



Submission to Justice Committee Inquiry- The Future of Legal Aid.

2 November 2020

1. APPEAL (working name of Centre for Criminal Appeals) is a charity and law practice which aims to identify and litigate miscarriages of justice. The lawyers and investigators at APPEAL focus solely on appeal cases, screening applications for assistance and identifying cases where we believe a wrongful conviction or unjust sentence has arisen in the courts of England and Wales. We bring cases principally to the Court of Appeal (Criminal Division) and Criminal Cases Review Commission (CCRC). Since launching in 2014, we have provided representation to 60 clients, and have received over 900 requests for assistance from prisoners.
2. At APPEAL we also aim to achieve broader progressive reforms in our criminal justice system. Through strategic litigation, policy efforts and working with the media we push for reforms that will increase fairness, transparency and accountability. Our contribution to policy includes providing the secretariat to the All-Party Parliamentary Group on Miscarriages of Justice.
3. While we expect a significant amount of our submission to echo what is said by others, our focus on an investigative approach to criminal appeals means we have unique experience. The submission relies on certain evidence from defence practitioners taken and published by the APPG on Miscarriages of Justice in the course of its inquiry into the CCRC, a full transcript of which is available at <https://appgmiscarriagesofjustice.files.wordpress.com/2019/12/transcript-of-fourth-evidence-session-solicitors.pdf>.

Our funding model

4. As a charity, APPEAL only represents people who cannot afford to pay for legal representation themselves - we do not take on cases for private clients or ask prisoners or their families to pay fees. Nonetheless, only 7% of our casework is [funded by legal aid](#).
5. We deploy factual investigation and analysis strategies developed in death penalty appeals the United States, and rely on thorough and wide ranging

post-conviction enquiries to uncover information not presented or known at trial, in order to bring before the Court of Appeal a fully developed account of what actually occurred.

6. Our work on a case might involve requesting documentation not previously reviewed in the case, interviewing new potential witnesses, re-interviewing or investigating the credibility of old ones, or conducting new testing of physical or digital evidence by engaging new experts or obtaining access to previously untested material.
7. The vast majority of our work is funded by donors and charitable foundations, precisely *because* the legal aid scheme is too restrictive to allow robust investigative work capable of demonstrating that a conviction is unsafe. Current legal aid restrictions mean that pre-trial investigation by the defence is rarely conducted, with juries making decisions based on only half the evidence.

Legal aid for post-trial criminal work

8. The legal aid available in this area is extremely limited. Three types of funding are available.

Trial Court Representation Order

9. Representation under the Crown Court Representation Order, essentially for advice on appeal given by trial counsel
10. APPEAL finds that advice on appeal, given by trial counsel, is often perfunctory, and as it is given by the same team who conducted the trial and under a funding regime that discourages additional work being done tends to be based on counsel's recollection of the trial rather than any further investigation based on late disclosure at trial.
11. If leave to appeal is refused by the Single Judge, there is no funding for a renewal application.

Advice and Assistance via the Legal Aid Agency

12. Advice and Assistance under the Standard Criminal Contract can be provided by new representatives (and would be the main source of funding for representation on new issues).
13. Any appeal requiring substantive investigation, rather than on a pure point of law, is likely to fall within this category. Complex criminal appeals involving, for example, forensic testing, investigation into police errors or

disclosure failures, or efficient trial representation, will almost invariably only be funded under the Advice and Assistance regime.

Court of Appeal Representation Order

14. Representation under the Court of Appeal Representation Order is typically only for counsel and is only granted if an applicant reaches the full court. It is not generally extended to solicitors.

Funding rates and upper limits

15. The hourly rates for this work are £45.35 in London, and £42.80 nationally. The upper limits are £456.25 for a CCRC application, and £273.25 for a Court of Appeal case. These low caps and low hourly rates do not consider the unavoidable overheads incurred by any criminal appeals practice.
16. While it is possible to extend the upper limit, any work demands that a specific costs extension be obtained from the Legal Aid Agency prior to the work being done. Any work must be justified in advance, measured down to tenths of an hour and with exact costs of travel, and other disbursements, meaning that the representative must spend several hours (unpaid) applying for funding for 10-20 hours-worth of funded work.
17. Practitioners Joel Bennathan QC, Rebecca Trowler QC, and Gregory Stewart write in their *Criminal Appeals Handbook* (2nd edn, 2019) that only a minority of firms eligible to undertake freestanding advice and assistance work under this contract in fact do so (para 8.3), it being perceived as specialist and poorly paid.
18. The low remuneration for criminal appeal lawyers means that there simply are not enough law practices able or willing to do the work, with firms and practitioners essentially being forced out of the sector.

Scope of work funded

19. Complex, serious criminal appeal cases such as we deal with require hundreds of hours of case analysis and then case investigation.
20. The starting point is reading *all* of the available case papers in a comprehensive and systematic manner, yet the current funding guidance states reviewing the whole file will almost never be necessary. This is

absurd: you cannot identify what evidence may be fresh without checking what evidence was previously used.

