

INDEPENDENT REVIEW OF CRIMINAL LEGAL AID

RESPONSE PREPARED BY

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Response for the Independent Review of Criminal Legal Aid

Independent Review of Criminal Legal Aid welcomes evidence under the terms of Reference and seeks comments and evidence against the following questions:

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).*
 - Late provision of evidence between the parties. It is not unusual for police officer body worn footage or CCTV exhibits not to be included in the initial disclosure. In one case involving a racially aggravated public order offence body worn footage and CCTV was provided on the day of Trial showing the Defendant shouting racial epithets whilst punching the victim in the face before then spitting in the face of the arresting officer. This footage was provided 20 minutes before the trial was supposed to start. The arresting officer was understandably disappointed to discover that the footage had not been disclosed earlier because he had provided it to the CPS prior to charge. Had that footage been available prior to the first hearing in sufficient time for arrangements to be made to view it with the client then it is highly likely that the Defendant would have entered the appropriate plea at the first hearing. In another case which cracked on the day of trial records of previous interactions between the Defendant and the police were only served after close of business the night before the trial despite those records being requested at the first hearing, and in a defence statement and then in a section 8 application.
 - When CJSSS was brought in defence practitioners were told that the service users agreement between the police and the CPS and the Court would mean that the police would provide the file to the CPS 10 working days before the first hearing: that the CPS would then provide the file to the Court 8 working days prior to the first hearing at which point the defence could obtain a copy. This just doesn't happen. Papers are not usually received until the day of the hearing.
 - In the Youth Court the main issue is the length of time required to deal with a case in Cardiff Magistrates Court. Only one Youth Court will be run and Solicitors are required to queue outside the Court door. If a solicitor leaves the queue, he/she will lose their place. If papers are delivered late then the Solicitor will be further down the queue. Youth Court cases themselves take longer because of the workings of the Youth Justice System. There is a requirement that the bench seeks to engage with the Defendant, which is right but more time is taken as a consequence.
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.*

Criminal legal aid fees can be seen as a package of earnings generated from police station cases, Magistrates' court cases and Crown Court cases. Many firms will now cross-subsidise their defence work in the police station and Magistrates' courts from the fees paid in the Crown Court. The reduction of cases concluding in the Crown Court will have significantly affected the ability of firms to use crown court cases to offset lower earnings elsewhere.

Sustainability of any fixed fee scheme is dependent upon the rates of remuneration payable, the graduation of the fees and volume of cases.

The volume of cases which are the subject of charge and prosecution by the police and Crown Prosecution Service have fallen year on year and the number of cases in the Court system has greatly reduced.

The Police Station Fixed Fee Scheme

The following points arise :-

- The current fixed fee payable in Cardiff and Bridgend is £177.94 per case plus VAT and is inclusive of a one-off payment for all telephone advice. The fees have not been the subject of increase since 1996 and have been significantly reduced over the period by a series of amendments to the crime contract (see below). In dealing with the case study below I have now been spent some 5.5 hours to date. This equates to an hourly rate of £35.00 and the case is far from concluded, in fact it has only just started. A second attendance at the police station once witness statements have been obtained will likely halve that rate. The Fee Earner's overhead cost per hour to a firm is the same whether they are attending, travelling, waiting or engaged in administrative work that is not chargeable under the contract.
- Only one fixed fee is payable in respect of the same period of detention in police custody no matter how many different offences are the subject of investigation and interview. One fee of £177.94 is payable even where providers are obliged to open two or more separate files dealing with totally unrelated offences. Previously separate claims for a fixed fee could be submitted in appropriate circumstances for different offences.
- There is an escape fee mechanism but this rarely comes into effect and when it does total costs actually incurred are discounted before payment is made. The escape fee mechanism requires costs calculated at an hourly rate to exceed 3 times the fixed fee limit. A murder or serious fraud will escape the threshold but the majority of cases will not. Because of the detailed information provided on the CDS 11 form the LAA will know what the average time spent on a police station case is. This information however will only capture half the picture as there is a great deal of associated work that must be done by the practitioner following the police station attendance to ensure a file is contract compliant and the costs of this time are not reported to the LAA. The provider must in practice

absorb the administrative and other overhead costs incurred by doing police station work as the fixed fee is insufficient to cover these.

