

Independent Review of Criminal Legal Aid

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Table of Contents

Annexes.....	v
CHAPTER ONE: INTRODUCTION AND SUMMARY.....	1
Introduction	1
The Main Issues.....	7
Summary of Approach and Recommendations	9
Central Recommendation	10
An Advisory Board	10
CHAPTER TWO: GATHERING THE EVIDENCE	12
CHAPTER THREE: WHY FUND CRIMINAL LEGAL AID?	14
CHAPTER FOUR: BRIEF HISTORY OF CRIMINAL LEGAL AID AND RELATED DEVELOPMENTS	18
CHAPTER FIVE: OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM.....	32
The Police	32
The Charge (or Not).....	32
The Prosecution.....	34
The Magistrates' Court	36
The Crown Court.....	38
Other Elements of the System	39
The Supply Side.....	40
CHAPTER SIX: THE SUSTAINABILITY OF CRIMINAL LEGAL AID FIRMS	45
General Approach.....	45
The Case Made to the Review	47
Analysis of the Evidence	47
(1) The Decline in the Numbers of Providers	47
(2) The Impact of No Fee Increases for Many Years and Cuts.....	49
(3) Difficulties in Training, Recruitment and Retention	52
(4) Profitability and Financial Stability	55
Conclusion on the Sustainability of Criminal Legal Aid Firms	59
CHAPTER SEVEN: CRIMINAL LEGAL AID FIRMS: ACTION REQUIRED	61
The Immediate Options	61
The Overall Level of Funding Required	63
The Structure of the Schemes.....	65
Where Should Additional Funding Be Best Directed?	67
CHAPTER EIGHT: THE POLICE STATION SCHEME.....	68

The Structure of the Police Station Scheme	68
Further Issues Affecting Police Station Work	71
CHAPTER NINE: EARLY ENGAGEMENT	80
Pre-Charge Engagement.....	80
Engagement Post-charge.....	81
CHAPTER TEN: THE MAGISTRATES' COURT	85
CHAPTER ELEVEN: THE YOUTH COURT.....	90
CHAPTER TWELVE: THE LGFS AND RELATED ISSUES	94
The Structure of the LGFS	94
Recommended Reform of the LGFS.....	97
Conclusions on the LGFS Recommendations.....	100
The Relationship of the LGFS with the AGFS	100
CHAPTER THIRTEEN: THE AGFS AND THE CRIMINAL BAR	102
Brief Description of the AGFS	102
The Case Made to the Review	103
The Main Evidence	105
Analysis.....	115
Preliminary Observations	116
The Reasons for Increasing Funding for the AGFS	118
Implementing Increased Funding for the AGFS	121
CHAPTER FOURTEEN: OTHER CRIMINAL LEGAL AID EXPENDITURE	128
Appeals	128
Very High Cost Cases (VHCCs).....	132
Prison Law	135
Expert Witness Fees.....	138
CHAPTER FIFTEEN: WAYS FORWARD AND OUTSTANDING ISSUES	140
The Advisory Board	140
Structural Developments	141
Diversity.....	144
Quality	147
Transparency, Data and Competition	148
Listing.....	149
Remote Technology in the Courts.....	151
The LAA	152

CHAPTER SIXTEEN: SUMMARY OF RECOMMENDATIONS 155

Annexes

Annex A: Terms of Reference and Expert Advisory Panel Members

Annex B: Evidence Gathering

Annex C: Criminal Legal Aid Trends

Annex D: 2021 Justice Select Committee Report 'The Future of Legal Aid'

Annex E: Findings from Independent Review into Criminal Legal Aid Focus Groups for Legal Aid Practitioners

Annex F: Criminal Justice System User Interviews Analysis

Annex G: Student Survey Report

Annex H: Criminal Legal Aid Firms Case Studies Report

Annex I: Public Sector Salary Comparative Study

Annex J: Financial Survey Summary

Annex K: Data Compendium - Criminal Legal Aid Firms and Self-employed Criminal Barristers

Annex L: Self-employed Criminal Barristers

Annex M: The Fee Schemes and How They Work

Annex N: Glossary

CHAPTER ONE: INTRODUCTION AND SUMMARY

Introduction

- 1.1 This Report arises from long standing concerns about the lack of funding for criminal legal aid in England and Wales. Criminal legal aid in England and in Wales is supplied pursuant to the Lord Chancellor's statutory duties under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), using private sector providers, mainly solicitors and barristers, with the exception of a small Public Defender Service (PDS) of salaried lawyers. The system is administered on behalf of the Lord Chancellor by the Legal Aid Agency (LAA), which is also responsible for the PDS.
- 1.2 The criminal legal aid system consists of five main parts:
- A) The Police Station: a person arrested or attending a voluntary interview with the police is entitled to free legal advice and assistance, irrespective of means, provided through a duty solicitor scheme, although the client may request a solicitor of their choice.
 - B) The Magistrates' Court: a person charged with an offence in the Magistrates' Court is entitled to legal aid for representation and advice, subject to meeting a means test and an "interests of justice" test. There is also a Court duty solicitor scheme where unrepresented defendants may obtain free advice and assistance.
 - C) The Crown Court: a person charged with an offence in the Crown Court, typically more serious offences, is normally entitled to legal aid for representation and advice, but may be required to make a financial contribution if their income is above a certain threshold.
 - D) Prison Law: a prisoner may be entitled to legal aid in respect of certain sentencing and disciplinary matters and proceedings before the Parole Board.
 - E) Appeals: Legal aid is available in certain appeals from the Magistrates' Court to the Crown Court, from the Crown Court to the Court of Appeal, and for applications to the Criminal Cases Review Commission.¹
- 1.3 In December 2018, following the somewhat turbulent history described in more detail in Chapter 4, Lord Chancellor, the Right Hon David Gauke MP, announced a Criminal Legal Aid Review (CLAR), with the following main objectives:
- "a) To reform the Criminal Legal Aid fee schemes so that they:

¹The Review has concentrated on the main cases where legal aid is granted. Unless otherwise stated, the Review's recommendations are intended to apply, where relevant, to cases not dealt with specifically (e.g. appeals to the Supreme Court, contempt proceedings, matters prescribed as criminal under section 14(h) of LASPO, and various other matters). For the abbreviations used in this Report please see the Glossary at Annex N.

- 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; and
 - ensure cases are dealt with by practitioners with the right skills and experience.
- b) 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.
 - operates to ensure the right level of Legal Aid provision and to encourage a diverse workforce. “

1.4 The first stage of CLAR, which was delayed by the pandemic, consisted in gathering data now published in the Data Compendium² and addressing certain “accelerated areas”, reforms which took effect in August 2020.³ In December 2020 I was appointed by the Lord Chancellor Rt Hon Robert Buckland QC MP to carry out the second stage of CLAR, namely an Independent Review of Criminal Legal Aid (CLAIR). The terms of reference set out at Annex A require me to consider the criminal legal aid system in its entirety, the service being provided, and how it is procured and paid for, with particular reference to five themes: resilience, transparency, competition, efficiency and diversity. Each of these topics is to be considered as broadly as possible, the Review being expected to be “far more ambitious in scope” than previous reviews, the last of which was carried out by Lord Carter in 2006.

The System of Criminal Legal Aid

1.5 A person without means seeking legal advice and representation in defence of a criminal charge must do so through a solicitor contracted to the LAA under the Standard Crime Contract (SCC), which sets out the requirements to be met by solicitors supplying those services. The solicitor must then apply on the client’s behalf to the LAA for a Representation Order, giving details of the

² [data-compendium.pdf \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/91424/data-compendium.pdf)

³ See Chapter 4 below.

alleged offence and the client's means. If the criteria for legal aid are met, the LAA will grant the Order.

- 1.6 Solicitors provide advice and assistance in the police station, either acting for their own clients or through the duty solicitor scheme, advice and representation in the Magistrates' Court, including the magistrates' court duty solicitor scheme, and the preparation of cases in the Crown Court where a barrister is typically instructed. Solicitor advocates who have higher rights of audience also conduct cases in the Crown Court, and account for a significant proportion of guilty pleas, for example.⁴
- 1.7 Members of the Chartered Institute of Legal Executives (CILEX) work mainly in solicitors' firms. Although as yet no 'CILEX only' firm has a contract with the LAA, CILEX members with the necessary qualifications can be in partnership with solicitors, undertake police station work, and appear in the Magistrates' Court. In this report, in using for shorthand the terms 'solicitor' and 'solicitors' firms' I by no means overlook the vital work done by CILEX members.
- 1.8 It is the solicitor who is responsible for instructing the barrister to provide advocacy services on behalf of the client. Barristers appear mainly in the Crown Court although junior barristers are also instructed in the Magistrates' Court, particularly in London. Barristers do not have a direct contractual relationship with the LAA.⁵
- 1.9 The remuneration of solicitors and barristers for supplying criminal legal aid services is mostly set out in The Criminal Legal Aid (Remuneration) Regulations 2013, as amended, made under LASPO ('the Regulations').⁶ For historical reasons described in Chapter 4, there is a patchwork of different approaches. Police station work is paid a fixed fee; Magistrates' Court work is based on a mixture of certain standard fees and hourly rates; and most Crown Court work is based on "graduated" fees, whereby the fee is determined by using various "proxies", such as the offence charged, whether it is a guilty plea, cracked trial⁷ or trial; the length of the hearing; and the Pages of Prosecution Evidence (PPE). There are two different payment schemes in the Crown Court, one for advocates – i.e. barristers and solicitor advocates – known as the Advocates' Graduated Fee Scheme (AGFS), and the other for litigators – i.e. the solicitors during the preparatory work – known as the Litigators' Graduated Fee Scheme (LGFS). Certain Very High Cost Cases (VHCCs) in the Crown Court are dealt with separately.

⁴ See chapter 13 below

⁵ Thus, a lay client cannot instruct a barrister directly in a legal aid matter.

⁶ [The Criminal Legal Aid \(Remuneration\) Regulations 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

⁷ A "cracked trial" is where the defendant has pleaded not guilty to at least one charge, and subsequently, at any point between the hearing at which the plea was entered and before the jury is sworn, changes their plea to guilty, or the prosecution decides not to proceed. Cracked trials are defined in the Regulations at paragraph 1, Part 1, Schedule 1:

<https://www.legislation.gov.uk/ukxi/2013/435>

1.10 In 2019/20 total criminal legal aid expenditure was some £841 million, of which some £255 million related to police station, Magistrates' Court and prison work (known for statistical reasons as "crime lower"), while £586 million related mainly to cases in the Crown Court ("crime higher"). Within the Crown Court in 2019/20 litigators' costs under the LGFS were some £358 million, and advocates' costs under the AGFS were some £208 million, the balance of Crown Court expenditure being mainly on VHCCs.

The Wider Criminal Justice System

1.11 As shown throughout this Report, criminal legal aid cannot be properly considered without regard to the operation of the wider Criminal Justice System (CJS). The CJS includes 43 Police Forces, the Crown Prosecution Service (CPS), the Magistrates' and Crown Courts, administered by Her Majesty's Courts and Tribunals Service (HMCTS), the Judiciary, the Probation and Prison services (now Her Majesty's Prison and Probation Service - HMPPS), and the LAA. Each of these has their own priorities and usually separate budgets. Most of these actors are independent of each other for obvious constitutional reasons. However, Lord Carter's comments of 15 years ago still resonate:

"None of the active participants in the justice system has any responsibility to ensure that the overall result is the best possible allocation of public funding for society as a whole, each participant can say that it has protected the interests entrusted to it and that the fault lies elsewhere..."

*"Each of the participants [in the CJS] is able to cause a significant cost burden to fall on some of the others but, in many cases, little account appears to be taken of the overall financial burden."*⁸

1.12 The evidence to the Review is that communications between the defence and the prosecution, on the one hand, and the Courts and the defence on the other, can be less than ideal. Communications with the prisons are not straightforward either. In effect, decisions within the wider CJS do not routinely take into account the effect on the defence and indeed on the main "users" of the system, namely suspects, defendants and victims of crime.

1.13 One of my principal recommendations concerns the need for better mechanisms, nationally and locally, for involving all stakeholders, including the defence, in a more joined-up approach. As Sir Brian Leveson said in 2015, making the same point,

*"Part of the solution to improving the whole system is to acknowledge the critical role the defence can play..." "The only way of improving the end to end operation is to bring the different participants in these systems together to debate and agree on initiatives to improve the whole"*⁹

1.14 A further striking feature of the evidence to the Review is how much in the CJS is done late or with little time to prepare. Partly this is due to the inherent

⁸ Carter Review at p.6, para.37 [\[ARCHIVED CONTENT\] \(nationalarchives.gov.uk\)](https://www.nationalarchives.gov.uk)

⁹ *Review of Efficiency in Criminal Proceedings*, 2015, at p.30 <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

features of criminal justice, for example, where persons arrested overnight have to be brought to Court the following morning, or because of the disordered lives of some defendants. However, even given these pressures and a lack of resources within the CJS, the evidence to the Review suggests a lack of timely communication between the participants, and the absence of early engagement between the Police/CPS and the defence. This also impacts on adequate preparation. Again, two major themes of my recommendations are to encourage better earlier engagement, and to improve funding for preparation.

