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**Response to Independent Review of Criminal Legal Aid**

**About you: If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent**

1. APPEAL (working name of Centre for Criminal Appeals) is a charity and law practice which aims to identify and litigate miscarriages of justice and reform the system that leads to them in the first place. The lawyers and investigators at APPEAL focus solely on appeal cases, screening applications for assistance and identifying cases where there is strong evidence that a wrongful conviction or unjust sentence has arisen in the courts of England and Wales.

2. We bring cases principally to the Court of Appeal (Criminal Division) and Criminal Cases Review Commission (CCRC), with some ancillary litigation in the Administrative Court on access to information. Since launching in 2014, we have provided representation to 60 clients, and have received over 1000 requests for assistance from prisoners.

3. 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. This allows us to bring a better developed account of what actually occurred before the Criminal Cases Review Commission or Court of Appeal.

4. Our work on a case might involve requesting documentation not previously reviewed in the case, interviewing new potential witnesses, reinterviewing 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.

5. 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.

6. In fact, over the 12-month period from January to December 2021, we spent 1663 hours preparing CCRC applications, only 49 hours of which were billable to the Legal Aid Agency. This means a paltry 3% of our work falls under the legal aid scheme.

7. 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.

8. APPEAL is not going to provide a response to all the questions but will deal with the appeals and CCRC issues. However, the Government should be under no illusion that it is necessary to start funding the entire criminal legal aid system properly to avoid catastrophe.

**Investment in Fees for CCRC Work:**

**90.We propose increasing fees for litigators conducting CCRC work by 15%. Do you have views?**

1. The hourly rates for this work are £45.35 in London, and £42.80 nationally. The upper limits before an extension must be requested are £456.25 for a CCRC application, and £273.25 for a Court of Appeal case. The process of applying for an extension takes hours and involves gathering of quotes and documentation that is not properly remunerated. These low caps and low hourly rates do not consider the unavoidable overheads incurred by any criminal appeals practice.

2. The rate paid to lawyers under the relevant legal aid scheme have not increased in 25 years. In fact, they were cut by 8.75% in 2014. When inflation is taken into account over that quarter of a decade, it would take an increase of 100% to bring the rates back to an equivalent value.

3. The increasingly restrictive nature of the legal aid regime is having a clear impact. In its response to CLAIR, the government acknowledged the low levels of representation of CCRC applicants. In addition, 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. In our view it is highly likely that miscarriages of justice are going unidentified as a result.

4. Although we agree with government proposals to increase the fees for litigators conducting CCRC work, a 15% uplift is simply not sufficient to encourage firms to start doing this work and it will not prevent firms stopping the work altogether. We would recommend an uplift of at least 25%.

5. Any increase in fees should also apply all criminal appeal work, not just CCRC applications and it should be indexed linked otherwise they will be wiped out by inflation in a matter of a few years.

**91.Do you consider that the fee scheme for legal aid for applications to the CCRC needs to be reformed? Why?**

1. The legal aid scheme for applications to the CCRC needs urgent reform. This is not just about fair remuneration for lawyers. Reform is crucial for identifying cases involving a miscarriage of justice which is in turn key for retaining public trust in the system. Furthermore, it makes economic sense: 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. As such, below we propose four areas for reform.

**Update the guidance on legal aid for CCRC and Court of Appeal work using the expertise of appeal lawyers, to adjust scope to make sure that funds are spent effectively:**

2. The guidance on what work falls within the scope of legal aid funding should be updated with input from specialist appeal practitioners to ensure that priority is given to funding work that has the potential to identify fresh evidence that undermines the safety of the client's conviction or sentence. This includes reviewing all the case papers, making requests for further post-conviction disclosure, visiting and documenting the alleged crime scene, interviewing witnesses, generating timelines and key player lists, instructing experts, facilitating expert meetings, forensic testing, transcription of relevant portions of trial recordings and other investigative work either by solicitors themselves or private investigators / enquiry agents. The most effective major role for counsel in post-conviction cases should be providing advice on the need for funding at the outset and then drafting grounds of appeal or an advice to append to a CCRC application *after* the further development of the case facts. A model which simply allows solicitors from the outset to act as a conduit by sending case papers to external counsel for a paper review, to be paid for as a disbursement, is not likely to yield fresh evidence and is not a sensible use of public funds.