- Payments for travelling time to and from the police station were removed at a time when travelling times were increasing because police station custody suites in Wales were being consolidated. There are now only 4 “Bridewell Stations” for the whole of South Wales based at Cardiff, Newport, Swansea and Merthyr Tydfil. Smaller custody units at local police stations in and around Cities were closed. A practitioner will now have a round trip of 1.5 hours if a police station case in Cardiff is transferred to Bridgend to be dealt with.
- An 8.75% cut in the fixed fee was made in 2014 and a second cut of 8.75% was deducted from rates on 1st July 2015 , a combined 17.5% reduction applied for an 8-month period until the second reduction was reversed on 1st April 2016. These rate reductions were justified when introduced on the basis that case volumes would be increased as providers who successfully tendered for new contacts in 2015/16 would achieve a greater market share. Though the tender process was later abandoned the fee cuts remained in place.
- There is no fee graduation. The same fixed fee is payable regardless of the seriousness or complexity of the matter under investigation . The issues involved will obviously vary from the more routine of cases (e.g. shoplifting) to those which require the utmost care and attention (e.g. serious sexual offences). Whilst all cases must be well documented in the more complex and serious of cases there is an even greater need for extremely detailed instructions to be obtained from the client and the need for the practitioner to provide comprehensive advice on a whole range of issues of legal, evidential and procedural issues. These cases are obviously very stressful to deal with .
- There is now no differential in payment between work carried out in social and unsocial hours. Often a solicitor on 24-hour call will attend at the Police Station in the early hours of the morning or alternatively, receive telephone calls in connection with case, throughout the night and be required to attend at the Police station the following morning.
- As a police station case may only be billed at its conclusion there are often lengthy delays in payment for police station work for reasons beyond a practitioner’s control.
- Whilst the LAA contact terms and specification require that the highest standards are met in terms of the quality of representation the costs of compliance are not reflected in the level of fees payable. Quality is underpinned by the requirements of the Crime Contract Documentation rather than the fee payment scheme. The LAA Crime Contract Standard Terms runs to 94 pages. the Contract specification is a further 155 pages and the Peer Review Guidance document is 46 pages. Every aspect of the police station attendance must be recorded in writing on a police station attendance document which must be detailed enough

to be compliant with the contract. Our Police Station attendance document is 19 pages in length . A detailed document must be available for later LAA audit which comprehensively covers the reasons and justification for the clients arrest and detention, details of the reviews of detention carried out by the police, details of any medical conditions or other concerns in relation to the clients wellbeing, details of the disclosure of evidence relied on in relation to the offence, details confirming that correct police station procedures have been followed, a detailed recording of the clients instructions in relation to the offence and other relevant matters, details regarding the nature of the advice tendered and the reasons for that advice. All times for travel, waiting and attendance must also be meticulously recorded, a telephone log must be maintained and details of mileage travelled by reference to outgoing and return postcodes must be recorded. Compliance with the LAA Contract and Specification is the subject of annual LAA audits of a random sample of police station files as well as audit on an ad hoc basis from time to time throughout the year when individual files are requested and provided. In addition, files are also the subject of Peer Review every 3 years.

- Significant administrative costs are incurred by the provider in monitoring the progress of the police investigation through to charge or confirmation that the matter is the subject of no further action. There is a great deal of unpaid work involved in continuing to liaise with clients and the police after the initial police station attendance. Following a police station attendance, the client will more often than not be “released under investigation” or on bail. A rolling monthly police station case load for a provider of say 60 police station cases where a significant number of cases are not finalised at the first attendance soon places a considerable administrative burden on a practitioner in order to keep track of all cases and this aspect of work is presently unpaid.
- Very low rates of pay do not encourage quality of work in any profession.
- Very low rates of pay have already necessitated that practitioners be as efficient as is possible in order to continue to remain in business
- In summary the rates are far too low. They are uneconomic and present a significant threat to future sustainability of police station practice. The Police station cases we conduct as a practice are run at a loss. Undertaking police station cases allows a practitioner to expand its client base and in the event that the client is charged at the conclusion of the investigation to secure future revenue from the resultant Magistrates Court or Crown Court case. A firm will also carry out police station work in order to retain the goodwill of existing clients who require police station advice.
- The police station fixed fee scheme should be funded so as to allow a provider who delivers a quality service efficiently to generate a profit from this area of work or otherwise the provider base is put at risk.

A Police Station Duty Solicitor Case Study

I am a Duty solicitor on the Bridgend duty solicitor scheme with over 25 years' experience of criminal law practice. On 29th April I attended upon a duty client in relation to two allegations of causing actual bodily harm. The client was a mother of 4 children in her 30's with a history of poor mental health, anxiety and depression. It was alleged that my client had injured her 13 yr old son by biting him to the cheek during an argument at home and in a separate incident had caused injury to her 8 year old son by hitting him . Social services had been involved with the family previously and were now involved again. The first call from the DSCC providing notification of the case details was received at 7.05 pm. An advice call to the client was made within 45 mins of notification as required by the terms of the crime contract. Two further telephone calls were made during the evening to the investigating officer and a legal briefing pack was sent to me for consideration by e mail via CJSM at 8.39pm . I attended at the police station at 9.48 pm to consult with the interviewing officer prior to attending upon my client to take instructions and provide appropriate advice and assistance . An interview under caution took place between 9.48 pm and 10 minutes past midnight to obtain a " first account". A post interview briefing took place and the client was advised that she would be bailed to an alternative address away from the family home whilst the investigation continued. The client was advised that both children who were the subject of the alleged assaults would need to be interviewed by specially trained officers in order to obtain witness statements. A second interview under caution would then be arranged on a date to be fixed so that the client could be further interviewed regarding the statements obtained . Following the clients release from custody further telephone calls were made to the investigating officer to discuss the next steps in the investigation . The client was then telephoned so that the process could be explained to her and in order to provide an opportunity for the client to ask questions and/or raise any concerns. The client was bailed with conditions to re-attend at to Bridgend police station in 28 days' time.

