

Submission of Evidence to the Independent Review of Criminal Legal Aid

Dr. Lucy Welsh

Executive summary

1. I am a Senior Lecturer in Law and a criminal defence solicitor. I have conducted original research about legal aid in criminal defence services, with a focus on a) magistrates' courts proceedings and, separately, b) appeals and post-appeal applications to the Criminal Cases Review Commission.
2. My research indicates that the current system of legal aid funding requires urgent revision to ensure the future of legally aided criminal defence services in accordance with Art 6 European Convention on Human Rights (ECHR).
3. The quality of representation available under legally aided services is affected by low funding payment rates, uncertainty and bureaucracy surround legal aid funding, and poor morale among the defence lawyer community.
4. Sustainability is affected by each of the issues mentioned at point three, and is exacerbated by the impact of students fees and student loans. These issues are also likely to have a negative impact on the diversity of the criminal defence legal profession.
5. Funding rates are in need of urgent review in line with the current economic climate, and, for resilience, funding rates and systems need to be responsive to broader prevailing economic circumstances.
6. A key barrier for practitioners is bureaucracy and lack of transparency at the Legal Aid Agency (LAA), which creates uncertainty for practitioners and is demoralising.
7. Value for money for tax payers must take into consideration the broader social interest in having a criminal justice system which is viewed as legitimate by citizens, and complies with broader obligations under the ECHR. Victims, witnesses, defendants and the public all have an interest in a responsive and resilient justice system which convicts the right people through appropriately brought prosecutions. This is only possible with a robust and resilient defence provider market.

Introduction:

8. I am a Senior Lecturer in Law at the University of Sussex, where I am co-director of the Crime Research Centre. I am a Deputy Director of Clinical Legal Education and supervise the Criminal Justice Law Clinic as part of the Sussex Clinical Legal Education programme. I am co-author of the 5th Edition of *Sanders and Young's Criminal Justice* (OUP) which is due to be published in 2021. I am currently writing my monograph for Hart Publishing, with the provisional title *Access to Justice in Magistrates' Courts: A Study of Defendant Marginalisation*.
9. My primary research interests lie in access to justice in criminal cases. My Ph.D examined the impact of legal aid cuts in magistrates' courts, and I have published articles in academic journals and practitioner magazines on that topic.¹ I was a co-investigator on the recently concluded Economic and Social Research Council funded research project, *The Criminal Cases Review Commission: Legal Aid and*

¹ Newman, D and Welsh, L (2019) 'The Practices of Modern Criminal Defence Lawyers: Alienation and its implications for access to justice' *Common Law World Review* 48(1-2), pp. 64-89; Welsh, L and Howard, M (2019) 'Standardisation and the Production of Justice in Summary Criminal Courts: A Post Human Analysis' *Social and Legal Studies* 28(6), 774-793; Welsh, L (2017) 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: A case study' *Journal of Law and Society* 44(4) 559-85.

*Legal Representatives.*² I also recently conducted two focus groups during which the effects of legal aid cuts on expert witnesses were discussed. That work was funded by Research England's Strategic Priority Fund.

10. I am also a criminal defence solicitor. I worked in criminal defence services in South East England from 2004 until 2016.
11. These submissions are based on both my own experiences and my research. The submissions focus on issues of market contraction, sustainability, uncertainty, bureaucracy, low morale and resultant lack of resilience.

Submissions:

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

There are six main issues in the functioning of the criminal legal aid system.

The first main issue is fixed fees in police station work. My submission in relation to police station funding results from my experience as a practitioner. The introduction of fixed fees in the police station encouraged firms to spend less time at police stations. This meant that legal professionals, instead of waiting at the police station with their clients while the police made decisions, needed to direct their services into other bill-able casework. In turn, less client care activities took place (with potentially serious implications for particularly vulnerable suspects) and there was less engagement with the police while investigative decisions were being made. The decision that waiting time was no longer separately bill-able failed to recognise that legal representatives are - subject to the detention clock - at the mercy of the police in terms of when decisions about detainees will be made. It is rare to reach the escape fee threshold in police station work.

The second main issue is funding rates in magistrates' courts. My submission in relation to the magistrates' courts results from both my personal experience and from my research. Payment rates under the standard fee system in magistrates' court cases are too low. This view was expressed by solicitors interviewed for my Ph.D research, and was something I was conscious of in practice. As a practitioner, I was conscious that magistrates' court case work was often subsidised by payment from Crown court casework. The same view was expressed by practitioners interviewed for a recently concluded ESRC-funded study (para. 9). While, when standard fees were introduced the payment rate was slightly lower than fees for privately funded work, lack of fee review for many years and the 8.75% legal aid fee cut introduced in March 2014 have led to the situation where the fees payable are now less than half of what would be paid if fee rates had risen in line with inflation.

