

Interim Response by the Young Bar Committee of the Criminal Bar Association to the call for evidence from the Independent Review of Criminal Legal Aid Panel

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA Young Bar Committee is a sub-committee of the CBA.
2. The Young Bar Committee (YBC) discusses issues raised by young barristers about the criminal justice system and inform the CBA. A young barristers' practice differs from that of established practitioners, and they face different challenges as a result.
3. The CBA YBC adopt the contents of the interim response submitted on behalf of the CBA. The CBA YBC have serious concerns about the current fee rates and the sustainability of those rates for the young bar. As a result, the CBA YBC urges the IRCLA Panel to recommend a significant increase in the legal aid fee structure if there is going to be any prospect of ensuring the continuation of the independent criminal bar and the retention of talented young advocates.
4. This response has been prepared having spoken to a number of individuals who have recently left the criminal Bar, either to move to another area of practice, or to move in-house or left the Bar altogether. Those responses are submitted to the IRCLA Panel as a confidential annex to this report. Quotations are included in the open response below to illustrate issues discussed.
5. One respondent who is currently considering whether to return to the criminal Bar after a period of time away summarised the feelings of many at the junior criminal Bar:

'If I don't go back, it will be because - in my view - the combination of

- (i) long hours and weekends lost to work,*
- (ii) late and diminishing fees, and*
- (iii) high levels of stress and anxiety, mean that it's simply not conducive to a decent quality of (family) life.*

I also don't want to spend every year of my career campaigning, protesting, and fighting just to get paid for the work I do. It's too demoralising and exhausting."

6. The IRCLA Panel should be aware that there is a swell of anger at the most junior end of the profession. A significant reason for the anger is the feeling that the criminal Bar has, for many years, been taken for granted. There is no sense that the criminal Bar provides a chance for career progression. More and more work is being assigned to counsel to undertake without remuneration for the extra hours. Some individuals have voted with their feet, while others await with some scepticism the outcome of this review. The Young CBA would encourage the IRCLA Panel to speak to young individuals who have left the independent criminal Bar and to those still in practice to further understand the strain that is felt. This has been greatly exacerbated by the pandemic. The Young CBA would be happy to facilitate such discussions. It is felt that this would do much to develop a sense of trust in the process of this review.

Retention

7. Remuneration and retention go hand in hand. If there is to be any meaningful drive towards improving diversity of race, gender and other characteristics at the Bar it will only ever be a superficial exercise if fees do not allow those from diverse backgrounds to earn living at the independent criminal Bar.
8. The publication of the statistics within the Bar Council Data Compendium for leavers from the independent criminal Bar confirm what many at the Bar have known for some time; young practitioners are leaving. The average age of criminal barristers continues to rise. The medium to long term effect of this is that there will be a lack of skilled criminal advocates to prosecute and defend in the most serious cases in the future.
9. It is hoped that IRCLA Panel will be aware of the challenges faced by students in even making it to the independent criminal Bar. Individual students invest significant years of their lives in education as well as a substantial financial burden. Those burdens not only include the costs of education and living during that education, but the pursuit of experience through relevant employment (for example paralegal positions and voluntary positions) to stand out during the pupillage application process. Employment during those years is often poorly remunerated, no doubt due to the extremely tight margins most legally aided criminal solicitor firms must work on. The result is there is a significant financial commitment undertaken by any individual arriving at the criminal Bar.

10. This background must be considered against the income of junior individuals. The Bar Council data compendium outlines the median fee income for practitioners between 0-2 years call is £11,200. The median fee income for practitioners between 3-7 years call is £43,900. The expected fee income for many at the junior criminal Bar is simply unsustainable.
11. It is unarguable that new money is urgently required into the fee scheme. Over a third of leavers from the criminal Bar were below 7 years call in 2019/20 (20% below 2 years call, and 16% below 7 years call). The Panel should consider why so many individuals who have invested significant time and money in the pursuit of a career are so quick to leave. The only conclusion is that it is symptomatic of the serious, pressing, and fundamental issues which face the sustainability and future of the criminal Bar. Fees are one of the most significant of those issues.
12. When one examines the qualitative data, the work required to be undertaken for the fees paid is a significant factor in driving away young, bright advocates. Individuals from diverse and non-traditional backgrounds are the first ones forced to leave. One recent leaver from the independent criminal Bar said:

