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Call For Evidence by Ministry of Justice: Forensic Resources Ltd's Evidence on the Independent Review of Criminal Legal Aid.

I am founder and director of Forensic Resources Ltd and am writing in response to the Ministry of Justice's call for evidence on the Independent Review of Criminal Legal Aid. I am writing not of the viewpoint of a Legal Aid Practitioner in the contractual sense, but as a practitioner that works primarily in the Legal Aid sector and can provide substantial evidence of how the current system affects not only the lawyers but also those who provide defence evidence for criminal cases.

For ease of providing evidence, I will use the questionnaire questions as sub-sections to give my feedback using where possible the Terms of Reference (resilience, transparency, competition, efficiency and diversity).

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).**
 - Legal Aid Agency (LAA) funding: For expert witnesses this is the main issue, even in terms of the *functioning* of the Criminal Legal Aid System. I will comment more on the lack of funding in other answers, but it is important to mention here that the LAA's process for agreeing (or not) costs is hugely flawed and wastes an inordinate amount of time in a case. As a consequence the Defence expert is then required to provide their evidence at the last minute due to the LAA delays. The LAA delays are typically a result of them requesting additional quotes from lawyers and/or querying existing quotes, often over tiny amounts or travel expenses. This puts a huge time strain on the legal teams and the expert witnesses. At the end of the case there are then real issues with actually being paid those funds with different rules for different stages of cases with what you can and cannot claim costs for at each stage. I recommend some remedies for this in the answer to question 7.
 - Prosecution funding: Defence practitioners are seeing more and more often that the Prosecution experts/laboratories are doing the bare minimum of testing or analyses as their funding does not stretch enough to warrant a full interpretation of all of the possible evidence and we usually only get provided with a Streamlined Forensic Report 1. We also then see a very limited

approach to Prosecution reporting of the various options of conclusions for the evidence - and alternative options are rarely mentioned by the Prosecution.

- Prosecution laboratories: Defence experts are seeing more and more that some Police forces are utilising more than one forensic laboratory for the evidence (of the same discipline) in one case. An example is DNA where the Defence have to now liaise with more than one laboratory to get different parts of results and the casefile, despite relating to the same piece of evidence. There is a clear issue of continuity here and a likely issue with chain of custody as well.
 - Crown Court Expert Witness Requirements: Experts are often expected to attend court for no reason other than a safety net for the legal team for them to listen to the evidence and give advice, and they may or may not be required to give evidence. This is not a problem and is clearly useful, however, we often do not get paid the day or half day rates we claim for, and sometimes not at all. The central funds are not transparent nor efficient and seem to not be aligned to the LAA funding system (which too is not transparent nor efficient) and it would be helpful if they were linked or the LAA could disseminate court funds - I will make a recommendation in question 7 that shows how this would benefit the forensic practitioner as well as the lawyers.
 - Legal Process Concerns: Some legal teams do not know the formal processes of instructing an expert, nor what it is that they or Counsel really require in their case. We are happy to advise on this, but it is a concern that we have to hold so many hands. The main areas of unknown are about what they expect the Prosecution to allow the Defence expert to be able to work on in terms of evidence, and how the sharing of evidence works. The forensic expectations are also fairly unknown but this is understandable and we are happy to offer advice on this but the legal process needs to be clarified with lawyers.
 - Time expectations: As mentioned above, Defence experts usually get far less time to work on evidence than the Prosecution due to funding delays and legal team issues, but it is also down to the Prosecution taking a long time to disclose their evidence or delaying matters unnecessarily. Rarely when we do have a good amount of time to turn our work around, the Prosecution invariably delay sending us what we require, or they are part way through more work that then delays our initial instructions. More often than not, the Defence expert is rushing to complete reports as our turnaround is affected by the other Criminal Justice processes that are slow. Needless to say, no forensic scientist should be rushed with their work as this could have a negative effect on the Criminal Justice System.
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.**

I cannot comment on the fee scheme and payments (incentives or otherwise) as they only relate to legal practitioners, but I will take this opportunity to state that the guidance on the Remuneration of Expert Witnesses¹ is a real issue for expert witnesses. Not least the issue that the rates are far too low for the expertise of those working on the evidence but the main issue at hand is the lack of understanding by the LAA staff themselves about the granting of funds that they set guidelines for. Thereafter, there is an issue that LAA contract holders (lawyers) do not know the rules either and so the expert witness has absolutely no leg to stand on when funds are disputed by the LAA.

Almost daily we face LAA issues that our clients (criminal defence lawyers and barristers) have to deal with, which not only takes up more of their precious unpaid time but can on occasion detrimentally impact on their cases and the Criminal Justice System. By this I mean that lawyers are often unable to instruct the expert that they choose as the LAA, almost without exception, will insist that they must instruct the cheapest service provider having had to spend time searching for two or three comparable quotes.