21. Once the reviewing representative has an inkling that the conviction is unsafe or the sentence is unlawful (from reviewing the case materials accessible to the defence at trial) the next step is seeking fresh evidence that was either held by the police but not disclosed or never sought by the police in the first place. This stage of the investigation requires that representatives uncover 'unknown unknowns': issues which would simply never be apparent from a cursory review of the summing up and advice on appeal given by trial counsel.
22. However the system for obtaining extensions of the upper limit requires appeal representatives to specify what it is that the activity they seek funding for will reveal and how this will support a ground of appeal. This means that law practices entirely reliant on legal aid funding simply cannot do this sort of work, yet it is the most relevant work for uncovering the fresh evidence that must be present to support a ground of appeal.

Means testing of would-be appellants

23. A major challenge for clients and providers is simply that the thresholds of income and capital exclude the vast majority of applicants. The low eligibility criteria risk victims of miscarriages of justice being unable to access the legal help they need to challenge wrongful convictions.
24. At present, only those with a disposable income of £99 per week or less *and* disposable capital of £1,000 or under are eligible for the relevant legal aid scheme (with certain applicable deductions).
25. This threshold includes the income or capital of a prisoner's partner or spouse.
26. The low thresholds can lead to arbitrary outcomes. One client's legal aid funding eligibility ended when he received compensation for a vicious prison assault. Another's entitlement was threatened due to wages received after securing employment in prison, despite the fact that it would be entirely insufficient to cover any sort of legal representation.

The appeal lawyer desert

27. Even those who *are* eligible struggle to find law practices willing to represent them. In its session directed at hearing the experience of defence representatives of people applying to the CCRC, funding was a paramount concern: the legal aid rates effectively made the work a loss leader; there had been a 56% reduction in real terms for post-conviction work since 1986. The rate paid to lawyers under the relevant legal aid

scheme had not only failed to increase in over two decades, but was in fact cut by 8.75% in 2014. The rate does not vary dependent on who does the work, whether a paralegal or a solicitor with decades of experience.

28. The increasingly restrictive nature of the legal aid regime appears to be having a clear impact. These factors surely contribute to the difficulty experienced by current applicants to the CCRC – gatekeeper to the Court of Appeal – in securing legal representation: 90% of current applicants to the CCRC were ‘applicants in person’ according to the CCRC’s 2018-19 Annual Report: only around 10% had a lawyer. In 2008, approximately a third of CCRC applicants were represented.
29. Research [conducted](#) by Professor Jacqueline Hodgson and Juliet Horne has demonstrated that CCRC applicants’ chances are benefitted substantially by legal representation: they found during the period studied that 8% of represented applicants had their cases referred to the Court of Appeal, contrasting with only 2% of applicants in person.

The impact on the CCRC and the Court of Appeal

30. Moreover, it is short-sighted to view legal aid funding in a vacuum, as simply an expense incurred by the state that solely benefits legal representatives and clients, given that the understaffed CCRC and Criminal Appeal Office are each spared a great deal of time and effort by effective post-trial representation. The Court of Appeal Criminal Division has also expressed concerns about dealing with unrepresented appellants: see for example [Lord Chief Justice’s Annual Report 2019](#), p15. A properly organised, investigated and presented case allows the strained resources of the CCRC and Court of Appeal to be used as efficiently as possible.

The reforms needed to post conviction legal aid availability

31. The most straightforward starting point, within the current fixed fee regime, is to reserve appeal work to specialist practices that meet certain standard and then to raise the thresholds as follows:
- a. Increase the eligibility of convicted people in relation to criminal legal aid by removing the spousal aggregation requirement for people in prison unless there are exceptional circumstances which would make it just and equitable for the spouse’s income and capital to be taken into account
 - b. Increase the threshold of direct earnings of the prisoner to £209 per week, and capital value to at least £3,000, in line with the thresholds where prison discipline and Parole Board proceedings are concerned
 - c. Raise the fixed rates under the Standard Criminal Contract in relation to appeals and CCRC applications to £100 per hour for all

work, which would reverse (taking into account inflation) the diminution since the 1990s which has forced providers out of the sector

- d. Raise upper limits up to which that a law practice can work requiring permission to undertake additional work to allow at least ten hours of work on a given case
- e. Institute a system by which the application to raise the upper limit involves increases by increments of £1000 with a general explanation of the strategic value of the work, rather than a line item costing by hour and per disbursement as currently required (as these can be examined on audit)

32. This would allow more applicants to access effective representation, where they are currently inhibited from unable to accessing representation of any kind. It would give the Court of Appeal access to more relevant evidence in conditions in which miscarriages of justice are more likely, with trial representation increasingly unreliable despite the best efforts of practitioners. In addition, it would safeguard the availability of criminal appeals specialists for the appellants of the future in a system under increasing pressure.

33. However, the criminal appeal rates cannot be separated rigidly from the problems which current blight representation – in terms of both quality and availability – at the trial level. Without significant change in trial practice and legal aid rates, there will be more work for post-trial defence lawyers to do in order to put miscarriages of justice right.