“I was the first person in my family to go to University. I only practiced in general crime, predominantly defending on legal aid rates. To make a living one has to pile the cases high. That increases stress in an already difficult and demanding job. It leads one to work all hours of the night and every weekend to ensure that they provide the service that every defendant rightly deserves when facing the loss of their liberty. I personally found it near impossible to find any type of work/life balance. Leaving the independent Criminal Bar was the hardest decision that I have ever made. I am not the first and I certainly won’t be the last unless there is an increase in criminal legal aid and an improvement in working conditions.”

13. Young women and men starting families consider the criminal Bar unworkable with family life. One recent young mother who no longer undertakes criminal work said:

“I found the remuneration and working conditions of the publicly funded criminal bar to be incompatible with home and family life. The hours required and the last-minute nature of the criminal bar are completely incompatible with home and family life without sufficient pay to facilitate the other regular responsibilities and commitments which are so regularly disrupted by the nature of the work.

I do not consider that I could sustain my home and family life at the publicly funded criminal bar alone.”

14. The improvement of fees through new money into the scheme will allow individuals to implement a better work-life balance and contribute to greater retention of young practitioners.

Magistrates' Court Fees – London

15. A great deal of the work within the Criminal Justice System in England & Wales, takes place in the Magistrates' Court. Greater London has a significant concentration of these courts. Some of this work is carried out by solicitors directly, however, criminal legal aid solicitors are stretched thin, also dealing with Police Station appearances and conducting litigation for financially vital Crown Court cases. The result is that in London, solicitors regularly have to instruct pupils and junior juniors from the independent bar to represent defendants in first appearances and summary trials in the Magistrates' Court. This in turn means that this work will usually make up the majority of the income of those at the beginning of their careers at the criminal bar in London.
16. For many of those undertaking pupillages in predominantly criminal sets, and in some mixed sets, Legal Aid defence work in the Magistrates' Court is the bread and butter of the early years of practice. It is the arena in which all criminal counsel ultimately cut their teeth and gain the skills which they will eventually use in Crown Court trials and beyond.

The Magistrates' Court Fees Protocol

17. The fees in the Magistrates' Court and the systems in place for the payment for counsel are outdated, and abhorrently under paid. It is not possible to live on the fees paid in the magistrate's court. They are completely dislocated from the amount of work undertaken by counsel. One recent practitioner who has moved their practice away from criminal work said:

“Having done a lot of magistrates' court work, the rates of pay for defence work are unsustainable. I am a recent tenant, and as soon as my guaranteed earnings stopped, I was struggling to pay rent/ bills and had to rely on my partner to pay more.”

18. Those practising in these courts in Greater London are subject to the '2019 Revised Protocol for the Instruction and Payment of Counsel in Magistrates' Court Cases within the Greater London Area'¹ (hereafter 'The Protocol'). This represents the current incarnation of an agreement between the London Criminal

¹ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/2019-Magistrates-Court-Protocol-final.pdf>

Courts Solicitors' Association, the CBA and the Bar Council regarding best practice and minimum fees for work done in the Magistrates' court under the LAA Standard Crime Contract.

19. The minimum fees set out in the Protocol are as follows (exclusive of VAT):

a. **£50** for:

First appearances, remands, bail applications, sending hearings and sentences.

Aborted hearings other than trials, unless counsel is attending court already and does no billable work on the case.

b. **£75** for:

Half-day trials, trials adjourned on the day or discontinued, or where a defendant pleads guilty at trial and counsel's billable attendance time at court is less than 3 hours.

c. **£100** for:

Hearings other than trials where counsel's billable attendance time at court is 3 hours or more.

d. **£150** for:

Full day trials, or where counsel is instructed to attend for trial and counsel's billable attendance time at court is 3 hours or more.

20. The Protocol also makes provision for what is included within the definition of 'billable attendance time':

"Billable attendance time at court includes attendance, advocacy, preparation and the magistrate considering a verdict. It does not include preparation prior to attending court, travel or waiting."

