



## Independent Review of Criminal Legal Aid - Call for Evidence

Our contribution to your important review comes from a unique point of view as Commons is a not for profit, cooperatively run criminal defence firm. Founded four years ago by solicitors who collectively have experience working at Bindmans LLP, Hodge Jones and Allen, Hickman and Rose and Powell Spencer and Partners, Commons' business and governance model was developed in response to the challenges of publicly-funded defence work. Our objective was also to create a firm which in its ethos and opportunities promotes legal professional development and a workplace culture which rewards innovation and embraces change.

Before answering the Consultation questions, we believe it is important to frame our contribution in dialogue with what your Chair has reportedly called the 'double pincer movement' or in other words what is conceived of as a perfect storm of real terms reduction in income coupled with a reduction in work.

We do not disagree that many providers have a fragile financial base. Currently, because of the way the system is designed and funded, providers are at the mercy of external forces which make resilience planning difficult, if not impossible. However, our experience as a small criminal law firm is more nuanced than this. Although we very much struggle with the constraints imposed by low legal aid rates, we do not struggle for work. Our most significant challenges do not come from too little work but managing too much.

In the last 12 months we have recruited a full-time solicitor, our paralegal is about to become a trainee, we have recently hired a local unemployed graduate through the government Kickstarter scheme and this week we will start a recruitment process for another newly qualified solicitor. Most significantly of all, we responded to the state of crisis in which many of our clients found themselves in at the beginning of the pandemic by piloting a Crisis Navigation scheme.

The Crisis Navigator works with our client to identify areas of profound need in their lives, some of which intersect with their involvement in the criminal justice system. She then works

with other partner organisations and community services to get them to the help they need. By way of illustration, recent examples include: helping clients whose electricity had been cut off; alleviating homelessness by intervening with the local council; linking vulnerable people to mental health services such as counselling. Our Crisis Navigation role is a necessarily truncated example of a holistic approach which was pioneered and is now mainstream in many urban areas of the United States.

As this review implicitly acknowledges, much of the work funded publicly is not just unprofitable but loss making. However, as well as the fee rates which are now markedly under what they would be, had inflationary rises been factored in, the atomised nature of the funding structure stifles collaborative problem solving requiring lawyers to be answerable to different LAA managed fee schemes and contractual arrangements. This undermines efforts to move towards a holistic / whole person approach to what academic Luke Clements has called “clustered injustice”.

Many, if not most, people’s entry into the criminal justice system is caused or shaped by overlapping structural inequalities; racial, socio-economic, educational with attendant hardships such as substandard housing, lack of work or precarious work and endemic poor health both physical and mental.

To be truly resilient and sustainable and to provide both social and financial value to taxpayers, we believe a key innovation could be the roll out of funding for holistic defence services as a response to the multiplicity of problems that defendants in the criminal justice system have.

The Independent Review foregrounds diversity, resilience, responsiveness and value for money. We think we are designed to hit all those benchmarks but could go much further. Allowing smaller firms such as ours to set up and operate in ways attuned to innovation in practice and employment practices such as flexible working and remote technology delivers a way of working that younger lawyers will come to expect as a post pandemic dividend and helps older staff manage work and family life.

We very much hope that our contribution will highlight an important truth in the criminal defence sector. One size does not fit all and the previous tortured histories of competitive

tendering and the sporadic failures of large legal aid providers demonstrate the dangers of trying to answer what we think is the wrong question.

In our view, the question is not how to manage the challenge of low funding and shrinking work, it is how can the level of public funding and the method by which the funding is delivered and audited support innovation and resilient business planning. You will read a plethora of responses that tell you that the current arrangements thwart both objectives.

A diverse ecology of providers means that the system is not dominated by firms that are too big to fail, where failure would create a provider desert across a geographical location or where local market dominance means that clients face inevitable professional conflict situations.

Our experience demonstrates that by working innovatively using a hybrid income stream of legal aid work, private work and grant funding then you can succeed in terms of attracting work and gearing legal practice and ancillary support to people in crisis whilst keeping overheads low. However, we want to do more and the funding levels and the nature of the current contractual arrangements prevent us from working even more holistically.