The supply side

- 1.15 The fees of criminal providers are fixed externally under the Regulations, and where a certain fee depends on whether the LAA considers it reasonable, in practice the LAA has considerable discretion to refuse the claim.¹⁰ On the solicitor's side, the business model is also subject to the constraints of the SCC.
- 1.16 The supply of criminal legal aid is demand led, driven by the number of persons arrested or interviewed voluntarily by the Police, and by the number of persons subsequently charged by the Police or the CPS.
- 1.17 In terms of delivery, this too is determined largely by external forces. It is the police who decide when to interview a suspect, often during the night. For various reasons, the CPS may serve the prosecution evidence at the last minute. In both the Magistrates' Court and the Crown Court, the lists may change very late in the day. If HMCTS decides to close a local court – 164 out of 320¹¹ Magistrates' Courts have closed since 2010 – the providers, and of course others, are affected; and so on.
- 1.18 This is not to suggest that other participants in the CJS, also underfunded, do not encounter great difficulties as well. The point simply is that criminal legal aid providers are sandwiched between the Police and the CPS on the one hand, and the Courts on the other, with the processes and requirements of the LAA constantly in the background. Although rightly expected to be efficient, criminal legal aid providers can only be as efficient as the efficiency, or otherwise, of the rest of the CJS will allow.

The Pattern of Demand

- 1.19 Expenditure on criminal legal aid reached a peak of £1.2 billion in 2004/05 but by 2019/20¹² had fallen to £841 million a decline in cash terms of around 30% and a decline in real terms of around 43% since 2004/5. In 2020/21 the pandemic had a serious impact on many providers and continues to do so. Full details of criminal legal aid expenditure and case volumes from 2016/17 to 2020/21 are shown in Annex C. The figures for 2020/21 are of course distorted by the pandemic.

¹⁰ E.g. the fee for special preparation under the AGFS or LGFS, see Schedule 1, paragraph 17(3) and Schedule 2, paragraph 20, respectively of the Regulations.

¹¹ See footnote 91

¹² Although figures are available for 2020/21, the latter are distorted by the effect of the pandemic.

- 1.20 A significant explanation for the decline in demand up to 2020/21 has been the fall in the number of cases entering the CJS. This has been driven in turn by a fall in the number of arrests by the police, and in the number of persons charged with a criminal offence. In recent years, particularly in 2018/19 prior to the pandemic, a further factor has been a limitation on the number of sitting days in the Courts.
- 1.21 However, following the Government's recent policy of recruiting more police officers,¹³ and the drive to reduce the Court backlog that has grown during the pandemic, demand for criminal legal aid is now expected to increase. The Review is informed by the Ministry of Justice (MOJ) that, although forecasting is extremely difficult, there is likely by 2025/26 to be a substantial increase in workload, which would approximate to an expenditure increase of some 13%¹⁴ at current rates. In addition, as a result of the pandemic, as at Q2 of 2021 the backlog of cases in the Courts was some 364,122 cases in the Magistrates' Court and some 60,692 cases in the Crown Court.¹⁵
- 1.22 This expected increase in demand, coupled with the imperative to reduce the back-log, is central to my conclusions in this Review. The criminal legal aid system is already weakened. Absent a substantial increase in funding, there is a high risk that the system will simply be unable to cope with the challenges ahead, for the reasons set out in detail below.¹⁶

Fee Reductions or Lack of Increase

- 1.23 The present situation of providers is also a result of past Government policy. There have been reductions in cash terms, as for example the reduction in solicitors' fees of 8.75% in 2014, and cuts between 2010 and 2012 in advocates' fees. As far as solicitors are concerned, there has been no increase in the relevant fees for prolonged periods, for 15 years or even 25 years in some cases. Many of the rates, for example in the Police Station and Magistrates' Courts, are lower now, even in cash terms, than they were in 2008 or even in the 1990s.¹⁷ It is difficult to see how this situation can be sustained. Although for advocates the comparisons are more complex, not least because of changes in the AGFS in the meantime, the overall level of fees raises substantial questions about the sustainability of the criminal Bar, as further discussed below.¹⁸

¹³ See [National campaign to recruit 20,000 police officers launches today - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/national-campaign-to-recruit-20000-police-officers-launches-today). The review understands that increases in precept funding locally also foresee additional recruitment of police officers.

¹⁴ Other estimates have been made, for example the Institute of Government estimates that a 15% increase of capacity in the Courts will be required by 2023. [The Future of Legal Aid \(parliament.uk\)](#), paragraph 79.

¹⁵ [National statistics overview: Criminal court statistics quarterly: April to June 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/national-statistics-overview-criminal-court-statistics-quarterly-april-to-june-2021)

¹⁶ See Chapters 6,7 and 13 below

¹⁷ See Chapter 6 below.

¹⁸ See Chapter 13 below.

Erosion of Eligibility for Legal Aid

- 1.24 As an additional factor, the criteria for financial eligibility for criminal legal aid have not changed since 2008, although in real terms the value of money has broadly speaking declined by some 24% in the meantime. This primarily affects cases in the Magistrates' Court, since advice and assistance at the Police Station is free, and legal aid is generally available in the Crown Court, although often subject to a significant contribution.

The Main Issues

Sustainability

- 1.25 In light of the above, it was inevitable that the resilience of the criminal legal aid system should be the most prominent of the issues in the Review. By "resilience" or its synonym "sustainability", I mean in broad terms a system of public funding that is able over the years to attract and retain providers of sufficient number, quality and experience to provide effective legal advice, assistance and representation to all those eligible and in need of those services. That implies in particular a system that is financially viable; has a career path that bears comparison; promotes diversity; and encourages investment, particularly in new technology and ways of working.

Diversity

- 1.26 Diversity in terms of social background, gender, ethnicity and age, is of particular importance to this Review, given the need for the provision of criminal legal aid, and CJS as a whole, to reflect modern society in all its richness and complexity. This issue has a particular focus in the present context given several factors: the importance of sustainable career paths for those from less advantaged backgrounds; whether career development differs by gender or ethnicity; the relatively high proportion of minority ethnic defendants; and the number of young persons within, or affected by, the CJS.

Efficiency

- 1.27 The efficiency of the criminal legal aid system is also a central issue. The workings of the Regulations have not been examined in any detail since Lord Carter's review in 2006, 15 years ago. In the meantime, the CJS has moved on, notably with better case management, and the arrival of the digital age; the evidence is now much more to be found on CCTV, body-worn cameras, mobile phones and social media; issues of disclosure and unused material raise complex questions that hardly arose 15 years ago; and there have been many other significant changes, for example an increase in mental health issues in defendants, in the seriousness and complexity of certain crimes, in the number of serious offences committed by young persons and, more recently, the impact of remote technology. The various criminal legal aid remuneration schemes are "of their time", as one respondent put it, and need to be reformed and updated.

1.28 As indicated above, the efficiency of the criminal legal aid system is affected by a number of externalities, which have a major impact on users and providers of criminal legal aid, and for that reason concern this Review. These are in particular the effect of procedures within the Police/CPS in respect of early engagement, and the timely disclosure of prosecution evidence; the listing of criminal cases in the Courts; the use of remote technology in police stations and Courts; and the functioning of the LAA.

Transparency and Data

1.29 Although criminal legal aid services are supplied by private providers, the way that public money is allocated or spent by providers should be transparent. A major difficulty facing the Review has been the lack of data, for example on how far a system that essentially depends on the decisions of private providers is adequately meeting the public need, for example in relation to particular areas (rural locations, inner cities), particular users (e.g. young suspects or defendants, or those with mental health problems); particular offences (e.g. serious fraud, or cases involving children) or particular areas of work (e.g. prison law, appeals, POCA¹⁹ cases). Indeed, the overall capacity of the system is not very well understood.²⁰

1.30 One of my important recommendations is for the MOJ and other relevant parties to improve the available data. In particular, there is no data to evaluate how decisions in one part of the CJS may impose costs on another part of the system, in particular on criminal legal aid.²¹ Other matters which are not very transparent at the moment include the functioning of police station advice, how widespread are the problems of late or non-disclosure, and what is driving this; the allocation of work as between solicitors, solicitor advocates, and barristers and within barristers' chambers; and the overall effect on criminal legal aid of some listing decisions in the Courts. Please see further Chapter 15 below.

The Way Forward

1.31 I have considered possible different approaches to the present model, but for the reasons given in Chapter 15, I do not see, at least for the moment, that a radically different alternative, for example a major expansion of the PDS, would be likely to improve upon what we have, in terms of cost, quality and efficiency, given also the deeply established adversarial structure of the CJS. Indeed, despite the difficulties, providers whether solicitors or barristers, compete if not on price, on quality, service and reputation, most often under the unforgiving searchlight of a public hearing. In my view the present model has also shown itself capable of adapting, and is still adapting, to the digital age while maintaining the ethos of a fair system of criminal justice.

¹⁹ The Proceeds of Crime Act 2002, and similar statutes, enable the confiscation of the defendant's assets in certain cases.

²⁰ [Reducing the backlog in criminal courts \(nao.org.uk\)](http://nao.org.uk)

²¹ See paragraph 1.11 above.

1.32 In my view it is better to persevere with substantial improvements to stabilise criminal legal aid in its present form – including a mechanism in the form of an Advisory Board capable of keeping the system up to date, as discussed below. Nonetheless I discuss in Chapter 15 various ways in which the system could be further developed, for example by not-for-profit Community Interest Companies, or other grant-funded initiatives. I also draw attention to various aspects that should be considered by the MOJ and the LAA to lighten the administration of the system without compromising quality or the use of public money.

Summary of Approach and Recommendations

1.33 I take the view that the Review is about much more than the remuneration of defence lawyers, it is also about the effectiveness of the CJS as a whole. The adversarial system of the CJS cannot function without the defence. If the providers of criminal legal aid defence were to fail or be substantially weakened, the CJS as a whole would grind to a halt, with obvious adverse consequences, not least in the context of reducing the back-log. Moreover, criminal legal aid does not merely support the defence: it is the cradle of many barristers who also prosecute, and of solicitors and others who later join the CPS, or other authorities who need criminal law expertise. Criminal legal aid also provides the training ground for many who later become judges. The view has been expressed to the Review that, as it is, there are not enough criminal lawyers to go round.

1.34 In making my recommendations, I have tried to follow two principles that seem to me of central importance. First, that the remuneration of criminal lawyers should be such as to attract lawyers of the talent and calibre that the system requires, as indeed the Royal Commission on Justice observed in 1993; and secondly that the principle of equality of arms – broadly that the resources available to the defence should not be inferior to those of the prosecution – is central to the present system of criminal justice. To make an obvious point, if the police and the CPS have additional resources, then for reasons of both principle and pragmatism, the defence should be supported too.

1.35 Overall, my recommendations are intended:

- to place criminal legal aid on as sound a financial footing as possible, capable of attracting and retaining the necessary talent, and respecting the equality of arms;
- to restructure providers' remuneration to pay for work done, remove perverse incentives and encourage efficiency, particularly in early engagement and case preparation;
- to focus on the earlier stages or "front end" of the system, including police station work, and better engagement between defence and prosecution, not only pre-charge but also post-charge, before the first hearing in the Magistrates' Court, and in the pre-trial procedure in the Crown Court;
- to foster a more joined-up approach to criminal legal aid in the criminal justice system as a whole, both nationally and locally;

- to support full disclosure at the earliest opportunity, case ownership, and engagement much earlier than ‘the door of the court’;
- help improve communications between the defence, on the one hand, and the police, the CPS, the Courts and HMPPS respectively, on the other hand, with the principle of case ownership firmly in mind;
- to pay particular attention to youth justice; and
- to address diversity issues relating to criminal legal aid.

1.36 My detailed conclusions are explained in the following Chapters and my recommendations are listed in Chapter 16.

Central Recommendation

1.37 My central recommendation is that the funding for criminal legal aid should be increased overall for solicitors and barristers alike as soon as possible to an annual level, in steady state, of at least 15% above present levels, which would in broad terms represent additional annual funding of some £135 million per annum. How that sum should be distributed, and how the concomitant efficiency improvements to the various schemes should be implemented, are discussed in Chapters 7 – 14.

1.38 I would emphasise that the sum of £135 million is in my view the minimum necessary as the first step in nursing the system of criminal legal aid back to health after years of neglect. If I may say so, I do not see that sum as “an opening bid” but rather what is needed, as soon as practicable, to enable the defence side, and thus the whole CJS to function effectively, to respond to forecast increased demand, and to reduce the back-log. I by no means exclude that further sums may be necessary in the future to meet these public interest objectives.

1.39 It is also three years since CLAR was announced, and attention had been drawn to the underlying problems for many years before that. There is in my view no scope for further delay.

1.40 I would also emphasise, however, from the perspective of HM Treasury and the taxpayer, that I recommend in parallel significant changes to the system of criminal legal aid, to drive greater efficiency and control costs, while suggesting also possible ways forward in Chapter 15. I would hope the overall result will be seen as a package of reforms ranging well beyond the issue of remuneration, to the benefit of the public interest generally.

An Advisory Board

1.41 I would however highlight one other point here, namely the need as I see it, for an Advisory Board on criminal legal aid, as further explained in Chapter 15.

1.42 As seen in Chapter 4 below, the history of legal aid over the last 20 years has been far from ideal. The schemes tend to be “set in aspic” and have difficulty

in keeping up with either the needs of the CJS, or the changing concerns of providers. When providers encounter difficulties, negotiations with the MOJ tend to be conducted bilaterally with the main provider interests, while other stakeholders and users in the CJS are not involved.

- 1.43 In my view an independent Advisory Board, reporting at regular intervals to the Lord Chancellor, would be able to take a wider view, consult other stakeholders in the CJS, support policy development, and think ahead about improvements to the system and the additional data needed. In particular, the system of criminal legal aid will not be rebuilt overnight, and it will take some time to implement the recommendations of the Review, to the extent that they are adopted.
- 1.44 It also seems to me essential to promote more joined-up thinking across the CJS on matters affecting criminal legal aid. In my view it would be important for other stakeholders, including the police/CPS and the Courts to be able to participate in the Advisory Board on matters affecting them, such as case ownership or early engagement for example, to foster a more coherent approach to criminal legal aid and avoid the strictures of Lord Carter cited at 1.11 above. I would hope too that similar arrangements could be reinforced at local level.
- 1.45 For the avoidance of doubt, I do not see the Advisory Board as a “pay review body” of the kind that exists in some other public sectors. It would however be a forum in which the overall functioning of the system can be kept under review, reinforced in due course by additional data on how the system is meeting the public need. In that context, issues of provider remuneration may well arise, but that is not the main focus of the proposal.