The third main issue is payment by way of standard fee in magistrates' court cases. This is discussed at paragraph 13.

² Wiedlitzka, S. Welsh, L and Clarke, A (2020) Criminal Cases Review Commission: legal Aid and legal Repertoires. Stage 3 Report. (Brighton, University of Sussex); Clarke, A and Welsh, L (2020) Criminal Cases Review Commission: legal Aid and legal Representatives. Stage 4 Report. (Brighton, University of Sussex); Vogler, R, Welsh L. Clarke, A. Wiedlitzka, S and ,McDonnell, L (2021) Criminal Cases Review Commission: legal Aid and legal Representatives. Final Report (Brighton, University of Sussex).

The fourth main issue is the operation of the means test for legal aid eligibility in both magistrates' and Crown courts. For lawyers, the means test has increased uncertainty about if/when they might be paid for conducting a case. Many lawyers interviewed for my research indicated that the means test has introduced a level of uncertainty which means that they often conduct cases in magistrates' courts in the hope that they will eventually be funded, but that this is by no means a certainty. This feeds into the overall financial vulnerability of criminal defence practice. Additionally, the demands of the means test are complex, and require a defence representative to liaise with their clients, the DWP where necessary, and/or other agencies to try and provide evidence about income. This is a significant investment of unpaid time for legal professionals, which cuts further into their ability to maintain a healthy profit margin. Furthermore, the means test threshold is set too low. Many people on low incomes are not eligible for publicly funded representation, and are unable to maintain an acceptable standard of living whilst paying for legal representation.³ The number of people appearing in magistrates' courts without legal representation has steadily increased since the reintroduction of means testing, bringing with it delay in proceedings as self-representing defendants struggle to deal with the demands of the criminal justice process.

The fifth main issue is in relation to litigators' attendance at Crown court proceedings. My submission in relation to Crown court proceedings results from my experience as a practitioner. As a trainee and, later, a newly qualified solicitor, a key part of my role was to engage with the preparation of Crown court casework, and to attend Crown court hearings to support counsel and the client. As fees have stagnated and been cut, that role (of Crown court clerk) has almost completely disappeared. This provides defendants with less support at Crown courts, where it is clear that defendants are often alienated by the specialised and arcane nature of proceedings.⁴

The sixth main issue is in relation to appeal and post-appeal casework. My submission in relation to appellate and post appeal work results from my academic research. Many of the issues detailed above feed into appellate and post-appellate level work. Many legal professionals reported to us that this level of work is no longer financially viable for firms because a) it is poorly funded in and of itself and b) it can no longer be cross-subsided and supported by other areas of practice (because those rates have also become increasingly unsustainable). This particular area of practice is also funded at rates that have not increased in line with inflation, and have been subject to fee cuts. Furthermore, the inability to claim interim payments for disbursements in this area of practice creates significant cash flow issues for defence service providers.

All of the above issues feed into the unsustainability of legally aided criminal defence practice, and have resulted in significant market contraction in recent years.⁵

³ D Hirsch '[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 required to pay a contribution towards their legal costs.](#)' (Loughborough, Loughborough University, 2018)

⁴ See, e.g. Jacobson, J. Hunter, G. and Kirby, A (2015) *Inside Crown Court*. Bristol: Policy Press. Defendants are also alienated by the complexity of, and language used, during magistrates' court proceedings.

⁵ Ministry of Justice (2020) Summary Information On Publicly Funded Criminal Legal Services assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf; M Fouzder 'Landmark report paints bleak picture of criminal legal aid' *Law Society Gazette*

13. *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.*

The incentives created by the current fee schemes and payments are not positive in nature.

The payment rates themselves appear to offer no incentive to practitioners to remain in the market, and no incentive for new entrants to join the market, or to remain there if they do join.

The fixed fee payment scheme for police station casework undermines the quality of client care as detailed in paragraph 12.

The standard fee payment scheme in magistrates' courts incentivises the volume processing of cases. This may mean that relevant evidential or legal points may not be identified and exploited, client care might worsen, and details may be missed as cases are processed in routinised ways. While this may improve efficiency, it significantly undermines client care, and has potential to increase the risk of miscarriages of justice (which are arguably less likely to be identified funding in that area also becomes less viable). Client care is an important feature of sustainability. It feeds into lawyers' perceptions about the value of their work and into their morale. Furthermore, clients who experience poor service are likely to feel that the criminal justice process has not treated them legitimately, with implications for broader social justice and compliance with the process and/or any punishment imposed.

