



Bar Council Interim Response to the Criminal Legal Aid Review Call for Evidence April 2021

1. This is the interim response of the General Council of the Bar of England and Wales (the Bar Council) to the Call for Evidence¹ of the Independent Review of Criminal Legal Aid.
2. The Bar Council represents approximately 17,000 barristers in England and Wales, of which there are approximately 4,000 barristers who practice in crime. These practitioners provide a strong and independent criminal Bar, serving the public which is crucial to both the administration of justice and upholding the rule of law.

Introduction

3. The Government announced a Criminal Legal Aid Review (CLAR) in December 2018. Interim changes were brought into effect in August 2020 (see Annex 1 for the history). Alongside this it was announced that the next stage would be independently led:

“An independently led review will bring in outside expertise and fresh perspectives in order to deliver meaningful change. This will enable CLAR to widen its focus, ensuring the sustainability of the Criminal Legal Aid System as a whole – the original aim of the CLAR.”²

4. In February 2021, the Ministry of Justice (“MoJ”) team published a data compendium³ that had been prepared with the assistance and co-operation of the Bar Council, Law Society, Legal Aid Agency and Crown Prosecution Service.

¹ <https://www.gov.uk/government/consultations/independent-review-of-criminal-legal-aid-call-for-evidence>

² <https://www.gov.uk/guidance/criminal-legal-aid-review>

³ <https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

5. The Bar Council’s preliminary views and assessment of the data contained in the compendium are set out in the dataset analysis below. We formally submit these to the Review now so that members of the profession can understand our provisional view as to what the data shows and the extent of the problem the country faces. All views and conclusions presented in this paper, including those related to the assessment of the data set out in the data compendium, are the Bar Council’s views. They do not represent the views of the Ministry of Justice or the Crown Prosecution Service.

6. In the summer of 2019, the Government said:

“The work of the entire criminal legal profession, whether prosecuting for the Crown or defending those who are innocent until proven guilty, is fundamental to upholding criminal justice, and the rule of law.”⁴

7. The data reveals that years of underfunding have left the professions in a stark and weakened position. Urgent action is required to remedy the position which has been compounded by the Covid-19 pandemic. Without such urgent action the best efforts of everyone in the justice system to uphold criminal justice and the rule of law, to cut the backlog and to improve access to justice will be in peril.

8. The Bar Council sees no practicable option but to work within the current fee schemes. Any wider reform would take years that we simply do not have. All our interim conclusions set out in this document are based on that premise.

9. Some of our recommendations necessarily trespass on areas that are within the expertise of the Law Society and other professional bodies. We only do so because we consider that proper remuneration of those who work at the police stations and in the lower courts is a vital first step in the overall reform and implementation of a sustainable legal aid system.

10. On the basis that at every stage of the litigation process the professional engaged should be appropriately remunerated. We consider that the following objectives should underpin the work of the Review:

1. The provision of skilled and quality representation in police stations to ensure that cases are properly managed, and wherever possible resolved, at the earliest opportunity. This must involve restoring appropriate fees for police station attendance and pre charge advice.

⁴ <https://www.gov.uk/guidance/criminal-legal-aid-review>

2. A cadre of skilled lawyers dealing with work in the lower courts (which deal with more than 90% of the criminal cases conducted in this country). The more skilled the advocate the better the advice and the more efficient the conduct of the proceedings. This could be achieved by, for example, implementing proper fixed trial fees in the magistrates' court weighted to reward the efficient conduct of the proceedings.
3. A cadre of skilled and appropriately trained lawyers dealing with work in the youth courts, which in recent years have increasingly dealt with extremely serious criminal allegations.
4. A system that encourages (and does not disincentivise) resolution in the lower court where possible. In particular there should be no financial advantage or disadvantage to a decision to plead a case at the plea before venue (PBV) stage and Committal for Sentence (C4S) as against a case that is committed for trial and pleads at the first opportunity.
5. An improved "Better Case Management" regime in the Crown Court that truly ensures that guilty pleas are entered as soon as possible and reduces the number of cracked trials. Such a scheme may involve giving the judiciary more flexibility when it comes to assessing appropriate credit for plea.
6. A system of remuneration in the Crown Court that rewards litigators and advocates for actually performing their core functions at the appropriate stage in the proceedings. This would both improve case preparation and management and avoid any duplication.

11. The Bar Council will engage with the Review, the MoJ and all representative bodies, in order to work up detailed schemes and then implement such proposals as find favour with Government.

Dataset analysis

12. This is a summary of the Bar Council's analysis of a dataset⁵ collated under data sharing agreements between the Bar Council, the Ministry of Justice and Crown Prosecution Service, in preparation for the Criminal Legal Aid Review. A summary of the full dataset has been published by the Ministry of Justice in a Data Compendium.⁶

⁵ An overview of the dataset is at Annexe 2. It includes our assumptions as to the level of expenses which, on average, need to be deducted to arrive at a barrister's *profit*.