We are what may be described as a 'niche' firm and benefit from working alongside a diverse range of firms. We are committed to the principle of legal aid and to legal aid practitioners. It should be possible as it was historically for firms embedded in their community to provide publicly funded services and run a sustainable business purely on legal aid income.

We trust this review can achieve more than its predecessors by promoting a more supportive funding and regulatory environment for a variety of firms to deliver legal services efficiently and effectively working towards socially just outcomes that benefit us all.

## Consultation Response

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

*1. 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).*

### Police Stations

- Clients can be arrested at any time of day or night, any day of the year. Criminal Legal Aid solicitors are required to work in a way which guarantees a 24 hour a day service, 365 days per year.
- When a client is arrested or falls to be outside the working day, Monday to Friday, this immediately provides an extra cost to a firm in the form of either overtime payment for staff, or the employment of an ad hoc agent to represent that client. The overtime fee for such work covers around 40% of the fixed fee available to cover all work pre-charge (a period which may last several years).
- The police are now regularly sending formal requests to solicitors to commence "pre-charge engagement". However, this work currently remains entirely unfunded.
- The fixed fees set for police station work by the Legal Aid Agency are derisory and inadequate for all but the most straightforward of cases which conclude immediately.
- Unless a case reaches the very high threshold of an 'escape fee' no allowance is made within the fixed fee for the complexity of the case, the complexity of the client, the time or date.
- The consequence of this fee structure and the levels of fees on the quality of representation at the Police Station is apparently already obvious to the Legal Aid Agency. Their Peer Review guidance "Improving your Quality in Crime" (published February 2021) warns "The inappropriate use of inexperienced caseworkers on serious cases at the Police Station is frequently noted as a concern by Peer Reviewers." It often gives rise to later concerns about the suitability of the advice given. Mistakes, particularly about whether to give an account, remain silent, or submit a prepared statement are likely to be irredeemable, and therefore can seriously prejudice the client's case." (our emphasis)
- In the event you are released from the Police Station on bail or under investigation and wish to change solicitor, perhaps because of a concern over the experience or quality of advice and representation, the fixed fee structure (and its low level) means the ability to instruct another firm of solicitors to represent you in the investigation is only available to individuals with the means to pay the second firm privately, unless a firm is willing to represent you for free.

- The Police operate in shift patterns. Legal aid firms cannot afford to have staff working in the same way meaning that solicitors inevitably work hours far in excess of their contracted 35-40 hours a week. Often the same lawyer who has been up at 3am answering calls from the DSCC (and increasingly now being asked to attend for an interview in breach of PACE sleep periods ) will also have to be ready to start work or attend court at 9am. This is a recipe for burn out and is one of the reasons the profession struggles to attract new entrants and retain lawyers with caring responsibilities. Why work 60-80 hours a week (many of those hours unsocial) when you get an immediate salary bump and better working conditions at the CPS or in a firm that has eschewed legal aid work?
- By requiring their solicitors to be on-call in the evening and overnight when they have already worked a full day, Legal Aid firms are breaching the Working Time Regulations, which entitle all workers to a rest period of 11 hours in every 24-hour period. However, the alternative of paying an external agent to take over the phone overnight is not possible given the current level of fees. To pay such a person just £50 a day would amount to £18,250 in additional expenditure on police station representation annually.
- The current arrangements for solicitors accepting work and then making contact with the police do not work. The DSCC as an entity imports extra delay and inefficiency and of course cost into the system. To give one recent example, on the evening of 27 April one of our solicitors called the DSCC 6 times before she was finally able to get through. Each time she was left on hold for 6 minutes until an automated voice stated that no one was available to answer the phone. This started at 9:20 at night and was entirely unpaid. All the while our client was detained in custody facing a very serious charge and unable to access legal advice.
- If the Police could be helped to increase capacity to communicate directly with solicitors and police station representatives the time spent for those in detention would be dramatically decreased and many hours of unremunerated calls and wait time for the defence representative would be saved.

#### First Appearance at the Magistrates Court

- If you are a person who is reliant on Legal Aid for representation, even in a case where you may have been on bail or released under investigation for a period of several years, because of the funding regime for Legal Aid, preparation for the first

appearance can only begin when your solicitor receives the list of charges and Court date for the first appearance. Only at this point is it possible to apply for Legal Aid.

