

CCRC

Criminal Cases Review Commission

Response

Consultation

Criminal Legal Aid Review (CLAIR)

June 2022

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Context and Purpose

The Government requested feedback on the Criminal Legal Aid Review (CLAIR).¹

The Criminal Cases Review Commission ('the CCRC') was established by Parliament to investigate potential miscarriages of justice. The CCRC operates under the Criminal Appeal Act 1995 and we started work in April 1997. Since then, the CCRC has processed approximately 29,000 applications. Over 775 cases have been identified as potential miscarriages of justice and referred to the appellate courts. More information on the CCRC's policies and its performance is published on its website at www.ccr.gov.uk.

The CCRC met with the Chair of CLAIR, Sir Christopher Bellamy QC as part of a 'round table' discussion with practitioners in Birmingham during June 2021.

We then made written submissions expressing strong concerns about the declining levels of Legal Aid both in respect of CCRC work and the dangers posed to the criminal justice system generally.² Those submissions were informed by academic research, including a recent study on criminal legal aid led by the University of Sussex. That research built on earlier work by undertaken by the University of Oxford and University of Warwick.³

Following Sir Christopher's report and the Government's response, we have consulted further with academics and practitioners as part of a dedicated sub-group of our Stakeholder Forum.

We have considered the responses from across the professions including those of the Law Society⁴ and the Bar Council⁵ as well as drafts from the Criminal Appeal Lawyers Association (CALA) and the London Criminal Court Solicitors Association (LCCSA). We are also grateful to Dr Lucy Welsh for her input and substantial contribution to the research led by University of Sussex.

We provide responses to those questions that relate to our work and where we believe we can offer the most meaningful and informed assistance. We will also be pleased to provide any further information that will assist with these very important reforms.

¹ [Response to Independent Review of Criminal Legal Aid - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/criminal-legal-aid-review)

² <https://ccrc.gov.uk/news/ccrc-releases-response-to-independent-criminal-legal-aid-review-improving-the-availability-and-delivery-of-high-quality-legal-advice-is-important-for-potential-applicants/> and [ICLAR-Consultation-Response-Legal-Aid-11-June-2021.pdf](#)

³ [The criminal cases review commission: legal aid and legal representatives. Final report : Sussex Research Online](#). See also: <https://ccrc.gov.uk/news/criminal-cases-review-commission-says-urgent-improvements-needed-in-legal-aid-funding-in-response-to-university-of-sussex-research-report/>; [The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review](#); ['Reasons to Doubt : Wrongful Convictions and the Criminal Cases Review Commission'](#) by Carolyn Hoyle and Mai Sato | [Oxford Law Faculty](#) and [Commission and \(CCRC\) by Jacqueline Hodgson, Juliet Horne :: SSRN](#).

⁴ [response-to-criminal-legal-aid-independent-review-law-society-response-june-2022.pdf](#).

⁵ [Bar-Council-response-to-CLAR-consultation.pdf \(barcouncil.org.uk\)](#)

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

Yes. The CCRC notes the serious concerns expressed by the Law Society and shares these with the Bar Council and others. Assuming that the uplift applies to the rates of pay rather than the proposed overall spending, this level of remuneration is seen by the Law Society 'as the barest minimum increase' and 'an immediate starting point only'. The CCRC agrees that it would be sensible to implement this uplift immediately and to keep fees under review in order to see if this level is sufficient to meet the Government's aspiration of attracting new and suitable providers (as well as retaining existing ones).

The CCRC also notes that the proposed uplift will not address the significant defects identified with the system of payments. Those defects include: the absence of any funding for case assessment by legal representatives, the absence of enhanced rates for complex cases that inevitably require handling by more experienced practitioners, serious concerns regarding the losses sustained by undertaking associated unremunerated work as well as the disruption to cashflow that results from long delays in the payment of disbursements and fees. The CCRC advocates reforms that will address these issues too.

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

Yes. Reform is needed for the reasons previously given to Sir Christopher Bellamy and the academic research that the CCRC referred to in its submissions.⁶

In those submissions, we emphasised the dangers posed by inadequate levels of representation during the course of police investigations and the trial process with the serious risks of miscarriages of justice occurring as a result. We cited poor (or no) representation in police interviews, incomplete requests for disclosure and ill-informed guilty pleas as obvious causes. We noted that these created more issues for resolution in the appellate courts and by the CCRC. We consider that there is a strong case that better investment at first instance would be repaid by a reduction in the higher costs of appellate work. This in turn will increase efficiency, strengthen public confidence in the legal system and most importantly, avoid miscarriages of justice.

