Submission to Criminal Legal Aid Review Call for Evidence

Introduction

The Criminal Law Solicitors' Association is the only national association entirely committed to professionals working in the field of criminal law. The CLSA represents criminal practitioners throughout England and Wales and membership of the Association is open to any solicitor - prosecution or defence - and to legal advisers, qualified or trainee - involved with, or interested in, the practice of criminal law.

The structure of Criminal Legal Aid is made of a patchwork of fee schemes that have grown over time as a result of separate reforms to each scheme at different times. The fee schemes are of variable quality. The operation of some of the schemes have altered following updated guidance from the LAA or decisions from Costs Judges, and the schemes are very much 'of their time' in that they were created to reflect how the Criminal Justice System operated at that time, and in some cases do not reflect modern working practices, changes in procedure such as Better Case Management, Transforming Summary Justice, the Leveson Review, or the updated Attorney General's Guidance. The practical result of some of the schemes is to create perverse incentives and inefficiencies that are to the detriment of supplier firms, the Legal Aid Agency, and to the criminal justice system as a whole.

There is currently a crisis in the sustainability of the supplier base of defence criminal legal aid work. Prior to the modest additional fees introduced as part of the CLAR 1 Accelerated Areas, there had been no fee increases to the fees paid in the respective fee schemes in over 20 years. By contrast there had been actual cuts to fees, in particular the 10% cut to Crown Court fees when the Litigator Graduated Fee Scheme was introduced in 2007 and the 8.75% cut imposed in 2014. Placed alongside the increased complexity of the Criminal Justice System, the increased cost of living and the impact of inflation, the profession has reached a point where the remuneration available means that their practices operate at best on the margin of profitability.

It is not sustainable for this to continue. As the applicable legal aid rates fall further and further behind the commercially available rates of pay, firms undertaking Criminal legal aid will become steadily more uneconomic. Firms respond to the ever-reducing real terms rates of pay by attempting to be as efficient as possible to mask the real terms cuts in pay they endure year on year (this is before the direct cuts imposed in 2008 and 2014-16).

These efficiencies represent an attempt to rage against the dying of the light. Firms reach the point where there are no more efficiencies to be made and criminal defence work becomes simply uneconomic. They then cease doing it.

In 2010 1861 firms held crime contracts. In 2020 that had reduced to 1090. This trend will continue and accelerate unless the profession is put on a sustainable footing. This pattern is repeated elsewhere in other areas of law such as the provision of Housing Law advice where advice desserts have appeared and the LAA have struggled to find suppliers despite multiple tendering rounds.

This has had a consequential impact on the salaries firms are able to offer their employees which in turn impacts upon who can afford to choose a career as a defence solicitor. Fewer than 3% of training contracts now include an element of criminal defence work. Many of those who are already qualified as defence solicitors are leaving. The previous incumbent Director of Public Prosecutions,

Alison Saunders, openly stated when giving evidence to the justice Select Committee that the Crown Prosecution Service has been able to recruit from the defence profession as they can offer better pay and conditions. A similar position exists for those employed by the Public Defender Service, despite the fact the work being done by employees of the PDS is essentially the same (or less) than that done in private practice but is effectively subsidized so as to allow them to offer more lucrative remuneration and benefit packages.

The consequence is that there was a 29% drop in the number of accredited duty solicitors on the rota between 2016 and 2019. This is before the impact of Covid-19 pandemic. In 2018 the Law Society published a heat map showing the ageing nature of the profession with very few young solicitors choosing a career in criminal defence work. In many areas there are no solicitors working under 30 and worse still, there will be areas with no practitioners within 5 years, should those working on those rotas retire at their retirement age.

Criminal Defence work is a vital part of the criminal justice system. There is a significant public interest in ensuring that Defendants in criminal proceedings have access to highest quality legal representation. This is not just in the interests of the Defendant.

Good quality legal representation means that those cases that are capable of resolution, do resolve, and at an early stage. This benefits complainants as well as the producing a significant benefit in time and money for the Crown Prosecution Service and the Courts.

Where trials are required, quality representation means that the defence case is prepared and presented properly. Again, this produces benefits in time and money, but also benefits witnesses and complainants (particularly vulnerable complainants) and juries.

Quality legal representation for defendants in criminal proceedings provides value for money for the taxpayer by enabling the system to work to the advantage of all participants.

A need exists within the entire system for the structure of the criminal legal aid to provide a sustainable future for suppliers providing quality advice and representation. This will in turn provide realistic career opportunities for young solicitors who would want to enter this sector of the profession.

In this paper we intend to give a short review of each fee scheme, identifying obvious inefficiencies and perverse incentives, and making general proposals for reform of those schemes so that they operate to promote sustainability, quality, and efficiency for the Legal Aid Agency and benefit the criminal justice system as a whole.

Prior to examining those schemes, we address the hourly rates upon which those schemes are based as we take the view that the central cause of the crisis in the sustainability of criminal defence work comes from the lack of increase on those hourly rates since the 1990's.

Finally, we will address further inefficiencies we observe within the system in addition to the pay schemes, and make suggestions for their reform.

Hourly Rates

While most of the fee schemes operate with different systems of fixed fees there are still some claims based upon the traditional model of solicitors' charging, namely hourly rates. For example Proceeds of Crime Act proceedings, special preparation claims, escape route police station claims, and non-standard magistrates court fees claims, all of which are still paid for by an hourly rate with claims being subject to detailed ex-post facto assessment.