21. It is worth noting that whilst these are indeed only *minimum* fees (and indeed it is open to Chambers and solicitors to agree for the payment of higher fees) the reality is that the overwhelming majority of Chambers and firms in London continue to pay pupils and young juniors at these minimum rates.

22. Unlike payment of counsel's fees in the Crown Court, payment of Magistrates' Court fees are reliant on direct payment out of the LA 'pot' paid to solicitors. This in turn leads to a dramatic variation in the speed at which these fees are ultimately paid out to counsel, with solicitors having to consider the cashflow of their firms.

23. The Protocol makes provision for counsel to be paid within 30 days following receipt of their invoice. The collective experience of many pupils and junior juniors is that Magistrates' court fees are often paid substantially after this, if at all (in the case of some firms). Many junior juniors, having been at the bar for a number of years, still have outstanding fees from early Magistrates' Court work carried out in the very beginning of their pupillage years. This compounds an issue with extremely low flat fees and can lead to very real day-to-day cash flow difficulties for some.

How (if at all) do these fees reflect work?

24. It may be helpful to give some context to the amount of work ultimately reflected in the final fee which will be paid in accordance with the Protocol. For the purposes of this exercise and for simplicity, we will consider a £50 first appearance. For the purposes of this, we will consider a typical third-six pupil² practising in Chambers in London, almost solely reliant upon Magistrates' fees.

Pre-court

25. Due to the nature of the work, pupils and junior juniors can often receive instructions at the last minute, particularly for first appearances. Where the papers/IDPC is provided early, counsel would be expected to spend time considering the papers before arrival at court. Pre-court preparation, legal research and contact with solicitors is not billable under the Protocol and will not be reflected in the flat £50 paid.

26. Every criminal offence starts its life in the Magistrates' court – even those which ultimately end up in the Crown Court. As such, the pupil could be dealing with anything from an allegation of petty shoplifting to a complex drugs case, fraud, violent offence or murder. Some will inevitably require substantially more preparation and research than others and yet the ultimate fee will remain the same.

27. Even with offences which are inevitably beyond the jurisdiction of the Magistrates' Court, the pupil will have to ensure that they are fully and carefully prepared to advise on the basis of whatever evidence has been served, which can vary from a handful of pages to many hundreds and exhibits. The consequences to the defendant may be substantial – the first appearance, other than in

² 18-month pupillages consisting of an additional 6 months' further practising element after the completion of the preceding 12 months' pupillage are increasingly seen as the norm amongst predominantly criminal sets in London. Many third-six pupils are no longer in receipt of guaranteed earnings and will no longer be in receipt of a pupillage award, meaning that the fees earned through their practice often represent their sole income.

exceptional circumstances, marks the first and only occasion in which they will receive full credit for a guilty plea. This change was introduced by the “Reduction in sentence for a guilty plea Sentencing Guidelines” in March 2017 and has placed an enormous amount of pressure on the advocate attending a first appearance.

28. Where remote attendance via CVP is not available or practical, counsel will often have travelled some distance to get to court. Whilst travel fees are covered by the Protocol, delays in payment can mean counsel being substantially out of pocket awaiting remuneration (and at times *paying* to work, when initial outlay on travel is compared against the £50 fee). Counsel often has to spend time on the train working, preparing cases and researching their recently received case on the way to court.

At court

29. A ‘first appearance’ can vary dramatically based on several often unforeseeable factors. Depending on the nature and seriousness of the offence and the instructions of the defendant, it might include a bail application, sending exercise, sentencing exercise or a host of other contested legal applications (or a combination of some of the above). Since the 2017 Guidelines, it also will now inevitably involve advising client on the strength of the evidence so that they can make a fully informed decision about whether to plead guilty and retain full credit or not.
30. The pupil will need to be afforded sufficient time to attend on the defendant and provide sufficient advice. If the instructions have been received at the last minute, this will have to be balanced with the aforementioned preparation and legal research. The defendant may have complex learning needs, significant mental health difficulties or other vulnerabilities. It cannot be stressed enough that first appearances frequently have high stakes. If a defendant enters a guilty plea, they may be sentenced there and then (including to immediate custody). The first appearance can significantly impact the future life of a case – and yet it is reflected in a flat £50 fee.
31. It is the lived experience of those who appear at the Magistrates’ court that there are frequent delays, often caused by court capacity and unforeseen issues. There is inevitably a lot of waiting around, which is not considered ‘billable attendance’ unless it is time spent waiting for a verdict in a trial. As such, a single £50 hearing can end up engaging a full working day’s worth of hours at court alone.