CHAPTER TWO: GATHERING THE EVIDENCE

- 2.1 Given that criminal legal aid providers are both integral to and dependent upon the rest of the CJS, and that the situation differs in different parts of England and in Wales, the Review has engaged not only with the providers, but also the Police, the CPS, the Magistracy, the Crown Court Judiciary, HMCTS and the LAA, among others. I have had the advantage of visiting Birmingham, Bristol, Cardiff, Chester, London, Manchester, Newcastle on Tyne, and Swansea to have discussions in police stations and in Courts in most of those cities, and with practitioners based there or in the surrounding areas, as well as numerous virtual meetings with solicitors and barristers from all over England and in Wales, the Circuit Leaders, academics active in this field, and many others. These are detailed at Annex B.
- 2.2 The Review has received submissions from and has met the main professional bodies and the principal regulators. The Review received 330 replies to the Call for Evidence, and a number of financial and other studies have been carried out to supplement the Data Compendium²² compiled by the MOJ in collaboration with the Law Society, the Bar Council, the CPS and the LAA. The Review has built on that foundation in carrying out a Financial Survey of solicitors' firms, Case Studies of a number of solicitors' firms, and a Study to arrive at criminal barristers publicly funded income post expenses. Various focus groups and user engagement interviews have also been conducted, and a student survey carried out. The results are contained in the various Annexes listed in the index above.
- 2.3 One of the purposes of Review is to shed light on relevant matters, so with the consent of the parties concerned most of the evidence received, but not including individual online responses, is published online at the Review's website.²³ I have not tried to summarise all this material, but it is there for all to read as thought fit.
- 2.4 In a Review such as this, much of the evidence necessarily comes from the providers, and/or expresses a point of view critical of other participants in the CJS, for example the police, the CPS, the LAA or hard-pressed listing officers. I should make it clear that this is a Review, the process is neither adversarial nor adjudicative. Although I feel I am duty-bound to publish the evidence, it is not my intention to criticise. I make no "findings" on disputed points, nor could I do so, since neither the structure of the Review nor the compressed timetable permits detailed investigation of every point raised. What I can however say is that among the defence providers there is clear and widespread recognition

²² The Data Compendium is a summary that was created for the Independent Review of Criminal Legal Aid. It aims to summarise some of the key descriptive pieces of information that is available on publicly funded criminal legal services.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/960290/data-compendium.pdf

²³ Independent Review of Criminal Legal Aid Website:
<https://www.gov.uk/government/groups/independent-review-of-criminal-legal-aid>

that everyone within the CJS is grappling with similar problems, as a result of underfunding, and more recently the effect of the pandemic. I too encountered in the course of the Review many dedicated police officers, prosecutors, court officials, LAA staff and many others discharging their duties in a highly professional way in very difficult circumstances. My views and comments in this Review are solely intended to find constructive ways forward.

- 2.5 I have also sought to bear in mind that what matters first and foremost is the largely silent interests of those whose voice is not present, at least not directly. These comprise the general public, who look to the CJS for the maintenance of a law abiding and civilised society; the users, who include those “in trouble with the police”, whether as suspects or later as defendants, the victims of crime and their families; and the taxpayer, upon whose willingness to fund criminal legal aid the whole system depends.

Structure of this Report

- 2.6 Since every Government has to make invidious decisions about public funding when there is never enough money to go around, Chapter 3 below articulates what in my view are the main policy and pragmatic reasons for funding criminal legal aid. On the basis that planning for the future is assisted by knowledge of the past, Chapter 4 sets out the often-chequered history of criminal legal aid. Chapter 5 is a brief summary of the CJS as it affects legal aid. Chapters 6 and 7 deal with the sustainability of criminal legal aid firms and my recommendations in that regard. Chapters 8 to 12 deal respectively with Police Station Advice and Assistance, Early Engagement, the Magistrates’ Court, the Youth Court and the LGFS. Chapter 13 deals with the sustainability of the Criminal Bar and reform of the AGFS. Chapter 14 covers other applications of legal aid in relation to appeals, VHCCs, prison law and experts’ remuneration. Chapter 15 discusses the proposed Advisory Board, and various alternative models for the future. Cross-cutting issues including Diversity are discussed where they arise in the relevant Chapters, but are summarised in Chapter 15 together with other outstanding issues. My recommendations are set out in Chapter 16.
- 2.7 Finally I would like to warmly thank all those who responded to the Review or engaged in discussion, the Judges and Magistrates’ who kindly gave of their time, and by no means least the custody officers, legal advisers, ushers, and many others who assisted the Review. I would like to thank too the Review’s Challenge Panel, who kept me focussed on the main issues, and of course the entire Review team, led initially by Lawrence Price and later by Paul Daly, for their outstanding work. The views I express are however mine alone.

CHAPTER THREE: WHY FUND CRIMINAL LEGAL AID?

- 3.1 Given its difficult history, it was to be expected that some respondents would openly question whether the Government was really committed to funding criminal legal aid. Why, said one respondent, should they any longer “rage against the dying of the light”?
- 3.2 Although many would think it axiomatic that the State should fund the defence of those without means facing a criminal charge, one should also face up to a public perception, in some quarters, that payment for lawyers to defend supposed criminals is a less deserving cause than many others with an arguably better claim to public resources.
- 3.3 The short answer to the question “Why fund criminal legal aid?”, is that Section 1 of LASPO requires the Lord Chancellor to make available a system of criminal legal advice, assistance and representation. In addition, there is a constitutional right to access to justice²⁴ and to a fair trial.²⁵ That short answer does not however fully explain why properly funding criminal legal aid is essential.
- 3.4 First, England and Wales have an adversarial system of justice which involves one side, the prosecution, placing its evidence before an impartial decision maker – the bench in the Magistrates’ Court or the jury in the Crown Court – while the other side, the defence, challenges the prosecution evidence and presents their side of the story. In modern conditions such a process presupposes that the two sides have a roughly equal opportunity to present their case, and access to the necessary expertise to do so. In other words, there should be equality of arms between the parties. If that were not the case, the outcome would be seen as unfair, and undermine confidence in the criminal justice system, which deals mainly with legally aided defendants.
- 3.5 If confidence in the criminal justice system were ever to be seriously damaged in the eyes of large sections of the community, the potential consequences hardly bear thinking about. Although operating largely in the background, and much less visible to the general public than say health or education, a trusted and fair system of criminal justice is the foundation of civil society, upon which law and order, and personal freedom, ultimately depend. From this perspective, criminal legal aid is essential to maintaining a modern, peaceful and democratic society.
- 3.6 Secondly, in a modern democratic society every individual is equal before the law, regardless of their personal circumstances or background. That principle of equality is not respected if only some, but not others, have the means to defend

²⁴ R (UNISON) V Lord Chancellor [2017], UKSC 51. <https://www.supremecourt.uk/cases/uksc-2015-0233.html>

²⁵ See generally Bingham *The Rule of Law* (2010) Chapter 9; see also Article 6 of European Convention on Human Rights (ECHR), 1950, reflecting common law and civil law principles alike https://www.echr.coe.int/documents/convention_eng.pdf Page 11

themselves against a criminal charge, leading again to unequal treatment and a deep sense of injustice. Criminal legal aid upholds the principle of equality and the acceptance of the rule of law, again the foundation of society as a whole.

- 3.7 These considerations are reinforced by the presumption of innocence at common law, “innocent until proved guilty” having been a principle of the common law since time immemorial. The related principle that it is for the prosecution to prove its case beyond reasonable doubt, to use the time-honoured words, is equally fundamental. If, for lack of means, a defendant is not equipped to contest the prosecution case, these basic principles, respected internationally as the gold standard of criminal justice, have very little value. A perception that England or Wales had abandoned or degraded these long-standing foundations of the common law would seem to be very damaging, both domestically and internationally.
- 3.8 Closely related to the above, criminal legal aid protects due process. As in other walks of life, parties will more readily accept an adverse decision if they feel they have been properly heard in a fair process. For many defendants, victims and their families, to have had a fair hearing is often as important as the actual outcome. If the process followed is not fair, the result is a corrosive sense of injustice.
- 3.9 Following due process also leads to better outcomes. Absent due process, there are obvious risks of mistakes, or miscarriages of justice, devastating to the individuals concerned and very expensive to the public purse to recompense. Due process is even more important where there is marked inequality between the parties, for example when a suspect is held at a police station.
- 3.10 These considerations require a cadre of good lawyers skilled in criminal law to keep the criminal system functioning, and those lawyers need to gain experience at all levels of the justice system. Barristers for example will do publicly funded work for both the prosecution and the defence. Experienced and able criminal lawyers are also needed in-house by the CPS, the Serious Fraud Office (SFO), and many other authorities. Criminal legal aid work is also the training ground for the judges of the future. If for whatever reason a career in publicly funded criminal work is unable to attract sufficient people of the necessary calibre and ability, the justice system itself will slowly but surely seize up, not only for lack of defence lawyers but for lack of prosecutors and ultimately experienced judges. As indicated at paragraph 1.33 above, funding criminal legal aid is not just about funding the defence; it is ensuring the future of criminal justice as a whole.
- 3.11 In addition, and from a quite different perspective, good defence lawyers, although paid by the State, also save public money. Few defendants are able to understand the legal process or the rules of evidence, or fully appreciate what their options are in the light of the prosecution case. Indeed, many defendants have learning difficulties, mental health issues, addiction problems or limited

command of English. It is here that the defence lawyers play a vital role in enabling the system to function by spending time with the client and then arguing their case as clearly and succinctly as possible.²⁶

- 3.12 The point that defence lawyers save public money is not limited to traditional advocacy. A significant aspect of modern criminal justice is the system of sentencing discounts under which the earlier a defendant pleads guilty, the greater the discount: for example, a plea entered at the first hearing in the Magistrates' Court qualifies for the highest discount of up to one-third. This system cannot function fairly and effectively unless the defendant is able to obtain skilled advice at as early a stage as possible, analysing the evidence and the possible outcomes. If clear and objective advice does lead to a guilty plea earlier than would otherwise be the case, or the prosecution dropping the case or accepting a plea on a lesser charge, the resulting savings – in police time, in the CPS, in Court time and resources, in avoiding distress and inconvenience to victims and witnesses, – are substantial, not to mention reducing pressure on the prison estate if the defendant thereby qualifies for a shorter sentence.
- 3.13 Moreover, the modern CJS seeks to foster a large degree of co-operation between the prosecution and the defence. Case management and engagement between the parties aim to ensure that any eventual trial runs smoothly, and that the parties have a prior opportunity to explore alternative outcomes, for example a possible plea, or indeed whether the prosecution should discontinue. There will undoubtedly be cases where such engagement is not in the defendant's best interests. But early engagement cannot even get off the ground if the defence is not funded to participate.
- 3.14 The above considerations are reinforced by the digitalisation of the CJS. The Digital Case System (DCS) has for some years largely replaced paper-based procedures in the criminal Courts. HMCTS is currently implementing the Common Platform, a series of products designed to incrementally digitise the passage of cases through the CJS and facilitate "touch-points" between the various agencies. In addition, during the pandemic HMCTS instituted the Cloud Video Platform (CVP) facilitating remote working in the CJS. Self-evidently, nothing will function unless the defence lawyers have access to these systems.

²⁶ See Jeffrey Review, 2016, Introduction. *"Effective advocates simplify rather than complicate; can see the wood for the trees and enable others to do so; and thereby can contribute to just outcomes and save court time and money"*.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf .

See also Leveson in *R v Crawley* [2014] EWCA Crim 1028 at para 57 *"The better the advocates, the easier it is to concentrate on the real issues in the case, the more expeditious the hearing, and the better the prospect of true verdicts according to the evidence. Poor quality advocates fail to take points of potential significance, or take them badly, leading to confusion and, in turn, appeals and, even more serious, leading to potential miscarriages of justice. We have no doubt that it is critical that there remains a thriving cadre of advocates capable of undertaking all types of publicly funded work, developing their skills from the straightforward work until they are able to undertake the most complex."* <https://www.bailii.org/ew/cases/EWCA/Crim/2014/1028.html>

In certain cases it is now difficult for an unrepresented defendant to participate fully in criminal justice without access to lawyers connected to these digital systems.

- 3.15 Moreover, much of the evidence in modern cases is in audio-visual or digital form. All this has to be uploaded onto the systems common to the courts, prosecution and defence. Again, defendants need to be represented by criminal legal aid lawyers who have access to these digital systems and the wherewithal to fund and operate them.
- 3.16 Finally, but not least, there are circumstances where an out of court disposal, such as community resolution or other forms of diversion away from the court system, is a sensible option, particularly for young defendants. Crime will often be associated with multiple problems in the defendant's home or background, and a "joined-up" approach to addressing the root causes of crime is part of public policy. Here too a good criminal legal aid lawyer has a positive role to play, for example advocating to the police for a diversionary outcome and being in touch with social services and other support agencies. This can be particularly important in pre-charge engagement where suspects are released under investigation.²⁷
- 3.17 Again, the potential savings of public resources are substantial. One particular example is the use of cautions, now being further defined by the Police, Crime, Sentencing and Courts Bill²⁸ currently before Parliament. To be eligible for a caution, the offender has to admit guilt; but requiring an admission of guilt without providing effective access to legal advice is unlikely to lead to satisfactory outcomes.