However even within the fixed fee schemes, there is a notional hourly rate used as the basis for calculating what the fixed fees should be. The applicable hourly rate therefore has a considerable impact upon the level of fees that firms can expect from each fixed fee scheme.

By way of example, in the Accelerated Areas consultation, the sending fee payment was calculated using the hourly rate applicable for Magistrates court work – the fixed fee is £181.40 +VAT based upon the principle that each sending involves 4 hours work paid at £45.35 + VAT, which is the hourly rate applicable for Magistrates Court work.

The hourly rate for Police station work varies between £47.45 and £73 per hour dependent upon whether the case is in London or national, is a duty case, is a serious offence and is in social or unsocial hours[1].

The hourly rates for work in the Magistrates court are £45.35 for preparation and £56.89 for Advocacy. Those rates have not been increased since the 1990's. In fact, as mentioned above, they were cut in 2014, and while that cut was partially reversed in 2016, the net effect was an 8.75% cut.

The Hourly rate for special preparation in the Litigator Graduated Fee Scheme (LGFS) scheme ranges from £27.15 per hour for a Grade C fee earner outside London to £50.87 +VAT per hour for a Grade A fee earner in London. The Legal Aid Agency rarely agree to pay the rate for a grade A fee earner and so most claims are paid at £41.06 +VAT per hour which is the rate for a grade B fee earner outside London. Again, those hourly rates have not been increased since 2008 when the LGFS scheme was introduced. Again, they were cut in 2014, partially reversed in 2016 leaving an 8.75% cut.

[1] See Schedule 3 of The Criminal Legal Aid (Remuneration) (Amendment) Regulations 2016

The hourly rates used in criminal legal aid are woefully inadequate. They are based upon the hourly rates that were applicable in the 1990's when fixed fees were first introduced.

Indeed, many of the hourly rates could also be uplifted by 100% for work carried out with expertise and expedition, effectively doubling the hourly rate in many cases. These uplifts no longer exist or are no longer applied. Even before the cuts applied in 2014, the net effect of inflation is such that there is a year on year real terms cut.

In the mid 1990's a Solicitor who was able to claim an uplift to their hourly rate and could make claims at £90+VAT per hour. If that rate was uprated for inflation to 2021, that hourly rate would be in the region of £170 +VAT per hour. The current hourly rates used as a basis for criminal defence work are roughly one third of that.

By way of comparison, we set out below the Solicitors' guideline hourly rates for use in the County Court[2]

Pay band	Fee earner	London grade 1	London grade 2	London grade 3	National grade 1	National grade 2	National grade 3
A	Solicitors and legal executives with over 8 years' experience	£409	£317	£229–£267	£217	£201	£201
B	Solicitors and legal executives with over 4 years' experience	£296	£242	£172–£229	£192	£177	£177

[2] https://www.gov.uk/guidance/solicitors-guideline-hourly-rates

Pay band	Fee earner	London grade 1	London grade 2	London grade 3	National grade 1	National grade 2	National grade 3
C	Other solicitors or legal executives and fee earners of equivalent experience	£226	£196	£165	£161	£146	£146
D	Trainee solicitors, paralegals and other fee earners	£138	£126	£121	£118	£111	£111

These fees are themselves 10 years old, having been set in 2010, and have been the subject of much judicial criticism for being out of touch, and uplifts beyond these rates are routinely allowed.[3] However they more properly reflect the rates that are appropriate in 2020 than the current legal aid rates which are decades out of date.

One can see from that table that the hourly rate for a trainee solicitor or paralegal in national grades 2 and 3 (£111+VAT) is more than double the hourly rate for a Grade A Solicitor in London doing special preparation under the LGFS scheme (£50.87+VAT).

Also, by way of comparison, in 2019 Northumbria Police ran a pilot scheme of Sexual Violence Complainant Advocates. This pilot scheme provided legal assistance to complainants alleging sexual offending during the course of the

[3] For example in PLK & Others the court held in charges within 120% of the guideline rates were prima facie reasonable and in Cohen v Fine and others an uplift of 35% was considered a reasonable starting point.

investigation and prosecution of their complaint. This Scheme, for example, would employ and advocate to advise the complainant on the rules of disclosure and making representations to the police and Crown Prosecution service as to what did and did not represent a reasonable line of enquiry in the investigation. This advice mirrors advice that would be given to the suspect during the investigation under the Police Station Advice and assistance scheme. The hourly rate paid for advising the complainant under the pilot scheme was £150 + VAT per hour, whereas the hourly rate payable for giving the suspect the same advice under legal aid was £47.45 +VAT per hour, or less than a third. This represents an affront to the concept of equality of arms.

These derisory rates of pay also inevitably have an impact on the quality of advice and representation that is provided. Firms are incentivized to provide the cheapest possible advice at each stage rather than the highest quality. This has an impact across the criminal justice system. As we have set out above, it is in the interests of all that the Defendant is given the highest quality (as opposed to just the cheapest) representation.

If the payment for criminal defence work is to be put on a sustainable and value for money footing, the hourly rates which set the fee structures need to be updated for 2021.