32. It is also worth noting that these fees include cases in which the defendant is a child. It is widely recognised that youth advocacy is a specialist area, requiring significant soft skills and training in certain cases – not to mention the added consequences where a child is deprived of their liberty and remanded or refused bail. This is already reflected in prosecution fees - under the current CPS fee scheme, CPS fees for counsel prosecuting youth cases in the Magistrates' court are higher than those in which the defendant is an adult.

After court

33. The pupil's work toward the £50 fee does not end upon the conclusion of the hearing in court. A full and detailed written note of the day's events will need to be prepared, ready to send to the instructing solicitor on the day of the hearing (or within 24 hours) in accordance with the Protocol. If this cannot be completed on the journey home, the pupil or junior counsel will often end up working late to ensure the full note is compiled and sent that evening before preparation for the next day's case(s) commences.

Further reductions of the fee

34. Whilst the fees set out in the Protocol are exclusive of VAT, the pupil or junior junior will not in fact ultimately receive the £50. Further deductions result in a much lower net figure once the following have been considered:

- a. Income tax;
- b. Chambers contributions (particularly in third six and early tenancy – a percentage cut sometimes up to 20%);
- c. Accountants fees (self-employed barristers are sole traders with significant tax liability);
- d. Payments towards student/BPTC debt and loans
- e. Cost of living – typically higher in and around Greater London than in certain other parts of the country outside of the South-east.

35. It is clear that pupils and young juniors practising in the Magistrates' Courts in London undertake significant quantities of work for low fixed fees which do not adequately reflect the amount (and importance) of the actual work done. It is no surprise that this is causing a significant retention issue at the junior end of the criminal bar with many leaving for better paid positions in-house or in other areas of law.

Magistrates' Court Fees – Outside London

36. Unlike in London and the South-east, legal aid Magistrates' Court work on circuit is primarily conducted by the solicitors in-house and junior counsel is very rarely instructed to attend Magistrates' Court hearings. Generally, throughout the parts of the Western and Northern Circuit, junior counsel who is instructed to appear in the Magistrates' Court for a legally aided case are paid around 40% of the litigators fee. As a result of this, solicitors choose to conduct their own Magistrates' Court work for money saving purposes.
37. The fees that Junior counsel on circuit, can expect to be paid for a Magistrates' Court appearance are as follows:
- a. £75 (+VAT) – First appearance, mention, PTR, short preliminary hearings and sentences
 - b. £125 (+ VAT) – Half day trial and legal arguments
 - c. £175 (+ VAT) – Full day trial
38. Whilst the fees for the attendance of Junior counsel in the Magistrates' Court on circuit are higher than those in London the rates reflect the increase in travel costs accrued across circuit courts, which cannot be claimed from the LAA. Despite the higher fees, junior counsel are very rarely seen in the Magistrates' Courts throughout the non-London circuits because the solicitors keep the work in-house to save costs; this then impacts the ability of the Junior bar to learn and cut their teeth in the Magistrates' Court.

Youth Court Fees

39. The Youth Court is a highly specialised Court often dealing with extremely vulnerable youths. As a result, specialist knowledge and skills are required of those who practise within the Youth Courts throughout England & Wales. Many pupils and junior counsel will find themselves in the Youth Court frequently, exercising their specialist skills and training to ensure that the vulnerable youths are dealt with appropriately and in a way in which they understand. Astonishingly, there is **no distinction** between Magistrates' Court fees and Youth Court fees (save for certificate for counsel cases) when it comes to pupil barristers and Junior counsel attendance and as a result, the fees are wholly disproportionate to the level of work required and the nature of the work.