- Applications for Legal Aid are, in our experience, processed reasonably quickly within a few days.
- The next obstacle faced by the defence solicitor is to obtain a copy of the Initial Details of the Prosecution Case. Under CrimPR 8.2, where a defendant is on bail the Prosecution are obliged to provide IDPC “as soon as is practicable and in any event no later than the beginning of the day of the first hearing”. It is our experience that frequently and despite regular emails, IDPC is often provided too close to a hearing (or on the day) to allow for instructions to be taken in advance or significant preparation to be carried out.
- Furthermore, it is also our experience that notwithstanding the requirement within CrimPR 8.3 that all statements and exhibits material to plea must be provided within the IDPC, the IDPC provided is often inadequate. Applications for adjournments by the defence on this basis are seldom treated favourably by the Courts in the name of efficiency, meaning late and inadequate provision of IDPC has become a normal, mundane aspect of a dysfunctional system. A particular issue is the service of BWF and CCTV, which prosecutors will often refuse to serve at the first appearance despite having access to the material on their system.
- The effect of the truncated period available to the defence for case preparation and the slow and inadequate provision of IDPC by an underfunded CPS, facilitated by the indifference of the Magistrates Court is that where significant proactive work is required ahead of the first appearance, it is not always possible for the defence to achieve this.

#### Proceedings at the Magistrates Court

##### Financial Eligibility

- The primary issue demonstrating the dysfunction of the criminal legal aid system in the Magistrates Court is the level of financial eligibility for criminal legal aid. Law Society research published in September 2018 concluded:  
“means testing of legal aid is set at a level that can require people on low incomes to make contributions to legal costs that they could not afford while maintaining a socially acceptable standard of living. An underlying factor contributing to this outcome is the fact that the criminal legal aid means test only allows for living costs

that are typically only around half of the minimum costs estimated by my research, as well as being well below the commonly recognised poverty line. The living allowances and income limits on which the system is based have not been updated since 2008, since when the average cost of living according to the Consumer Prices Index has risen by over a quarter, and the minimum cost of living according to my research has risen more rapidly”

- The stark reality is that individuals on low incomes are expected to make a choice between having legal representation in a case which their liberty, employment and family may be at stake and a “socially acceptable standard of living”.
- Criminal Legal Aid means testing is not done on a person’s actual living costs, but based on an algorithm which account for living costs “well below the commonly recognised poverty line”.
- We would urge the CLAR panel to read and take heed of Professor Hirsch’s “Report on the affordability of legal proceedings for those who are excluded from eligibility for criminal legal aid under the Means Regulations, and for those who are required to pay a contribution towards their legal costs.” published September 2018.
- We currently have a client charged with obstructing a police officer during a drugs search. Based on the material served to date, we believe that the decision to search this person was unlawful. There appears also to have been an element of racial bias, and if acquitted he may have a civil case against the police. The client works in garbage disposal for the council and his take home pay after tax is £1450 a month. He therefore does not qualify for legal aid, but also cannot afford to pay for private legal representation. In two weeks’ time he will need to cross-examine 3 police officers himself and make complex legal points about the extent of their compliance with the PACE codes of practice. The CPS have not complied with their duties of initial disclosure – which he will need to raise – and his case would almost certainly be strengthened by the service of a Defence Statement. The system currently expects him to do all of these things himself. He has no previous convictions.
- The second main issue in the functioning of the Criminal Legal Aid system in the Magistrates Court is the low level of fees and the consequential effect on the quality of legal representation and access to justice for those people unable to pay privately.
- The fee structure, and levels, produce absurd results. Within the LAA’s 112 page Criminal Bills Assessment Manual, there is a provision which states it will normally take 6 to 12 minutes to consider and dictate each page of a simple document. The

expectation is that a 'simple' two page letter should be completed within 12 to 24 minutes.