By way of an example, if the hourly rate payable in the Magistrates Court in 1995 (£44.75+VAT) had kept pace with inflation then (based upon the conservative Bank of England online Calculator) this would amount to £75.17 +VAT today. This would make the Sending Fee (see para 19) £300.68+VAT. This is the sort of level that might make the work just about sustainable.

Below we make comment upon the current fee structures and our suggestions for reform, we wish to make clear that, whatever fixed fee structure[s] is/are adopted, the fixed fees must be calculated upon realistic and sustainable rates of pay.

Police Station Advice and Assistance Scheme

The system of fixed fees payable for advice in the police station was introduced in 2007, replacing a scheme whereby fees were paid by an hourly rate that was assessed on audit.

In the vast majority of cases the fixed fee payable for an individual case is the same regardless of the amount of time spent, whether the advice is provided in hours or out of hours, the nature and complexity of the offence the suspect has been arrested for, or the grade of fee earner that attends the police station. The fee is for the case as a whole, as opposed to each attendance, so if a suspect is interviewed a second time, this second attendance is done without any additional payment.

The only variable that impacts on the fixed fee payable is the location of the police station. Each police station attracts a different fixed fee. The lowest fixed fee is the £126.58 paid in Blackpool. The highest is the £274.66 paid in Heathrow. There are variations in the fee paid at police stations in close geographical proximity – for example, the fixed fee in Brighton is £183.41, whereas 11 miles away in Worthing it is £164.25. There are variations within the same police force or even the same town.

Each police station has a unique number which are periodically updated. Some stations despite being regularly attended have not got numbers at all. For example, we challenge the reader of the report to locate the number for Perry Barr custody suite in Birmingham where most City suspects arrested for offences are interviewed. The suite has only been open for five years yet the administration of the LAA has not allocated a number.

We very much doubt if there ever was a logical justification for all this which withstood scrutiny, but it is clear now that there is none. If the Criminal Legal Aid Review can identify anyone who can coherently explain why a paralegal

attending upon a suspect in a shop theft in Heathrow on a Tuesday afternoon should be paid more than twice as much as a Grade A fee earner attending upon a murder suspect in Blackpool on a Sunday evening, please let us know who they are and what the explanation is.

While there is an escape fee available, it is three times the fixed fee, and additional fees are only payable for costs incurred above the escape fee limit. As a result, the way the way the escape fee works is such that the small number of cases that qualify for it are utterly uneconomic.

For example, the escape fee limit for Leicester is £552.15. A Solicitor going to Police station there for an own client would be making a claim at the hourly rate of £47.45 per hour. Thus, they would need to do over 11 and ½ hours work before they reached the escape fee. If the Solicitor did 11 hours work, and so did not qualify for the escape fee, they would be paid the same fixed fee they would be paid if they only did 30 minutes work. Any work done in addition to 11 and ½ hours work would be paid at £47.45 per hour. If the Solicitor did 13 hours work they would be paid the fixed fee (£177.94) plus a further 90 minutes work at £47.45 per hour (£71.17). This is a total of £249.11 + VAT for 13 hours of work which represents an hourly rate of £19.16 + VAT per hour.

As the escape fee claims are paid on an hourly rate, they are sent to the LAA for assessment. The time (and therefore cost) of the firm preparing and submitting the claim, together with time and cost taken by the LAA in assessing it, are often vastly disproportionate to the escape fee being claimed. The fees are often disputed by the LAA leading to further unremunerated cost arguing with the LAA.

As is obvious, this fee structure creates perverse incentives. The most lucrative cases are those which are most simple and straightforward and thus can be done as quickly as possible. The more serious and complicated cases which require the most experienced advice are the most unattractive in pure remunerative terms.

Firms are incentivized to send the lowest grade and cheapest fee earners possible. They are incentivized to spend as little time at the police station as possible. There is no assistance in meeting the costs of attending at unsocial hours. Subsequent attendances reduce the viability of the fee even further. Those firms lucky enough to work in an area where there is a high fixed fee will be paid more than those who are not. The escape fee scheme does very little to mitigate those perverse incentives and is hugely inefficient to claim and assess.

An example of the perverse incentives is that it would make more financial sense to send an experienced Grade A fee earners to act in 2 simple shoplift offences that will likely take no more than a few hours combined, than to attend on an allegation of murder which may involve many hours, if not days, at the police station.

Research by Transform Justice[4] suggests that average time spent in custody by detainees has grown by 4 hours in the past 10 years. This is perhaps not surprising given that previously solicitors were remunerated for remaining in at the police station to ensure efficient progress was made, to make representations on bail, and to chase the police regularly. The single fixed fee scheme includes no such payment by its nature.

We propose a scheme that is based upon the following principles:

a. Fixed fees that are simple to claim, assess and audit.

b. Incentives to provide higher grade experienced fee earners for more serious and complex work.

c. Remuneration for the costs of additional time spent doing re-interviews and doing interviews in unsocial hours.

[4] See for example https://www.thejusticegap.com/the-over-use-of-police-custody/

We propose that there is a national fixed fee, with a weighted London increase. For the reasons we have set out above, that fixed fee should be calculated using hourly rates that are applicable to 2021 not the 1990's.

That fixed fee would be uplifted by 100% if the offence is serious and a Grade A fee earner conducts the attendance. This ensures the right level of solicitor are doing the serious cases.