Conclusion

- 3.18 Quite apart from the issues of principle, which many would regard as paramount, there are strong pragmatic reasons for the proper funding of criminal legal aid. A policy of underfunding criminal legal aid runs the serious risk of a malfunctioning CJS. More particularly, underfunding criminal legal aid runs directly counter to the CJS policy of seeking better engagement and earlier case disposals, an aspect of particular importance given the current backlog in the Courts.
- 3.19 In present circumstances, given the weakness of the system described in detail below, now expected to cope with significant increased demand, I for myself see no practicable alternative to properly funding, and reinvigorating, criminal legal aid in England and in Wales.

²⁷ I also discuss further thinking on this point at Chapter 15 below

²⁸ See part 6 of the Police, Crime, Sentencing and Courts Bill ([Police, Crime, Sentencing and Courts Bill - Parliamentary Bills - UK Parliament](#))

CHAPTER FOUR: BRIEF HISTORY OF CRIMINAL LEGAL AID AND RELATED DEVELOPMENTS

- 4.1 Government concerns about the cost of criminal legal aid date back at least 30 years. A summary of a difficult and unusual history is important background to understanding the present issues.

1945 to the 1990s

- 4.2 The general availability of criminal (and civil) legal aid, subject to a means test, and to an “interests of justice” test, was established under the Legal Aid and Advice Act 1949, following the report of the Rushcliffe Committee in 1945.²⁹ The Rushcliffe Committee opted for the delivery of legal aid through private providers using the existing structure of the legal profession, namely solicitors and barristers, paid on a case by case basis. This basic structure has remained the same ever since.
- 4.3 The provisions of the 1949 Act were not brought fully into force for some years, but by the 1960s legal aid was routinely granted to anyone without means facing a trial on indictment in the Crown Court.³⁰ It was only in the 1970s that legal aid became widely granted in the Magistrates’ Courts.
- 4.4 Decisions to grant legal aid in individual cases were taken by the courts (in practice the court clerks), applying the then eligibility criteria under the means test, and what are known as the Widgery principles, established in 1965, under the interests of justice test.
- 4.5 According to the Widgery principles, now reflected in LASPO, the interests of justice test is met if the defendant if convicted is likely to lose their liberty, is subject to an existing suspended sentence, is likely to lose their livelihood, or is likely to suffer serious damage to reputation; whether the proceedings involve a substantial question of law; whether the defendant may not be able to understand the proceedings or present their own case; whether cross examination of witnesses is involved; or whether it is in the interests of a third party that the defendant is represented.³¹
- 4.6 From the 1970s onwards the wider availability of legal aid, both civil and criminal, brought a substantial increase in the numbers of both barristers and solicitors, and rising expenditure on legal aid. The duty solicitor scheme to assist unrepresented defendants in the Magistrates’ Courts was introduced in 1983. The police station duty solicitor scheme, was established in 1986,

²⁹ Prior to World War II, free legal assistance for jury trials was available to a limited extent under the Poor Prisoners Defence Acts of 1903 and 1930,

³⁰ At this time the Assizes and Quarter Sessions, replaced by the Crown Court under the Courts Act 1971

³¹ See now LASPO, section 17(2) ([Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(legislation.gov.uk\)](https://legislation.gov.uk))

following the reforms introduced by the Police and Criminal Evidence Act 1984 (PACE).

- 4.7 In 1986 the CPS became responsible for all prosecutions, whether indictable, either way or summary,³² many of which had been previously handled by police prosecution departments, and in the case of the Magistrates' Court often by police officers themselves.
- 4.8 In 1988 the newly established Legal Aid Board (LAB) took over the administration of legal aid under the Legal Aid Act 1988. The LAB was obliged to fund any organisation carrying out criminal legal aid work, but the decision to grant legal aid remained in the hands of the courts. Providers' remuneration was based largely on hourly rates and the reasonableness of each provider's bill was assessed individually by the LAB.
- 4.9 By the 1990s there was serious concern about the cost of criminal legal aid, particularly that legal aid was being granted in unmeritorious cases. A distinguished commentator has said that "By the late 1980s government spending on criminal legal aid had become a national scandal".³³ The Comptroller and Auditor General refused to approve the Lord Chancellor's 1990-91 Appropriation Accounts.

Fee reforms in the 1990s

- 4.10 In 1991 the then Lord Chancellor, Lord Mackay of Clashfern, announced his intention to introduce standard fees for solicitors doing criminal legal aid work. This provoked strong opposition and an unsuccessful application for judicial review. The Lord Chancellor persevered, saying in January 1993 "The normal basis for paying lawyers for legal aid work must become a standardised fee, set at a level which will attract enough lawyers of appropriate quality to do legal aid work".³⁴ The 1993 Royal Commission on Criminal Justice also supported standard fees, and stated in particular:

*"The fees should be kept under review to ensure their adequacy in attracting sufficient numbers of competent solicitors, properly trained, to perform this very necessary work..."*³⁵

- 4.11 Standard fees for solicitors' magistrates' court work were introduced in June 1993. The system then adopted is essentially still the same today: a lower standard fee intended to cover most cases; a higher standard fee if the work done, calculated on defined hourly rates and charges, reaches a certain level; and a non-standard fee assessed individually to deal with the more exceptional cases.

³² See Chapter 5 below

³³ Joshua Rosenberg, *The Search for Justice (1994)* pp 246-247

³⁴ *The Times*, 22 January 1993

³⁵ Report of the Royal Commission on Criminal Justice 1993, p.118.

<https://www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice>

4.12 From 1st January 1997, a fixed fee scheme, namely the AGFS was established for advocacy by barristers and solicitor advocates in the Crown Court³⁶. The original AGFS determined the fee on the basis of the category of offence; the outcome, namely whether a guilty plea, a cracked trial, or a trial; whether the advocate was a QC or another advocate; the length of the trial; the PPE; and the number of prosecution witnesses.³⁷ Various versions of the AGFS have been in use ever since. At the time the AGFS applied only to trials of up to 10 days and cases with less than 1000 pages of PPE. The scope of the AGFS has since been extended over the years and now covers all Crown Court work except VHCCs, which normally involve trials of more than 60 days.

The Access to Justice Act 1999

4.13 The Access to Justice Act 1999 replaced the LAB by the Legal Services Commission (LSC). The LSC was to run a Criminal Defence Service, alongside a Community Legal Service for civil matters. These services were to be based on contracts entered into by the LSC with solicitors in private practice, charity-funded organisations, or salaried lawyers paid by the Government. A General Criminal Contract was established under the 1999 Act, and its successor the current SCC remains the basis on which criminal legal aid services are supplied by solicitors.³⁸

4.14 The 1999 Act also created the PDS, run by the LSC, consisting of publicly funded salaried lawyers providing criminal legal aid services, mainly organised along the lines of a law firm. Initially established in eight offices, later reduced to four (in Cheltenham, Darlington, Pontypridd and Swansea) and with some salaried advocates doing Crown Court work, the PDS has remained small in scale. A survey conducted by the LSC in 2008 concluded there was no evidence that the PDS could provide criminal defence services at a commensurate cost to private providers.

The Auld Report (2001)

4.15 The Right Hon Sir Robin Auld, in his *Review of the Criminal Courts* published in 2001,³⁹ considered that the key to a just and efficient criminal process is good case preparation and early identification of the issues. One of the essentials to achieve this is “**experienced and motivated defence lawyers who are adequately paid for pre-trial preparation**”... “**the general thrust of the criminal graduated fees scheme... is fundamentally flawed in that it does**

³⁶ Higher rights of audience were granted to solicitor advocates under the Courts and Legal Services Act 1990.

³⁷ [The Legal Aid in Criminal and Care Proceedings \(Costs\) \(Amendment\) \(No. 2\) Regulations 1996 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/1996/1201/contents/make). For the update version of the AGFS, Chapter 13 below.

³⁸ See Chapter 5 below.

³⁹ [Review of Criminal Courts](https://www.criminalcourtsreview.org.uk/), Chapter 10, para 13.

<https://webarchive.nationalarchives.gov.uk/ukgwa/+http://www.criminal-courts-review.org.uk/ccr-00.htm>

not provide an adequate reward or incentive for preparatory work”.
(emphasis added)

The Reforms of 2005/2008

- 4.16 In the early 2000s the Government continued to be concerned about the cost of legal aid. According to *A Fairer Deal for Legal Aid* published in 2005,⁴⁰ criminal legal aid expenditure rose from some £900 million in 1997/98 to £1.2 billion in 2004/05 although there was little increase in the number of cases. Crown Court expenditure had increased by 65 per cent against a background of stable volumes. The Lord Chancellor, now Lord Falconer of Thoroton, emphasised that the legal aid system had *“a bias towards court-based outcomes and insufficient emphasis on resolving problems swiftly or without recourse to litigation. A small number of very expensive criminal cases absorb too great a share of the budget.”*⁴¹
- 4.17 The main thrust of the Government’s proposals was to introduce price competition into the procurement of criminal legal aid services through means of block contracts, a suggestion first mooted in 1995 and envisaged by the 1999 Act. Recognising the practical difficulties, the Government set up a Review led by Lord Carter of Coles to make concrete recommendations.

Lord Carter’s Review (2006)

- 4.18 The Carter Review⁴² aimed for a market-based outcome, the essence of which would be a further move to fixed fees wherever feasible, and a system of Best Value Tendering (BVT) combined with quality assurance through peer review. BVT aimed among other things to achieve economies of scale by reducing the number of solicitors’ firms. However, BVT ran into practical problems and resistance from providers, based notably on fears that some providers would unfairly “lowball” the tenders, driving out perfectly viable firms, and then find themselves unable to make ends meet; that the result would be local oligopolies of lower quality; that niche providers, such as those serving minority ethnic communities, would be excluded; and that client choice would be reduced. BVT did not go ahead.
- 4.19 However, three important changes did to come out of the Carter Review: fixed fees in police stations; a new scheme, the LGFS, for solicitors’ preparation of Crown Court cases; and reform of the AGFS.

Introduction of Police Station Fixed Fees

- 4.20 From 14 January 2008, police station advice and assistance, hitherto charged at hourly rates plus travel and waiting time, became based on a fixed fee, to

⁴⁰ Department for Constitutional Affairs, *A Fairer Deal for Legal Aid*, 2005.

<https://www.gov.uk/government/publications/a-fairer-deal-for-legal-aid>

⁴¹ *A Fairer Deal for Legal Aid* at pg. 5

⁴² The Carter Review:

<https://webarchive.nationalarchives.gov.uk/ukgwa/20081205143452/http://www.legalaidprocurementreview.gov.uk/docs/carter-review-p1.pdf>

include travel time and waiting time. If the work involved very significantly exceeded the average attendance at the police station concerned, an “escape fee” became payable, but only for the time incurred thereafter. Such police station fixed fees were originally based on the historical activity applicable to particular police stations, with the escape fees fixed at three times the standard fee for that police station. Under this system, which is still in place, police station attendance fixed fees vary significantly between police stations, reflecting local usage as it was in 2008. Except for an 8.75% reduction in 2014, these fees have remained the same ever since.

Introduction of the LGFS

4.21 Until the Carter Review solicitors’ fees for Crown Court work other than solicitor advocacy already covered by the AGFS, was mainly based on hourly rates with some standard fees for routine matters. On Lord Carter’s recommendation this system was replaced by the LGFS established in 2008.⁴³ The LGFS was introduced on similar principles to the AGFS. The litigator’s fee is intended to cover the preparation of the case in the Crown Court, and is determined by various proxy elements, the most important being the offence, the outcome (guilty plea, cracked trial or trial) and the number of PPE. Again, VHCCs fall outside the LGFS.

Reform of the AGFS

4.22 Lord Carter’s view was that the AGFS would be more efficient if trials were to be remunerated by a single basic fee charged by the instructed advocate, and that most of the ancillary matters hitherto charged separately should be bundled into this basic fee. Lord Carter recommended that the basic fee should be set according to the class of offence, and whether the advocate was a QC or a junior, with uplifts according to the PPE involved and number of witnesses. This basic fee would include a plea and case management hearing, up to five other interlocutory hearings including mentions, the first two days of the trial and up to three conferences. These reforms were duly implemented as Lord Carter had recommended.⁴⁴

AGFS fee reductions 2010-2012

4.23 The Carter Review led to an increase in AGFS fees, but by 2009 the fees payable under the AGFS were higher than those paid to prosecution advocates by the CPS. Given the pressure on the legal aid budget, the MOJ implemented a reduction totalling 13.5% of AGFS fees over a three-year period from April 2010 to April 2012. At the same time the AGFS was extended to trials expected to last up to 60 days.⁴⁵ The MOJ commented:

⁴³ Criminal Defence Service (Funding) Order SI 2007 No 3352

⁴⁴ Criminal Defence Service (Funding) Order SI 2007 No 1174.
<https://www.legislation.gov.uk/ukSI/2007/1174/contents/made>.

⁴⁵ See The Criminal Defence Service (Funding) (Amendment) (no 2) Order 2010 no 1181.
<https://www.legislation.gov.uk/ukSI/2010/1181/contents/made>

*“We believe that it is right to compare payments for advocacy made by the CPS to those made to defence advocates via legal aid. We do not accept that the roles of prosecuting and defending advocate are not, broadly speaking, comparable”.*⁴⁶

LASPO and the LAA

4.24 In 2012, the provision of legal aid was radically reformed under LASPO, which is the modern foundation for the legal aid system. In particular LASPO sets out the statutory duty imposed on the Lord Chancellor to make criminal legal aid available to eligible persons for advice and assistance at the police station, and for advice, assistance and representation in criminal proceedings where the interests of justice test is met.