A total of 4 hours' time was involved in the first attendance at the police station during unsocial hours. Attendances upon client and investigating officer lasted 2 hrs 42 mins. Travel to and from the police station took 1 hour (48 miles) with waiting time of 18mins. 4 telephone advice calls and 4 routine calls were made in connection with the case.

Further interviews will be conducted with the client when she answers her bail.

A decision on charge will ultimately be made by the Crown Prosecution Service.

Administrative work relating to the attendance will involve opening a file for the client on our case management system. Correspondence and detailed terms and conditions will be sent to the client to confirm the advice tendered and to comply with client care requirements. A risk assessment must be completed in relation to the case. All chargeable time spent on the matter is time recorded on the case management system. No entry is made for the non-

chargeable administrative time (say 45 minutes at this stage) that is not the subject of remuneration under the contract.

A case can only be billed once concluded. If the client's period on bail comes to an end it remains an option thereafter that the client to be further released under investigation.

The file is billed at the conclusion of the matter by submitting a form CDS 11 sent electronically to the LAA. There are 21 separate pieces of information required including, client name, unique file number, outcome code, stage reached code, matter type code, profit costs, travel costs, waiting costs, disbursements, date work concluded, police station identifier, police station scheme identifier, ethnic origin, equal opportunities monitoring DSCC reference numbers and its completion will require some 30 mins of administrative time.

The Magistrates Court Fixed fee scheme

The Magistrates Court standard fee scheme was introduced in 1993. There are three categories of fees payable depending on case type. The 3 case types are guilty pleas, contested / cracked trials or committal proceedings to the Crown Court. A lower standard fee or a higher standard fee is payable in each category determined by the amount of work a solicitor carries out on the case on the basis of an hourly rate calculation. Up to a certain case-value the lower standard fee is payable, beyond this threshold the higher standard fee will be paid. If a solicitor's costs exceed the limit set for the higher standard fee, remuneration will be on an hourly rate basis and a non-standard fee claim must be made.

The current fixed fees for cases at Cardiff Magistrates Court are :-

Category 1 Guilty plea before Trial, Either way Offences, Lower Standard Fee £248.71 and Higher Standard Fee £471.81

Category 1 Guilty plea before Trial, Summary Only Offences, Lower Standard Fee £202.20 and Higher Standard Fee £435.64

Category 2 Trials, Lower Standard Fee £ 345.34 and Higher Standard Fee £723.35

Category 3 Committal for Crown Court Trial, Lower Standard Fee £252.31 and Higher Standard Fee £571.68 -Abolished due to legislative changes

The Applicable hourly rates for the calculation of the lower and higher standard fees are as follows:-

Preparation - £45.35

Attendance - £45.35

Advocacy - £56.89

Travel- £24.00

Waiting- £24.00

Routine letters and telephone calls - £3.60

The following points arise :-

- The rates have not been increased since 1996
- Since the introduction of the scheme the fees paid have also been the subject of further significant reduction because of amendments made to the Criminal contract directly reducing the fees and also because of legislative changes in the criminal justice system which have had the effect of reducing the fees .
- Section 51 Crime and Disorder Act 1998 brought in procedural changes that abolished “committal proceedings” in the Magistrates Court stage which allowed the evidence to be considered at the Magistrates court so as to be satisfied that there was a case to answer at the Crown Court . As a result of these changes the need for payment of a “Category 3 fee” was removed. Serious cases were accordingly sent at the first Magistrates Court Hearing to the Crown Court for case management by a Crown Court Judge. Payment for the work done by the solicitor in the Magistrates court was “rolled up” into the fee for the Crown Court case which at that time was payable at hourly rates.
- “Revised standard fees” for Magistrates’ courts work were introduced in “urban areas” from April 2007. Payments for travel and waiting time for cases dealt with at the Magistrates court were “rolled up “ into the standard fee paid. Between 1993 and 2006 payments for travel and waiting had been made in addition to the standard fee at an hourly rate. There is agreement that waiting time in the Magistrates court is largely not in the control of the practitioner yet practitioners are required to absorb this cost. Waiting times will have increased significantly following the introduction in 2007 of CJSSS (see below) because the majority of cases are now required to be dealt with at the first Hearing. There are inevitable delays following a plea of guilty if pre - sentence reports are required to assist the Court in passing sentence and the case will need to be put back in the list for the client to be interviewed at Court by the probation service and for a written report to be prepared or for an oral report to be delivered by the probation service to the Magistrates sitting in Court.
- The Magistrates Court estate has been consolidated in South Wales . There is now centralised delivery from Cardiff, Swansea, Merthyr Tydfil, Newport and Cwmbran Magistrates Courts . Travel costs have increased as a result as a practitioner is now required to travel to and from these central court locations rather than to and from the local Magistrates Court which previously operated.
- An 8.75% cut in the fixed fee was made in 2014 and a second cut of 8.75% was deducted from rates on 1st July 2015 and a combined 17.5% reduction applied for an 8 month period until the second reduction was reversed on 1st April 2016. These rate

reductions were justified when introduced on the basis that case volumes would be increased as providers who successfully tendered for new contracts in 2015/16 would achieve a greater market share. Though the tender process was later abandoned the fee cuts remained in place.