It should be noted, however, that many legal professionals who I have interviewed were not averse to being paid a standard fee for magistrates' court work in general. The key issue was the rate at which that payment rate was set. If the standard fee remained in place, but at a more realistic and responsive payment rate, these problems might be partially or totally remedied.

The payment regime for appeal and post-appeal work operates under the Advice and Assistance scheme. Legal professionals we spoke to identified the sufficient benefit test, and uncertainty surrounding its administration, as a significant barrier to performing appellate level casework. This had a deleterious effect on sustainability, on quality (in terms of the scope of investigations that could be conducted) and on efficiency (as it seemed many people applied prematurely to the CCRC in the absence of legal advice, thereby increasing the CCRC's workload).

Overall, therefore, the payment rates do not incentivise sustainability, quality or efficiency in any way.

The current fee scheme incentivises efficiency through working to volume, but at significant cost to quality and sustainability.

(London, 12 February 2021); Vogler, R. Welsh, L. Clarke, A. Wiedlitzka, s AND McDonnell, I (2021) The Criminal Cases Review commission: Legal Aid and Legal representatives. Final Report (Brighton, University of Sussex). See also the evidence given to the Justice Committee in 2021 (House of Commons Justice Committee *Oral evidence: (a) court capacity, HC 284; (b) The future of legal aid, HC 289*. 9 February 2021)

14. *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?*

The efficiency and quality of criminal legal aid service could be enhanced by improving interactions between:

- the CPS and criminal legal aid service providers;
- expert witnesses and criminal legal aid service providers; and
- the LAA and criminal legal aid service providers

First, defence service providers frequently complain that they are pushed to make decisions about cases both before funding is in place, and before they have received the appropriate level of disclosure from the prosecution. If the CPS complied with early disclosure obligations in accordance with Cr.PR 8, the defence would be better placed to make decisions on cases, and potentially to apply for funding, at an earlier stage in cases. This would reduce uncertainty around funding for practitioners, and enable more meaningful case engagement at earlier stages in proceedings.

Second, in recently conducted focus groups with expert witnesses it became apparent that the public funding regime has a negative effect on relationships between experts and defence solicitors.⁶ The fact that defence lawyers are required to act as a 'middle man' for expert witness funding reportedly caused delay, and caused relationships to become fractious when payments were not made to lawyers and/or paid out in a timely manner. Expert witnesses expressed the view that their role would be made easier if they could be paid directly by the LAA.

Third, defence lawyers spoken to in relation to magistrates' court proceedings and appeal level work all identify the LAA as problematic to the service that they are able to provide. My own desire to leave private practice was in part driven by the fact that I did not want to deal with the bureaucracy of the LAA if I were to take partnership.

Lawyers who have been spoken to regarded the LAA as inconsistent in its decision making practices, and overly suspicious of lawyers' activities. Inconsistency fed into uncertainty about whether practitioners would be paid for work done, feeding into the overall problem of financial viability. Concerns about the LAA's approach to audit led lawyers to invest significant amounts of unpaid time trying to manage LAA bureaucracy and put in place mechanisms that would ensure the LAA could not claw back payment following audit. While lawyers I spoke to understood and appreciated the need for public money to be managed appropriately, they also expressed the view that the obstructive nature of LAA processes increased the overall level of bureaucracy involved in conducting legally aided work. The time spent managing that bureaucracy was unpaid, eating into what would otherwise be chargeable

⁶ In February 2021, Dr Amy Clarke and I ran two focus groups of expert witnesses. Each reported that legal aid funding for expert witnesses is so low that some experts do shy away from doing legally aided work, and raised concerns about both sustainability and quality in relation to the work done by expert witnesses. Expert witnesses were also concerned about perceptions around funding rates held by the LAA, alongside LAA perceptions about how long it takes to prepare an expert report. Experts further revealed that delays and wrangling about obtaining payment from legal aid lawyers was a significant problem, and one that could sour the relationship between expert witnesses and lawyers.

casework time. The requirement for firms to fund and sustain quality marks (SQM or Lexcel) to qualify for legal aid contracts had a similar effect.

Ultimately, relationships between service providers and the LAA appeared strained, often resulting in breakdowns in communication and feeding into low morale, with consequent effects for long-term sustainability in the profession. Furthermore, the way in which the LAA manages, and requires certain management practices, of firms takes time away from bill-able activities, and from client care. This feeds into overall funding problems and into the issues with quality and sustainability described at paragraph 13.