The serious offences can be identified using the matter codes that are already used by firms when submitting their police station bills on their monthly CRM 6 submissions. The matter codes currently used are:

1. Offences against the Person
2. Homicide and related grave offences
3. Sexual Offences and Offences against children
4. Robbery
5. Burglary
6. Criminal Damage and Arson
7. Theft
8. Fraud
9. Public Order Offences
10. Drug Offences
11. Driving and Motor Vehicle Offences
12. Other Offences
13. Terrorist offences

14. Anti-Social Behaviour Orders

15. Sexual Offender Orders

16. Other Proscribed Proceedings

Offence categories 2, 3, 8 and 13 should attract the uplift. Whether an offence qualifies can easily be assessed on audit. Whether a fee earner attending is a Grade A fee earner also can easily be assessed. The claiming and assessing of the uplift are therefore a quick and straightforward tasks for the firm and the LAA.

The purpose of the uplift would be to incentivize firms to send qualified and experienced staff to police stations in those cases which are more likely to be serious, complex, and therefore lengthier. Firms who did not have a Grade A fee earner available (either due to it being at unsocial hours or due to conflicting professional commitments) would still be able to conduct the work, they just would not be able to claim the uplift.

There would be a further 50% uplift should the suspect be re-interviewed on a date after the first interview. This would remunerate firms for the costs of having to re-attend a police station for a second interview, which is currently unpaid. There would be further 50% uplift if an attendance is undertaken at unsocial hours. This would remunerate firms for the costs of maintaining 24/7 police station cover and attending at unsocial hours. Again, whether a claim qualifies for these uplifts is easily identifiable and therefore straightforward for the firm to claim and for the LAA to assess on audit.

Should these uplifts be in place, there would be no need for the escape fee scheme which can be dispensed with. This would achieve efficiency savings for firms making those claims and for the LAA in assessing them.

We believe the scheme we propose is simple to claim and assess, incentivizes allocating experienced staff to the more serious cases, and rewards firms for the

costs of attending further interviews and maintaining coverage at unsocial hours.

Magistrates Court fee Scheme

Magistrates Court work is remunerated by a series of fixed fees which increase based upon the amount of work done by the firm on the file and whether the case went to trial (or was fully prepared for trial) or not. There is also a separate fee if the case was not fully prepared for trial dependent upon whether offence was summary only or either way. There is a lower standard fee and a limit above which a higher standard fee is paid. Above that there is a non-standard fee limit above which the claim is assessed on hourly rates.

As we have set out above those fixed fees have not been uprated for inflation since they were introduced. They were subject to the 8.75% cut imposed on 2014-2016. The fixed fees are based upon hourly rates that are decades old.

For the reasons explained above, the fixed fees are therefore becoming steadily more uneconomic as inflation imposes a real term cut as the years go by. The fixed fees, and the hourly rates upon which they are based, should be increased to allow for the effect of inflation since they were introduced. There should be a yearly review to uprate for inflation. The 8.75% cut should be reversed.

Subject to that, we view the structure of the Magistrates' Court fixed fee scheme positively. As the fixed fees are based upon the time spent on the file, the proper preparation and presentation of the defendant's case is rewarded. The structure of the scheme avoids the perverse incentives of the LGFS scheme which we set out below. It takes account of time spent working on a file, and this rewards firms for work done, but without over burdening the LAA with administering the scheme. Claiming the fees, and assessing them is simple and straightforward, and provides certainty.

We therefore propose retention of the current fixed fee scheme structure, subject to our comments about the hourly rates and calculation of the fixed fees using those rates.

LGFS

The current LGFS scheme was introduced in 2008. It replaced a scheme in which claims were assessed based upon an hourly rate and time reasonably spent.

It is of note that when calculating the LGFS the MOJ took the overall budget and arbitrarily reduced it by 10% before then working out a Graduated Fee Scheme that would pay the same amount. There was therefore a 10% cut to the remuneration for work done in Crown Court cases right from the start. As set out above, the 8.75% cut in 2014-16 and the effect of inflation since 2008 have imposed further real terms cuts in fees since then.

The fixed fees under the LGFS are based upon several proxies, the category of offence, whether the case was a guilty plea, cracked trial or trial, the pages of prosecution evidence, the length of the trial and the number of defendants represented. There are a number of bolt on fees, for example evidence provision fees. Following the accelerated areas consultation there are now bolt on fees for considering unused material.

The principle standing behind the LGFS scheme is that of a case mix. While firms may have some cases that underpay relative to the amount of work done, there will be others that overpay. The expectation (although it is often more a hope than an expectation) is that the overall case mix of firms will even out those overpaying and underpaying cases.

The principle of the case mix has not worked in practice and has itself led to unattractive behaviour such as the 'cherry picking' of cases. It has also been

largely frustrated by changes made by the LAA.[5] Nor has the use of proxies as a means of calculating the amount of work done on a file and therefore the correct fee to be paid for it. Instead, what has grown is a system of perverse incentives and inefficiencies which do nothing to assist either supplier firms or the criminal justice system as a whole.

The fixed fees are heavily dependent upon Pages of Prosecution Evidence (PPE) which are by far the most important factor in determining the level of fee. It should be noted that the test is 'pages or material served' and not 'work done' or even 'pages read'. Thus, the fee increases if the prosecution serve evidence regardless of how much work is done by the firm or the level of fee earner who does it. This incentivizes obtaining instructions in cases which are likely to have a large amount of served material. It does not incentivize doing any work in those cases once those instructions have been obtained and the material has been served, nor does it incentivize the proper early resolution of those cases where that is in the interests of the Defendant.