**Raise the upper limits up to which a law practice can work:**

3. To put this issue into context, it is necessary to understand the complex investigative work involved in preparing CCRC applications.

4. Complex, serious criminal appeal cases such as we deal with require hundreds of hours of case analysis and then case investigation. 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. Even a cursory review of a trial summing up - which in complex cases can run to hundreds of pages – or a previous Court of Appeal judgement is unlikely to be possible to complete within the 2 hours allocated to initial case screening by the current Standard Crime Contract allocation for Appeals and Reviews. We recommend raising the upper limits up to which that a law practice can work without requiring permission to undertake additional work to allow at least ten hours of screening work on a given case.

5. 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.

6. In light of the level of detail that is often required to prepare a CCRC application, it is necessary to make reforms to the upper limits up to which a law practice can work on legal aid. The following recommendations echo those submitted by the Criminal Appeal Lawyers Association (CALA):

7. It is suggested that the basic rates be uplifted at least by 25% as an initial increase. However, solicitors should be able to claim an uplift of 100% on cases that warrant such a claim. Authorisation for the uplift must be provided as early in case as possible and not judged on an ex post facto decision taken at the end of the case as that would leave providers working at risk on complex and lengthy cases.

8. Currently when the financial limit is to be exceeded, an application is made to the LAA on a CRM5 online application. It is recommended that law practices should be able to make an application to the LAA in a similar way to the financial extension to be paid at an uplifted rate as soon as it becomes clear that the case falls within the exceptional category.

9. Uplift on exceptional cases is not an unusual concept for the LAA. It is used in magistrates court work and in POCA and Court of Appeal claims as indeed it was in Crown Court work before the LGFS was introduced. The same criteria should apply to advice and assistance funding but it is crucial that the decision is made before the work is done and not at the end of the case. To do otherwise puts an unacceptable risk onto the firm that their work will not be sufficiently remunerated. These cases can take several years to conclude and it is imperative that there is certainty on the rate being paid.

10. The vast majority of conviction appeals and CCRC applications and some sentence appeals will fall within the exceptional bracket. This will significantly increase the money spent on this area of work but is not an excessive burden on the legal aid funds given that it currently only takes £2M from the legal aid budget.

11. Urgent reform is required to enable practitioners to undertake both applications to the CCRC and fresh advice work on appeals to the Court of Appeal. The above would provide that reform and give this work a chance of being sustainable.

**Reform means testing rules of would-be appellants:**

12. 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. 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).

13. This threshold includes the income or capital of a prisoner's partner or spouse. 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. A third was ineligible for public funding after £3000 in their prison finance account, painstakingly saved over 13 years

of earning prison wages, took them over the limit, despite the fact that it would be entirely insufficient to cover any sort of legal representation.

14. We recommend increasing 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.

15. We also recommend increasing 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.

**Increase fees for litigators:**

16. As recommended as part of question 90, legal aid fees should be immediately increased by at least 25% followed by a restructuring of fees in the future.

**92.If you already undertake CCRC applications work, what are some of the challenges with this work?**

1. The starting point for making an initial assessment of the merits of a case is understanding what happened at trial. However, there is a major barrier for representatives in this regard.

2. Trial audio recordings and court documents are being prematurely destroyed in England and Wales under the current Crown Court Record Retention and Disposition Schedule ('RRDS') devised by HM Courts and Tribunals Service ('HMCTS').

3. The RRDS specifies that digital trial audio recordings are retained for just seven years, whereas a precise record of trial proceedings may be required several decades after an individual's conviction.

4. This greatly diminishes access to justice for the wrongly convicted and hinders the work of appeal lawyers, the Criminal Cases Review Commission ('CCRC') and Court of Appeal Criminal Division ('CACD').

5. Even where trial audio recordings have been retained, transcripts can be prohibitively expensive for appeal lawyers and unrepresented appellants to obtain. Potential efficiencies offered by deployment of automated speech-to-text technology are not being applied to make transcripts accessible to those who need them.

6. The problem of the unavailability of trial transcripts and other court records has recently been acknowledged by the Vice-President of the CACD, the Westminster Commission on Miscarriages of Justice and the CCRC.

