Criminal Appeal Lawyers Association

Response to the Independent Criminal Legal Aid Review

1. About CALA

The Criminal Appeal Lawyers Association ("CALA") was formed in 2002 with a view to promoting better representation for those persons seeking to appeal their convictions and sentences.

Our members undertake appellate work under the various legal aid schemes which are available and on a privately funded basis in relation to:

- appeals against conviction and/or sentence to the Crown Court, Court of Appeal and Supreme Court
- applications to the Criminal Cases Review Commission
- applications for compensation for victims of miscarriages of justice.

CALA is recognised for its collective experience in appellate matters as indicated by the following:-

- CALA is a member of the Court of Appeal (Criminal Division) court user group.
- CALA is a member of the Criminal Cases Review Commission user group.
- We intervened in the Supreme Court case of *Nunn* to provide assistance to the Court.
- CALA organises conferences for lawyers, academics and others interested in appeal issues;

- The association contributes to relevant policy development through contribution to consultations and liaison with legal agencies.
- CALA has previously been invited to discussions with the Legal Aid Agency in relation to issues concerning the public funding of appeal work.

2. The scope of this response

The Independent Criminal Legal Aid Review ("ICLAR") is long overdue and is welcomed as an opportunity for a body independent of Government to review how the criminal legal aid system currently operates and what improvements are desperately needed to maintain a sustainable criminal defence profession going forward.

Not to put too fine a point on it, there is no future for this part of the legal profession without investment from Government into criminal legal aid. Re-organising funding from one part of the system to another will not cure the massive problems in the system or rectify the chronic under-funding of criminal legal aid that has taken place under Governments of different colours in the last 25 years.

The ICLAR will be aware that there has been no increase in legal aid fees in general terms in the last quarter of a century. This is starkly illustrated in appeal work where the rates under both schemes for solicitors are 8.75% below the rate that was payable in 1996. With inflation in that 25 years taken into account; firms are being paid an hourly rate that is half the value of the rate paid 25 years ago. It must be obvious to anyone looking at the system that such a position can only lead to problems.

This response will concentrate on appellate work but there are problems throughout the system which at every turn can be linked to under-funding. Very low rates of pay combined with payment structures that do nothing to incentivise input into the preparation of cases by solicitors will lead to miscarriages of justice.

Very few firms of solicitors undertake appeal work where they were not the firm which represented the appellant at trial. It is difficult, stressful, often challenging in terms of the issues of law dealt with and the success rate is not high. However, it remains one of the most important areas of work undertaken by criminal lawyers as these cases set the law for future cases and miscarriages of justice, some many decades old, can be rectified through the hard work and perseverance of criminal lawyers.

Over the years there have been many notorious and headline grabbing miscarriages of justice. It would be naïve to believe that changes in the law over time have done anything to eradicate the possibility of further miscarriages and we continue to see them on a regular basis, most recently with the scandal of the "Post Office cases". Not every miscarriage of justice makes the headlines and the work of lawyers to challenge convictions and sentences for those potentially the victim of such a miscarriage remains vital to the proper functioning of the criminal justice system.

The ICLAR document lists numerous questions. This response will look at the first three from the point of view of appellate work. Please note that officers of CALA have also worked on responses for the Howard League and the London Criminal Courts Solicitors Association and there may be some overlap in the responses from those organisations.

1. *What do you consider are the main issues in the functioning of the Criminal Legal Aid System?*
2. *Do the incentives created by the current fee schemes and payments encourage sustainability, quality and efficiency? Please explain your answer and specify which fee scheme or payment you are referring to.*

Legal aid funding for appeals can be divided into two distinct areas: funding provided by the Court of Appeal in terms of cases before it where a representation order is granted; and funding under the Appeals and Reviews class of work funded under the Standard Crime Contract 2017.

3. Court of Appeal funding

After conviction and sentence in the Crown Court, the Advocate and the Litigator are professionally obliged to provide an advice on appeal. If this is negative, there is no additional funding for their work (as it is subsumed within the fixed fee for trial payable under the AGFS and the LGFS). Alternatively, if that advice is positive (and grounds are lodged at the Court of Appeal), an additional claim for payment (at the hourly rates below) can be made to the Criminal Appeal Office (CAO). The assessors at the CAO are scrupulous in allowing only very limited additional payments for any appellate advice.