There is an acute awareness in the Crown Prosecution Service of the financial consequences of serving large amounts of material. As previous CLSA conferences we have been told that knowledge of how much material will have to be served, and therefore the economic cost of serving it, is a factor that is taken into account by the CPS when deciding whether and how to prosecute cases.

The Legal Aid Agency spends a significant amount of time assessing and litigating as to whether a material counts as PPE or not. When the scheme was being consulted upon, it was said by the LAA and the Ministry of Justice that one of the heralded benefits of the LGFS fixed fee scheme was that it would provide certainty to providers, cut out the need for costs draftsmen to be

[5] By way of examples, high-paying cases where the trial was likely to be length or complex were paid under a different scheme, the Very High Costs Case scheme, under a 'Case Contract'. The scheme itself was introduced to control the level of fees by having clear agreed hourly rates, and the requirement for regular interim bills, and prior approval being given for any task before it would be paid. Over time the LAA has declined to accept new cases into the scheme, instead diverting case to the LGFS scheme for which it was never designed to deal

engaged preparing claims, and for the LAA (or LSC as it was then) to be engaged in assessing them as was the case under the previous scheme. However, just as much time is now spent arguing and litigating over the assessment of claims, only it is now an argument as to whether material counts as PPE rather than whether time spent on the file was reasonably spent. Much time is spent arguing over:

- What constitutes a page
- Whether that page was served
- Whether the page is a duplicate of another page
- Whether considerations of the material were relevant to the defence (it is not clear how one is to assess that without considering it first)
- The nature of the material
- Whether the material is electronic or paper (which is more difficult given most material is now served as a pdf in any event, and so the argument is whether the material is 'material served electronically' or 'electronic material'.)

As we have referred to above, the LGFS scheme intended that some cases would be overpaid, on the basis that this would make up for the underpaid cases as part of the case mix. Over time the LAA seem to have forgotten this when arguing over claims they feel to be overpaid while being content with those cases they acknowledge to be underpaid. As a result, the 'case mix' concept has become frustrated, and the scheme is dysfunctional.

There is also a huge disparity the fee paid of the case is a cracked trial, as opposed to a trial. We have referenced this in our response to the Accelerated Areas Consultation. That consultation recognized the need to ensure that Advocate Graduated Fee Scheme (AGFS) fees paid when a case cracks at a stage

it is fully prepared for trial should reflect the work done to fully prepare it for trial.

When a case is listed for trial both the advocate and the litigator will have done a significant amount of work to have it properly prepared. If the trial cracks, then they will both have done this work unnecessarily. The rationale set out in the Accelerated Areas consultation for raising the AGFS fee to 100% of the trial fee applies equally to the LGFS.

There is no principled or practical reason why this proposal should not be extended to the LGFS as well as the AGFS. It is no answer to say that the LGFS has other proxies that the AGFS does not have. The Trial/Crack and days of trial are both significant proxies in the LGFS scheme and can make significant difference to the fixed fee paid. Indeed, the principal reason given for why the same principle did not apply was because it would be expensive.

As currently structured, the LGFS incentivizes a case being taken to trial so that the fee paid reflects the work done to prepare it for trial. This perverse incentive has been mitigated in the AGFS but it remains in the LGFS.

While the Accelerated Areas Consultation produced a modest bolt on fee for the consideration of unused material, we do not believe this to be adequate for the reasons we set out in our response to that consultation. The additional fees are based upon hourly rates that, for the reasons we have set out above, are not fit for purpose. Further, the additional fees only remunerate reading the unused material as opposed to the work needed to pursue further requests for disclosure and deploying the unused material if it assists the defence case.

Many of the recent initiative ranging from Better Case Management, or the Criminal Procedure Rules, to the latest Attorney General's Guidelines express a desire for cases to be progressed proactively by encouraging 'early engagement'. The scheme, however, means that any firm doing early work which might lead to an early resolution is financially penalized.

As with Lower Crime work, LGFS fixed fees have not been increased for inflation and so have been cut in real terms every year since they were introduced. They were subject to the same overall 8.75% cut from 2014-16.

As a result of these issues with the way the LGFS scheme works, we propose a complete overhaul of the LGFS scheme which is not fit for purpose.

We believe it to be unarguable that fee structures ought to reflect, in some way, the work actually done by the Solicitor with conduct of the case. We propose the introduction of a scheme mirroring the Magistrates Court fixed fee scheme which has been a largely successful. That is a fixed fee scheme based upon the amount of work reasonably done in the case rather than proxies intended to estimate the amount of work needed, put simply because the best measure of the amount of work done is how long it took.

It would mean the use of PPE as a proxy is no longer needed, and the consequent perverse incentives are removed as is the satellite litigation and argument over what is and what is not PPE. There would be no need to create an additional fee structure for the consideration of unused material as all material generated by the prosecution, whether served or unused would be work done that went towards calculating the fixed fee. There would be no need for a separate scheme for assessing special preparation. Work done to prepare the case for trial would be remunerated regardless as to whether the case cracked or not, thus removing the perverse incentive that exists in the current LGFS scheme.