⁶ Ministry of Justice (February 2021) "*Summary Information on Publicly Funded Criminal Legal Services*"

13. Our analysis of the data leads to the following headline conclusions:

1. **Retention of experienced barristers is a significant problem.**
2. **The full practice criminal Bar has an aging population that is not being replaced.**
3. **Remuneration for junior barristers is insufficient and unsustainable, and fees and profit flatline the more experienced a junior barrister becomes.**
4. **Barristers' fees and profits have failed to keep pace with inflation – in real terms barristers' profits are lower now than in 2015/16.**
5. **Profit and fees between groups of barristers is not equitable, and women from ethnic minority backgrounds earn the least of all.**

14. Further on in this document we set out the data that underpins these conclusions under each of the headlines above. The data reveals a criminal Bar that is barely sustainable after a decade in which funding for the criminal justice system in England and Wales has been cut by 29% per person in real terms, and legal aid spending has been cut by 37% per person in real terms.⁷

15. Junior practitioners are not able to earn enough to meet essential living costs. While fee income does go up for those with slightly more experience, it then begins to tail off at around 8 years, often when barristers are in their early 30s, and flatlines from 12 years onwards. The Advocates' Graduated Fee Scheme (AGFS) operates on the principle of same work, same level of fees from mid senior to very senior juniors, where we have increasingly complex cases that do not result in a proportionate increase in the fees paid. As a result, there is a glass ceiling on earnings. This lack of career/earnings progression has a clear impact on retention.

16. We are seeing an exodus from the middle of the profession, as practitioners take their valuable experience elsewhere. Data on fee income by protected characteristic has led to a concern that there may be systemic problems with briefing practices. This all has a worrying impact on equality, diversity and mobility within

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf

⁷ Chalkley, M and Chalkley, A (2020) "Small Change for Justice: Funding for Justice in England and Wales, 2010-2019" <https://www.barcouncil.org.uk/resource/small-change-for-justice-report-2020-pdf.html>

the profession. Historically recruitment to the criminal Bar has been healthy, but this appears to be changing. Chambers report decreasing numbers of prospective pupils applying for smaller numbers of pupillages on offer.⁸

17. Much of the information presented in this document relates to the sustainability of the publicly funded criminal Bar. The Lord Chancellor in announcing the CLAR described its aims as, “ensuring the criminal legal aid market remains effective and sustainable, while reflecting the diverse society it serves”, which includes making sure it can provide high quality legal advice and representation, through a diverse set of practitioners, is appropriately funded, and contributes to the efficiency and effectiveness of the criminal justice system.⁹ In keeping with the stated aims of CLAR, sustainability at the criminal Bar as we see it encompasses the following parameters:

- a. A cohort of barristers that is numerically enough to meet legal need and ensure good working lives for members of the profession. The entry level and ability to secure pupillage should be appropriate to attract the best candidates while replacing those who retire or leave the profession. This includes those who leave practice to a full time judicial appointment, where there must be a sufficient supply of practitioners to maintain wide judicial experience and expertise in the criminal law.
- b. Entry to the Bar should be available to all suitable candidates, regardless of background. We would like to see a Bar that is reflective of society and treats all practitioners and aspiring practitioners equitably. We therefore closely monitor experiences within the profession according to social mobility, ethnicity, gender and other measurable self-identified protected characteristics.
- c. Barristers specialise in one or more areas of practice, and it takes some time to become expert in a legal field. The types and volumes of work that are available in an area of practice can change over time, attracting practitioners accordingly. Pay and conditions can differ greatly between areas of practice meaning that certain areas can struggle to attract enough barristers to fulfil the legal need and in others there is not enough work for all who are specialists.

⁸ The pandemic is likely to accelerate many of these trends and problems at the criminal Bar; we summarise its impact at Annex 3.

⁹ The Lord Chancellor Robert Buckland QC MP. Quoted by Michael Cross, “Competition expert to chair criminal legal aid review” *Law Gazette*, 21 December 2020.

<https://www.lawgazette.co.uk/news/competition-expert-to-chair-criminal-legal-aid-review/5106843.article>

- d. Fee schemes and availability of publicly funded work being of adequate quality to attract the right number of barristers to address the legal need and allowing publicly funded barristers who, although self-employed, function as quasi-public servants, to work in tolerable conditions.
- e. The geographical supply of suitably qualified practitioners matching the distribution of legal need with the understanding that a disparity between geographical supply and demand can result in regional “cold-spots” or “legal aid deserts”, particularly in publicly funded work.
- f. Many self-employed barristers work within chambers, which source and manage their work. The chambers structure needs to be sound for barristers to work effectively and for there to be a supply of high-quality pupillages to ensure the recruitment and training of the next generation of criminal practitioners.

Findings from the Bar Council’s analysis of the CLAR dataset

18. Our five main findings are:

1. Retention of experienced barristers is a significant problem.

The data confirms that retention is a serious problem.

- The number of barristers practicing any amount of crime in 2019/20 was 3,680 (22% of practising barristers in England and Wales). Of those, 2,273 (62%) were full practice criminal barristers.¹⁰
- Although in decline for the past two years, the overall number of New Practitioners (barristers 0-2 years in practice) has grown by 12% since 2015.
- From 2016/17 to 2019/20 the pool of full practice criminal barristers shrank by 11%, from 2,553 to 2,273.
- The number of full practice criminal QCs has gradually reduced by 22% since 2015.¹¹
- In 2019/20, 27% of barristers who had been engaged in full practice criminal work in 2018/19 were no longer full practice criminal barristers. It is currently

¹⁰ This group is comprised of individuals for whom the great majority of their fees are derived from publicly funded defence or prosecution work.

¹¹ From 266 full practice criminal QCs in 2015/16 to 207 in 2019/20.

unknown how many of those leavers went into part time criminal practice; another specialisation; or left practice.