4.25 LASPO also created the LAA which replaced the LSC. The LAA, an executive agency of the MOJ, is the body through which the Lord Chancellor’s duty to provide criminal legal aid is discharged. In particular the LAA took over from the courts the function of granting legal aid. Thus, for the first time all the main stages of the legal aid process, namely the application for legal aid, the provider’s application to be reimbursed, and the determination of the reimbursement due, came under one roof.

The 2013/2014 proposals for reform

4.26 In the meantime, in 2010, the MOJ had again published proposals for competitive tendering for criminal legal aid.⁴⁷ This was carried forward in April 2013 by the Lord Chancellor, by now Right Hon Christopher Grayling MP, who announced wide-ranging reforms⁴⁸ aiming at saving £220 million. The main proposals were:

- To introduce a tendering process for the procurement of own client and duty solicitor work. The duty solicitor contracts would be limited to 527, covering 97 geographical procurement areas with between 4 and 17 contracts awarded in each area. The initial proposal included price, but this was later dropped in favour of provider capacity and quality as the main determinants
- To reduce solicitors’ fees overall by 17.5%, with a reduction of 8.75% in 2014, and a further reduction of 8.75% to follow
- To create a national fixed fee rate for police station work, with a higher rate for London police stations

⁴⁶ Explanatory Memorandum on SI 2010 no 1181 laid before Parliament and Impact Assessment 5 April 2010. https://www.legislation.gov.uk/ukxi/2010/1181/pdfs/ukxiem_20101181_en.pdf

⁴⁷ Proposals for the Reform of Legal Aid in England & Wales, 2010.

<https://www.gov.uk/government/publications/proposals-for-reform-of-legal-aid-in-england-and-wales>

⁴⁸ Transforming Legal Aid: Delivering a more credible and efficient system, 2013.

<https://www.gov.uk/government/consultations/transforming-legal-aid-delivering-a-more-credible-and-efficient-system>

- To make various changes to the LGFS and the AGFS, the latter also involving an AGFS fee cut estimated at 6%
- To reduce the fees paid on VHCC cases by 30%⁴⁹
- To reduce the scope of legal aid for prison law advice.
- To reduce fees paid to experts by 20%

4.27 These proposals were not welcomed by the professions. After further consultation in September 2013,⁵⁰ the MOJ published modified proposals in February 2014. These modified proposals were then subject to a successful judicial review, necessitating a further consultation in September 2014. In the meantime, walkouts of the professions occurred in January and March 2014, disrupting court proceedings in England and Wales.

The Outcome of the 2013 Proposals for Solicitors.

4.28 In February 2014, a Report prepared for the Law Society and MOJ by Otterburn Legal Consulting (the Otterburn Report) indicated that criminal legal aid firms' margins were some 5% and highlighted the financial fragility of many legal aid firms. Nonetheless the first cut in solicitors' fees of 8.75% overall went ahead in April 2014. The reduction by 30% of solicitors' fees on VHCC cases also went ahead, as did the reduction in experts' fees.

4.29 The MOJ then commenced the tendering process. Given that there were then more than 1500 firms doing at least some criminal legal aid work, the reduction to 527 of the duty solicitor contracts available for tender represented a major upheaval. A judicial review to suspend the tender process failed, but when the outcome was made known in late 2015, some 99 further legal challenges were brought by unsuccessful tenderers under the public procurement rules, followed by a judicial review brought by an organisation called Fair Crime Contracts Alliance.

4.30 This litigation forced the postponement of the tendering implementation date, and in early 2016 the Lord Chancellor, now Right Hon Michael Gove MP, decided not to go ahead with the tendering process. Proposals for tendering arrangements have not been revived since.

4.31 The second fee reduction of 8.75% also went ahead in July 2015, but at the same time as abandoning the tendering process the Lord Chancellor announced⁵¹ that this second cut would be suspended from April 2016, which it was. Following a judicial review, a challenge to the reduction in scope of legal

⁴⁹ At that time there were said to be six barristers with legal aid income of more than £500,000 per annum.

⁵⁰ Transforming Legal Aid: Next Steps, 2013.

<https://www.gov.uk/government/consultations/transforming-legal-aid-next-steps>

⁵¹ Written Statement to Parliament, 28 January 2016. <https://hansard.parliament.uk/Commons/2016-01-28/debates/56f6b60f-2d57-4b3a-a5e2-c1293e16b3e2/WrittenStatements>

advice on some aspects of prison law succeeded in the Court of Appeal, but other aspects of prison law were taken out of scope.⁵²

The Protests of the Bar in 2013 and 2014

- 4.32 Meanwhile, following the cuts from 2010 to 2012 referred to above, the Bar for its part considered that the 2013 proposals resulted in a further cut to the AGFS fees, although the MOJ had pointed out there was already an oversupply of barristers. In protest, the Bar adopted a “no returns” policy – meaning that if the barrister originally instructed in a case was unavailable, no other barrister would take over. The MOJ then agreed to suspend the AGFS cuts until after the next General Election due in 2015.
- 4.33 The Bar also opposed the proposed cut for VHCC cases, and the Bar’s disruptive action led to a fraud case (known as Operation Cotton) being dismissed because there could be no fair trial without adequate representation. That decision was however reversed on appeal, primarily on the ground that PDS advocates would be available to the defence.⁵³
- 4.34 In July 2014 the MOJ and the Bar announced a settlement under which VHCC cases would be negotiated with the Bar under the arrangements known as Interim Fixed Fee Offers (IFFOs)⁵⁴ and these arrangements have been in place ever since.

Quality Assurance Scheme for Advocates (QASA - 2013)

- 4.35 While these upheavals were in progress, in 2013 the Bar Standards Board (BSB), Solicitors Regulation Authority (SRA) and CILEX jointly proposed an accreditation scheme which would apply to all criminal advocates, based essentially on appraisal by judges, known as the Quality Assurance Scheme for Advocates (QASA). This scheme was opposed by the Criminal Bar Association (CBA), largely on the basis that QASA placed both the advocate and the judge in a problematic position, given their respective roles. The CBA took the matter to a judicial review which was eventually dismissed by the Supreme Court in 2015.⁵⁵ However, in 2017 the regulatory authorities decided not to proceed with QASA, as a result of which there is no formal quality assurance scheme for

⁵² *R (The Howard League and the Prisoners’ Advice Service) v the Lord Chancellor* [2017] EWCA Civ 244. <https://www.bailii.org/ew/cases/EWCA/Civ/2017/244.html>. The aspects still out of scope of legal aid include sentence planning, risk assessments, treatment cases, licence conditions and home detention curfew orders.

⁵³ *R v Crawley and others v FCA* [2014] EWCA Crim 1028. <https://www.judiciary.uk/wp-content/uploads/2014/05/r-v-crawley-others-21052014.pdf> See also the comments of Leveson P cited at footnote 26 above.

⁵⁴ [Interim Fixed Fee Offer \(IFFO\) Scheme](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740586/Interim_Fixed_Fee_Offer_(IFFO)_Scheme), Ministry of Justice, the LAA and the Bar Council, 2014. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740586/Interim Fixed Fee Offer Scheme explanatory note.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740586/Interim_Fixed_Fee_Offer_Scheme_explanatory_note.pdf)

⁵⁵ See *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41. <https://www.bailii.org/uk/cases/UKSC/2015/41.html>

criminal advocates.⁵⁶ Quality control of criminal legal aid solicitors is achieved through the provisions of the SCC.⁵⁷

The attempt to reduce the impact of PPE in the LGFS (2017)

- 4.36 In arriving at the graduated fee payable under the LGFS, an additional fixed payment is made per page of prosecution evidence, up to 10,000 pages. The concept of PPE dates from the time when “a page” was in traditional paper format. In modern times there has been a proliferation of documents but also of electronic evidence such as mobile phone records, social media content, and computer hard drives. In 2014, the case of *Napper*⁵⁸ decided that PPE included such electronic evidence, contrary to the LAA’s then guidance.
- 4.37 The MOJ took the view that the *Napper* decision would further increase LGFS costs, which were already rising although the volume of cases was falling. Accordingly, in 2017 the MOJ consulted on a proposal to reduce the PPE upper limit from 10,000 to 6,000. The MOJ Impact Assessment indicated a saving in LGFS costs of between £26 million and £36 million.⁵⁹
- 4.38 This was strongly opposed by the Law Society and criminal legal aid firms, who pointed out that these PPE payments under the LGFS were critical, in that many firms relied on a small number of higher value LGFS cases to bring in a substantial part of their annual income. Firms were already in a fragile financial condition. In the event, the Law Society successfully challenged the consultation process by judicial review, so the reform of PPE under the LGFS did not proceed.

The Law Society Heatmap 2018

- 4.39 In April 2018 the Law Society, by now seriously concerned about the viability of criminal legal aid firms, published a “Heatmap” showing those regions where there was a dearth of duty solicitors as a result of fewer and fewer entering the profession. According to the Law Society, the average age of duty solicitors was 47, and in many regions considerably higher, and in several regions there were no duty solicitors under 35. In an accompanying press release the Law Society warned that “*Criminal defence lawyers in England & Wales could become extinct*”.⁶⁰ According to the Law Society, within 5 to 10 years’ time there could be insufficient criminal defence solicitors in many areas.

⁵⁶ See Chapter 15 below

⁵⁷ [Standard Crime Contract 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653263/lqfs-consultation-response-impact-assessment.pdf), effective from June 2021.

⁵⁸ *R v Napper* [2014] 5 Costs LR 947.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/859646/R_v_NAPPER.PDF

⁵⁹ MOJ Impact Assessment, IA No. MoJ013/2017, October 2017.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/653263/lqfs-consultation-response-impact-assessment.pdf

⁶⁰ [Criminal duty solicitors in England and Wales \(carto.com\)](https://carto.com)

The AGFS Negotiations 2017 - 2018

- 4.40 In January 2017, and working with the Bar Council, the MOJ set out further proposals for reforming the AGFS, designed to complement the introduction of better case management in the courts⁶¹ and improve the position of the junior Bar. The main features of the proposal were a significant reduction in the use of PPE in determining the fee (but retained to some extent in drugs and fraud cases); an extension of the categories of offences and the banding within categories which determine the fee, to 42 bands in total; separate fees for the first six standard appearances, such as the Plea and Trial Preparation Hearing (PTPH) and sentencing hearings; and additional daily attendance fees after the first day of the trial. This was, in effect, a reversal of the approach adopted by the Carter Review.
- 4.41 The announced intention of this reform was to be cost neutral as compared with 2013/14. However, the CBA objected to the use of 2013/14 as a baseline, arguing that the proposals effectively involved another fee cut. The Bar Council pointed out that the MOJ's own Impact Statement stated that using 2015-16 data, as distinct from 2013/14 data, the new scheme implied a cost reduction of 3%.
- 4.42 Responding to these points on 23 February 2018, the MOJ adjusted the scheme in various ways, notably by increasing the fees for work typically done by junior barristers. These various changes, when modelled against 2014/15 and 2015/16 saw increases in AGFS spend of around 4% and 1% respectively, but when modelled against 2016/17, the spend in cash terms was around 1% less, albeit as a result of a predicted fall in volumes.⁶²
- 4.43 The CBA was extremely unhappy with the revised proposals and on 29 March 2018 recommended its members to consider declining new legal aid cases from 1 April, stating that the criminal justice system was "collapsing" and that the lack of Government investment in legal aid was "the final straw". On 9 May 2018 the CBA announced a no-returns policy, along the same lines as that used in similar circumstances in 2014, to take effect from 25th May 2018.
- 4.44 Negotiations then took place with the MOJ, and on 24th May 2018, it was announced that the Treasury would make available a further £15 million, targeted mainly towards the cases which might lose out from the reduced reliance on PPE, and towards the junior Bar, with a 1% increase in fees from April 2019, and a review of the AGFS within 18 months.
- 4.45 This new proposal was balloted by the CBA, and its members voted to accept it by 51.55% to 48.45%. The proposed changes to the AGFS came into force in

⁶¹ Reforming the Advocates' Graduated Fee Scheme Consultation, January 2017.

<https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/>

⁶² MOJ Impact Statement, 20 February 2018, IA No. MoJ033/2016.

https://consult.justice.gov.uk/digital-communications/reforming-the-advocates-graduated-fee-scheme/supporting_documents/agfsimpactassessment.pdf

December 2018, and according to the MOJ Impact Statement⁶³ amounted to an additional £23 million per annum.

The House of Commons Justice Committee Report 2018

4.46 The Justice Committee of the House of Commons chaired by Sir Robert Neill MP published a Report on Criminal Legal Aid on 18 July 2018. The main conclusions of the Committee were:

- Solicitors appear to have serious grievances about the fees. There was a worrying level of demoralisation and threats to the sustainability of their firms.
- Regrettable although it was that the Criminal Bar had chosen to take direct action, the underlying reasons were reductions in fees from 2010 onwards, unhappiness about the revised AGFS, and a genuine and heartfelt concern about the future of their profession and the underfunding of criminal justice
- There should be a comprehensive review of criminal legal aid, with the aim of devising a scheme that is sustainable and user focused, to be launched no later than March 2019.

4.47 The Committee recorded the evidence of the Law Society that there had been no inflationary increases of criminal legal aid fees for 20 years, and there had also been significant reductions, such that criminal legal fees were now, at most, one third of private rates. The Criminal Law Solicitors Association (CLSA) considered that in real terms fees had fallen by around 42% since 1997.