Most importantly, the scheme would incentivize the diligent and proper preparation of the Defence case. This is to the benefit of not just the Defendant but the Criminal Justice System as a whole. It encourages the engagement with the Crown and early resolution of cases where that is appropriate. Where a trial is appropriate it encourages the proper preparation of the defence case.

We anticipate that this scheme would create efficiencies in the making and assessing of claims. Rather than assessing each claim, the lower standard and higher standard fixed fees can be assessed on audit by the LAA, as happens with lower crime work. While the LAA would also have to assess the non-standard claims, the LAA currently spends large amounts of time assessing PPE claims and special preparation and we anticipate that our proposed scheme would reduce the administrative burden on the LAA rather than increase it as their time could be focused on just the non-standard claim rather than every claim. The scheme we propose mirrors the existing Magistrates Court scheme, and so the LAA and providers will be familiar with assessing those claims.

Committals for sentence

Committals for Sentence are currently paid via a set fixed fee, which is not subject to any uplifts or escape fee.

We do not propose any change to the structure of the fixed fee, save to repeat that the fee itself has not been increased for inflation since its introduction. When it was introduced, it was based on hourly rates which were several years out of date. The fee was also the subject of the 2014/16 8.75% cut.

This has an impact on the criminal justice system as it does not encourage the early resolution of cases, as the low fixed fee available for a committal for sentence is inferior to the general LGFS fixed fee.

The Courts are anxious to encourage the early resolution of either way cases in the Magistrates court. Credit for plea reduces from the 1st appearance in the Magistrates court. The allocation guidelines encourage either way cases to be retained in the Magistrates court for trial. This is frustrated if defence firms are given the incentive to have the matter sent for trial.

As such the fee needs to be increased to reflect inflation since the fee was introduced and there should be a yearly review of the fee to consider uprating it to take account of inflation. The 8.75% cut should be reversed. This will encourage cases to be retained and resolved in the Magistrates Court, thus encouraging early resolution of cases, and saving time and money in more expensive Crown Court trials.

There is a further issue with the way in which Legal Aid is granted for cases committed for sentence. There are different eligibility criteria for the grant of legal aid in the Magistrates Court and the Crown Court.

For Magistrates Court cases, the Defendant will not qualify for legal aid if their gross earnings are above £22,325 per year. If they earn between £12,475 and £22,325 they will not qualify for legal aid if their net disposable income is above £3,398 per year[6]. If they are above those limits they will have to pay privately for representation.

However, in Crown Court cases they will still qualify for legal aid above those limits but subject to a contribution. Thus, there are people who do not qualify for legal aid for magistrates court proceedings but do for Crown Court proceedings, subject to a contribution.

The eligibility for Committal for Sentence is based upon the Magistrates Court eligibility criteria. There are therefore Defendants who will not qualify for legal aid in the Crown court if they plead guilty in the Magistrates Court and are committed for sentence, but would qualify if they withhold their plea and their case is committed for trial as the Crown Court contribution scheme would apply.

[6] These thresholds are given weighted increases if the Defentant has a partner or children. See Paragraph 9.2 of the Criminal Legal Aid Manual for a Summary of the eligibility criteria. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983311/criminal_legal_aid_manual_may_2021.pdf

Many Defendants who do not qualify for legal aid in the Magistrates Court are unable to afford the costs of representation in Crown Court Proceedings. Those costs will include not just Solicitors and Barristers fees but also the costs of any expert's reports that may be necessary for sentencing.

To qualify for legal aid, those defendants who are above the threshold for legal aid in the Magistrates Court are required to withhold their plea, so that their case is committed for trial. They will then qualify for legal aid and can enter their plea and have their case resolve in the Crown Court. If they cannot pay privately for representation, their alternative is to be unrepresented in the Crown Court.

This causes cost and inefficiency for all participants in the Crown Court as Defendants withhold their plea rather than plead guilty, simply to qualify for legal aid. Otherwise, the Court is either faced with an unrepresented Defendant.

If a Defendant chooses to withhold his plea to qualify for legal aid, they face the prospect of losing credit for their plea and therefore receiving a heavier sentence. As noted above, credit for guilty plea reduces from the moment of first appearance in the Magistrates Court. A plea entered there attracts 33% credit. A plea entered at the PTPH in the Crown Court attracts only 25% credit. Even if the Defendant indicates he will plead guilty at the Magistrates Court hearing, he will still lose credit – see *R v Hodgin* [2020] EWCA Crim 1388, and *R v Plaku* [2021] EWCA 568.

The Defendant in these circumstances therefore places in the unhappy position of either withholding their plea and losing credit or being unrepresented in the Crown Court proceedings.

This is clearly unfair to the Defendant and is inefficient for all other participants in the Criminal Justice System. It is the against the stated intention of the credit for plea sentencing guidelines, and the allocation guidelines.

The position can be contrasted with the legal aid available for Appeals against Sentence and Conviction. Defendant who does not qualify the legal aid in the Magistrates Court will qualify for legal aid for an appeal to the Crown Court subject to a one-off contribution to that legal aid.

We submit that the eligibility criteria for Committals for sentence should be the Crown Court means testing criteria. Defendants who are above the relevant contribution threshold can be asked to make a one-off contribution to their legal aid, in the way that they would if the case was an appeal against sentence or conviction.

This would remove the unfairness caused to Defendants who do not qualify for legal aid in the Magistrates court, but whose cases are committed for sentence. It would also incentivize the early resolution of cases in the Magistrates Court.