- At the rate of £45.35 per hour paid for preparation, the value of this 'simple' piece of work is just £9.07 - £18.14 to the solicitors firm.
- If the letter is translated into another language, the payment structure is more closely aligned to the work done; a payment of 10p per word .
- To give a recent example, we were refused a fee of £54.42 for drafting our client's proof in an extradition case where the proof is served as the client's evidence-in-chief. The LA assessor stated that it was unreasonable to spend 72 minutes drafting this document. However, the LA agreed to pay £126 for the proof to be translated.

#### Advocates in the Magistrates Courts

- It is often necessary to instruct counsel in summary trials when you work at a smaller firm - either because there is no one in-house available on the trial date or (more often) because the instructed solicitor has given advice at the police station (meaning it would usually be inappropriate for them to act as advocate). The single fee earner principle means that the work taken to instruct counsel is unpaid. Moreover, the derisory legal aid rates prevent firms from paying trial counsel an appropriate fee.

*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.*

#### Police Station Fixed Fee Scheme

- Many police station cases are done at a loss and the rest of the fee structures do not allow these cases to even meet the impoverished ambition that they will be a loss leader. The current fee scheme encourages things to be done in a rush when often the greatest care is required for suspects who are often very vulnerable facing life changing charges.
- The current fixed fee disincentivises more experienced practitioners from attending at the police station. The financial pressures facing firms mean that these more senior lawyers inevitably have to seek out private work. The absence of enhanced rates for the most serious cases such as homicide and serious sexual assaults also tilts the balance towards more inexperienced staff attending on these cases. Quality and



efficiency would be improved if the fees allowed experienced practitioners to do more police station work.

- The fee scheme for pre-charge engagement is a welcome recognition that the Police Station fixed fee is inadequate to cover necessary work at this stage in a case. However, whilst a welcome reform to cover engagement with lines of enquiry and disclosure issues in prosecution evidence, it does not allow proactive work on diversion by for example allowing early instruction of experts and evidence gathering efforts.

#### Magistrates Court Non Standard Fee

- The convoluted paper based billing process regularly riddled with assessment errors which require further unremunerated time spent on redetermination appeals acts as a perverse incentive for firms to avoid complex cases and defendants and try to churn through as many cases as possible to maintain cash flow. The shift during the pandemic to allowing digital bill submission has been hampered by poor digital platforms and the requirements to spend hours organising digital files for multiple uploads.

#### Crown Court LGF scheme

- As the review team will know many of the most serious sexual offence allegations and serious assaults which often require hundreds of hours of litigation work are defended at a net loss. Often experts earn more for a report than the firm earns in profit costs. This is not to begrudge expert rates which are now so low that many of the best experts have withdrawn from legal aid work or ration their exposure. The abandonment of litigation uplifts for case complexity, seriousness and defendant vulnerability acts as a brake on proactive defence work and has forced some excellent firms to all but abandon legal aid work or restrict themselves to large page count LGF cases only.
- We do not advocate the abolition of PPE as a key metric. Large page count cases keep many firms afloat and allow for some form of budgeting within the financial year. However, we advocate for the return of enhanced fees for complexity and seriousness to run alongside the page count metric. This would, at a stroke, reward excellence and eliminate the cherry picking of cases.

## CRM 1-2

- The paucity of the hourly rate and the convoluted and dispiriting procedural hoops created by the LAA in applying for and maintaining funded appeal cases is a major contributory factor in the growing unmet need in appeal cases. This is reflected in the increase in unrepresented applicants to the CCRC which is a significant drain on the Commission's time and resources.

### Appeal from the Magistrates Court to the Crown Court

- Often these cases require a root and branch approach to rectifying errors of law and procedure committed by the court, the prosecution and the defence. The current derisory fee means that firms cannot afford take these cases on making the automatic right of appeal a right which is illusory in reality. The failure to properly fund appeal work is creating a legitimacy problem which bleeds into the public perception of how the rule of law is increasingly failing to extend to people without the financial resources to challenge mistakes in the criminal justice system.