There are a number of problems with this:

- A. Obligation & additional quotes:** Firstly, it should be noted that criminal defence solicitors are obliged to keep a record of approved experts under their Legal Aid Contract. They are also obliged to provide the best expert for their client which complies with their professional duty to act in their client's best interests. If the expert that they choose is on their approved panel and their quote is within the legal aid rates, then they should not have to obtain a second quote - as per the LAA's own policy. Indeed, as far as I am aware, the necessity to provide more than one quote is only if the expert is a specialist whose discipline is not listed within the Remuneration Regulations - however the LAA documentation is ambiguous at best as to whether they are referring to civil or criminal cases. At any rate, the issue still stands that the lawyer should not need to provide additional quotes if the expert is on their panel and is within the hourly rate set by the LAA. I would estimate that probably 90% of the time Solicitors are *still* required to seek those further quotes by those in the LAA that are either unaware of this policy or do not take it into account when assessing quotes. It is then also abundantly clear that the LAA will, almost without exception, choose the lowest of those quotes when providing the Prior Authority certificate. As LAA lawyers do not have their own additional funds to be able to accommodate the shortfall, the cheapest expert therefore wins, and it is safe to say that this is not the way the Criminal Justice System should operate. It is fair that the LAA might want to question the number of hours that a provider is seeking, but this can be mitigated by the LAA being briefed on the case and understanding the requirements. Indeed, forensic providers should always provide a clear breakdown of their costs which would help this situation. It is also fair that perhaps the Solicitor does not have an approved list of experts - but this is for the LAA to ensure that they do. In addition, I would argue that expecting

¹ The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2013

a Solicitor to disclose the case bundle and detailed instructions on a case to two or three different people/companies is wholly inappropriate from a confidentiality and disclosure point of view. Whilst we do need this information to quote, it should only be sent to one company/individual in order to mitigate risk of loss and unnecessary dissemination - hence the need for the approved panel of experts to be pushed with Solicitors. If the LAA policy of having an approved panel of experts was properly taken into account by all LAA staff, multiple quotes could be abandoned, there would be much less risk of a breach of confidentiality, huge amounts of time would be saved and ultimately the legal team would be able to instruct the expert that they choose, and not those that the LAA deem the cheapest. It is clear from the above that training of the LAA and also legal teams is required here.

B. LAA Consideration: The LAA seemingly do not take into consideration the amount of work and time that is involved in cases, including the quality of the work. We spend a huge amount of time formulating quotes that detail every aspect of the work and we divide it up by hours and break it down in detail for the LAA to simply only look at the bottom line when making their decision. I have proof of this on a recent case whereby we were openly told by a good client that he needed to send off two quotes to the LAA and he provided us with the first quote that he had been sent by an alternative forensic provider. We let him know that the quote was not comparable with what we would be sending as the first quote was a 'provisional estimate' and it was clearly noted by the first expert that he/she was likely to have to request more funds at a later stage. The solicitor said he would raise this with the LAA but still required us to quote, which we duly did (incidentally, a quote amount that had been accepted for a previous case by the LAA). Despite the Solicitor pointing out to the LAA that our quote was fair and fixed (and who he wanted to instruct) and the alternative quote was a *provisional estimate* that would require more funds further down the line (which would likely then be more expensive than our quote), the LAA only looked at the net price and agreed the first quote. I have plenty of evidence of other similar situations that I can provide if required.

C. Prior Authority: The LAA seems to have an entirely arbitrary method of agreeing costs for expert witnesses as there is certainly no consistency in their awarding of Prior Authority certificates. Worryingly I can provide a multitude of evidence of mal administration by the LAA in terms of their acceptances and rejections of hours and rates over the 13 years that Forensic Resources has been trading. One such example I will give is that we had provided a number of Psychiatry quotes for a good client of ours and each one had been accepted over a period of time. Another Solicitor in the same firm came to us for a Psychiatric case and we duly quoted exactly the same amount as the other quotes, as we usually provide a fixed cost for these assessments unless there is something significantly different in the instructions. With this solicitor (presumably through a different person at the LAA) the quote was rejected and the LAA arbitrarily reduced our hours. When asked if we would accept this, we provided a statement to say that we had had plenty of the

same quotes accepted previously and we would not accept the reduction. The Solicitors were then told to get a second quote and thankfully they let us know this and when we presented evidence to prove that multiple identical quotes had been agreed for the same firm, the LAA finally backed down and accepted our quote. We should not have to fight like this; nor should the Solicitor. The LAA should have a clear and transparent method for quote acceptances across the board as currently it seems it entirely depends on who you get assessing your quotes as to whether they will be accepted or not. This is not a fair way of disseminating taxpayer's money. In addition, I can provide the same concerns from our lawyer clients who are tearing their hair out wanting to instruct us but are prevented from doing so due to a lack of funding and a wholly unfair process by the LAA of disseminating the little funding that is available to us.