Appeals to the Crown Court Against Sentence and Conviction

There is a right of appeal against decisions of the Magistrates Court to the Crown Court. The appeal is a complete hearing of the original case. Where it is an appeal against conviction, the appeal is a complete re-run of the trial. If the Crown and Defence called witnesses in the Magistrates Court, they will have to be re-called to give evidence again in the Crown Court. Where it is an appeal against sentence it is a complete re-run of the sentencing hearing with sentence being at large (i.e the Crown court is entitled to *increase* the sentence if it wishes).

As such, these appeals involve the re-litigation of the entire case. If the Defendant instructs a new firm to conduct the appeal, that firm effectively must re-start the entire case from scratch.

Unfortunately, the fixed fees for these appeals (£155.32 +VAT for an appeal against sentence, and £349.47 + VAT for an appeal against conviction), are wholly uneconomic given the work required. Firms are entitled, and often do,

decline to take instructions in such appeals as a result. Defendants are left unable to exercise their right to appeal because they are unable to find solicitors prepared to work for the rates of pay involved.

The central cause is the fact that, as with the other fixed fees we have referenced above, they have not been uprated for inflation since they were introduced and have instead been subject to cuts. If the fixed fees ever were economic, the effect of those real terms cuts, they are not now.

As with the fees for committals for sentence, the appeal fee sneed to be increased to reflect inflation since the fee was introduced and there should be a yearly review of the fee to consider uprating it to take account of inflation. The 8.75% cut should be reversed.

POCA

Proceeds of Crime Act Proceedings are currently paid by way of an hourly rate and the amount of work reasonably incurred on the file. We do not suggest any change to this scheme but repeat the submissions we have made about regarding the hourly rates that apply.

Proceeds of Crime Act proceedings can be extremely complex and require significant amounts of work to properly resolve. They are governed by a hybrid of criminal and civil law. That work is wholly uneconomic given the hourly rates of pay available. The result is that the proper preparation of those cases is not incentivized.

Proper preparation encourages the early resolution of cases as the issues in the case are more quickly distilled and negotiation with the Crown is worthwhile. This was envisaged by a Law Commission paper late last year[7]. Without proper remuneration for the defence team as a whole then this is merely a pipe dream. An increase in the rate of pay for such cases will produce savings for the Court,

[7] https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002/

Police and Crown Prosecution Service as cases resolve sooner and contested cases take less time.

Further Efficiencies

Abolition of the DSCC and CDS Direct.

Until 2007 the Police called Defence firms direct. There is no need for calls to be routed through the Defence Solicitor Call centre. The function of the DSCC can be replaced by modern IT systems, and an online portal that can be used by the Police and Defence Solictors to log cases. It would save significant amounts of money not only to the MOJ but also for the police.

Review of the Duty Solicitor Scheme in each area.

In many Courts duty schemes have not been reviewed in line with court sitting patterns or demand. In some Courts two or three Duty Solicitors may be on per session to deal with the various individual court rooms which is often wholly unnecessary.

Reform to the practices of the Crown Prosecution Service.

The procedures adopted by the Crown Prosecution Service do not encourage the early resolution of cases, particularly in the Magistrates Court. The resolution of a case requires both parties to have instructions in a case, knowledge of the issues, the authority to agree a compromise, and the means to engage in communication regarding that compromise. The operation of the 'anticipated guilty plea' has at times being counter productive. Under the scheme, which was introduced by the police and CPS unilaterally, the police seek to identify cases where a guilty plea is likely. They then serve very little if any evidence on the defence since the assumption is that guilt is not in issue. CrimPR 8.3 provides:

8.3 Initial details of the prosecution case must include –

(a)where, immediately before the first hearing in the magistrates' court, the defendant was in police custody for the offence charged –

(i)a summary of the circumstances of the offence, and

(ii)the defendant's criminal record, if any; or

(b)where paragraph (a) does not apply –

(i)a summary of the circumstances of the offence,

(ii)any account given by the defendant in interview, whether contained in that summary or in another document,

(iii)any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence,

(iv)the defendant's criminal record, if any, and

(v)any available statement of the effect of the offence on a victim, a victim's family or others.

In practice, certainly where a guilty plea is anticipated (and often even when that is not the case) the 'IDPC' will often note include (iii) or (v) even though those are in the possession of the Crown. This can hamper the advice given by the defence solicitor, and even if a guilty plea is likely, it may impact on a basis of plea being offered.

In Magistrates Court cases, the only means of communicating with the Crown is in written correspondence. However written correspondence is inevitably on the record. Off the record conversations are often crucial as it how potential compromises are explored without either side being held to a proposal that they suggest. Until the day of trial, there is no means by which the Defence can speak to a CPS Lawyer with authority to accept or refuse a suggestion to have an off the record conversation regarding resolution. Even on the day of trial, the CPS are sometimes

represented by an agent who does not have the authority to agree a proposal.

The practices of the Crown Prosecution Service should be reformed so that cases in the Magistrates Court have assigned Reviewing Lawyers who have sufficient time and authority to review files and authorize resolutions. There should be effective means for the Defence of contacting the assigned reviewing lawyer to be able to engage in meaningful negotiation regarding resolution of the case. We believe this would enable the early resolution of cases in the Magistrates Court to the assistance of all participants.