40. At a bare minimum a certificate for counsel in the Youth Court should be automatically granted for any indictable offence. Consideration should be had to a significant improvement in fees for summary only matters in the Youth Court. Dealing with youths, and youth witnesses, is a highly skilled and vitally important part of our Criminal Justice System. The impact of a conviction on a young person is arguably greater than that on an adult. The remuneration does not reflect the skill and specialism required for undertaking this important work.
41. The Young CBA assert that the Youth Court fees are wholly unsatisfactory and require urgent reform.

AGFS

42. The CBA YBC adopts the findings and recommendations made by the CBA Remuneration Committee in their interim response document.
43. For many junior practitioners the types of cases they are instructed in are placed into “warned lists.” This causes a number of issues. There is no guarantee that instructed counsel will be available to do the trial, however it is still expected that the case is fully prepared for trial. That includes the drafting of defence statements, the response to legal applications such as bad character or hearsay and liaising over jury bundles and other pre-trial issues. All this work is done unpaid. The scheme only recognises hearings as work where payment is due. The payment trigger in the scheme requires a trial or plea. Court listings do not, in the author’s experience, pay much if, any heed, to the availability of trial counsel when listing cases. This has deteriorated further following the pandemic. The effect is, criminal Barristers work for free preparing cases they do not end up doing. One recent leaver from the criminal Bar said:

“Since joining the [independent] bar I have been instructed in approximately 100 crown court criminal trials (the majority as prosecution counsel). Not one case has gone to trial on a date where I can attend. As a junior junior it is impossible to develop confidence in advocacy by preparing cases for trial that you will never present, I now haven't undertaken a jury trial since 2017 – and as a result I have no intention of ever doing one again. I have built up a separate stream of work which does not work with warned lists and I no longer wish to be instructed in trials, prepare cases, draft advice etc. where I will never present the end case or be paid properly for doing so. It is financial suicide and a total waste of my professional time.”

44. The Young CBA have experience of the LAA “knocking back” legitimate claims for fees earned. This requires counsel to appeal, often on points which are clearly set out in the regulations. Claims have been knocked back on claims for payment of pleas to an indictable only charge as an “elected case” (which is not possible) and issues taken over the categorisation of cases when evidence has been submitted which clearly places a case in a certain category. The effect of this is to delay the payment of counsel and creates further work in order for counsel to be properly paid. If this is not in the scope of the review the Young CBA would welcome the IRCLA Panel to consider ensuring any changes to the fee scheme are better administrated by the LAA.

45. Cash flow is a difficult issue for all members at the criminal Bar. It is worse for the most junior who have not been able to build up any “fund” to cover delays in payments. One response set out that delays in payments caused significant financial issues, where they were unable to rely on family to assist. This is a damning indictment on the current system, and actively destroys the ability for diversity at the Bar. The response stated:

“...the pay structure was problematic for me. For example, being in a long trial and having to wait to the end of the trial for be paid (sometimes with significant delays). I was not in a position to have any financial assistance from family. When there were delays in being paid, I sometimes found myself in a position where I had reached my overdraft limit (for which I was charged by my bank) and could not even afford to board a bus. I would regularly have to dip into my tax account to cover my basic costs of rent and groceries.”

Proposals

46. The CBA YBC adopt the proposals set out in the CBA interim response, and make the following proposals:

- a. The Magistrates’ Court fees are far too low and the billing structure for these fees does not make an allowance for the instruction of counsel. As a result, the solicitors are burdened with paying counsel out of the litigators fee which is too low.
- b. The Magistrates’ Court fees should be billable directly by the clerks, as per the AGFS fees, to ensure that pupils and junior counsel do not have to rely on solicitors paying their fees. This will avoid non-payment of fees and ensure timely payments for work completed.

- c. The Youth Court fees are too low and should not mirror the Magistrates' Court Fees. These cases often involve specialist skills and knowledge in cases with vulnerable defendants and the fees should reflect the seriousness and sensitivity of the work conducted, separately for Counsel and the solicitor.

- d. Direct engagement with junior members of the profession on the issue of fees. The Young CBA is happy to assist in facilitating this.

The Young Criminal Bar Association Committee

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