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?**
- CPS Authority & police liaising: In an ideal situation we ask our instructing Solicitors to write an email of introduction to their CPS counterpart asking for CPS authority for us, their chosen Defence expert, to liaise with the Officer In Charge and Prosecution experts in order to gain access to the evidence for the Defence work. This can go well on occasion but more often than not we get a huge delay before the CPS will grant authority and then we get resistance from the Police and/or the Prosecution laboratory to liaise. The issues on delays for the Defence are clear.
 - Court payments: I mentioned in the answer to question 1 that the courts sometimes do not pay the experts properly for their time. There should be a better link between lawyers and the courts in terms of proving that the lawyer's expert is required at court, and they should be paid for their attendance regardless of whether they give evidence or not. We should also get some security over this payment as recently the courts have withheld payments on account of an expert not giving evidence which is out of the expert's control and entirely unfair as their time has still been spent at court at the request of their instructing Solicitor.
 - Experts & Prison Officials: We have to make applications for prison visits or video links for assessments frequently and whilst this can sometimes go smoothly if we have a good relationship with the prison staff, this is a rarity as there are usually different people on shifts and as with the LAA there does not seem to be a standard process that all prisons follow for this. This results in even more time being wasted as assessment/visit dates cannot be booked or when they are, the expert is turned away due to an administrative issue or staffing issue.

- Video link at courts: I talk about this more in my answer to question 6 but the use of video link simply must become more of the norm in the Criminal Justice System. Please see my response to question 6.

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 same applies to forensic scientists:

- The LAA rates are grossly underestimated for the expertise of the professionals in each discipline.
- The amount of work required to complete a case is not remunerated fairly by the LAA.
- The LAA cause too many issues for administration and delays to cases.
- Time pressures on the Defence are unreasonable and not consistent with the Prosecution time allowance.
- As a result, fewer and fewer experts are willing to take on legally aided cases and fewer forensic scientists are prepared to work as expert witnesses. If this continues the Criminal Justice System will have no way of acting fairly as the Defence will have little to no access to experts and this may lead to miscarriages of justices.
- The above can be applied to legal practitioners as well.

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?

I cannot comment on this.

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

I cannot comment on the suspects and victims.

- Witnesses: Not *expert* witnesses certainly, for all the reasons mentioned in the answers to the other questions.
- Defendants: In terms of funding, given the possible issues of not receiving the evidence from the expert that the legal team may have requested (and known the quality of) because of LAA issues, they may well be at risk of a lower standard of evidence in their case, given that the LAA clearly base their decisions solely on the lowest price. In terms of delays, thankfully expert witnesses are adept at working to tight timescales but the needless pressure

on them *could* have an effect on the quality of their work and thereafter impact on the Defendant.

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?

- Video link: We (Forensic Resources) have been using video link for years to perform remote Psychiatric assessments and have been pushing to give evidence in this manner but there has always been push-back on this by the courts, until the Pandemic. Not least it reduces travel time and costs as well as benefitting the safety of others whilst Covid-19 is still prevalent, but it also saves the central funds budget a *huge* amount. The time wasted in courts for experts not required or on standby or being pushed back due to delays is currently enormous and this could easily be reduced by using video link.

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?

- Courts: The delays in courts sitting was far greater than it ought to have been. The HMCTS could have made courts safe by investing in air purifiers and enforcing social distancing with video links in separate court rooms (and indeed between separate court buildings). Whilst this would have reduced how many court rooms could be used in any one building in a day, it would still have kept the cases ticking over.

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

- Funding: LAA dissemination of expert witness funds to be standardised and made non-competitive by doing the following:
 - Keep hourly rates but preferably increase the amounts.
 - It should also be mandatory that expert witnesses are only allowed to quote based on these hourly rates and they are not allowed to undercut by offering a lower rate. Unfortunately, we have evidence of the LAA allowing this which clearly shows that they are allowing competitors to affect the commercial market value of services in our industry negatively. This is a very urgent matter that needs to be investigated and resolved as it is wholly unethical to bind us by rates and then accept quotes from some providers that do not use these rates.
 - All LAA staff need to be working in exactly the same way in terms of what their decisions are for accepting/rejecting quotes. It is clearly not happening currently and so an investigation into this needs to happen urgently and continuity training for LAA staff is required.
 - Thereafter to remedy this the LAA need to cap disciplines to allow for a maximum number of hours (at the approved rates) for a standard

case. As long as the expert then quotes within the hourly rates and within the cap, the lawyer should not be required to obtain a second quote. Funding should be granted to the expert that the lawyer chooses and should not become a competition of price.