Abolition of the Public Defender Service.

The PDS is hugely inefficient compared to the private Solicitors firms. The comparison between the two is an example of the efficiencies that defence firms have had to make. There is no longer any justification for retaining the PDS which is an expensive white elephant; the work conducted by the PDS can be conducted more efficiently by private defence firms.

Conclusion

We remain of the view that access to legal advice and access to justice are one and the same, particularly in the case of criminal justice. On the one hand you have the state, with the full force of the police and Crown Prosecution Service, and on the other a defendant who may have no resources beyond that which the state provides through Legal Aid. The difficulty is that years of neglect, by parties and governments of all persuasions have led to a criminal justice system that is in its entirety underfunded, and in the case of Legal Aid, is the worst of the bunch. Whereas some departments have seen investment, for example the CPS recent £80m pay increase, Legal Aid continues to be cut in real terms.

The impact of years of cuts is the loss of many firms and practitioners. Firms are struggling to recruit and the position is unsustainable. The consequence of this is that the most vulnerable in society are seeing their access to justice being diminished.

Those working in the legal aided criminal defence sector are highly trained, hard working, experienced, highly regulated and committed professionals. Without them the criminal justice system stutters. Throughout the pandemic we have been recognized as 'essential front-line workers' and our members have done their bit to keep the wheels of justice turning. Our members are entitled to be able to make a living doing what they are doing. The taxpayer is entitled to know they are only paying for work done and at fair rates. The suspect is entitled to know that they are getting the right level of advice from the right person and for the right reasons.

The current difficulties facing the criminal legal aid sector are in stark contrast to those basic minimum expectations, because the rates are not reasonable, and because the fee scheme structures themselves are flawed and do not encourage and reward good practice.

We suggest there are 3 planks to ensuring a sustainable sector which in turn provides access to justice at good value to the taxpayer:

- The basic rates must be reviewed to reflect the corrosive effect of decades of inflation.

- Fee schemes must be restructured to pay fairly for work done and encourage good practice; and

- Fee schemes and rates must be reviewed annually having regard to inflation and changes in practice.

What will the taxpayer receive in return? We believe the structures we have suggested in this paper remove the perverse incentives that are inherent in the

current system and meet the goals of incentivizing good practice, producing benefits across the criminal justice system and efficiency and certainty for firms and the LAA in assessing claims. On the basis that the fixed fee structures we propose are calculated on sustainable hourly rates of pay, we believe that they provide a future for firms conducting criminal defence work. We also suggest our proposals do not seek a pay rise, but a restoration of the rates paid when they were fixed, in real terms. It cannot be that the value of legal advice offered now is less than it was in the 1990s.

There is a significant public interest in ensuring that there is a such a future. Without immediate reform we believe the sharp reduction that has taken place in the number of firms and practitioners conducting legal aid criminal defence work will accelerate. The criminal justice system relies upon the dedicated professionals who do such work. It cannot function without them.

Responses to Consultation Questionnaire

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).

Please see the main body of our response in relation to each fee Scheme

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.

This is dependent upon the fee scheme. For the reasons we explain above, we answer an emphatic no in relation to police station work and LGFS. We are broadly

supportive of the fee scheme in relation to magistrates court work, save that the fixed fees for such work are at unsustainably low levels.

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?

Please see our response at paragraph 109 above.

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

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

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?

No. Please see paragraphs 6-7 above for our reasons. To that we add that Criminal Defence work requires professionals to be on call at unsocial hours and to work on Saturdays and weekends. There are further proposals for flexible operating hours for criminal courts which periodically re-surface. The result is that the work is comparatively poorly paid for comparatively long, unsocial hours. Police station duties for example often involve a night or a whole day set aside, unpaid, just in case a call comes in. It is not possible to plan, to socialise or commit to spending time with families in case there is a call from the DSCC. Compared with other sectors, criminal defence work is unattractive in pay and conditions. This makes it harder or those from poorer economic backgrounds to do the work, and harder for people with caring responsibilities. This inevitably impacts upon the ethnic and gender diversity of the profession.

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

No. we have explained above how the structure of Police Station fixed fees and LGFS in particular, create perverse incentives.

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?

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?

By necessity, Prisons, Courts and Police forces have all had to expand their facility for Solicitors to attend upon them remotely via Cloud Video Platform (CVP). In general we would welcome the ability to continue to perform those attendances *where we deem it in the interests of our client's do so*.

There are benefits to CVP attendances that will last beyond the pandemic. Remote attendances can save time and cost in travelling for all concerned. This creates further efficiencies as professionals can complete other work in the time they would have spent travelling. The technology required for CVP has now been installed in most places and so the fixed costs of installing it have already been incurred.

We are of the view that the facility to attend remotely be retained so that it can be used in individual cases, where it is appropriate.

This should not be taken as an invitation to enforce remote attendances in all circumstances. There will always be cases and circumstances in which we judge it to be in our client's interest to attend in person and that should continue.

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

We have set out above our suggestions for how the various fee structures should be reformed.

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 reduction in the number of firms with criminal contracts since 2010 speaks to the profitability of criminal defence work. We have also cited above the 2018 Law Society Heat map and the statistics in relation to the number of accredited Duty Solictors. To that we add the analysis conducted by Otterburn consultants in 2014. We welcome any other data gathering exercise that is to be conducted.

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

Please see our full submissions above.