- The number of New Practitioners (barristers 0-2 years in practice) who have come into full criminal practice has decreased each year for the past 3 years. In this same period, the number of New Practitioners who have left full criminal practice has increased by 86%.¹²

2. The full practice criminal Bar has an aging population that is not being replaced.

- 45% of full practice criminal barristers are aged 45 or over.¹³
- As of 2019/20:
 - The Young Bar (0-7 years of practice) makes up 27% of the pool.
 - Barristers in their middle practice years (8-22) make up 35% of the pool.
 - Barristers in their later practice years (23+) make up 38% of the pool.
- From 2015/16-2019/20
 - The overall number of Young Bar barristers has grown by 17%
 - The number in their middle years has shrunk by 33%.
 - The number in later years has grown by 12%.
- Breaking down the figures for those in their middle years of practice at the Bar, from 2015/16 – 2019/20:
 - Full practice criminal barristers at 8-12 years of practice have seen the largest proportional drop off in numbers at 50%.
 - The number of barristers at 13-17 years of practice reduced by 26%.
 - The number of barristers at 18-22 years of practice reduced by 28%.

The data suggests an exodus from the middle of the profession, with barristers after 8 years of practice moving away from dedicated criminal practice, to either diversify into other areas of law or leave the profession entirely. This data raises

¹² From 2016/16 to 2019/20, the number of New Practitioner Joiners to full criminal practice was: 177, 182, 162, 153. From 2016/17, the number of New Practitioner Leavers from full criminal practice was 69, 59, 97, 110.

¹³ The percentage is probably greater than this because there are 14% of this group of barristers for whom detailed age information is not known and these are more likely to be older individuals whose registration pre-dates the requirement to record their date of birth. Amongst barristers who self-declare that they do more than 80% criminal work, the figure is 49% aged over 45.

concerns about the pool of specialist criminal barristers who will be available in the future to meet legal need, provide a pool of high calibre candidates for future judicial appointment, replace outgoing barristers who retire, and who will be available to train and mentor newly practising barristers.

3. Remuneration for junior barristers is insufficient and unsustainable, and profit flatlines the more experienced a junior barrister becomes.

- In their first three years of practice, full time criminal barristers earned a median pre-tax profit of £12,200¹⁴ in 2019/20; and an average (mean) of £18,400.¹⁵
- We are aware of junior criminal barristers taking on second jobs despite working full time and/or incurring large debts to support themselves at the Bar.
- Given that those starting out at the criminal Bar had, in 2019/20, average (median) debts in the range of £20-£29,000, an amount which has been growing year-on-year,¹⁶ this is and will continue to have an impact on the recruitment and retention of those without independent financial means.
- This will disproportionately impact on diversity and social mobility and affect the efforts that have been made to ensure the Bar is more diverse and reflective of the society it serves.

¹⁴ Annual fees and profits are reported to the nearest £100 in line with Ministry of Justice reporting standards.

¹⁵ Profit as reported here was calculated by deducting the average (mean) expenses as a percentage of total fees (28.7%) which was derived from anonymised accounting data from 53 barristers (the sample was later updated to 200, and larger sample confirmed the mean expenses). Essential costs of practise comprising chambers fees, professional indemnity insurance, subscriptions (including practising certificate), work travel, other expenses and capital allowances were included in the model, but not pension contributions, debt repayments or other voluntary deductions and no allowance was made for the absence of sick pay or annual leave, which means that these figures are not the equivalent of a salary. The figures presented are gross, so self-employed income tax and National Insurance would need to be deducted from the amounts presented to arrive at net (“take-home”) income.

¹⁵ This is derived from the Bar Council’s Pupillage Gateway data for the year 2019/20. It relates to median self-reported anticipated level of debt on completion of pupillage of the 840 applicants who applied to criminal sets for their pupillage.

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The general trend for the average profits of junior barristers is that whilst there is initially a significant uplift for barristers who remain in dedicated criminal practice past 7 years, thereafter the uplift in average profits decreases as a barrister's experience increases. This means that the financial aspect of career development flatlines - there is no significant profit development after around 13 years of practice unless a barrister becomes a QC.

- In 2019/20, junior full practice criminal barristers at 3-7 years of practice earned on average 183% more than New Practitioner barristers. Junior full practice criminal barristers at 8-12 years of practice earned an average profit that was 27% greater than the average profit of barristers at 3-7 years of practice. Barristers at 18-22 years of practice earned an average profit that was 10% greater than barristers at 8-12 years of practice.
- In 2019/20, the average profit of junior full practice criminal barristers at 18-22 years of practice was only £500 greater than the average profit of barristers at 13-17 years of practice.

4. Barristers' profits have failed to keep pace with inflation – in real terms barristers' profits are lower now than in 2015/16.

- Inflation as measured by the Consumer Price Index has eroded the value of incomes by 8.4% over the last 5 years.
- Over that period the average pre-tax profit of junior full practice criminal barristers increased by 2.8% from £56,700 to £58,300. This constitutes a decline¹⁷ in real terms of 5.1%.
- The real terms decrease in profits has been greater for less-experienced barristers. For example, those with less than 13 years of practising experience have seen their pre-tax profits fall from £42,200 in 2015/16 to £41,700 in 2019/20. This constitutes a decline in real terms of 8.8%.

5. Profit between groups of barristers is not equitable, and Black women earn the least of all.¹⁸

¹⁷ The calculation of 'real terms' percentage decrease is as follows: a profit of £58,300 in 2019/20 equates to a profit of £58,300/108.4 (£53,800) in 2015/16, so in 2015/16 terms profit has fallen from £56,700 to £53,800 up to 2019/20 – a 5.1% reduction.