- Whilst the LAA contract terms and specification require that the highest standards are met in terms of the quality of Magistrates court representation the costs of compliance are not properly reflected in the level of fees payable. Quality is underpinned by the requirements of the Crime Contract Documentation rather than the terms of the fixed fee payment scheme. Every aspect of the Magistrates court attendance must be recorded in writing on the Magistrates court file which must be detailed enough to be compliant with the contract. Attendance notes on file will need to document that appropriate advice has been tendered regarding the Offence charged, Mode of Trial, Plea, Credit for plea of “guilty”, Court procedure in relation to trial, sentence, committal for sentence, committal for trial or the Section 51 procedure, likely sentence in the event of conviction, any Pre-Sentence Report prepared, client instructions in relation to their defence or matters of mitigation, the outcome of the case at the conclusion of the proceedings, the Court’s sentence in the event of conviction, the prospect of an appeal if appropriate. Attendance notes will record each distinct stage of the proceedings, each attendance upon client, preparatory works following the receipt of Prosecution case papers and thereafter; a full note of each Court hearing including what transpired and any discussions and advice provided to client and any action required. There must be an attendance note on file to record the perusal by the fee earner of the Prosecution Witness Statements and Exhibits and an analysis of the strengths and weaknesses of the Prosecution and Defence case to include a consideration and analysis of unused material. Attendance notes will also be required to confirm a consideration of any Applications for Special Measures or Bad Character, etc. There must be an attendance note on file to demonstrate that at an early stage in the proceedings that the client’s comprehensive instructions were taken in relation to the Prosecution evidence, matters of background and the personal circumstances of the client. The client must be shown the case papers and given the option of whether he would wish to be sent a copy for further consideration. All of these matters must be incorporated into a written Statement prepared on behalf of the client to be kept on the file. Correspondence must also be sent to the client dealing with these issues and confirming the advice given. All times for attendance, preparation, advocacy, travel and waiting must be meticulously recorded on the file and on the Case Management System, a telephone log must be maintained and details of mileage travelled noted. Compliance with the LAA Contract and Specification is the subject of annual LAA audits of a random sample of police station files as well as audit on an ad hoc basis from time to time throughout the year when individual files are requested. In addition, files are also the subject of Peer Review every 3 years.

➤ **CJSSS: the triple S stands for Simple, Speedy and Summary.**

CJSSS was introduced to improve the speed and effectiveness of the magistrate's court. The process intended that summary trials would be speeded up so that cases could be dealt with from beginning to end within a maximum of 6 weeks. All parties would be involved – the courts, police, CPS, defence solicitors .

The key aspects of the scheme included:-

- A reduction in the number of hearings in most cases, from an average of between 5 and 6 to an expectation of one (for guilty pleas) and two (for contested cases);
- The first hearing in the Magistrates' court should be effective.
- In order for the first hearing to be effective, the prosecution should have served on the Defendant and the court all necessary papers so as to allow a meaningful discussion of the case at that first hearing.
- Where there is to be a trial, the date for trial should be set at first hearing, not more than 6 weeks away.
- Directions for pre-trial issues should be given at the same time, the first hearing, where at all possible so that a trial within that period of 6 weeks could be achieved

In summary:-

- CJSSS limits the number of cases that one practitioner can deal with on a daily basis because each case has to be conducted from start to finish that day. It can take the greater part of a Court day to conclude one case both in terms of the Court attendance and the related paperwork that must be completed in order for the file to be contract compliant as well as the other administrative work, such as billing, that is not chargeable under the contract. One case a day is obviously not profitable.
- The CJSSS procedure has effectively taken the payment of a Guilty plea Higher Standard Fee out of scope because it is not possible at a first hearing to exceed the threshold of £471.81 on the hourly rate calculation. Most cases dealt with by practitioners in the Magistrates Court are guilty plea cases.
- In the event you do not exceed the standard fee for a Guilty then all work up to a maximum of 6 hours attendance and preparation work being carried out for £248.71 for either way offences which is an hourly rate of £41.45 or up to 4.7 hours of advocacy being carried out for an hourly rate of £52.92 or combinations thereof.
- The distinction between payment for summary only and either way offences is artificial. Summary only offences where there is a maximum of 6 months imprisonment can involve as many issues as either way offences.

- The concept of “swings and roundabouts” for Category 1 guilty plea cases no longer has any real application as the lower fee is now payable in almost all cases (save for Newton hearings) and is not “balanced out “ by the higher fee being paid in a proportion of cases.
- The Category 2 Trial Higher Standard Fee threshold of £467.84 requires a practitioner to undertake a combination of in excess of 17.1 hours preparation and attendances or 13.7 hours advocacy is required before the Higher Standard Fee of £779.64 is payable.
- In the event you do not exceed the threshold then all work over the fixed fee for a Trial of £354.34 is unpaid. This results in up to a maximum of 17 hours attendance and preparation work being carried out for £345.34 which is an hourly rate of £20.31 or up to 13 hours of advocacy being carried out for £35.99 or combinations thereof .
- The failure to keep pace with rpi of itself has resulted in a real terms reduction in payments for criminal litigation work in the Magistrates Court of near 50% since 1996.