Generally, they will only allow minimal preparation by the Litigator, which generally will not include a face-to-face attendance on the convicted client. The Litigator is expected to advise the convicted client by letter on conviction/sentence and send a copy of any grounds of appeal. This can lead to misunderstandings and failure to take account of proper issues raised by the client. Historically, the settling of grounds of appeal has been viewed by the CAO costs office as a technical legal exercise requiring very little client contact or discussion with the instructing Litigator.

In these increasingly consumer friendly times this can seem somewhat outdated, especially as lawyers practising in this area are often subject to complaints to the Legal Ombudsman from disgruntled defendants (who have an excess of time at their disposal and may suffer from mental health issues). Those complaints may well involve many hours un-chargeable time.

One member of the CALA committee can attest to monthly complaints, none of which has ever been upheld after a full investigation. This could be avoided if confused and disgruntled defendants had the merits of a potential appeal against conviction/sentence adequately explained to them by their original lawyers.

This lack of funding can then create additional costs down the line: both in terms of stand-alone advice by follow on lawyers (under the Standard Crime Contract – see below) and the growing 'non-counsel' list at the Court of Appeal.

The CACD can grant a representation order but only usually does so in cases where leave has been granted. There is no public funding if leave is refused even though the defendant has an automatic right to renew the application for leave orally before the Full Court (though the Applicant does not have a right to be produced!).

This means that when a trial advocate advises positively or a new advocate agrees to advise afresh following a negative (or lack of) trial advice, they will know that they may well need to make an oral application for leave to renew which will only be retrospectively paid for if the renewal succeeds.

Renewal will require the advocate to attend the Court of Appeal in London, which usually will take an entire day out of an advocate's diary, besides the additional preparation and any unpaid conference time. This is not attractive work.

Increasingly, the Court of Appeal will consider the full argument on both renewal and appeal and then either allow the appeal or refuse leave. In the latter event despite much work neither the advocate nor their instructing Litigator will be paid. If the application is successful, the advocate will be able to claim for their preparation and advocacy via a retrospective representation order, but this will not cover the Litigator unless exceptional circumstances apply.

There is no other area of Legal Aid where representation of an individual in Court suffers from such a profound funding gap. This is of grave concern in matters that involve the liberty of the person, where lengthy and complex argument is expected before the senior courts. Successful appeals can save resources in preventing unnecessary and costly incarceration. Many members of the CALA committee can attest to the quashing of

unlawful sentences on defendants, saving the cost to the State of several years in detention.

In most cases, legal aid is granted for the advocate only. It is relatively rare for the representation order to cover work by a Litigator. Where the order does cover litigation work, the scope is usually limited to specific work and the Registrar of Criminal Appeals is the sole arbitrator of whether additional funding is justified. Whilst the Registrar will be a highly qualified lawyer, the Registrar rarely has relevant defence experience.

There is an anomaly in that a lawyer at the office to which the substantive appeal is being made, makes these ancillary funding decisions. Arguably, either an independent body or a judicial appointee should determine it.

Work that can be claimed will be assessed at the end of the case by the CAO Costs Office., Again those lawyers may or may not have experience of defence work. Assessment often leads to pruning down claim schedules by small amounts of time, rarely are enhanced rates allowed.

There is the right of appeal to the Senior Courts Costs Office where assessments are challenged but few appellate lawyers have the time and resources to argue over such small amounts of costs.

Advocates

The Advocates fees for the Court of Appeal are set out at para 9 of Schedule 3 to the Criminal Legal Aid (Remuneration) Regulations 2013:

9.— Advocates' fees for proceedings in the Court of Appeal

(1) Subject to sub-paragraph 9(4), for proceedings in the Court of Appeal the appropriate officer must allow fees for work by advocates at the following prescribed rates—

Junior Counsel

Types of proceedings	*Basic fee*	*Full day refresher*	*Subsidiary fees*		
			Attendance at consultation, conferences and views	*Written work*	*Attendance at pre-trial reviews, applications and other appearances*
All appeals	Maximum amount: £545 per case	Maximum amount: £178.75 per day	£33.50 per hour, minimum amount: £16.75	Maximum amount: £58.25 per item	Maximum amount: £110 per appearance

