needs to urgently examine the bigger picture.
25. The objectives<sup>19</sup> of CLAR need to be joined by the political will to make the necessary changes and to secure appropriate funding, so that lasting change is realised before it is too late.

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<sup>17</sup> See paragraph 20 IBCR (page 13)

<sup>18</sup> See Annex 1 IBCR (page 15)

<sup>19</sup> Paragraph 17 IBCR (page 5)

### Question 8

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.

26. Beyond the observations made in respect of the earlier questions, we would add that it is essential that Criminal Defence firms are also on a sustainable footing as an integral part of a fully functional and effective Criminal Justice System.

### Question 9

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

27. Observations have already been made about the artificial basis for the reforms in 2018 and in particular to the categorisation of offences. It was in part because of such artificiality that some fee categories clearly lost out to others. One egregious example of this is category 1.3, the standard category for murder.
28. As the most serious offence in the criminal calendar, the offence of murder carries a mandatory life sentence. The relevant schedule<sup>20</sup> sets out the applicable starting points up to and including a 30 year starting point for an offence of murder where committed for gain or a full life tariff. Yet, although the schedule draws the distinction between the different life sentence starting points, a murder which attracts a minimum term of 16 years is paid the same as one which carries 30 years or a full life tariff. The figures<sup>21</sup> for Junior Counsel in a murder at category 1.3 are as follows:
- a. Brief fee: £2,575
  - b. Daily attendance rate of £580
  - c. Additional fee for page count: none
  - d. Special prep available: when page count above 10,000 pages
29. In contrast are the figures for both serious fraud and drug offences where page counts remain relevant:
- a. Class A drugs case involving either over 5kg or over 5,000 pages of evidence (Category 9.1)

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<sup>20</sup> Chapter 8, Sections 321-324 and paragraph 3(1) Schedule 21 of the Sentencing Act 2020

<sup>21</sup> The fee figure examples here are taken from the latest AGFS Scheme 11 effective from 17<sup>th</sup> September 2020

- i. Brief fee: £5,919.01
    - ii. Daily attendance rate: £530
  - b. Fraud involving either a loss over £10m or over 20,000 pages (Category 6.1)
    - i. Brief fee: £8,544.01
    - ii. Daily attendance fee: £530
30. These examples demonstrate the impact of the removal of page count from murder offence categories: such changes are entirely inappropriate and urgent consideration is necessary both as to the figures in the boxes for murder categories and the distinctions between said categories.

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**6<sup>TH</sup> MAY 2021**