The Bank of England Monetary Policy Inflation Calculator notes an average rise in inflation between 1996 and 2020 of 2.8 % per year.

If 1996 rates had kept pace with rpi the hourly rates should now be as set out in the table below:-

1996 Rates	Adjusted Rate 2020	%Loss
Preparation £45.35	£87.05	47.9%
Attendance £45.35	£87.05	47.9%
Advocacy £56.89	£109.21	47.9%
Routine Letters and Telephone calls - £3.56	£6.83	47.9%
Travelling and Waiting - £24.00	£46.07	47.9%

The fixed fees uprated for rpi would look as follows:-

	1996	2020
Category 1 Guilty Plea before Trial 1A Either Way Offences Lower Standard Fees	£248.71	£473
Category 1 Guilty Plea before Trial 1A Either Way Offences Higher Standard Fee	£471.81	£905.71
Category 1 Guilty Plea before Trial 1B Summary Only Offences Lower Standard Fee	£202.20	£388.15

Category 1 Guilty Plea before Trial 1B Summary Only Offences Higher Standard Fee	£435.64	£836.27
Category 1 Trials Lower Standard Fee	£ 345.34	£662.93
Category 2 Trials Higher Standard Fee	£723.35	£1388

- Defence Solicitors have played a central role working with other criminal justice agencies to transform working practices in the Magistrates court since 2007 which has resulted in very large costs savings for the public purse but at a cost to themselves in terms of the reduced fees now payable as a result of fewer Hearings. The completely unrealistic hourly rates that form the basis of the calculation of fixed fees have not increased since 1996 and are now wholly inadequate and unsustainable. The Savings made in all other areas as a result of the work of criminal practitioners more than justify proper payment for the vital work undertaken.

The Litigator Graduated Fee Scheme

The following points arise :-

- The present scheme was introduced in 2008. The previous system for payment of Crown Court work governed by the Legal Aid Act 1988 was far superior allowing for either a claim for a fixed fee payment without the submission of a file of evidence or the submission of an ex post facto bill enclosing the file of papers for taxation by the national taxing team.
- The rates of Crown Court remuneration for the majority of litigator fee cases set by the proxies of case type, plea and pages of prosecution evidence are far too low for most areas of crown court work as demonstrated by the examples given below. LSF's don't adequately remunerate seriousness or complexity or the effort required in the preparation of the majority of defence cases. There are far too many cases where the remuneration does not cover the costs of the work required in properly preparing a case for Trial. Payment for certain categories of cases is derisory.
- Perhaps the provision of 95% of crown court cases is subsidised by a relatively small number of Crown court cases. A handful of well-paying crown court cases can be the difference between profitability or loss. Small numbers of cases which generate 10,000 plus pages of evidence will result in a large payment and in the absence of such a case/s the figures don't work for the practitioner.

A Committal for Sentence Case Study

The Defendant in this case had been Committed in custody to the Crown Court for sentence having pleaded guilty to possession of a bladed article in a public place. The Prosecution said that the Defendant had attended at his former partner's home brandishing a knife and shouting threats and abuse towards her and other residents. The Defendant had numerous previous convictions including convictions for similar offences. The Defendant had a significant history of mental health problems having been diagnosed with schizophrenia aged 3 as well as other serious medical conditions. A Brief to Counsel was prepared. There was extensive correspondence and telephone calls with Prison Healthcare, the Defendants GP, a Consultant Forensic Psychiatrist who attended upon the client in custody for the purposes of preparing a psychiatric report as well as the Probation Service and the client. There was also significant correspondence and telephone calls with the Crown Court listing department to ensure that an Order was made by a Judge for the expeditious disclosure of the Defendants medical records and also with regard to the date of the sentencing hearing that was also brought forward by 2 weeks at our request. There were a number of Court Hearings . The chargeable time recorded in dealing with the case over a 2-month period was in excess of 30 hours. Prior Authority was obtained from the LAA for the psychiatric report in the sum of £700. The Defendant received a suspended sentence of imprisonment and was released from custody two weeks earlier than would have been the case as a result of representations made to the listing department on his behalf with a significant saving to the public purse. The Litigator Fee payable for a committal for sentence is £232.98 plus VAT.

If a client is properly advised he will have pleaded guilty where appropriate at the first opportunity in the Magistrates Court and accordingly some very serious and weighty cases will be dealt with in the Crown Court under a fixed fee which does not come close to properly remunerating the work that a practitioner is professionally obliged to undertake.