QC

Types of proceedings	*Basic fee*	*Full day refresher*	*Subsidiary fees*		
			Attendance at consultation, conferences and views	*Written work*	*Attendance at pre-trial reviews, applications and other appearances*
All appeals	Maximum amount: £5,400 per case	Maximum amount: £330.50 per day	£62.50 per hour, minimum amount: £32	Maximum amount: £119.50 per item	Maximum amount: £257.50 per appearance

There are a number of points to be made about the fees set out in this table:

1. The basic fee includes all preparation work for the appeal case and includes the Appeal hearing itself;

2. It is only if the appropriate officer considers there are "exceptional circumstances" and considers that the amount payable by way of fees in accordance with the above table would not provide reasonable remuneration for the work done that they may allow such amounts as appear to them to be reasonable remuneration for the relevant work (para 9(4) of Schedule 3);

3. In determining the fee paid, appropriate officers do not routinely give reasons for the determination. These have to be specifically requested. It is usually therefore not known what work has been deemed as payable and what the hourly rate is that has been paid;

4. It can be seen that the maximum brief fee for a QC is ten times that of junior counsel. It is not known why there is such an extreme disparity between the two. In Crown Court cases by contrast QC rates are usually between 1.5 and 2 times that of junior counsel;

5. It can be seen that the rates of pay for advocates at the Court of Appeal are very low, even relative to other criminal legal aid work. For example, a maximum fee of £58.25 for an "item" of written work, which could easily take in the region of 10 hours, would be an hourly rate below the minimum wage.

It is of note that very often the advocates undertaking Criminal Appeal work have not acted at first instance. The preparation required in assimilating all that went on at the lower Court and mounting a successful appeal necessarily involves tens if not, on occasion, hundreds of hours work. The payment system is such that it is only very rarely that the hours taken will in fact be paid by the Court of Appeal. Advocates undertaking this work do so knowing that they will not get paid for much of the work done.

Litigators

The rates payable for litigation work are hourly rates for all work reasonably undertaken on the case within the scope of the representation order. The rates remained static from 1st April 1996 until the end of March 2014 when they were reduced by 8.75%. There was a further 8.75 % reduction the following year which was subsequently reversed in 2016. Consequently, the rates paid now are less than they were 25 years ago.

The below table sets out the rates for the most senior grade of solicitor (over 8 years post qualification experience) with an inflationary calculation using the Bank of England inflation calculator:

Class of work	London Rate 1996	London Rate 2021	1996 Rate adjusted for inflation to 2020	Percentage reduction in real terms
Preparation (A grade)	£55.75	£50.87	£107.02	52.5%
Advocacy	£64.50	£58.86	£123.82	52.5%
Attend on assigned counsel (A grade)	£42.45	£38.55	£81.49	52.7%
Travel/Wait	£24.75	£22.58	£47.51	52.5%
Letters/calls	£3.60	£3.29	£6.91	52.4%

It should be acknowledged that the above rates can be increased by way of a claim for uplift up to 100% if the case is deemed to merit such treatment which is assessed by the Costs Office at the CACD. It is commonplace for claims for enhancement to be refused even though almost by definition, if the case merits a representation order for a Litigator, it is out of the ordinary in terms of the normal run of cases.

As stated above there are very few firms of solicitors undertaking appeal work where they were not the firm which represented the appellant at trial.

The paltry rates of pay are no incentive to undertake this work at even a paralegal level let alone at the level of seniority that is often required for cases before the appellate court that attract a representation order for Litigators. As a rough guide to cover the costs of employment and an office a lawyer in private practice would need to earn 2-3 times their

basic salary to cover national insurance, tax, holiday & sickness entitlement along with the overheads of running an office. A lawyer can bill between 1200-1500 billable hours per annum once normal holidays, bank holidays and sickness are deducted. At the current hourly rates, it is almost impossible to bill enough to cover a London salary. Aside from the rates above which will only be paid in the most serious cases which justify a senior solicitor, the hourly rate for Grade B fee earner (less than 8 years PQE) in London is £47.25 and a trainee or paralegal rate is £34.00. A very industrious fee earner can barely generate enough fees to cover their salary and some limited overheads. These rates can be contrasted with the Guideline Hourly Rates published by the Senior Courts Cost Office (which are criticised by civil Litigators as being out of date since they were last revised in 2011 but are still 5-6 times the legal aid rate).