¹⁸ This holds true even once differing volumes of work are considered. The figures in Figure 1 do not account for different volumes between different groups of barristers and therefore reflect the fact that some groups undertake fewer cases, but we have no way of ascertaining whether this is due to the barrister's choice or a constraint they face (they are available and

- Women barristers in 2019/20 worked on an average of 63 cases per year for an average pre-tax profit of £47,500 (or £754 per case); men an average of 72 cases per year for an average pre-tax profit of £65,000 (or £903 per case).¹⁹
- Becoming a QC implies a considerable uplift to profits, but the fee income differential between men and women persists. The pure effect of a male barrister becoming a QC is a £57,400 increase to profits relative to a White male non-QC whilst the effect of a woman becoming a QC is smaller - a £32,900 increase to profits relative to a White male non-QC.²⁰
- Sex disparity in earnings is sustained within each ethnic grouping; Asian²¹ women earning on average 53% of what Asian men earn; Black²² women earning on average 79% of what Black men earn; White²³ women earning on average 71% of what White men earn, women of Mixed/Multiple Ethnicity²⁴ earning on average 70% of what men of Mixed/Multiple Ethnicity earn, and women from Other Ethnicities²⁵ earning on average 42% of what Other Ethnicities men earn.²⁶

willing to take on work but are not being instructed). Further analysis was undertaken accounting for different volumes and whilst the exact figures change to a small degree (for example the 'volume adjusted' difference between White men and women is £11,400 rather than £12,800) the pattern of differences between barristers persists.

¹⁹ This is for self-declared full practice criminal barristers.

²⁰ At the present time, there is not enough data regarding the interaction of ethnicity and seniority to make any statistically significant conclusions about the profits of QCs from ethnic minority communities or backgrounds.

²¹ The 'Asian' category has been created by combining the data relating to those barristers who identified as Asian/Asian British Bangladeshi, Asian/Asian British Chinese, Asian/Asian British Indian, Asian/Asian British Pakistani and any other Asian background.

²² The 'Black' category has been created by combining the data relating to those barristers who identified as Black/Black British African, Black/Black British Caribbean and any other Black background.

²³ The 'White' category has been created by combining the data relating to those barristers who identified as White English/Welsh/Scottish/British, White Irish and Any other White background.

²⁴ The 'Mixed/Multiple Ethnicity' category has been created by combining the data relating to those barristers who identified as White and Asian, White and Black African, White and Black Caribbean, White and Chinese, and any other Mixed/Multiple background.

²⁵ The 'Other Ethnicities' category was created by combining the data relating to those barristers who identified as Arab and any other ethnic group.

²⁶ Asian men earn an average profit of £71,500 to women's £38,000; Black men £58,800 to women's £46,500; White men £72,500 to women's £51,300; Mixed/Multiple ethnicities men £59,800 to women's £41,800; Other Ethnicities men £66,700 to women's £27,700.

The figures above partly reflect the fact that different sexes and ethnicities of barristers tend to have different levels of experience, and possibly different working patterns.²⁷ Furthermore, sex is differentially represented within ethnic groups. Additional analysis was undertaken to separate out these effects and thereby to isolate the pure effect of sex and race on a barrister's profits other things being equal.²⁸

- The starting point used was a junior White male barrister at 13-17 years of practice. By changing the sex to female, we observe a lowering of pre-tax profit of £12,600. This is the pure effect that being a White woman has on a barrister's profit, keeping all other factors constant.
- This reduction in pre-tax profit according to sex cannot be accounted for by differing work volumes. The 'volume adjusted' difference in pre-tax profit between White men and White women is £11,400 rather than £12,600, so volume adjustment accounts for only 10.5% of the total difference in pre-tax profit.
- Making the comparison by ethnicity instead of sex, we observe a £15,300 lower pre-tax profit for Black men relative to White men, and a £9,000 lower pre-tax profit for men of Mixed/Multiple Ethnicity. There is no differential for Asian men relative to White men, whilst men from other ethnicities have £5,100 lower pre-tax profit than their White counterparts²⁹. By altering both race and sex, we observe a lower pre-tax profit of £18,700 for a Black woman relative to a White man, and a lower pre-tax profit of £15,200 for a woman of Mixed/Multiple Ethnicity. Asian women (in contrast to Asian men) have lower pre-tax profit relative to their White counterparts so that they have £16,400 lower pre-tax profit compared to a White man.³⁰