Case Study Guilty Plea Category I - Pervert the Course of Justice

The Defendant appeared in the Magistrates Court charged with an Indictable only offence of Perverting the Course of Justice. The case was sent to the Crown Court for Trial . The Defendant had limited previous convictions, but was very concerned about the prospect of going to Prison as he ran his own business and had a family to support. The Defendant also had mental health problems and had been sectioned prior to the commission of this offence. A guilty plea was entered in the Crown Court and the case was adjourned for a Pre-Sentence Report. The Sentencing date was moved on a number of occasions by the Crown Court Listing department at very short notice. There was regular contact with the Defendant following hearings, a full conference with Counsel and telephone conferences with the client pre and post his PSR. The client received a custodial sentence. The Guilty Plea fee in this case is – £174.60 (which is even lower than the standard committal for sentence fee of £232.98)

Case Study Burglary Category E

The standard fee for a guilty plea based on 30 pages is £184.70
A cracked Trial fee based on 30 pages is £233.03

A Trial fee for a case lasting 2 days is £352.72

A contested Burglary case often involves a lot of work on the part of the defence in dealing with issues arising from the forensic and other evidence served. This will often require the instruction of Defence Expert witnesses to deal with evidence obtained via DNA, fingerprint, footwear or CCTV and in each instance Prior Authority to instruct an expert will be required from the LAA which is, of itself, a time-consuming process especially if the Legal Aid Agency refuse to grant approval in the first instance.

Case Study Trial Section 20 GBH Category C

The Defendant had pleaded not guilty to a charge of causing grievous bodily harm.

The preparation of the case for Trial required the defence to take statements from 6 defence witnesses and 2 witnesses had to be attended on at their home addresses.

The case has been listed for Trial on 5 previous occasions prior to commencing.

The Trial fee for first Trial (aborted after 2 days due to prosecution failing to disclose necessary documents and a second 999 recording) was £739 plus VAT. The Re-Trial Fee for a 5-day Trial £493.30 plus VAT.

Case Study Trial Possession of Offensive Weapon Category H

The Defendant had pleaded not guilty to Possession of Offensive Weapon. The Defendant had previous convictions for similar offences which put him in the minimum sentence category. He was a self-employed builder working on a part time basis and relied on the defence of reasonable excuse for being in possession of what he said was a Stanley knife for use in the course of his employment. The Defendant was Carer for his daughter, who was on the Autistic Spectrum and struggled with most tasks. The Defendant was extremely anxious about the case and there were lengthy telephone conferences with him in addition to a 2-hour office appointment and an hour's conference with Counsel. The Defendant was rightly very concerned about the prospect of a Prison Sentence and the impact this will have on his family. The Defendant took an active part in his defence.

The fee for a 2-day Trial based on 41 pages of evidence is £366.35 plus VAT.

Case Study Trial Category J - Rape of Under 13 Year Old

Allegation that this offence was committed whilst the Defendant was also a child. Young Professional man with no previous convictions. Seven defence witnesses were interviewed, some of whom had to be traced as this was a historic allegation.

Two defence witnesses who refused to assist had to be witness summonsed to Court and statements taken from them at Court.

The first Trial was stopped on day 4 due to technical difficulties with the Court CVP equipment for a link to witness room within the Court building.

A Trial fee of £2,237.37.

A Fee for a 5-day retrial will be £682.19 based on 88 pages.

Case Study - Attempt S18 and Violent disorder Category B

The Defendant was a Youth with learning difficulties charged with an Attempt Section 18 with a machete and Violent Disorder. The case was fully prepared for Trial and involved over 30 hours of preparation and attendance. There were 3 Hearings at the Crown Court. It was necessary to obtain Expert Reports from both a Psychiatrist and Psychologist and Prior Authority was obtained from the LAA for each report. This case was prepared for Trial as the CPS would not initially accept a plea to count 1 alone. The case involved 4 Defendants and 186 pages of evidence.

A Cracked Trial fee paid of £ 1,607.43 was paid.

For the avoidance of doubt, our firm will attend at the Crown Court to instruct Counsel at each Hearing so as to attend upon the client and Counsel in conference and to take a note of the proceedings.

Our firm will routinely prepare a Draft Defence Case Statement in each instance for the approval of Counsel.

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?*

- Late provision of evidence between the parties is dealt with at question 1 above.
- Notification of outcome to the defence solicitor following a client's release from police custody is an area where improvements could be made to allow defence solicitors to work more efficiently. It would greatly assist if following a suspects release from custody as a matter of practice a copy of the custody record were emailed to the defence solicitor via CJSM so as to confirm the outcome. Otherwise it falls to the solicitor to try to contact the officer to obtain this information which is not always straightforward particularly if the officer is off on rest days . The provision of details of charge, bail dates, bail conditions and outcomes should be standard practice.

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

- No.

