

Criminal Legal Aid Review
Call for Evidence May 2021

25 BEDFORD ROW RESPONSE

25 Bedford Row supports and endorses the Criminal Bar Association and Bar Council responses to the CLAR call for evidence. Both responses provide detailed and compelling evidence-based submissions on the urgent need for significant investment in the criminal legal aid scheme.

Introduction

1. 25 Bedford Row is arguably the leading specialist set of criminal defence practitioners. We only defend. We have been representing defendants in the criminal courts at every level for over 40 years. Our 73 members range from the most junior to leading juniors and QCs and we are culturally and ethnically diverse. The majority of our work is taken on a legally aided basis.

2. We have been completely consistent in our responses to the government's various attempts to improve the AGFS since 2017; we have welcomed every improvement in the rates and conditions while pointing out that they have been far too modest and regrettably the current situation for the Criminal Bar has changed little since our response to the AGFS10 in 2017

3. The coronavirus pandemic has revealed the shocking state of every aspect of the criminal justice system after a decade and a half of neglect and under-investment. The inability of the court estate to operate at efficient capacity both before and during the pandemic has led to a catastrophic backlog. This has had a devastating impact on the earnings of all criminal practitioners, from the most junior to the most senior. It has never been clearer that significant investment is required as a matter of urgency. By way of example "As of December 2020, criminal barristers are typically working 21.7% fewer hours than their pre-Covid-19 usual, and their fee income is still significantly down – criminal barristers are earning 49.4% less than their pre-Covid-19 usual. 83% of the criminal

Bar have incurred personal debt or used savings to support their practice through the pandemic; 27% have taken on personal debt of over £20,000¹”

Our Response

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

Question 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).

- i. The extremely low fees across all criminal cases have a direct impact on the quality of the service provided. Morale, and the financial and emotional wellbeing of the profession are at an all-time low, and diversity and retention has been stunted.
- ii. A significant portion of work is unpaid because it is not included in any of the fee schemes. Increased obligations to draft legal submissions and responses, defences statements and sentencing notes are all unpaid. It can often take days to draft submissions, which are most often done outside of normal working hours because practitioners cannot afford to take time out of court for “papers”. These additional unpaid obligations have a detrimental impact on the quality of life.
- iii. Lack of adequate prison video conference facilities for both counsel and solicitor prior to PTPH.
- iv. Means test for granting of representation orders has not been index linked and needs urgent review.

¹ Bar Council Response to CLAR 2

- v. Lack of timely service by the prosecution of key evidence/material, such as CCTV and forensic evidence, prior to PTPH in the Crown Court.
- vi. The Egress system is problematic and often restricts access to instructed counsel requiring a great deal of administration to resolve.
- vii. The service of unused material is inadequate. The material is not always uploaded to the digital system despite the fact that there is now a separate section for it.

Question 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.

In respect of the AGFS – there are real deficiencies with regard to the basic fee in respect of several offences such as:

- i. Remuneration for junior barristers is insufficient and unsustainable and is directly connected to low retention rates.
- ii. Burglary – this is paid at a very low rate regardless of value or complexity, these are the types of offences which junior barristers will undertake.
- iii. Supply of drugs cases (for example cases which do not involve more than 1 kilo of class A drugs) being remunerated at the lowest rate despite the often-complex nature of these cases and high page counts.
- iv. Low refresher fees for these cases (and a host of other offences) circa 300 – 400 per day are simply not sustainable when chambers rent, and other expenses are then factored in.
- v. Low fees with regard to cracked trials (on day of trial) do not encourage sustainability.

- vi. The removal of PPE has not been sufficiently replaced with adequate remuneration in cases which involve high page counts/complex evidence but low basic fees and low refreshers.
- vii. Expenses are set at an unrealistically low rate, particularly for those living in London
- viii. The disparity between a guilty plea fee and a cracked trial fee in complex cases. Often Counsel has to conduct the same amount of work to advise the defendant on the evidence. The significant disparity is not always a reflection of the work and time invested in the case.

Question 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?

- i. Lack of liaison between the police and CPS still undermines the preparation of cases.
- ii. Lack of a common electronic file between the police and CPS often undermines the disclosure system as prosecution counsel does not have an overview of all relevant material gathered during the investigation.
- iii. The courts do not liaise adequately with the defence in respect of the listing of cases often without reason at short notice when contact with the defence would enable matters to be resolved without a hearing.
- iv. The courts do not liaise with the defence and the prosecution about trial listings in long cases. Advanced notice of potential trial windows would allow the defence and the prosecution to consider diary management and reduce the returns

Question 4.1: Do you consider that Criminal Legal Aid work, as currently funded, represents a sustainable career path for barristers, solicitors or legal executives?

- i. Unquestionably not. There has been no increase in legal aid fees in real terms for many years whilst the cost of living, especially in London, increases year on year.
- ii. When compared to the rates payable to others employed in the criminal justice system the rates payable to barristers are significantly lower. Expert witnesses, for example, are fixed by Government as part of the Criminal Legal Aid (Remuneration) Regulations 2013. These rates are subject to increase if the LAA deems it reasonable to do so as a result of the exceptional circumstances of the case.

Question 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?