7. We recommend that retention policies are amended so that trial audio recordings are held for at least as long as a convicted person is in custody. We also recommend making use of modern technologies for the production of trial transcripts to make them more affordable for both the court and defendants. Finally, all defendants eligible for legal aid should be given a statutory right to be furnished with a full transcript of their trial at the public's expense, or at least a transcript of the judge's summing up or sentencing remarks.

**93.Are there factors besides remuneration which disincentivise you from undertaking CCRC applications work? Which ones?**

1. Slow and conservative decision-making by the CCRC, as well as the extremely low rate of referrals from the CCRC to the CACD (currently standing at 1.95%) are also major disincentives for appeal representatives. More information is contained in the 2021 report by the Westminster Commission on Miscarriages of Justice.

2. One way to mitigate these problems would be to reform the 'real possibility test' as set out in section 13 of the Criminal Appeal Act 1995. The test should be urgently reviewed and replaced with one that does not anchor CCRC decision making to that of the CACD. The Justice Select Committee recommended a review of the test in 2015 which is yet to be instigated. There is widespread support for reform.

3. The CCRC requires further funding in order to investigate and process applications with the depth and urgency that each one requires. A parliamentary inquiry reported that the CCRC received just £5.93m in 2019 in government funds compared with £9.24m in 2004, making it the part of the criminal justice system that has suffered the biggest cuts since austerity measures were introduced. There is little doubt that the lack of resources is having an impact on the quality and speed of decision-making. In 2015 the Justice Select Committee recommended that the CCRC should be granted an additional £1m of annual funding "as a matter of urgency".

4. A further challenge/disincentive is the difficulty would-be appellants have in accessing records relevant to the case held by public bodies. The police and CPS are routinely unresponsive to post conviction disclosure requests despite the guidance set out in the Attorney General's Guidelines. In cases where responses to requests are received, they often demonstrate a complete misunderstanding of the law regarding post-conviction disclosure. To meet this unfairness and inconsistency a nominated individual specialising in post-conviction disclosure requests should be appointed. Furthermore, conviction/sentence reviews should be introduced within police forces and CPS authorities to increase efficiency in dealing with appellate cases.

**94.Is there a clear demarcation of work which should be done by the provider of legally aided services and that which should be done by the CCRC?**

1. The CLAIR government consultation response exhibits a fundamental misunderstanding of what is involved in undertaking CCRC work. Representatives do not undertake a "screening" exercise but, as described above, they carry out substantive investigative work and advice that is akin to preparing a case for the full CACD. The CCRC simply use or expand upon work conducted by the representatives.

2. The CCRC has wide investigative powers which are used to do additional work or to examine what has been submitted by solicitors or unrepresented applicants. In our experience, it is extremely rare for the CCRC to use their investigative powers beyond the avenues that have been submitted in an initial application.

3. There is therefore a clear demarcation between work involved in preparing an application (by the representative) and that involved in reviewing and investigating the points raised in the application (by the CCRC). In our experience, this line is becoming brighter as the CCRC are increasingly hampered in their ability to carry out investigation due to limited resources.

**95.Do you routinely and accurately record time spent on this work?**

Yes, detailed time recording and management is a fundamental part of APPEAL's internal processes and we must account for every penny of public funds we spend litigating our cases.

**96. Do you support the reform into standardised fees, considering any administrative burden which would be introduced to claim those fees? Why?**

1. The current system is adequate but only if the remuneration is increased significantly by increasing hourly rates and allowing an uplift in exceptional cases of up to 100%.

2. Any alternative system must be subject to full consultation and must not further penalise the few specialist lawyers in this area. It is in fact unnecessary to set up a standard fee system as most cases in this area of work would be within the "non-standard" bracket which would have to be available.

**97. Do you consider that reforming the fee scheme would incentivise providers to take on this work? Why?**

Yes. Fair financial remuneration is a key aspect of incentivising providers to take on this complex area of work. However, we believe that wider policy reforms to the criminal appeals system – for example reforming the 'real possibility' test, securing access to transcripts and audio recordings and providing further funding to the CCRC – are also necessary.

**98. Do you consider that retaining the existing fee scheme once the fees have been uplifted would incentivise providers to take on this work? Why?**

Retention of the existing scheme would work with an uplift. However, the basic rate needs to be uplifted and then the ability to claim enhancement up to 100% is essential if this work is to be sustainable.