We also noted that the current fee structure for assisting with CCRC applications appears linked to a marked decline in the number of practitioners who are able and willing to undertake this work. The CCRC emphasised that it has adapted its processes and remains accessible to all. Moreover, it aims to provide every applicant with the same high quality of case review and will always do so irrespective of whether an applicant is represented or not. However, we note that many more applicants would wish to be legally represented than is currently the case. Likewise, although the CCRC is confident that

⁶ [ICLAR-Consultation-Response-Legal-Aid-11-June-2021.pdf](#)

unrepresented applicants are not disadvantaged in the outcome of a review, there are considerable benefits that legal representatives bring: both in terms of speeding up CCRC reviews and for the criminal justice system overall by ensuring applications are properly directed (*i.e.* the usual appeal routes are used unless exceptional circumstances are identified).⁷ The Consultation has requested views on the 'demarcation' of work between the CCRC and practitioners. We have explained in our response to **Q.94** what we see as those tasks that clearly fall to be undertaken by legal representatives as well as acknowledging the benefits that this work brings and the scope for some limited overlap with the CCRC's inquiries.

Our concerns are shared by practitioners and the academic researchers we have worked with. In particular, we note the statistical data and direct quotations from practitioners provided in the submissions to this consultation by Dr Lucy Welsh (University of Sussex).

We are also concerned that many of those who are convicted may be unaware of their rights to appeal and/or the option of applying to the CCRC due to inadequate advice and a lack of awareness by some representatives (see our answer to **Q.94** regarding the provision of educational modules relating to the CCRC).

There are some associated consequences for some victims. The CCRC does not inform all victims of applications but will do so in appropriate circumstances.⁸ Victims are often concerned to learn of reviews and are apprehensive about the potential need to return to court (although this requirement is extremely rare). The CCRC recognises that these issues will exist irrespective of whether an applicant is legally represented. However, if one corollary of an increase in remuneration is speedier reviews, there will be shorter periods of anxiety for victims and any witnesses.

Finally and as mentioned as a recurring point throughout this and other responses, the CCRC agrees that reforms must go beyond an uplift to a standard rate of pay. Reforms must provide better support for those engaged in all complex and lengthy cases and at all stages in the Criminal Justice System.

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

Not applicable to the CCRC. We have detailed some of the challenges that practitioners and researchers have described to us elsewhere in our responses.

⁷ Criminal Appeal Act 1995, s13(1)(c) and s13(2).

⁸ [CW-POL-09 Victim Notification version 1.0](#)

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

Although this question is not directed at the CCRC, we would like to place on record that the responses from across the professions mirror the issues that practitioners have consistently raised with us.

Over the years in which levels of legal representation in CCRC applications have declined, practitioners have reported experiencing an unacceptable level of bureaucracy and inconsistency in funding decisions. In particular, practitioners have complained that the uncertainty created by the funding process makes it impossible to reliably forecast income from CCRC cases. These financial risks understandably deter firms from taking more CCRC work. Other firms have drastically reduced the amount of CCRC work or have withdrawn from doing so completely.

Notwithstanding unease about the low rate of pay, the CCRC is particularly concerned that remuneration for work done and disbursements, if paid, only comes at the end of a case. The nature of the work involved in investigating miscarriages of justice is usually painstaking, detailed and in the most complex cases, that work may span several years. In this climate, any substantial volume of CCRC work will obviously jeopardise a firm's viability.

For the reasons set out here and in our answer to **Q.91**, we consider that in many cases it would be more ethical and more effective to make prompt, staged payments for work done as well as providing advances to cover costs of client consultation, obtaining transcripts from trial, seeking counsel's advice in appropriate cases and obtaining any expert reports. This will help remedy miscarriages of justice at the earliest opportunity.

The CCRC understands from practitioners in its Stakeholder Forum that representatives do not receive travel costs where it is necessary to visit clients in prison and that there are considerable difficulties in obtaining video conference slots. This causes unnecessary difficulties and delays in obtaining instructions and making submissions on potentially meritorious cases where clients are serving custodial sentences.