- A Solicitor upon qualification will have completed a 2 year training contract after 4 years study at significant expense to obtain a Law degree and Legal Practice Qualification. The salary for a newly qualified criminal solicitor in South Wales is likely to be in the region of £23,000. After 10 years qualification a Duty Solicitor in South Wales may earn £35,000. Low salary levels and the lack of a sustainable career path have contributed to many criminal practitioners leaving the field. It continues to give rise to recruitment and retention issues. We have lost in recent years 2 excellent duty solicitors of 10 year plus qualification for this very reason; one to a different area of law and one to the Crown Prosecution Service. The Law Society has prepared an excellent heat map illustrating the aging profile of criminal duty solicitors and gaps in coverage.
 - Salary levels in the CPS far outstrip those available in private practice
 - At partner level it cannot be said that the current rates of remuneration for criminal work in 2021 provide any satisfactory return on investment for the risks inherent in running a business. The current scheme is barely if at all profitable for providers and the resultant lack of return for work done poses a continuing threat to the sustainability of the fragile supplier base. Reform is long overdue. A point will soon be reached, certainly at the end of the present contract period, when firms will have to decide whether they can continue to provide criminal defence services.
5. *Does the present structure of Criminal Legal Aid meet the needs of suspects, Defendants, victims and witnesses? Please explain your answer.*
- Released Under Investigation - RUI is used by the police instead of bail-but unlike bail it has no time limits and conditions. This can leave the accused and victims in limbo with no updates on their case for an unlimited time. The Law Society has pointed to evidence that people are being released under investigation who are potentially a risk to victims of crime and the public in general, rather than being put on bail as would be more appropriate. This particularly impacts on victims, who may be targeted again by the same perpetrator. Time limits should be placed on the use of RUI and it should be ensured that it is not used for people who are a potential risk to the public. There should be a central register for all suspects released under investigation so inactivity in cases can be monitored.
 - Court closures have led to Defendants and witnesses having to make unreasonably long and expensive journeys to Court. In South Wales since 2011 some 30 Magistrates Courts have closed including Aberdare, Abertillery, Ammanford, Barry, Chepstow, Abergavenny, Brecon, Bridgend, Caerphilly, Carmarthen, Pontypridd, Gowerton, Neath, Talbot Green, Tenby, Tredegar and Ystradgynlais. There are now only 5 court centres in South Wales located in Cardiff, Swansea, Newport, Cwmbran and Merthyr Tydfil.
 - The means test for Legal Aid is set at far too low a level. Defendants who fail the means test but who cannot afford to pay privately for representation will have to represent themselves. Unrepresented Defendants who do not have the benefit of legal advice

often plead not guilty when they would not otherwise have done so had they been legally represented. This adversely impacts on the efficient running of the Court process and increases costs when cases are needlessly adjourned for Trial with the resultant costs for the Crown Prosecution Service, HMCTS, and other Criminal Justice Agencies. The added delay in concluding cases will cause unnecessary inconvenience and worry to both victims and witnesses.

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

- Electronic working which has enabled some Court Hearings to be conducted virtually has proved very successful and should be retained.
- Changes to charging policy as a result of the pandemic have resulted in a backlog of cases where suspects are “released under investigation” at the police station.

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

- Fixed fee schemes for police station and Magistrates’ Court work which properly reflect the work done to comply with the terms of the crime contract both in terms of legal and administrative work. To include a new system of graduation of cases by case type and complexity to ensure that appropriate cases would attract a higher fixed fee. The LAA billing process should also be simplified in terms of billing and reporting requirements. A mechanism should also be put in place to ensure the new fee levels are reviewed regularly enough to keep pace with changes to rpi rates.
- A new fee payment scheme for the Crown Court should be introduced which is more akin to the previous system for payment of Crown Court work which was governed by the Legal Aid Act 1988. This scheme was far superior to the present one allowing as it did for either a claim for a fixed fee payment without the submission of a file of evidence or the submission of an ex post facto bill enclosing the file of papers for taxation by the national taxing team. Any fixed fee scheme should properly take into account defence preparation over and above that which is involved in dealing with the pages of Prosecution evidence such as the instruction of an Expert Forensic Accountant in cases of fraud or dishonesty, or the instruction of Medical Experts, or the interviewing of Defence Witnesses.
- Time limits should be placed on the use of RUI and it should be ensured that it is not used for people who are a potential risk to the public. There should be a central register for all suspects released under investigation so inactivity in cases can be monitored.
- The means test should be increased in line with inflation or scrapped altogether with advice fee at the point of access. Presently individuals earning more than 12,475 a year may be deemed ineligible for fully funded legal aid and may have to make contributions towards their legal costs. Individuals earning more than 22,325 may receive no legal aid funding at all.

- Stricter procedures should be introduced in order to ensure earlier disclosure of evidence in the Magistrates' Court at least 8 days prior to the First Hearing.
- 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.*

Martyn Prowel Solicitors are a general high street practice established in 1996 undertaking crime, civil, family, conveyancing and private client work. We employ 34 staff including, 22 fee earners and 10 administrative staff.

Our criminal department has 6 duty solicitors, 2 accredited police station representatives and 1 paralegal. One secretary provides administrative support to the crime department and we share the services of the firms accounts department and receptionist with the rest of the firm.

Our Crime department has a mix of legally aided and privately paying cases and accounts for about 25 % of the fees of the practice.

The Crime department has benefited in cash flow terms from income generated from other areas of practice.

Factors affecting profitability that are within the firm's control are its reputation and profile, its efficiency and use of technology and its financial structure.

The crime department's ability to make a profit in crime will depend on the rates of remuneration, case type and the volumes of work that are available and all of these are matters beyond the firm's control. The efficiency of other outside agencies such as the police, CPS, prison transport services, prisons and courts will have also impact on profitability. The more efficiently these other agencies operate, the more efficiently a firm can operate. If there are problems elsewhere in the overall criminal justice system, these impact directly on a criminal firms' profitability.