- The LAA should be allowed to be challenged by the lawyers - and for that to happen the lawyers need to be well versed in the process of what can/cannot be awarded for funding for experts. As we cannot be contracted to the LAA, the lawyers have a responsibility to the expert that they are instructing (or wanting to instruct) to fight their corner and prevent the LAA from unfairly administering or rejecting funds. Forensic Resources can provide a wealth of evidence of this. This remedy therefore involves the training of legal teams after the LAA transparency issue is sorted.
 - Forensic practitioners awarded the Prior Authority Certificate should have their company name listed on the certificate to allow for security of funds (especially if the firm goes into Administration without paying the expert).
 - The LAA should be held accountable for their decision on whether they have rejected or accepted a quote by filling in the clearly marked 'Reason for Decision' section on the Prior Authority Certificate.
 - Forensic practitioners should be able to invoice the LAA directly and chase their own invoices. Lawyers have too much work to do to be submitting LF1 disbursement forms and chasing the LAA for our money. We can do this with more ease and we also have security over the funds so Lawyers cannot use it for their cashflow means and pay us late.
 - Courts need to pay fairly for an expert who is requested to attend by their legal team, regardless of whether or not they give evidence. Perhaps these funds being linked to the LAA and having Prior Authority of a 'Court Quote' would be a better way to disseminate funds.
 - The LAA do not provide interim payments for Magistrates Court cases like they do for Crown Courts cases. This needs to be addressed as expert witnesses are waiting months if not years to be paid by some of their clients for Magistrate cases.
 - Currently, the LAA should have a monitoring process to check that Solicitors have paid their experts the LAA money that they have been sent. This will avoid Solicitors being able to use our funds for their cashflow purposes, which we have evidence of. The remedies listed above, if implemented, will negate the requirement for this monitoring process to continue - but now it is very much required.
- Process:
 - Judges need to take into account when the Defence are provided the evidence and allow for extensions more readily if a delay has been caused by the Prosecution, as currently the amount of the time the Prosecution and Defence have to work on the evidence is disproportionate.
 - Video-links to be made more common place for assessments and providing testimony.

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.

- The current methods deployed by the LAA for disseminating funds to expert witnesses do not allow for a fair wage for a fair job and certainly do not allow for firms to be in much profit, if at all. This is based on two factors:
 - A. The rates are far too low to make any considerable profit on cases. The LAA also arbitrarily reduce the number of hours of a quote without any justification for doing so.
 - B. The LAA play an unfair game of playing experts off against each other and will approve funding for a quote even if it is £1 cheaper than another. They do this without taking into account the work required, checking to see if the quotes are comparable, checking the experience of the expert and without consideration of who the lawyer in fact wants to instruct - the latter two points are arguably the most important factors when it comes to the Criminal Justice System.

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

We appreciate that forensic science providers are not contractors to the LAA and hence why we do not get a say in the way procedures are carried out or indeed how much money we should be paid, as whilst the money is provided by the Ministry of Justice, the rates are set by the LAA; as far as I am aware. I may be wrong on the latter point. However, whilst we do not get a say, I believe it is vital that our situation is made clear to the Criminal Legal Aid Independent Reviewer, and the expert panel set up to test his recommendations thereafter, as we are a critical part of the Criminal Justice System who are also hugely impacted by not only a lack of funding from the MoJ but also a lack of transparency in the procedures of the LAA.

On the topic of funding, I will simply say that the boost of up to £51m from the Lord Chancellor only seems to be directed at legal practitioners with no mention of the expert witnesses that they instruct on cases. This needs to be addressed as we too are grossly underpaid based on the LAA rates that we are bound by and we are seeing, as in the legal world, that forensic scientists are getting fewer and fewer as they leave their profession in search of a job that will pay them fairly. As such we are also seeing fewer forensic students and those who *do* graduate will have fewer jobs available to them as more and more companies go out of business. As with everyone in the legal aid industry we would like to see more funding but the reason I raise this point is for it to be highlighted that no thought has been given to those who provide the evidence in the criminal cases - and without some of the cash injection being apportioned to forensic science practitioners, the Criminal Justice System will be gravely impacted by a lack of expert witnesses.

My response to the call for evidence only highlights a few of the issues that face forensic providers, and thereafter our clients - I have many more issues to raise about the LAA but these are the most important at present. Many criminal cases rely on the evidence provided by forensic scientists and worryingly, the future of many

independent service providers hangs in the balance due to the seeming lack of consistency and transparency of the LAA. My worry is that money will be given to the LAA after this review, but it will not be disseminated in a fair and transparent way, with forensic science providers being adversely affected to the point of crisis in our industry. The Ministry of Justice are in the perfect position to express the very real and very worrying situation that criminal lawyers and their experts find themselves in today and for that reason I am grateful that this call to evidence has been implemented and I am glad to have given my response.