CLAR

4.48 As stated above, in December 2018, the then Lord Chancellor, the Right Hon David Gauke MP, announced the Criminal Legal Aid Review (CLAR). Following, I understand pressure from the Bar, it was decided to fast track certain aspects of the fee schemes known as the “accelerated areas”. Following a consultation that opened on 28 February 2020 (subsequently extended as a result of the pandemic) and the MOJ response of 21 August 2020, a number of changes to the LGFS and the AGFS were introduced from 17 September 2020. These were the introduction of a fixed fee for reviewing unused material, with an additional claim for special preparation above 3 hours work; an additional special preparation fee under the AGFS if the PPE is above defined limits for the offence; all Crown Court trials paid under the AGFS which crack after the PTPH to be paid at the same basic fee as trials; and litigators to

63

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/762983/agfs-response-impact-assessment.PDF

receive a fixed sending fee when a case is sent to the Crown Court from the Magistrates' Court.⁶⁴

4.49 According to the MOJ's Impact Analysis, these changes represented an additional £19-26 million per year for the AGFS and £17-24 million for the LGFS, compared to the to 2019/20 spend. That would represent approximately 9-13% extra for advocates and 5-7% extra for litigators.⁶⁵ However, due to the disruption caused by the pandemic, these changes have not yet fully percolated through to providers.

House of Commons Justice Committee Report 27 July 2021

4.50 While this Review was in progress the House of Commons Justice Committee published a further report on the Future of Legal Aid, the part dealing with criminal legal aid following up the Committee's earlier Report in 2017.⁶⁶ The Committee continued to express grave concerns about the sustainability of criminal legal aid, and their recommendations are included at Annex D.

4.51 Shortly before this Review was completed, the Westminster Commission on Legal Aid also published a report into the Sustainability and Recovery of The Legal Aid Sector,⁶⁷ expressing serious concerns about the sustainability of both civil and criminal legal aid, particularly from the point of view of young lawyers entering the profession.

Other Relevant Reports

The Jeffrey Review (2014)

4.52 In 2014 Sir Bill Jeffrey, former Permanent Secretary to the Home Office reviewed the functioning of criminal advocacy in England & Wales. His most relevant conclusions were:

- The Bar, “*a substantial national asset*,”⁶⁸ had an oversupply of advocates but was an aging profession: many barristers' chambers resembled an inverted pyramid, with most practitioners in their 40s and 50s, only a

⁶⁴ [Criminal Legal Aid Review: An accelerated package of measures amending the criminal legal aid fee schemes](https://www.gov.uk/government/consultations/criminal-legal-aid-review-an-accelerated-package-of-measures-amending-the-criminal-legal-aid-fee-schemes). <https://www.gov.uk/government/consultations/criminal-legal-aid-review-an-accelerated-package-of-measures-amending-the-criminal-legal-aid-fee-schemes>. One area which was not “accelerated” is the proposed introduction of an additional defence fee where a voluntary agreement has been reached to engage with the prosecution prior to the suspect being charged, see Chapter 9.

⁶⁵ [MOJ Impact Statement, 21 August 2020, IA No. MOJ052/2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910944/clar-impact-assessment.pdf) .

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910944/clar-impact-assessment.pdf

⁶⁶ [The Future of Legal Aid - Justice Committee - House of Commons \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/reports/the-future-of-legal-aid/)

⁶⁷ [The Westminster Commission on Legal Aid WEB.pdf \(lapg.co.uk\)](https://www.lapg.co.uk/wp-content/uploads/2021/07/The-Westminster-Commission-on-Legal-Aid-WEBSITE.pdf)

⁶⁸ [Jeffrey Review](https://www.jeffreyreview.org.uk/), pg.62, para 9.12.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf

handful under five years call, and fewer and fewer pupillages, leading to a less diverse profession, despite the continuing demand for pupillages,⁶⁹

- The Bar lacked any mechanism for adjusting to a fall in demand, and that the allocation of cases within chambers was likely to be influenced by seniority,⁷⁰
- Delay in assigning advocates to cases and uncertainty over trial dates, made the system “*more hand to mouth than is conducive to good quality*”. He criticised in particular the “warned list” system in the Courts.⁷¹

There was no follow-up to the Jeffrey Review.

The Leveson Report (2015): Better Case Management

4.53 In his 2015 *Review of efficiency in Criminal Proceedings*, the Right Hon Sir Brian Leveson, then President of the Queen’s Bench Division, recommended four principles, since adopted as the basis of case management in the CJS:

- **Getting it right first time** – the police and the CPS should work closely to ensure the right charges are laid at the outset, with proportionate disclosure of material to the defence; on this basis defence lawyers can take proper instructions and progress expeditiously, indeed it would be incumbent upon them to do so.
- **Case ownership** – for each case, in the police, the CPS and the defence, there must be one person who is (and who is identified to be) responsible for the conduct of the case.
- **Duty of direct engagement**– the identified representatives should engage at the earliest opportunity and in advance of the first hearing; what matters is early direct engagement, whether by telephone, email or otherwise. If this is done properly, interlocutory hearings would rarely be needed
- **Consistent judicial case management**, notably to ensure that the necessary evidence is served, disclosure has been undertaken, and that court time is deployed to maximum efficiency.

These changes were largely implemented in the Criminal Procedure Rules, but no further funding was made available to defence practitioners to assist them to fulfil their obligations.

4.54 On the issue of early engagement, Sir Brian Leveson said:

⁶⁹ Sir Bill also raised the possibility that barristers might restructure themselves into legal entities and move “downstream” to do more of the client facing work traditionally done by solicitors; or alternatively that the legal profession might in future have a single entry point, with the choice of becoming a barrister being made later in career, rather than at the outset as at present.

⁷⁰ [Jeffrey Review, page 49, para 6.8](#)

⁷¹ [Jeffrey Review](#), page.9.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf

“Part of the solution to improving the whole system is to acknowledge the critical role that the defence can play”.⁷² (emphasis added)

4.55 Sir Brian recommended that that the CPS should serve the Initial Disclosure of the Prosecution Case (IDPC) in time to enable the defence and CPS to engage in discussions about the case before the first hearing in the Magistrates’ Court or before the first hearing in the Crown Court. He expressed concern that matters “*are far too frequently left to the door of the Court*”.⁷³

4.56 Sir Brian Leveson described the warned list system “*as an inefficient means of organising the court’s work [which] frequently leads to dissatisfaction on the part of victims, witnesses, the general public and the professions*”.⁷⁴

*The Lammy Review (2017)*⁷⁵

4.57 On a different but important aspect, in September 2017 the Right Hon David Lammy MP, until recently Shadow Lord Chancellor, published his independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic (BAME)⁷⁶ individuals in the CJS. Mr Lammy observed that many BAME communities felt the CJS to be stacked against them. He was particularly concerned about youth justice, pointing to increasing trends in offending and reoffending, with 41% of those under 18 in custody coming from a BAME background. Mr Lammy noted that BAME defendants were more likely than white defendants to plead not guilty, not trusting the police and legal aid solicitors seen as “part of the system”. BAME defendants were also more likely to elect jury trial, not trusting the Magistrates’ Court. BAME defendants often incurred longer sentences, since they lost the discount available for an early guilty plea.

4.58 Among many other recommendations, Mr Lammy suggested that different approaches should be explored in relation to explaining their legal rights to BAME defendants in custody at the police station, for example a role for community intermediaries, giving suspects a choice between different duty solicitors, and earlier access to advice from barristers. Mr Lammy was also particularly concerned about youth justice, with for example a 45% rate of reoffending among black defendants.

4.59 I refer to these reports where relevant later in this Review.

⁷² Pg. 30, para 99. <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

⁷³ E.g. pg. 40 at paragraphs 138-141. <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

⁷⁴ Pg. 100, para 30. <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

⁷⁵ The Lammy Review 2017: <https://www.gov.uk/government/publications/lammy-review-final-report>

⁷⁶ In using for shorthand the acronym “BAME” in this Review I do not overlook the differences between the various minorities encompassed within that term, nor do I exclude minorities from other backgrounds.

CHAPTER FIVE: OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

5.1 This Chapter sets out a brief overview of the CJS so far as relevant to the provision of criminal legal aid.

The Police

5.2 Leaving aside motoring offences and the like, the criminal justice process normally begins with a suspect being arrested by the police and taken to a police station or being asked to attend a voluntary interview. There are 43 separate police forces in England & Wales, often with different computer systems. In March 2021 there were approximately 135,000 active police officers, excluding support staff, a number which is increasing as a result of the Government's plans to recruit an extra 20,000 police officers announced in 2019. The cost of the police is some £15 billion per annum, although of course the police have many "non-crime" responsibilities. The recent Spending Review envisages further resources for the police including a further £540 million to complete the recruitment of further police officers up to 148,000 by 2023.⁷⁷

5.3 In 2019/20 the police recorded some 5 million notifiable offences (excluding fraud), and about 350,000 such offences resulted in a charge or summons.

Legal Aid at the Police Station

5.4 Anyone under arrest in England & Wales or attending a voluntary interview as a suspect is entitled, irrespective of means, to legal advice and assistance. This is provided 24/7 by solicitors or accredited police station representatives under the duty solicitor scheme administered by the LAA, covering approximately 1400 police stations.⁷⁸ The suspect may ask for his own solicitor or use the duty solicitor (in both cases free of charge). It is thought that around 50% of defendants seek legal advice at the police station,⁷⁹ which means many defendants go unrepresented. In 2019/20 some 600,000 police station claims were paid by the LAA at a cost of some £126 million.⁸⁰

The Charge (or Not)

Summary, Either Way or Indictable

⁷⁷ Spending Review page 99 [BUDGET 2021: Protecting the jobs and livelihoods of the British people \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/91212/budget-2021-protecting-the-jobs-and-livelihoods-of-the-british-people.pdf)

⁷⁸ Strictly speaking the attendance fee is payable even if the interview does not take physically at a police station: a "police station" is defined under the Standard Crime Contract 2017 as "a police station or any other place where a Constable is present".

⁷⁹ See further – Vicky Kemp, Written Evidence to Parliament, 2020 <https://committees.parliament.uk/writtenevidence/12784/pdf/>. Dr Kemp estimates the number at 56%.

⁸⁰ Some of these claims are telephone advice only, including claims under CDS Direct which can cover telephone advice in driving cases, including drink-driving.

- 5.5 The subsequent route through the criminal process depends on which court can try the suspected offence. Summary offences are lesser crimes, such as motoring offences, common assault, or minor criminal damage, and may be tried only in the Magistrates' Court. Indictable offences are serious crimes such as murder or serious violence and may be tried only in the Crown Court before a judge and jury. Either way offences are offences of varying seriousness where the defendant may elect trial either in the Magistrates' Court or the Crown Court. Typical either way offences are theft, burglary, possession of drugs, or assault occasioning actual bodily harm.

The Charging Process

- 5.6 Normally the police will interview the suspect, and then take a decision on how to proceed. If it is considered there is already sufficient evidence, the police will proceed to charge. However, the suspect might be Released Under Investigation (RUI) on pre-charge bail to enable further enquires to take place before a charging decision is taken, and this frequently occurs.⁸¹
- 5.7 The charging process is governed by the *Director's Guidance on Charging*⁸² issued by the Director of Public Prosecutions (DPP) who heads the CPS. The suspect may be charged with an offence only if there is sufficient evidence to provide a reasonable prospect of conviction and a charge is in the public interest. Charging decisions may be taken by the police in summary cases and certain either way offences where a guilty plea is anticipated, and the case is suitable for the Magistrates' Court. In all other cases the charging decision will be taken by the CPS.
- 5.8 If the suspect is charged at the police station, it is for the custody officer to decide whether the suspect is remanded in custody or released on bail. If the suspect is remanded in custody they must be brought before the magistrates, normally on the following day, who will then decide whether the defendant should be released on bail or remanded in prison until trial. There are custody limits on how long a defendant may be held pending trial, for example 182 days for an indictable offence, subject to the possibility of extension for good reasons.

Alternatives to Charging

- 5.9 It may not be generally appreciated how many police matters never reach a court or do so only after considerable delay.

⁸¹ See further The Policing and Crime Act 2017 and [Pre-charge bail and released under investigation 2020](https://www.legislation.gov.uk/ukpga/2017/3/contents), HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary and Fire and Rescue Services. <https://www.legislation.gov.uk/ukpga/2017/3/contents>, <https://www.justiceinspectors.gov.uk/hmicfrs/publications/pre-charge-bail-and-released-under-investigation-striking-a-balance/>. RUI is proposed to be reformed but not abolished under the Police, Crime, Sentencing and Courts Bill currently before Parliament (see Clause 43 and Schedule 4)

⁸² See [Director's Guidance on Charging](https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020), 6th Edition, effective from 31 December 2020.

<https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020>

- 5.10 There are essentially three other decisions open to the police:
- i. No further action (NFA): for example, if a victim does not support further action, the evidence is too weak or the circumstances too trivial.
 - ii. An out of court disposal: this may consist of formal action, for example accepting a caution if the offence is admitted, or informal action. Informal action includes notably community resolution, which normally requires the victim's consent, and may consist of an apology and financial reparation, for example. Although policy differs between police forces, much effort is made to divert young defendants from the formal justice process, through out of court disposals, leading to a decline in the number of prosecutions of young defendants. Self-evidently out of court disposal is unsuitable for serious offences.
 - iii. RUI: As mentioned above, frequently the police will release a suspect without charge at the initial stage in order to pursue further investigations. This is not a release on bail in the traditional sense, and for that reason the numbers of persons on bail, i.e. charged and then released on bail, has declined sharply. Often a person subject to RUI hears nothing further for months, if not years, and then receives a postal requisition (i.e. summons) indicating they have been charged, giving a date for their court appearance.⁸³

The Prosecution

The Crown Prosecution Service

- 5.11 The CPS, led by the DPP, is responsible on behalf of the Crown for most prosecutions in England and Wales, although some other bodies have prosecution powers, such as the Serious Fraud Office.⁸⁴ The CPS has suffered severe cut-backs in recent years, but in 2019 was granted £85 million to fund a substantial recruitment programme and improve case progression through the CJS. The recent Spending Review has also announced an £80 million increase in resource funding for the CPS,⁸⁵ in part to support the work of the additional 20,000 police officers.
- 5.12 Once the charging decision has been taken, it is for the CPS to prepare the prosecution evidence for presentation to the relevant court. The CPS will review the police case file and indicate what further evidence needs to be obtained, often a complex and time-consuming process where digital and forensic

⁸³ Under the Police, Crime, Sentencing and Courts Bill currently before Parliament, pre-charge bail will be limited to nine months and in certain cases 12 months. See also, Police Powers: pre-charge Bail, Home Office, January 2021

⁸⁴ Private prosecutions may also occur. Although infrequent a recent example is the prosecution by the Post Office of numerous sub-postmasters, leading to substantial miscarriages of justice.