Without an increase to these rates, and a significant increase at that, it is difficult to see how this area of work will continue in the future. It is accepted that in many cases, the firm that undertook the initial trial or sentencing will be engaged with the appeal but in a very significant number of cases, there has been a change of representation between trial and appeal.

The fees for advocates are a mixture of fixed fees, daily rates, and hourly rates and vary depending on the status of the advocate. The prescribed hourly rates also specify a minimum rate below which the appropriate officer cannot go in determining the appropriate fee payable.

In the case of a refresher fee in respect of less than a full day, the appropriate officer must allow such fee as appears to him reasonable having regard to the fee which would be allowable for a full day.

Where it appears to the appropriate officer, taking into account all the relevant circumstances of the case, that owing to the exceptional circumstances of the case the amount payable by way of fees in accordance with the regulations would not provide

reasonable remuneration for some or all of the work he has allowed, he may allow such amounts as appear to him to be reasonable remuneration for the relevant work.

The rates in the regulations are so poor that it is difficult to imagine a situation where an application to exceed them would not be made. Unlike for Litigators' fees there is no cap at a claim for 100% enhancement and an application to exceed the hourly rates by something in the order of 100% to 300% (or even more) would not seem unreasonable depending on the nature of the case. This leaves the advocate at the mercy of the costs department at the CACD in terms of the rates they will eventually be paid.

This work makes up a very small percentage of the criminal legal aid budget. According to the LAA statistics there were 4,922 cases funded in 2012/13 by the CACD and only 2,579 in 2019/20 with the cost of the work dropping from £4.5M to £2.6M in the same period which is about 0.3% of the current criminal legal aid budget[1].

Even where lawyers are paid for their work before the CACD, the billing process is lengthy and convoluted.

4. Appeals and Reviews (including applications to the CCRC)

Under the Standard Crime Contract 2017, a firm can provide advice about the prospects of an appeal in a case in which they did not act at trial. The case must meet the Sufficient Benefits Test but if it does so and the client is financially eligible the scheme will allow advice to be given and experts and counsel to be instructed.

This scheme makes up a very small percentage of the criminal legal aid budget with just over 1 million acts of assistance in 2019/20 down from 1.7M in 2001/02. This is a large reduction over time and reflects the problems that we see daily of firms limiting the work they take on and potential appellants struggling to find legal representation. Most firms with a crime

[1] Legal Aid Statistics January to March 2020 – table 4.1

contract will not undertake appeals work under this scheme as it is complex and the rates of pay uneconomic.

Many individuals are not eligible for such funding as the financial eligibility criteria are set so low. In addition, the income and savings of a partner are included even if the couple are separated by the prison sentence being served regardless of how long the individual has been in prison.

The capital limit is set at just over £1000 and the income limit after a nominal deduction for dependants is set at £99 per week. Individuals including those on pensions or in prison with a working partner do not qualify and cannot afford to pay privately for advice. Consequently, they must seek to challenge their convictions unrepresented.

The cost of this area of work in 2019/20 to the legal aid fund was £1.5M which is a significant decrease on the figures in the mid-2000s to 2010s when it reached a high of £5.1M in 2012/13 and has dramatically declined from that point. Consequently, it makes up about 0.5% of the criminal legal aid lower work budget[2].

The work is remunerated on an hourly rate under the advice and assistance scheme and is subject to upper limits on funding which can be extended by application to the LAA.

The hourly rates are below what was payable for this work in 1996 as the table below demonstrates with an index linking to 2019 showing that the work is paid at roughly half the real value of 25 years ago:

Work	Apr-96	1996 rate indexed to 2019	Current rate	Percentage cut in real terms
Preparation & attendance	£47.25	£92.61	£45.35	51.03%
Travel and waiting	£24.75	£48.51	£24.00	50.53%
Letters and calls	£3.60	£7.06	£3.51	50.26%

[2] Legal Aid Statistics January to March 2020 Table 2.2

This payment structure does not differentiate between the level of fee earner undertaking the work and does not allow for any uplift to reflect the more complex nature of the work on certain cases.