*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?*

- Time and space do not permit us to list the many ways in which other agencies interact or fail to interact with one another and the effect that this has on the efficiency and quality of criminal legal aid services. All agencies within the criminal justice system suffer from underfunding which causes poor administration. Because of the low fixed fee regimes which defence solicitors work under, the state is largely insulated from the effect of these inefficiencies on defence solicitors. Time spent chasing emails, on hold or calling unattended phonelines, time spent waiting at Court is time which is lost to meaningful work and the impact is therefore felt by defence solicitors and the clients who rely on them.
- Court hearings which are moved without the defence solicitors being moved are a particularly inexplicable occurrence. It is not within the remit of the CLAR to mandate that Court staff communicate changes to listings but it is within the gift of the CLAR to provide some financial protection to defence solicitors for loss caused by structural failings elsewhere.

- Information sharing is still poor between the Police and CPS despite the introduction of Service Level Agreements and MOU. This causes delay for the CPS in being able to review cases meaning that diversion is fragmentary and service of evidence and unused material is still reliant on how much time and energy the defence have to pressure the state agencies to fulfil their statutory obligations.
- As a matter of routine defendants are pressured into entering a plea at first appearance in the Magistrates Court without key evidence in their case. This is an ongoing breach of Article 6 obligations and contributes to miscarriages of justice. From a process point of view the failure to serve evidence creates a vast inefficiency of people being processed through a system accruing convictions triggering the intervention of the probation service and fines collection resources.
- "Efficiencies" elsewhere can lead to inefficiencies and negative impact on the quality of defence representation. Closure of Magistrates Courts and the concentration of hearings at the courts which remain have the impact of increasing the number of cases listed in a particular Court. No increase in consultation rooms in the remaining Courts has accompanied these changes. A packed list may be an efficient list from the perspective of the Court, but may lead to delays for those who are at Court. In London, centralising Magistrates Court phones and administration may have provided an efficiency to HMCTS, but at the expense of considerably worsened court administration.
- The Single Justice Procedure (SJP) is creating a myriad of miscarriages of justice. People are being convicted of offences which takes away their good character and blights employment prospects and puts them at the mercy of debt collectors often without having proper notification of the charge. As we are seeing with Fixed Penalty Notices resolved via SJP for alleged breaches of the corona virus regulations the law is being applied wrongly and very often in a markedly racially discriminatory way with no proper oversight.

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

No

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

The reason criminal legal aid is not a sustainable career path for solicitors is that the remuneration and other benefits of working in this field provide an inadequate reward for demanding and stressful work. Furthermore, the low esteem in which the criminal justice system and criminal legal aid lawyers are held by successive governments suggests the future prospects of this particular career are poor, and therefore unlikely to be sustainable over the course of a career.

Remuneration levels for legal aid practitioners have not only fallen further behind other legal sectors such as commercial or employment law, they now lag behind public sector rates such as those in the Crown Prosecution Service or Government Legal Service. Given the high levels of debt from university and law school graduates, this makes criminal defence one of the least attractive arenas to work in.

*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?*

The hours, low salaries and uncertain futures of legal aid firms means that increasingly those drawn to a career in criminal law have to rely on family financial support ( if available ) and are consigned to a career which is punishing in its demands and which does not allow for personal financial stability.

Young lawyers are more adversely affected by legal aid cuts than established professionals. They are more likely to have paid tuition fees and be subjected to onerous student debts. They are less likely to have acquired savings when Legal Aid rates allowed for more generous salaries. They are less likely to have bought a house and more likely to be renting. They are less likely to be in a position within a firm to set their remuneration, and less likely to be able to avoid very poorly remunerated work. Lawyers at the beginning of their careers are more likely to have the opportunity to choose alternative specialisms.

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

No, because the perceived cost efficiencies sought by successive governments have been achieved by diminishing the quality and availability of legal services for defendants. This in turn has led to cost shifting and strategic failures in diversion, rehabilitation, lowering

prisoner numbers and reducing public faith in the state's investigative and prosecutorial functions.

*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?*

- Remote non contested hearings.
- Fully digitised electronic bill submission
- LAA to revise the contractual arrangements to allow for greater flexible remote working

*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?*

We will shortly be publishing a report on our free advisory service (funded by a charitable grant) for people who were issued Fixed Penalty Notices under public health / coronavirus laws. Please contact us if you would like to receive a copy.

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

Please refer to preamble.

*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.*

Please refer to our preamble.