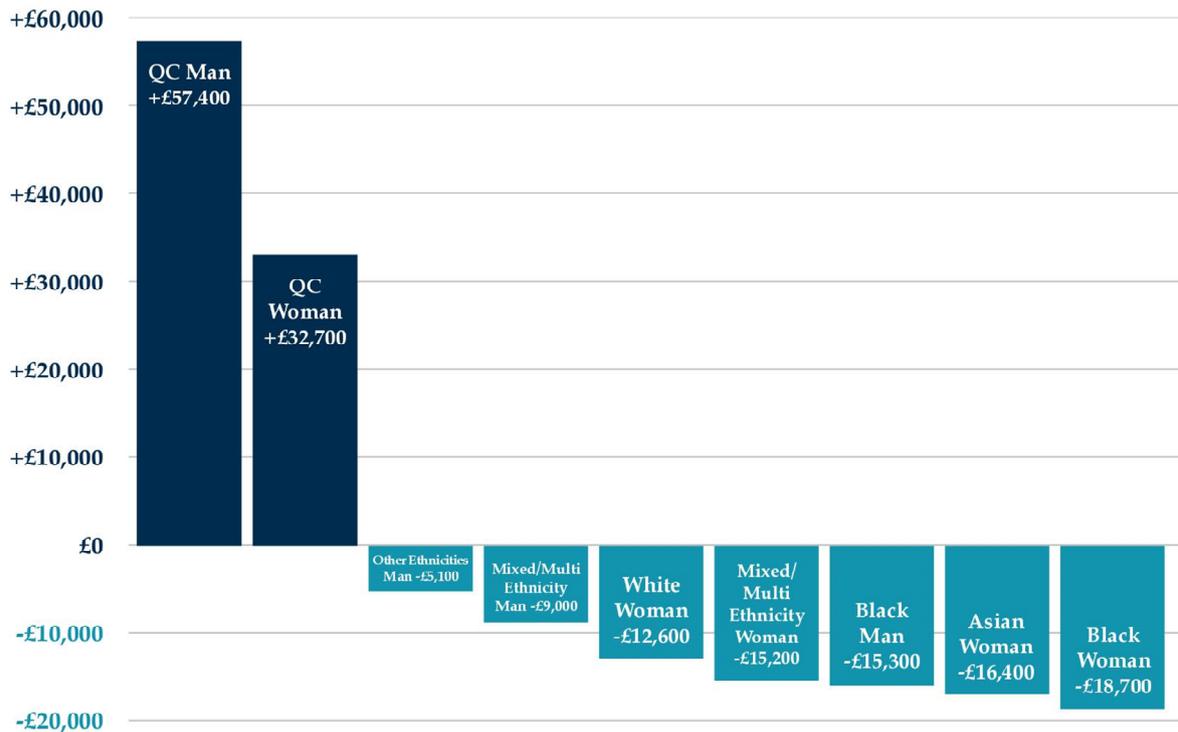
²⁷ The Bar has had an approximately 50:50 sex representation since 2000. Representation of barristers from ethnic minority groups and communities has slowly climbed to the current level of 13.6% (compared to a population level of 14% according to the 2011 census). This means barristers from those groups tend to be more represented at the more junior levels.

²⁸ This was achieved by conducting multiple regression analysis of profits against sex, ethnicity, practise experience, age, region and seniority (QC status). The regression model was estimated as a Generalised Linear Model (GLM) with random effects at the barrister level. This approach ensures as far as possible (within the limitations of the data) that the estimates of the different factors on profit are unbiased.

²⁹ This last figure is imprecise – not *statistically* significantly different from zero – on account of the relatively few Other Ethnicities of barristers in the data.

³⁰ Again, this figure is imprecise due to limited data.

How sex, race and seniority affect pre-tax profit at the self-employed criminal Bar



A multiple regression analysis of pre-tax profits against sex, ethnicity, practise experience, age, region and seniority (QC status). The figures cover self-employed full practice criminal barristers in 2019/20.

- Criminal barristers all work under the same fee schemes, so these stark variations in fee income and profit support an observation that there are systemic issues with equitable briefing practices and access to work in the legal sector. Possible factors include client briefing practices and panel selection, the distribution of work within sets, and distribution of better-remunerated work.
- The Bar Council is aware of some of the systemic barriers around access to work, retention and career progression and is committed to sustained long term activity in this area – the ‘Accelerator Programme’ (see Annex 4).

Concluding Observations

19. Urgent attention needs to be paid to ensuring the Criminal Bar remains sustainable. This is currently in doubt:

- a) Numbers of full practice criminal barristers have significantly decreased in recent years. The profession is aging, and retention for mid-career barristers is a concern.
- b) They are working long, stressful and uncertain hours – typically over 50 hours a week according to our survey data. Criminal barristers have among the

highest stress levels and lowest wellbeing levels at the Bar. In 2017, 33% of criminal barristers told us they would leave the Bar if they could.³¹

- c) Women barristers and some from ethnic minority backgrounds are not getting equal access to the best-paid work under public fee schemes. Even once differing volumes of work are considered, women at the criminal Bar are billing lower gross fee income than men. Over and above this inequality according to sex, barristers from some ethnic minority backgrounds are also systemically billing lower gross fee income than white barristers. This inequality is damaging to individual barristers, to the profession and to society.
- d) We are concerned that, over time, as public understanding of the challenges involved in making a legal aid practice work deepens³², the publicly funded Bar will seem a less desirable place to work. Our recent research on civil legal aid tells us that this is already starting to happen.³³
- e) Given self-employed barristers do not always work in the region in which they live or their chambers are based, we have not identified any significant problems with supply on a geographical basis.
- f) There is a threat to the chambers structure and with it the recruitment and training that ensures a supply of high-quality entrants to the profession.

20. The problems we have identified come at a moment of increasing pressure on the criminal justice system. Crest Advisory anticipate, as a result of the end of CPS restrictions on charging, the additional 20,000 police officers and a rise in recorded crime, “The volume of charged cases [entering the criminal justice system] is projected to increase by 72% between September 2019 and September 2024”.³⁴ We have yet to see any government modelling that projects demand in the criminal justice system (factoring in the court backlog) over coming months and years. It is, in this context, challenging to predict how we can ensure the adequate supply of legal professionals to meet legal need. The system is already at breaking point following a decade of

³¹ See, for example, Bar Council (2017) “Barristers’ Working Lives 2017”

<https://www.barcouncil.org.uk/uploads/assets/694001c1-7e81-4f21-8709602e7d9238ee/working-lives-2017.pdf>

³² BBC (7 January 2021) “Criminal barrister: I earn less than minimum wage”

<https://www.bbc.co.uk/news/av/uk-55548821>

³³ Bar Council (January 2021) “Running on Empty: Civil Legal Aid Research Report”

<https://www.barcouncil.org.uk/resource/running-on-empty-civil-legal-aid-full-report.html>

³⁴ Crest Advisory (30 October 2019) “Impact and legacy of Covid-19 on the CJS”

https://b9cf6cd4-6aad-4419-a368-724e7d1352b9.usrfiles.com/ugd/b9cf6c_e16b3e351b12430bb79cd6a2830f88f3.pdf

systemic underfunding including dramatic cuts to legal aid, a backlog in the courts that may take years to clear, an exodus of criminal legal aid practitioners, and an absence of dedicated financial support during the Covid-19 pandemic. It is unclear whether, without government intervention, we would be able as a profession to service a dramatic and sudden rise in criminal cases coming into the courts.