- i. The low rates of pay particularly at the junior end, the cost of living and increased workloads collectively act as a barrier to the profession. Without significant and sustained investment, a career at the Bar will not be a financially viable option for those from particular ethnic minority backgrounds or women.
- ii. The consistent and severe cuts mean that the Criminal Bar is not viable for those from particular socioeconomic backgrounds many of whom have significant debt at the conclusion of their first degrees. The cost of the Bar Practice Course and the GDL further increase that debt. Many students are aware that criminal legal aid work is the lowest paid in the profession, significantly reducing the ability to repay student debts and facilitate the most basic cost of living.
- iii. There is a significant issue with the retention of those with protected characteristics who often have external pressures to ensure that they can earn a viable and stable income from an early stage e.g. childcare, single parent status, care status in any capacity. As a result of this, the impact of extremely low rates

of remuneration is more likely to be felt by members with protected characteristics.

- iv. Low fees in basic cases and short interlocutory hearings impact on young lawyers as their practices will often involve covering such matters. The cost of travel to court for short hearings is also something that should be reduced by a concerted effort to use CVP following the cessation of the pandemic.
- v. Low/unsustainable fees in the early part of a barrister's career is likely to have a more marked effect on ethnic diversity of the profession as people from ethnic backgrounds are less likely to have independent financial support from other sources such as family.
- vi. Profit between groups of barristers is not equitable, and Black women earn the least of all. This holds true even once differing volumes of work are considered. Analysis was undertaken accounting for different volumes and whilst the exact figures change to a small degree (for example the 'volume adjusted' difference between White men and women is £11,400 rather than £12,800) the pattern of differences between barristers persists.²

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

- i. Means test for grant of representation order for defendants needs urgent index linking and general review. It is often a false economy to deny legal aid to defendants in the Magistrates' Court.
- ii. Where matters are committed for sentence and the defendant fails the means test in the Magistrates' Court, there is often no recourse to them except private funding, which is mostly unaffordable.

² Bar Council Response at para 5

Question 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?

- i. CVP to be used as much as possible to assist with instructed counsel covering their own cases. It is an effective way of dealing with short hearings.
- ii. CVP to be used as much as possible to maximise income and support retention. Women with children and women from ethnically diverse backgrounds are the lowest paid in the profession. The use of CVP not only reduces outgoings on daily expenses but allows the instructed advocate to cover a number of cases from a single location.
- iii. The time marking listings work effectively.
- iv. The courts should have a progressive attitude towards this new technology and embrace it, while working towards refining it rather than insisting on counsel attending in person where that sometimes involves hours of travel for a hearing that lasts only a matter of minutes.

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?

- i. The cost-cutting exercises pre-pandemic including closure and sale of court buildings, reduction of sitting days and lack of utilisation of recorders all combined to leave the CJS in a parlous and ill-prepared state for the pandemic. The backlog of cases was obviously problematic pre-pandemic and is now potentially incapable of resolution within the short to medium term.
- ii. Multi-handed cases, both in custody and on bail, are suffering in terms of the lack of availability of fixtures within a reasonable time, this has an impact on the income

of barristers and solicitors and is likely to undermine the sustainability of both professions.

- iii. The use of remote technology for some hearings would be a more efficient use of time and court space and would have no adverse effects on the interests of justice, however the effectiveness of this approach depends on quality of the technology used and effective training of court staff and judges.
- iv. Remote technology makes it significantly more likely that trial counsel can attend pre-trial hearings, supporting better case management and ownership.
- v. Remote technology reduces travel and footfall in court.

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

- i. Investment in court staff; there has been a significant reduction in the most experienced and efficient court employees. Such losses have negatively impacted the efficient running of the court estate.
- ii. Significant increase in sitting days and significant investment in Nightingale courts to deal, in particular, with multi-handed cases if the current court estate is unable to increase capacity to hear these cases in the short to medium term.
- iii. Uplifts for cases involving Intermediaries and expert witnesses
- iv. Uplifts for cases involving a high number of live witnesses
- v. Uplifts for defendants who have a diagnosed mental health condition
- vi. A system which improves cashflow for juniors, such as billing for hearings, conferences and written work before the case has concluded.

Question 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.

- i. Many of the problems identified in our response above will have a knock-on effect on the litigator and the profitability/sustainability of firms undertaking criminal legal aid work. In particular, the delays in the resolution of trials are obviously having a hugely detrimental effect on cash flow which is likely to cause the closure of many defence firms in the short to medium term unless dramatic and effective measures are undertaken to address the backlog of cases in the Crown Court in particular.

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

- l) The conclusions at para 63 of the Bar Council's response most effectively sums up the urgency of position.

“Economic reality pushes practitioners away from the practise of criminal law. It takes an average of close to a decade of expensive postgraduate training and work experience before an aspirant barrister can expect to begin to see a return on their time and financial investment. The average age of those who can even begin to earn a return on the huge debt levels they have built up is around 33 years old. And all the risks of economic investment in a career at the self-employed criminal legal aid Bar are borne by the individual, who has no insurance in the form of sick pay, pension contributions, regular salary, or terms and conditions of employment. A doctor in contrast is all but guaranteed to enter the profession from the moment she embarks upon training at medical school. The data reveals that individuals respond to the low economic return on their investment by moving away from a full publicly-funded criminal practise. By year 7, 15% have left, and the exodus increases after year 8. As the Lord Chief Justice, Rt Hon Lord Burnett of Maldon, has recently expressed, the justice system is “demand-led” and needs to be responsive to shifting legal need, a state that should be reflected in justice funding. If the state wants a high quality justice system with sufficient full time specialists to prosecute

and defend cases and, for the years ahead, to bring down the backlog, then relying on part-timers whose expertise is lost as they seek economic benefits elsewhere is not a prudent strategy”

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