15. *Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?*
- Please explain the reason for your response to question 4. (above).*
 - 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?*

Criminal legal aid work, as currently funded, does not represent a suitable career path for solicitors and barristers. I am unable to comment in relation to legal executives.

Many students that I teach are discouraged from pursuing a career in criminal legal aid work by the funding and payment rates. This is exacerbated by student debt. As a student paying fees of approximately £1,500 per year, I (and my contemporaries) were able to afford to go into lower paying areas of legal practice after graduation. Levels of student debt mean that many students, especially those who do not have other sources of financial support, are financially unable to pursue a career path in criminal legal aid. This also has an impact on the diversity of the profession, as graduates from less wealthy backgrounds are likely to be less able to begin or sustain a career in criminal legal aid practice.

All of my research indicates that there has been a significant contraction in the legal aid provider market. With this comes fewer opportunities for training contracts. Barristers who have been interviewed suggested that, in relation to appellate work, there are greater levels of paralegalisation which feed into the quality of work done. Several interviewed junior legal professionals who were conducting appellate level work had plans to move out of that area of practice in recognition that it was unlikely to provide a sustainable career for them.

In my own area of practice, I was aware of seven newly qualified defence solicitors in the mid 2000s (including myself). Every one of those practitioners has now left defence practice altogether, and I am only aware of two new trainees being employed since that time. This is not just because potential trainees do not want to go into defence practice, but also because firms cannot afford to offer training contracts in the current climate. Firms are also unable to compete with the salary and benefits packages offered by the CPS.

Coupled with the funding issues are issues of low morale. There is widespread evidence that the defence profession is extremely demoralised,⁷ which is not conducive to

⁷ Newman, D. and Welsh, L. (2019) The practice of modern defence lawyers: Alienation and its implications for access to justice. *Common Law World Review* 48(1-2), pp. 64-89; Thornton, J (2020) 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions.'

creating a sustainable career path. The ageing population of defence solicitors provides evidence of this lack of sustainability.

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

It does not. As detailed above, defendant's needs and client care are placed at risk due to issues with sustainability of service and incentives to volume process casework. These issues have implications for victims and witness. Where cases might not be as fully prepared as they could be, victims and witnesses are also at the mercy of being put through processes unnecessarily, and perhaps at greater risk of miscarriages of justice occurring.

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

- a. *Are there any new working practices you would want to retain, and why?*
- b. *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?*

No comments to add

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

In light of the above, I make eight recommendations that ought assist in remedying the issues identified.

- Revise funding rates in line with inflation, and provide a formal mechanism for regular review. This would still incentivise efficient working practices within a standard fee regime, but would improve morale, and should increase the amount of work practitioners are prepared to put into cases. This would hopefully, in turn, improve the quality of casework and client care experienced, which should also improve victim and witness experiences of the criminal justice process.
- Revise procedures and decision making processes at the LAA with a view to encouraging greater transparency and consistency of decision-making. This would hopefully assist firms by increasing the certainty about applying for, and obtaining, funding. It would also mean that less potential fee earning time is diluted by excessive requirements to engage with the LAA, and should improve morale among the profession.
- Revise the operation of the means test and how it is administered. If the means test were easier to administer, it would improve certainty about funding for providers, and reduce their unpaid bureaucratic load.
- Improve communications between the LAA and the defence service community. This should serve to increase trust, certainty and morale within the profession.
- Make provision for greater access to interim payments across a range of case types. This ought to ease cash flow for firms, especially in relation to those providing services under the Advice and Assistance scheme.
- Create incentives for recent graduates to pursue careers in criminal defence services. This could include writing off some of all student loan costs, or offering paid training schemes. Taking this course of action would aim to improve

recruitment, but might only assist with retention as part of a wider package of reform.

- Consider a government-funded scheme of work related benefits for criminal defence solicitors in order to compete with what the CPS can offer. This could be, for example, membership of Civil Service Pension schemes (especially given that both Crown prosecutors and defence lawyers are ultimately performing state-led and -funded work).
- Consider altering the payment regime for expert witnesses. This would improve relationships between experts and defence professionals, and reduce the bureaucratic workload of defence lawyers with likely negligible impact on workload at the LAA.

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

One significant problem for defence service providers is the image of their work that is represented in the media, and sometimes by government. Sustaining or enabling a narrative that defence lawyers are 'fat cats' is both demoralising and inaccurate. It feeds into sustainability issues by devaluing the work that the defence community does, and ought be publicly discouraged through counter narratives.

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