⁸⁵ HMT Spending Review document p.103 [BUDGET 2021: Protecting the jobs and livelihoods of the British people \(publishing.service.gov.uk\)](#)

evidence is often involved. The review process is also complicated by lack of system compatibility between the CPS and the various police forces.

Disclosure

- 5.13 The evidence relied on by the CPS has to be disclosed to the defence at the earliest opportunity. The IDPC must be disclosed at the earliest opportunity and no later than the beginning of the day of the first hearing in the Magistrates' Court, which is normally 28 days from charge. The evidence to the Review suggests that it is not unusual for the IDPC to be received by the defence only very shortly before, or indeed on the day of, the first hearing, and may not be complete when it is disclosed.
- 5.14 A particular difficulty is that the defendant is expected to enter a plea at the first hearing and may obtain maximum credit on sentence for doing so.⁸⁶ If there is no time to review the prosecution evidence or it is not complete, that places the defendant's representative in a difficult position. On the other hand, the CPS may not have known the identity of the defendant's representative or may not have received the material in time from the police.
- 5.15 The CPS is also responsible for disclosing to the defence a schedule of unused material on the police file. At common law and in accordance with the *Attorney General's Guidelines on Disclosure*⁸⁷ the Crown must disclose to the defence evidence, which is not part of the prosecution case, but which might undermine the prosecution case or assist the defendant. Issues often arise as to the timeliness and sufficiency of the disclosure of unused material, and it is admittedly not always easy for the police, who bear the initial responsibility, to determine what unused material is required to be disclosed.

The CPS and the Police

- 5.16 The CPS and the Police work together to improve their operational efficiency through the national file standard and other mechanisms, and there is a Joint Operational Improvement Board jointly chaired by the CPS and the Police.⁸⁸ In 2021 a commitment from the College of Policing, National Police Chiefs Council and the CPS, the National Case Progression Commitment,⁸⁹ acknowledged that cases were not always progressing efficiently through the criminal justice system, and described the difficulties the police and the CPS face in progressing a case to trial, notably the time it takes to receive and analyse digital devices and forensic evidence. The Commitment refers to the need to improve communications between all the parties in a case, not only between

⁸⁶ [Reduction in Sentence for a Guilty Plea Guideline - January 2017 \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk/reduction-in-sentence-for-a-guilty-plea-guideline-january-2017)

⁸⁷ See [Attorney General's Guidelines on Disclosure](https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020), effective 31 December 2020.

<https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020>

⁸⁸ One particular recent example is the Police-CPS Joint National RASSO Action Plan (2021) to improve investigation and prosecution of rape and serious sexual offences.

<https://www.cps.gov.uk/publication/police-cps-joint-national-rasso-rape-and-serious-sexual-offences-action-plan-2021>

⁸⁹ [National Case Progression Commitment: College of Policing, National Police Chiefs' Council and Crown Prosecution Service, March 2021 | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/publication/police-cps-joint-national-rasso-rape-and-serious-sexual-offences-action-plan-2021)

the Police and the CPS, but also between the Police, the CPS and the Defence:

“There is commonly little or no engagement with the defence before the first hearing and any discussions with a view to resolving issues generally takes place with the advocate at court. As a result, engagement only starts to take place in court at the first hearing and correspondence begins after the first hearing once the evidence has been fully considered. Early engagement should be encouraged and requests made of the prosecution team dealt with in a timely manner.”

The Magistrates’ Court

- 5.17 All cases begin in the Magistrates’ Court,⁹⁰ which consists of a bench of lay magistrates or a District judge sitting alone or with two magistrates.⁹¹ The bench is supported by a legal adviser, a qualified lawyer. Under an initiative known as *Transforming Summary Justice* introduced from 2015, the police assess whether a guilty plea is anticipated, in which event the case is listed in a ‘GAP’ court. If a not guilty plea is anticipated the case is listed in an ‘NGAP’ court. The defence is not normally involved in this police decision.
- 5.18 At the first hearing in the Magistrates’ Court, whether a GAP or NGAP court, the defendant is asked whether they intend to plead guilty or not guilty. If they indicate that they intend to plead guilty then under the Sentencing Guidelines⁹² they are entitled to a discount of up to one third off their sentence, since they pleaded guilty at the earliest occasion. If it is a summary offence, or an either way offence, the Court might proceed to sentencing that day or adjourn the matter for reports. If the defendant pleads not guilty, then another date is fixed for the trial to take place in the Magistrates’ Court.
- 5.19 If it is an indictable only offence, or an either way offence where the defendant indicates a not guilty plea and elects jury trial in the Crown Court, then the matter goes to the Crown Court. Again, for an indictable only offence, to be sure of obtaining maximum credit for a guilty plea the defendant is expected to indicate to the Magistrates’ Court an intention to plead guilty when the case is heard in the Crown Court.⁹³
- 5.20 If the defendant pleads guilty in the Magistrates’ Court, or is convicted, of an either-way offence, the magistrates’ may commit the defendant for sentencing to the Crown Court if they consider their sentencing powers – up to six months imprisonment for a single offence and up to 12 months in total – are insufficient.

⁹⁰ The [Police, Crime, Sentencing and Courts Bill](#) currently before Parliament provides that indictable only cases i.e. those that may be tried in the Crown Court only, may proceed direct to the Crown Court without being “sent” there by the Magistrates’ Court. <https://bills.parliament.uk/bills/2839>

⁹¹ There are approximately 13,200 lay magistrates and 400 district judges in England & Wales, and approximately 156 Magistrates’ Courts, reduced from 320 in 2010.

⁹² [Reduction in Sentence for a Guilty Plea Guideline - January 2017 \(sentencingcouncil.org.uk\)](#)

⁹³ [Reduction in Sentence for a Guilty Plea Guideline - January 2017 \(sentencingcouncil.org.uk\)](#)

An appeal lies to the Crown Court against a conviction or sentence by the Magistrates' Court. Such an appeal is by way of re-hearing.

Legal Aid in the Magistrates' Court

- 5.21 A defendant may obtain legal aid for representation in the Magistrates' Court if (a) they are eligible financially and (b) the "interests of justice" test is met. The defendant's solicitor must apply to the LAA for a Representation Order, giving details of the defendant's means and sufficient details of the circumstances to satisfy the interests of justice test.
- 5.22 A defendant on benefits, or an offender less than 18 years old, qualify automatically for legal aid. Around 45% of applications are automatically "passported" for legal aid since the defendant is receiving Universal Credit. In other cases, a defendant with a gross annual income of £22,325 or more is not eligible for legal aid. If the defendant's annual income is between £12,475 and £22,325 then various allowances are deducted, for example for rent or mortgage payments, council tax, and a cost of living allowance, to arrive at the defendant's net 'disposable' income. If the defendant's annual disposable income so calculated is less than £3,398 then they qualify for legal aid. As already indicated, these limits have not been revised for many years, but are currently under review.⁹⁴
- 5.23 Since legal aid is almost always granted in the Crown Court, albeit subject to a contribution, it has been suggested to the Review that some defendants who do not qualify for legal aid in the Magistrates' Court elect trial in the Crown Court, because otherwise they would not be able to afford legal representation.
- 5.24 In the Magistrates' Court the CPS is normally represented by an in-house prosecutor, or by a barrister or other agent. Defendants are typically represented by a solicitor or a chartered legal executive with rights of audience in the Magistrates' Court, or by a junior barrister. If the solicitor instructs a barrister, the barrister is paid by the solicitor rather than by the LAA.
- 5.25 In 2019/20 there approximately 257,000 claims in respect of legal aid for representation in the Magistrates' Court, costing some £110 million.

Duty Solicitor Scheme in the Magistrates' Court

- 5.26 Many defendants arrive at the Magistrates' Court without representation. This can be for many reasons, for example having declined legal advice at the police station, losing touch with the solicitor who advised at the police station, perhaps as a result of a long period of RUI, not understanding the process, or simply believing they do not need legal assistance. However, under the Magistrates' Court duty solicitor scheme, a solicitor is on duty at the Court to give free

⁹⁴ A Legal Aid Means Test Review was announced in February 2019. The review will consider areas such as the income and capital thresholds for civil and criminal legal aid entitlement, benefits passporting, non-means tested areas of legal aid, types of income and capital that are disregarded when assessing financial eligibility and the contributions system. The review is planned to be completed by late 2021, having been delayed by the COVID-19 outbreak.

advice and assistance, including advocacy assistance, to unrepresented defendants, albeit at very short notice.

- 5.27 In 2019/20 there were some 63,500 claims in respect of the Magistrates' Court duty solicitor scheme, costing some £19 million.

Youth Court

- 5.28 Except for very serious offences, children between the age of 10 and 17 are tried in the Youth Court, even if the offence is an indictable offence. Cases in the Youth Court are tried by three magistrates or a district judge. Legal aid is available to anyone under 18 without a means test, but the remuneration is based on the Magistrates' Court fees even if the offence charged is indictable. The procedure in the Youth Court is less formal, and the proceedings are not open to the public. Please see further Chapter 11 below.

The Crown Court

- 5.29 The Crown Court tries indictable only offences and either way offences where the defendant has elected to be tried in the Crown Court. The trial is before a Crown Court judge and a jury. The Crown Court also deals with committals for sentence from the Magistrates' Court and appeals from the Magistrates' Court to the Crown Court, the latter being heard by a Crown Court judge sitting with two magistrates.⁹⁵

The stages in the Crown Court

- 5.30 When the case arrives in the Crown Court from the Magistrates' Court, a PTPH is held normally 28 days after sending. Before the PTPH takes place, the CPS should have served the principal materials relied on by the prosecution, including sufficient evidence to allow the Court to manage the case effectively.⁹⁶ The Review has been told that this does not always happen.
- 5.31 A plea of guilty or not guilty will normally be taken at the PTPH. If the plea is guilty, the judge may proceed to sentence. If not guilty, the judge should give further directions. Thereafter the procedure should continue in stages. First the CPS should serve the bulk of the prosecution evidence within 50 days (custody cases) or 70 days otherwise (Stage 1). Then 28 days after Stage 1 the defence should serve the Defence Statement setting out the nature of the defence, the facts relied on and various other matters (Stage 2). The prosecution should then respond to the defence statement (Stage 3) and the defence make any final applications (Stage 4) at which point the case should be ready for trial. Again, the Review has been told that these timings are not always respected, and that in practice disclosure is sometimes tardy. It seems that in some cases several PTPHs may be necessary. There is in practice almost no sanction available to the Court if the parties do not adhere to the timetable.

⁹⁵ There are approximately 84 Crown Court centres. Some trials are heard by a High Court judge on circuit. Part time judges, typically QCs sitting as Recorders also try cases in the Crown Court.

⁹⁶ Plea and Trial Preparation Hearings – Notes for Guidance, 2015, pg.1.

Legal Aid in the Crown Court

- 5.32 Most defendants in the Crown Court are legally aided. Except for appeals from the Magistrates' Court against conviction or sentence, all Crown Court cases are deemed to pass the interests of justice test for legal aid purposes. As regards the means test, defendants with a disposable income (i.e. gross income less deductions for rent, cost of living etc) of more than £37,500 are not eligible for legal aid, and those with a disposable income between £3,398 and £37,500 are asked to pay a contribution of 90% of their disposable income for a maximum of six months. If acquitted, these contributions are returned to the defendant. If the defendant is convicted and has capital above £30,000, they may be asked to pay a further contribution to cover their full defence costs. Around 9% of defendants in the Crown Court pay income contributions, and 3% pay capital contributions. About 7% of defendants are privately represented. If acquitted, privately paying defendants may be awarded costs but only at the legal aid rates.⁹⁷
- 5.33 In 2019/20 there were around 89,000 legal aid cases in the Crown Court, with legal aid expenditure amounting to some £564 million. There were some 82,200 claims made under the LGFS, totalling some £358 million, and 82,500 claims under the AGFS, amounting to £207 million.

Other Elements of the System

Appeals

- 5.34 Legal aid is available to appeals from the Crown Court to the Court of Appeal, Criminal Division, against either sentence or conviction. Legal aid is also available for proceedings before the Criminal Cases Review Commission (CCRC), to which persons who feel they have been victims of a miscarriage of justice may apply for a review of their case once all other appeals have been exhausted.

The MOJ

- 5.35 The MOJ is the major government department responsible for the criminal justice system. The strategic direction and main funding of the police is the responsibility of the Home Office. The CPS is led by the DPP and is responsible to the Attorney General. The total MOJ expenditure in 2019/20 was £10.5 billion.⁹⁸ The largest item is HMPPS (£5.3 billion), responsible for prison and probation services. HMCTS (£2 billion) is responsible for criminal courts, civil courts and tribunals. HMCTS is also responsible for the relevant digital systems, including the Common Platform, currently being rolled out to better connect participants across the CJS. The administrative cost of the LAA,

⁹⁷ See Schedule 7 of LASPO. This issue is outside the scope of the Review.