Annex 1: Background to criminal fee schemes

Barristers undertaking criminal defence work are paid under different fee schemes. In legal aid defence work, barristers who undertake cases in the magistrates' court are paid by the solicitor who in turn is paid by the Legal Aid Agency as part of the solicitor's contract with the LAA. In the Crown Court, the barrister is paid direct by the LAA under the Advocates' Graduated Fee Scheme (AGFS). For prosecution work the barrister is paid by the CPS under the CPS Graduated Fee Scheme.

A brief history of these fee schemes:

Magistrates Court – defence fees

In the magistrates court, solicitor's legal aid fees have not been increased since the 1990s and so are substantially lower in real terms. Consequently, there is little money out of which the solicitor can pay the barrister for their advocacy in the magistrates' court. For example, in 2008 the Bar Council had a Protocol with the London Criminal Courts Solicitors Association (LCCSA) where the recommended minimum rate for a barrister to do a full day trial in the magistrates' court was £150. In 2019 the Protocol was updated,³⁵ but the rate was kept at £150, given that the solicitor's fees for the case had received no increase over that eleven years either. Almost all cases conducted in the magistrates' court represent a "loss leader" for barristers and solicitors alike. This has damaging consequences for the quality of justice on offer in the magistrates' court and wider undesirable consequences for the whole criminal justice system.

Crown Court – defence fees

In 2010, AGFS fees were cut by 4.5% followed by a further 4.5% cut in 2011 and a further 4.5% cut in 2012.³⁶ In October 2011 more fee cuts were introduced³⁷ for murder cases, fraud cases, cracked trials and sentencing hearings.

In April 2018 the Ministry of Justice re-structured the AGFS.³⁸ The changes reduced reliance on page count as a determining factor in the calculation of the fee, and instead sought to achieve graduation by increasing the number of categories of case. Bar representatives had been involved in the design of the new scheme structure. However, when the new scheme was introduced no additional funding was provided. Consequently, those cases that had a fee increase were at the expense of other cases

³⁵ Bar Council (May 2019) "Protocol for the Instruction of Counsel in the Magistrates' Court" <https://www.barcouncilethics.co.uk/documents/protocol-instruction-counsel/>

³⁶ *The Criminal Defence Service (Funding) (Amendment No.2) Order 2010*. S.I.1181.

³⁷ *Criminal Defence Service (Funding) (Amendment) Order 2011*.

³⁸ S.I., 2018, No. 220

that had a fee cut. The Criminal Bar Association (CBA) undertook a ballot of its members and a majority responded that they would not undertake work under the new Scheme. Following discussions, the MoJ undertook to consult on a proposal to:

- make a targeted injection of £15m. (The figure was based on the 2016-17 Legal Aid spend and case mix. When the 2017/18 data subsequently became available, the increase was only £8.6m.);
- a 1% increase of all AGFS fees in April 2019;
- a review of the Scheme to take place within 18 months.

Following this commitment by the MoJ, there was a CBA vote in June 2018 to suspend action. In August 2018, the MoJ issued its consultation document on the proposed amendments. They published, “Amending the Advocates’ Graduated Fee Scheme: Government Response” in December 2018.³⁹ That response stated:

“we are allocating a further £8m of spending to the AGFS, bringing the overall level of additional spending on the scheme to around £23m against 2016-17 AGFS spend.”

“8. In the August consultation, we set out our intent to start a review of the AGFS 18-24 months after the cessation of action by the Criminal Bar in June 2018. In a change to these plans, the Government now intends to begin a broader review of criminal legal aid fee schemes beginning in January 2019. This is in response to consultees’ outstanding concerns, the Justice Select Committee’s recent reports on criminal legal aid and disclosure in criminal cases, the Attorney General’s review of disclosure, and broader changes across the justice system including the modernisation work being undertaken by the Home Office, police, Crown Prosecution Service (CPS) and Her Majesty’s Courts and Tribunals Service (HMCTS). The Government believes the time is right for a more holistic review of criminal legal aid fee schemes.”

“53. The review will consider criminal legal aid throughout the life cycle of a criminal case. This will include pre-charge advice at the police station, advice and advocacy services in the Magistrates’ Court, and litigation and advocacy services in the Crown Court through the AGFS, the Litigators’ Graduated Fee Scheme (LGFS) and Very High Cost Case (VHCC) scheme. We intend to begin this review in January 2019, and will begin engaging the professions on next steps shortly. The first phase of the review will be a design phase to determine its scope and remit. As part of this design phase, we will carefully consider the wider concerns about the AGFS raised by respondents.

³⁹Ministry of Justice (December 2018) “Amending the Advocates’ Graduated Fee Scheme: Government Response” https://consult.justice.gov.uk/digital-communications/amending-the-advocates-graduated-fee-scheme/results/181210_agfs_consultation_response_final.pdf

54. Even with the increased scope set out above, we would seek to deliver a final report, including any recommendations, towards the end of the Summer in 2020. Alongside this, we would seek to share emerging findings with the professions throughout the review process.”