As mentioned above, very few firms undertake this work with any regularity. Many will avoid it at all costs as being uneconomic. Many individuals write to many firms and never find anyone able to take their case forward.

This area of work includes applications to the CCRC. The number of legally represented applicants to the CCRC has fallen steadily over the years and is now at an all-time low: almost 93 per cent of applicants did not have support from a legal representative in 2019/20, down from a historical average of around 70 per cent (Criminal Cases Review Commission, 2020).

At the same time, it is recognised that applicants who are legally represented by firms with expertise in the area have a much better chance of having their cases referred: legally represented applicants are nearly four times as likely to have their cases referred to the Court of Appeal by the Commission (Hodgson and Horne, 2009).

Many cases that come to solicitors who are experienced in this area will not get to the CCRC because negative advice is provided to the clients. This in turn prevents the CCRC having to deal with applications that are unlikely to succeed and reduces the strain on the CCRC.

The recent Westminster Commission on Miscarriages of Justice recognised the strain on the CCRC and recommended that the Ministry of Justice should:

- provide increased funding to the CCRC so that it can recruit additional case review managers
- raise the financial eligibility criteria for advice and assistance with CCRC and Court of Appeal matters;

- increase the rates payable to solicitors for work undertaken under the legal aid scheme to allow more solicitors to undertake the work on a financially sustainable basis.

Advocates are paid as a disbursement of the solicitor in this class of work and there is no fixed rate. Generally, the LAA will allow £80 per hour for an advocate and following a recent judicial review of the LAA, rates of up to £120 per hour may be payable if the case merits the instruction of a QC. It should be noted that the intervention of the High Court has recently been required to provide this differentiation after the LAA effectively stopped following their own guidance. Such a differential or opportunity to claim an uplift on rates would be welcome for solicitors.

The current funding system is not fit for purpose and firms are refusing to take on such cases. Even firms that are specialist in the area are not taking on cases as they must balance the economics of such cases. It is not economic to run these files with senior solicitors' input without effectively making a loss.

The ICLAR needs to consider at least the following issues for any future scheme if this work is to remain viable at all and available to those who believe themselves to be wrongly convicted:-

- Increase the financial eligibility limits perhaps to the equivalent of Crown Court cases which in itself ought to be increased from current levels;
- Differentiate the rates payable to encourage the use of senior solicitors;
- Allow an uplift claim to be assessed in cases which are exceptional (the concept is familiar to the LAA and criminal lawyers);
- Increase the rates of pay. It should not be prohibitively expensive to bring them in line with what they were in 1996 which would be to double what they currently are – that this may seem to be an extravagant request is testament to exactly how far legal rates have been allowed to fall by successive governments who have created the current crisis;

- Payments on account for experts, external advocates' fees that have been approved and for 75% of current profits cost (that have been approved via the CRM5) so that firms are not out of pocket in what can be lengthy cases;
- Overhaul the archaic funding system in the Criminal Appeal Office.

5. Appeals to the Crown Court

Appeals to the Crown Court from the Magistrates' Court are funded for solicitors by a fixed fee of £155.32 for an appeal against sentence and £349.47 for an appeal against conviction for solicitors. An appeal against conviction is a re-trial of the case.

Many solicitors' firms will adhere to the Law Society guidance on not taking on uneconomic cases in relation to these appeals and not take on an appeal against conviction if the firm did not act at the trial in the lower court.

Often these cases involve complex cases or individuals (e.g. cases of obsessive harassment or where mental health issues perhaps unidentified are present) and to prepare a trial at that rate simply cannot be done effectively or economically. Taking on such a case potentially puts the firm in breach of their professional obligations.

A new scheme of payment for such cases is badly needed. An hourly rate scheme or refined fixed fee scheme like that in the magistrates' court may be appropriate for consideration. However, as with everything else, unless the work is adequately remunerated the problems will continue. This is one area where many firms refuse the work entirely.