Criminal practitioners in the Magistrates' Court have been required to operate as efficiently as is possible following the introduction of the CJSSS - Speedy Summary Justice Reforms in 2007 in order to remain in business. In our own practice we have reduced our main office space from over 2,500 sq feet to half that, invested heavily in digital working and found other economies and savings wherever possible to reduce operating costs. The costs associated with providing a quality service have all increased since 1996 whereas the fee rates payable in crime have not and in some cases have halved in real terms.

The Otterburn target financial profile for a successful law firm apportions fee income between: salary costs: non-salary overheads and net profit in percentage terms. The 50/30/20 rule. Otterburn suggests that to achieve a net profit of 20% a firm would

need for example to limit salary costs to 50% of fee income and other overheads to 30% of fee income.

Otterburn contends that a firm that can achieve a net profit of 20% will be efficiently run and net profit at this level will provide a sufficient level of income for a firm to be sustainable and to provide a quality service. Such a firm will have the available revenue to invest in people, equipment and training. It will be in a position to set aside money to provide for periods where there are unforeseen drops in income or increased expenditures. He notes that the profit figure generated by a practice on paper will not necessarily mean that that is the figure available for the partners to take out of the business as income as all firms are funded through a combination of retained earnings and bank finance and part of the partner profits are invariably retained in the business.

The current rates of remuneration payable under all of the fixed fee schemes make it near impossible to achieve a profit margin of 20% from criminal legal aid work despite every effort of the practitioner and the adoption of the most efficient working practices.

Otterburn in a report prepared for the MOJ in 2013 concluded from a survey carried out of 167 criminal firms (some 10% of the supplier base) that the overall profitability margin of these firms was 6%.

At this level of profitability, the risks associated in running a criminal firm which are significant will deter many from wishing to take on or to continue to take on liabilities in respect of property leases, professional indemnity premiums, supplier contacts, personal guarantees for overdraft facilities or the liability for redundancy payments if things go wrong. Firms have to fund their operating costs and generate a surplus over and above that before they can pay their owners a sum to reflect their investment and risk. An area of law in which practitioners cannot make a reasonable return on their investment is not one that is likely to attract new entrants and will continue to lose providers.

Crime Contract Value	20% Net Profit	5% Net profit
£250k	£50,000	£12,500
£500K	£100,000	£25,000
£750k	£150,000	£37,500
£1m	£200,000	£50,000

Since 2007 we have had to cross-subsidise criminal defence work in the police station and Magistrates' courts with the fees made in the Crown Court. Fee reductions in Crown Court during the period have significantly affected the ability of firms to use these cases to offset lower earnings elsewhere. In 2020/21 the effects of the pandemic on the criminal justice system particularly in terms of the reduction of cases

in the magistrate court and the large reduction in concluded Crown Court Trials will have meant that the net profit figures for criminal departments across the country will be precariously low.

In assessing the profitability of our crime department, we have taken the actual information regarding fees and salaries of fee earners and support staff. We have then deducted an allocation of the firm's overheads based on the number of fee earners in the crime department relative to the total in the whole firm.

In 2017 our profit margin was 12% . This was the result of a relatively small number of comparatively highly paying cases in the Crown Court of the type that do not occur every year.

In 2019 with very similar volumes of case work carried out our net profit was 5% in the absence of enough of the comparatively high paying crown court cases.

The rates of Crown Court remuneration for the majority of cases are set by the proxies of case type, plea and pages of prosecution evidence and the fees payable are far too low for the all areas of Crown Court work. Remuneration in some cases is unfortunately derisory.

9. *Anything Else To Submit For Consideration Etc*

The following figures are obtained from the Report of Lord Thomas of Cwmgiedd - Justice in Wales for the people of Wales , October 2019

- MoJ budget :-a reduction of 27 % between 2010-2018
- Criminal Legal Aid spend in Wales :- a reduction of 34% between 2011-2019
- A very significant decline in the work of the Magistrates Court in Wales by about 35% , materially greater than the decline in England (Figure 23 , para 4.155)
- More than 90% of cases are completed in the Magistrates Court
- Magistrates Court closures :- 30 Courts closed between 2001-2019
- A significant decline in the workload in the Crown Court which has fallen by 24.5% in Wales
- Criminal legal aid contract holders down from over 140 to under 80 a reduction of 40% between 2011-2019
- Rate of prosecutions and convictions in Wales down from 46,200 in 2013/14 to 30,027 in 2017/18 a reduction of 35% .
- Crown Court Prosecutions in Wales a reduction of 24.5% between 2013-2018

We would wish to adopt the recommendations made in the following excellent reports:-

- The House of Commons Justice Committee , Criminal Legal Aid Report 18th July 2018
- The Law Society Criminal Justice in Crisis Parliamentary briefing 29th January 2019
- The Law Society Report – Justice on Trial 2019; Fixing our criminal justice system.

Martyn Prowel Solicitors

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