Q.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?

CLAIR indicated that the demarcation line between the work of the CCRC and solicitors may require clarification.

Although the CCRC would not accept that a case is more likely to be referred just because an applicant has the benefit of legal representation, we have repeatedly recognised the

value of timely, focussed and candid submissions by practitioners. Such submissions focus on salient issues and ensure that usual appeal rights have been exhausted – or that ‘exceptional circumstances’ are readily identified. Further we recognise that useful inquiries can be made by practitioners and that witness statements and expert reports can help frame submissions. These may remove the need for the CCRC to conduct similar work. Legal representatives can also enhance submissions by making relevant inquiries with previous representatives regarding professional conduct at trial and appeal (in line with *R v McCook* [2014] EWCA Crim 734), explore post-conviction matters (in line with *R (Nunn) v Chief Constable of Suffolk* [2014] UKSC 37) and give advice on waiving legal privilege.

The CCRC therefore agrees with the professions that well-structured applications save the CCRC time and money. Well-formulated applications made by legal representatives undoubtedly speed the review process up and reduce the administrative burden.

The CCRC considers that the following clearly fall within the remit of representatives:

- Consultations with client
- Letters confirming instructions
- Initial advice on merits
- Preliminary inquiries and advice on waiving privilege
- Drafting grounds of an application to the CCRC
- Liaison with the CCRC as the review progresses
- Consideration of any provisional decision made by the CCRC
- Drafting any appropriate further submissions
- Consideration of any challenge to the CCRC’s final decision by way of complaint or judicial review
- Consideration of the basis of any re-application.

The CCRC will always evaluate submissions and update the applicant or representatives. It will undertake investigative work when that is justified and where statutory powers are required to secure access to exhibits. Often, the CCRC will instruct its own experts to comment on any reports submitted by applicants and when necessary, revert to trial experts for comment. It will also usually be necessary to investigate the credibility of new witnesses and to conduct further interviews. It follows that although inquiries by legal representatives can assist the CCRC, that work does not replace the need for the CCRC to independently and critically assess the value of new information.

With that in mind, we will continue to work with the professions to ensure that practitioners understand the principles that underpin strong applications to the CCRC, the way in which the CCRC works, the powers that it has and the statutory provisions that govern references to the appellate courts. Such awareness will enable practitioners to structure applications in the most effective way. We envisage increasing our outreach by offering free, online educational modules that are linked to the CCRC's work. While we would hope to encourage more practitioners to undertake CCRC work, we believe this will only materialise with reforms in the fees and payment structures.

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

The CCRC understands that this question is primarily aimed at the professions. The CCRC provides an Annual Report to Parliament with accounts. The Annual Report covers performance against Key Performance Indicators and contains commentary on business levels, operational issues, cases that are referred to the courts and our involvement in the criminal justice system.

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

We note the concerns of the professions and academics on this issue. It is clear that reform must go beyond an uplift to a standard fee. We refer to our responses to **Q.90**, **Q.91** and **Q.93** as well as the responses from the Law Society, Bar Council, CALA, LCCSA and Dr Lucy Welsh.

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

Again, it is clear that incentivising providers will require reforms that go beyond an uplift to a standard fee. We refer to our responses to **Q.90**, **Q.91** and **Q.93** as well as the comments of those listed in our response to **Q96**.

Q.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?

Much will depend on the nature of other reforms. If other reforms address the issues regarding the type of work that is remunerated and the timing of payments, then possibly yes. This is because of the volume of work that is potentially available and the clear public benefit that it has.

Q.99. Should the Government focus on the early stages of the criminal process and not uplift prison law at this stage? Please explain your reasons.

This question is not applicable to the CCRC's work.

Q.100. What more could be done by the Government to address problems around access to clients in prison?

The CCRC notes the concerns of the profession regarding the absence of any funding for travel to prisons for consultations. This is compounded by the very limited access to video conferencing. Much greater provision and use of video conferencing facilities would seem to be the most cost-effective solution.

END.

Contact:	John Curtis
Role:	Head of Legal
Organisation:	Criminal Cases Review Commission
Email:	AllLegal@ccrc.gov.uk