As far as advocates are concerned, the fees under the Advocates Graduated Fee Scheme are set out in the Criminal Legal Aid (Remuneration) Regulations 2013 at Sch. 1, para. 20. The fee is a fixed fee and depends on whether the advocate is Queen's Counsel, a leading junior, led junior, or junior alone. Appeals against conviction are payable at £661 per day for a QC, £496 for a leading junior, and £330 for a led junior or junior alone. For a sentence appeal the figures are £498, £373, and £250 per day respectively. There are fees payable for aborted or

supplementary hearings including bail applications and mentions at £175, £131, or £88 per day respectively.

However, unlike in the Litigators' Graduated Fee Scheme where it appears to the appropriate officer dealing with the claims for payment from counsel that the fixed fee allowed would be inappropriate taking into account all of the relevant circumstances of the case, he may instead allow fees in such amounts as appear to him to be reasonable remuneration for the relevant work.

Fees may be allowed in any of the following classes:

(a) a fee for preparation including, where appropriate, the first day of the hearing including, where they took place on that day short conferences, consultations, applications and appearances (including bail applications), views at the scene of the alleged offence, and any other preparation;

(b) a refresher fee for any day or part of a day for which a hearing continued, including the same types of work as above;

(c) subsidiary fees for attendance at conferences, consultations, and views at the scene of the alleged offence not covered by paragraphs (a) or (b) above;

(d) subsidiary fees for written advice on evidence, plea, appeal, case stated, or other written work; and attendance at applications and appearances (including bail applications and adjournments for sentence) not covered by paragraphs (a) or (b) above.

This does at least mean that advocates may be able to argue that the fixed fee set out in the Remuneration Regulations does not provide adequate remuneration for work undertaken and seek additional payments justified by the nature of the individual case. Such luxury is not afforded to solicitors under the Litigators' Graduated Fee Scheme.

The rates remain pitifully low when one considers the work required to prepare and present what is in effect a trial.

6. Interactions with other participants in the CJS

Q3. 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?

Firms often find it difficult when dealing with a case post-conviction to have an effective dialogue with CPS or police. The police will often seek to use the case of Nunn to refuse disclosure requests even those formulated in accordance with the guidance in Nunn. With no court immediately seized of the case, these issues are of great concern and cause sometimes intractable problems.

7. Conclusion

We have not sought to deal with every question raised in the consultation document. We have concentrated on the main issues which affect appellate work.

The work is complex and requires the input of senior lawyers. It is important as it provides a check on the system in terms of challenging convictions and sentences which appear to have been wrongly achieved. Although not every case considered will lead to the identification of a miscarriage of justice, it is an absolutely vital cog in the wheel of the criminal justice system that there remains a proper level of scrutiny of outcomes in this way.

The concerns that the association has of falling numbers of lawyers willing to take on such cases is reflected by the LAA statistics as to the dramatic fall in the number of acts of assistance in this area over time and the fall in the amount of money from the overall legal aid budget that goes towards such cases.

Specialist appeal lawyers are now extremely rare. Many of those who do undertake a lot of this work are well into their 50s and there is little sign of younger solicitors eager to undertake this arduous work. The future for appeal work looks bleak.

There is a direct comparison to be made of the rates paid on both elements of appeal work from 1996 as there has been no change of payment structure (unlike in the Crown Court) and the hourly rates are below what they were a quarter of a century ago without any adjustment for inflation. When inflation is considered the rates paid now are less than half the value of the rates from 1996. It should not be forgotten that the rates in 1996 were low.

With absolutely no deprecation to the trades involved in the following example, it is now more expensive on an hourly rate to have your car serviced, or have a plumber or electrician come to your house than it is to have a senior solicitor of many decades of experience to consider your conviction for murder and possibly lead to your release from a life sentence: that is if you can find anyone willing to look at your case.

There are changes that can be made to the funding system and we will happily engage with ICLAR further if invited to do so to discuss these, but some examples have been set out in this document. However, without an increase in the funding available for criminal legal aid in general, none of these problems can be resolved by moving funds from one area to another. More investment is required and in terms of what the Government spends, the figures for criminal legal aid are vanishingly small. A small amount of extra investment can make a huge difference to such an important but largely overlooked and forgotten element of the welfare state (and the costs are offset by savings in other areas of the public purse such as prisons)

Criminal Appeals Lawyers Association

28th May 2021