On 31 December 2018 the Government introduced⁴⁰ the fee increases for the new scheme. The amount of increase in funding depends upon which year’s basket of cases it is compared against, but was estimated by the MoJ to be an increase of between £23m and £24m, which was about a 10% increase.⁴¹ However, these increases did not bring the fees up anywhere near to previous levels in real terms. The funding per person for the Legal Aid Agency from 2010-2019 reduced by 37% in real terms.⁴²

The objectives for the forthcoming review were subsequently published⁴³ in December 2018 as:

“(1) To reform the criminal legal aid fee schemes so that they:

- fairly reflect, and pay for, work done
- support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce
- support just, efficient, and effective case progression, limit perverse incentives, and ensure value for money for the taxpayer
- are consistent with and, where appropriate enable, wider reforms
- are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies
- ensure cases are dealt with by practitioners with the right skills and experience

(2) To reform the wider criminal legal aid market to ensure that the provider market:

- responds flexibly to changes in the wider system, pursues working practices and structures that drive efficient and effective case progression, and delivers value for money for the taxpayer
- operates to ensure that legal aid services are delivered by practitioners with the right skills and experience

⁴⁰ S.I. 2018 No. 1323

⁴¹ Ministry of Justice (December 2018) “Amending the Advocates’ Graduated Fee Scheme: Impact Assessment” IA No: MOJ014/2018, 10/12/1028

⁴² Chalkley, M and Chalkley, A (2020) “*Small Change for Justice: Funding for Justice in England and Wales, 2010-2019*”

⁴³ Ministry of Justice (November 2020) “Guidance: Criminal Legal Aid Review”

<https://www.gov.uk/guidance/criminal-legal-aid-review>

- operates to ensure the right level of legal aid provision and to encourage a diverse workforce”

The announcement stated, “While the review is wide-ranging, we are committed to delivering a final report, including any recommendations, towards the end of the summer 2020.”

As a first step, the MoJ undertook to consider some particular issues that had been identified with the AGFS, including the absence of payment for reading unused material and the absence of fee graduation for the cases with the highest page count. In September 2020, following the Criminal Legal Aid Review ‘Accelerated Asks’ consultation⁴⁴, some specific fee increases were introduced:

- a fixed fee of the equivalent of 1.5 hours for reading “unused material” for any reading time up to three hours. For reading time above three hours, the ability to submit a claim for those additional hours on provision of worklogs;
- roughly the 7% of cases with the highest page count to be able to claim for their preparation for the pages above the new threshold;
- increasing the fee for a cracked trial, which had been calculated at 85% of the brief fee, to now be calculated at 100% of the brief fee.

The MoJ Impact Assessment⁴⁵ calculated that these three changes would result in an “Additional steady state annual cost to the LA fund of [...] an additional £19m - £26m for AGFS.”

The timetable for the Review, which should have concluded in Summer 2020 had slipped. On 21 December 2020, the Lord Chancellor appointed Sir Christopher Bellamy QC to Chair the Review. On 28 January 2021 the Government announced⁴⁶ the membership of the Expert and Advisory Panel to assist Sir Christopher. The stated timetable is:

⁴⁴ Ministry of Justice (August 2020) “Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes”

<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/>

⁴⁵ Ministry of Justice (August 2020) “Impact Assessment: Criminal Legal Aid Review: an accelerated package of measures amending the criminal legal aid fee schemes”

<https://consult.justice.gov.uk/criminal-legal-aid/criminal-legal-aid-review/results/clar-impact-assessment.pdf>

⁴⁶ Ministry of Justice and the Rt Hon Robert Buckland MP (28 January 2021) “News story Expert and Advisory Panel appointed for the Independent Review of Criminal Legal Aid”

<https://www.gov.uk/government/news/expert-and-advisory-panel-appointed-for-the-independent-review-of-criminal-legal-aid>

“The review will report in 2021 submitting recommendations to the Lord Chancellor and Justice Secretary, Robert Buckland. The MOJ will aim to publish the report alongside the government’s response on GOV.UK before the end of 2021.”⁴⁷

Prosecution Fees

The Crown Prosecution Service (CPS) introduced their Graduated Fee Scheme in 2001. In the following years they did not make any fee increases to keep up with inflation, and when they restructured the fee scheme in 2012, they cut the fees by 5%. In September 2019⁴⁸ and February 2020⁴⁹ some fee increases were introduced. Again, these increases did not bring the fees up to previous levels. The funding per person for the CPS from 2010-2019 was reduced by 39% in real terms.⁵⁰

⁴⁷ UK Government (January 2021) Independent Review of Criminal Legal Aid

<https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

⁴⁸ Crown Prosecution Service (1 August 2019) “Fees Bulletin No.1 of 2019 - Implementation of Scheme D” <https://www.cps.gov.uk/publication/fees-bulletin-no1-2019-implementation-scheme-d>

⁴⁹ Crown Prosecution Service (1 November 2019) “Revised Fees Schemes for Prosecution Advocates” <https://www.cps.gov.uk/cps/news/revised-fees-schemes-prosecution-advocates>

⁵⁰ Chalkley, M and Chalkley, A (2020) “*Small Change for Justice: Funding for Justice in England and Wales, 2010-2019*”

Annex 2 - Dataset overview

The dataset brings together detailed information on barristers' fees together with extensive information on those barristers personal and professional characteristics. The data was matched across systems using a combination of the unique system identifiers and names, and each barrister was assigned an "anonymous" identifier (a randomly generated combination of numbers and letters). The mapping between a barrister's anonymous identifier is encrypted and kept securely and the original identifiers are removed from the analysis data. This ensures that the data used for analysis cannot be matched back to a named individual.

There are 5 years of fees data hence each barrister gives rise to up to 5 rows of data. For some variables within these rows the values will always be fixed (e.g. ethnicity). Others either have values that vary at source (fees paid in a year) or have values calculated to be correct for the year of observation (the age of a barrister at the end of the financial year calculated from their date of birth). Amongst the most important calculated variables are indicators of whether a barrister in a particular year is 'fully engaged' in publicly funded criminal advocacy in the sense of deriving most or all of their fees from that source. This is referred to as *full practice*. Presently (as of February 2021) the dataset consists of 38,028 rows (observations) and 83 columns (variables).

Barristers' Fees and Profit

The payments data provided by the LAA and CPS give details of how much barristers receive in terms of fees. The remuneration a barrister receives depends on how much remains after they have incurred expenses that are necessary to conduct their practise. Total fees net of expenses will be reported by self-employed barristers as their *profit* in self-employment and will be taxed analogously to earned income. Hence, we report assessments of pre-tax profit calculated as a barrister's total fee income less their predicted expenses. The data on expenses used for this calculation are reported in the Data Compendium and were based on a sample of 53 barristers. These data show that on average barristers incur expenses that are 29% of their total fees⁵¹. Our further analysis has established that this percentage varies with a barrister's level of fees – those with higher fee receipts have a lower percentage of expenses. In making calculations for this document we have taken account of that variability⁵². We have also recently had access to a larger sample of 200 barristers' expenses. The larger

⁵¹ Paragraph 187 on page 96 of the Data Compendium.

⁵² This was achieved by estimating the parameters of a regression model of a barrister's percentage of fees against their total fee receipts and a dummy variable indicating whether they practised in London or not. The coefficients of this model were used to impute a percentage deduction for expenses for each barrister in each year.

sample has confirmed the figure of 29% as a deduction for expenses and we intend to incorporate the updated data in future analysis.

Annex 3 - Impact of the Pandemic

The pandemic this year has exacerbated the situation for a criminal Bar that was in a precarious state even before Covid-19. The pandemic has presented an existential threat with barristers suffering a significant reduction in hours worked and therefore their income. As of December 2020, criminal barristers are typically working 21.7% fewer hours than their pre-Covid-19 usual, and their fee income is still significantly down – criminal barristers are earning 49.4% less than their pre-Covid-19 usual. 83% of the criminal Bar have incurred personal debt or used savings to support their practice through the pandemic; 27% have taken on personal debt of over £20,000.

The criminal courts are, as a result of the impact of the pandemic superimposed on a decade of cuts, under the burden of a record case backlog. The magistrates' court backlog at 24 January 2021 stood at 474, 220 cases – a reduction of 10% from the peak seen on 26 July 2020, but still 16% up on the pre-Covid baseline.⁵³ The Crown Court backlog at 24 January 2021 is at 56,003 cases.⁵⁴ This is 42% higher than the pre-Covid baseline (which was even then at record levels), is steadily rising, and is the highest for at least twenty years. The problem is compounded because the backlog is now disproportionately composed of complex and lengthy cases needing jury trials. The Institute for Government (IfG) has modelled the Crown Court backlog adjusting for case complexity:

“We calculate that, if the government’s recovery plan for jury trials is met, the backlog in the crown court could reach 48,000 cases by November 2020 [this has subsequently proved an underestimate]. When adjusted for complexity, this amounts to a backlog of 61,000 cases... To get the backlog to pre-crisis levels would require a year in which crown court sitting days – the number of court days that the government funds – reached 111,000, a 33% increase on 2019/20 levels and similar to the 109,000 sitting days in 2015/16. Running courts at this level would require a similar increase [33%] in crown court funding.”⁵⁵

⁵³ HMCTS (14 January 2021) “HMCTS weekly management information during coronavirus - March to December 2020” <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-december-2020>

⁵⁴ HMCTS (14 January 2021) “HMCTS weekly management information during coronavirus - March to December 2020” <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-december-2020>

⁵⁵ IfG (2 November 2020) “Performance Tracker 2020: Criminal Courts” <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2020/criminal-courts>

Annex 4 - The Accelerator Programme

Queen's Counsel Appointments has made two grants available to Bar Council over a period of two years (2019/20 and 2020/21) to develop programmes and support that might enable and encourage more women to successfully apply for Silk.

Whilst our focus has been on gender specifically, we recognised early on that many of the proposed interventions support those with other protected characteristics and those from non-traditional backgrounds and that this is to be encouraged.

After an initial period of intensive research to identify barriers to career progression, nine key projects were launched to develop solutions.

The 9 projects in the Accelerator Programme are:

- (1) First Seven Years (Better support for the Young Bar, particularly in practice development);
- (2) Practice Management Guidelines and Standards (Improve practice management including allocation of work, fees and marketing);
- (3) Legal Directories (Ensure the directories accurately reflect the breadth of talent across the Bar);
- (4) Client Briefing Practices (Tackle discrimination in the way barristers are briefed);
- (5) Mentoring (update and deliver mentoring guidance and training; explore options to support stakeholder-based mentoring/matching via My Bar);
- (6) Flexible Working (model flexible working across the Bar);
- (7) Women in Law Pledge (promote uptake);
- (8) Tackling Sexual Harassment & Bullying (continue to promote use of resource like Talk to Spot etc.);
- (9) Culture Change.

It should be noted that no single intervention will address the challenges faced by members of the profession. The Bar Council is therefore committed to sustained long-term activity across all areas identified (beyond the life of the initial QCA grant).