⁹⁸ Gross expenditure is based on the 2019/20 Annual Reports from the Ministry of Justice and the Legal Aid Agency

which administers both civil legal aid and criminal legal aid was £95 million in 2019/20.

Criminal Justice Board

- 5.36 The Criminal Justice Board is chaired by the Lord Chancellor, currently the Deputy Prime Minister and Secretary of State for Justice, and is attended by senior leaders from across the CJS responsible for representing their own agencies. Although the Chair of the Bar Council and the Law Society Justice lead are invitees, the defence are not formally represented on the Criminal Justice Board.
- 5.37 The Criminal Justice Board model is replicated in many local areas across England and Wales. Local Criminal Justice Boards are usually organised around police force areas and are often chaired by the local Police and Crime Commissioner or Chief Constable. Wales also has the Criminal Justice in Wales Board, which brings together the local boards from across Wales. Some local Criminal Justice Boards include representatives of the defence, but many do not. The Hampshire and Isle of Wight Criminal Justice Board submitted helpful comments to the Review.

The Regulators

- 5.38 There are a number of relevant regulators responsible for their respective professions; the BSB, the SRA and CILEX. The Legal Services Board (LSB) oversees these regulators as well as the Bar Council and the Law Society.

The Supply Side

Solicitors

- 5.39 The client's primary contact for criminal legal aid is the solicitor.⁹⁹ Formally speaking, under LASPO the Lord Chancellor's statutory duty to supply criminal legal aid services is executed on his behalf by the Director of Legal Aid Casework (the Director) who is also the CEO of the LAA. When a criminal legal aid firm is granted a Representation Order authorising them to supply criminal legal aid services to a client, those services are supplied on behalf of the Director in discharge of the Lord Chancellor's statutory duty.¹⁰⁰ The supply of criminal legal aid services is both in law and in fact the carrying out of a public function.
- 5.40 In 2019/20 the LAA made payments to 1220 firms, of whom some 26% were in London. The information in Annex K shows that many firms have a relatively small turnover in criminal legal aid with around 50% having a turnover of less

⁹⁹ While this may be the individual solicitor, the first contact at the police station may be an accredited representative on behalf of the solicitor: see Chapter 8 below. At various stages in the process the client will have contact with chartered legal executives, associates, paralegals and others in the solicitor's firm working on the case. In this report "solicitor" is used as shorthand to cover all those in the particular firm to which the Representation Order has been granted.

¹⁰⁰ See the [Specification to the Standard Crime Contract 2017](#) section 4.

than £0.6million. Others are medium sized with turnovers of £0.6million to £10million. A small number of firms have a criminal legal aid turnover of above £10million.

- 5.41 In terms of gender, solicitors working in firms doing at least some criminal legal aid work are split approximately 50-50 between male and female. Overall, women outnumber men until around age 45, but thereafter the gender balance shifts, becoming 60:40 male/ female after 45, after which the female proportion further declines. In terms of duty solicitors, the balance was approximately 65% male and 35% female in 2019. In terms of ethnicity, overall solicitors with a BAME background represent around 20% of all solicitors working for firms doing some criminal legal aid work, with Asian ethnicity being the largest group.

CILEX members

- 5.42 Members of CILEX qualify as Chartered Legal Executives via a series of training courses specific to the area of law they wish to practise in, as distinct from solicitors' or barristers' professional examinations which cover a wide variety of subjects. CILEX argues that the CILEX route to qualification offers a viable alternative to the "heavier" approach adopted by the older professions and is particularly apt for those who do not have the social or financial advantages of many of those who qualify as solicitors or barristers. CILEX points to the strongly diverse character of its membership in relation to gender, ethnicity and age.
- 5.43 CILEX members can be, and are, partners in solicitors' firms, and work in solicitors' firms at all levels including in senior managerial roles. CILEX estimates about 1250 CILEX members work in criminal legal aid firms, although this number has been in decline as a career in criminal legal aid has become less viable.
- 5.44 Those members who demonstrate to CILEX the necessary competencies have rights of audience to appear in the Magistrates' Court and the Youth Court, and on certain appeals from the Magistrates' Court, bail applications and committals for sentence in the Crown Court.
- 5.45 CILEX members act as accredited police station representatives but cannot formally act as duty solicitors unless they are accredited under the Law Society's Criminal Litigation Accreditation Scheme (CLAS). This issue is discussed in Chapter 8.

The Standard Crime Contract (SCC)

- 5.46 The SCC is tendered every three years with the option to extend for a further 2 one-year extensions, and every entity which meets its requirements is entitled to a contract.¹⁰¹ The current contract is the SCC 2017, which expires in September 2022. The re-tendering process began in October 2021, but it is envisaged that the 2022 contract will be for one year, subject to possible

¹⁰¹ Technically the contract term is three years, with an option to extend twice for 1 year each time.

extensions, in order to accommodate any changes that may result from this Review.¹⁰² At present, there is no possibility for a new firm to enter the market between tenders. Each firm contracted to the LAA is allocated a Contract Manager who is the primary point of contact.

Quality and Service

- 5.47 In relation to quality and service, contract holders must:
- Hold either the LAA's own Specialist Quality Mark (SQM) or the Law Society's Lexcel Practice
 - Maintain at least one office in England and Wales
 - Meet the Supervisor Requirements: for criminal proceedings the firm must have at least one qualified full time Supervisor for every four Designated Fee Earners or Case workers. The Supervisor must be qualified under the CLAS, maintain a certain minimum of police station and Magistrates' Court attendances, and work from one of the firm's offices
 - Identify all Designated Fee Earners, including Police Station Accredited Representatives, and in the case of the latter ensure their compliance with the requirements of their accreditation
- 5.48 The SCC also requires the firm to have an IT system meeting minimum standards, including the ability to connect to the Common Platform, and to maintain proper records. In addition, the SCC lays down various Key Performance Indicators (KPIs), including avoiding a reduction of more than 15% of remuneration costs claimed over a rolling three-month period.
- 5.49 Quality control is supported by a system of Peer Review designed originally by the Institute of Advanced Legal Studies and in force since 2015. Peer Review usually takes place once every three years and is carried out on behalf of the LAA by experienced practitioners trained in the process. Providers may be rated on a scale of 1 Excellence, 2 Competence Plus, 3 Threshold Competence, 4 Below Competence and 5 Failure in Performance. Providers who score 4 or 5 are given a limited period of time to put their house in order.
- 5.50 In addition, the LAA conducts regular audits. This may be just a yearly visit from the contract manager, or a more detailed investigation. The audit may include the profit and loss account; cash flow statements; the eligibility of the clients for legal aid and the diligence conducted; and the claims made and the supporting evidence. If there is cause for concern, a more detailed targeted audit may be undertaken.

¹⁰² LAA, *Headline Intentions for Crime Services from 1 October 2022*, published 16 June 2021. [Microsoft Word - Headline Intentions for Crime services from October 2022.doc \(publishing.service.gov.uk\)](#)

- 5.51 It can be seen that the above structure is relatively “heavy” in terms of regulatory compliance, a source of concern that has been raised in evidence to the Review.
- 5.52 The SCC has further contractual obligations including:
- To ensure that sub-contractors or agents are properly supervised
 - That all invoices received from such contractors or agents be paid within 30 days
 - That neither the firm nor anyone on its behalf markets the supply of criminal legal aid services by way of unsolicited visits or calls, and that no inducement by way of money or other gifts is given to a client or potential client
 - That neither the firm nor anyone on its behalf pays or receives any referral fee or similar payment for the referral or introduction (directly or indirectly) of any client or potential client
 - When instructing Counsel or an in-house advocate, to consult the client about the choice, and advise the client of the experience and suitability of the chosen advocate, and the availability (or not) of an alternative advocate and keep a record of such advice.¹⁰³

The Duty Solicitor Scheme

- 5.53 Although some providers opt entirely for “own client” work about 95% of criminal legal firms participate in the Duty Solicitor scheme.
- 5.54 The LAA divides England and Wales into areas, with a separate Duty Scheme for each area. The boundaries between schemes may change from time to time for operational reasons. Which scheme or schemes the firm may belong to is determined by the geographical location (i.e. postcode) of its office(s). The schemes cover both police station and Magistrates’ Court duty work.
- 5.55 The firms that apply to join the Scheme(s) in their area(s) are allocated Duty slots, pro rata according to the number of Duty Solicitors each firm has at the time of tendering.¹⁰⁴ The LAA publishes a rota showing the allocation of the slots to the firms in question. There is no limit to the number of slots a firm may receive. Duty Solicitors must complete 14 hours of criminal defence work a week. It is proposed to amend this in 2022 to allow those working part-time and those with caring or other responsibilities to work more flexibly.¹⁰⁵ The SCC requires that the solicitor reach the police station within 45 minutes of receiving a phone call.

¹⁰³ Standard Crime Contract, Clause 7.3

¹⁰⁴ A small number of slots are reserved for the PDS in the four areas where the PDS operates.

¹⁰⁵ The Review were told by the LAA that this requirement was to remove “ghost solicitors” who were not in active practice, and perhaps not even in the UK, from counting towards the Duty Solicitor allocations.

Barristers

- 5.56 In 2019/20 there were around 3680 barristers doing some criminal legal aid work, of whom 2690 declared themselves to be in full time practice. Around 56% of criminal legal aid barristers are based in London. The overall gender balance of barristers doing criminal work in 2019/20 was 69/30¹⁰⁶ male/female, but in the first years of practice the balance is 50:50. In terms of ethnicity, around 80% of barristers doing criminal work are white. In 2019/2020 QCs accounted for around 13% of barristers doing criminal work, the remainder being junior barristers.¹⁰⁷
- 5.57 Barristers are self-employed, but operate from chambers and so share their office, IT, staff costs and other overheads with members of chambers. Some chambers will have 100 members or more. Barristers are instructed by their individual solicitors, but the allocation of work also depends on the clerks within chambers who are responsible for responding to solicitors' requests for counsel, often received late in the day. The clerks must ensure that their barristers are always in the right court at the right time the following day. This is no easy task since the court lists often change late in the day.

¹⁰⁶ Gender information was unavailable for 1% of these barristers.

¹⁰⁷ A barrister is described as a junior barrister if they are not a QC, whatever their seniority

CHAPTER SIX: THE SUSTAINABILITY OF CRIMINAL LEGAL AID FIRMS

General Approach

- 6.1 At one level the question whether a system is “sustainable” could simply be whether the system is capable of surviving for the foreseeable future delivering no more than a bare minimum of service by one means or another. In my view the question of sustainability is much wider than that.
- 6.2 There is first the public interest in a properly functioning system of criminal justice. Assistance and advice at the police station is provided not just for the benefit of a particular defendant, essential though that is, but to ensure that the PACE procedures are properly followed, thereby avoiding miscarriages of justice, and maintaining confidence in the police. The same is true at all later stages of the case: it is not just a question of the defence of the particular individual, but of maintaining the principles of due process upon which the whole criminal justice system is founded. A system that is just scraping by does not achieve that.
- 6.3 A sustainable system needs to provide a career path that enables new entry, provides the necessary training, and ensures that all levels of experience are available to deal with many different offences, from domestic abuse to murder, drink driving to rape, complex financial fraud to terrorism. This is demanding work, physically, intellectually and emotionally, dealing daily with trauma, from child abuse to knife crime, working in custody suites, often in court cells or in prisons. Duty solicitors may well find themselves at the police station most of the night and in Court most of the following day. The clients too are demanding, often young and from difficult backgrounds, inarticulate, mistrustful and themselves traumatised, many with learning difficulties, coming from a wide range of cultures, and often leading a chaotic existence. But their whole life chances may depend on the quality of the advice and representation they receive from their lawyer at a critical turning point in their lives.
- 6.4 A career in this setting is not for the faint-hearted. Criminal legal aid is essentially a vocation, and a public service, where those building a career necessarily forgo the higher rewards available in the private sector. But if those able and willing to undertake this work cannot aspire to even reasonable remuneration, the pipeline of new blood naturally dries up. Those sufficiently interested and idealistic to persevere, hoping for the best, find after a short while that the practicalities of making ends meet have to take priority, also given the debt that many will have accumulated from university and law school.
- 6.5 This is not just a question of remuneration, although that is a most important aspect: it is also a question of morale. A feeling that “nobody cares” and “criminal legal aid has no future” was often articulated to me in roundtables in both Wales and England.

- 6.6 Morale is also affected by the frustrations of dealing with the rest of the CJS, itself under enormous pressure. Typical comments in the evidence referred to time spent chasing up the police, communications to the CPS going unanswered, late service of documents, Courts unable to respond to emails, and listed cases not happening. RUI has put solicitor providers under additional pressure, needing to keep files open when nothing is happening and there is no remuneration. On the solicitors' side the administrative burden of the LAA's requirements were frequently cited as a major contributor of additional frustrations.
- 6.7 Dr Thornton of Nottingham Trent University has written of the structured interviews he has conducted with both solicitors and barristers. He concludes that what he sees as a crisis in morale is above all due to having to do a demanding job within fee constraints which make it is very difficult to invest the time needed to deliver a proper service. In Dr Thornton's view, the profession, as we know it, is unsustainable.
- 6.8 To my mind, the main questions for the Review are:
- At present levels of funding, are solicitors able to invest sufficient in salaries and working conditions to attract and retain good candidates willing and able to do criminal legal aid work?
 - Are the proprietors of solicitors' firms able to make a sufficient return on their investment to be willing to take the risks of investing in criminal legal aid work?
- 6.9 These questions also involve some examination of comparative yardsticks, since it is the availability of better paid alternatives which over time denudes criminal legal aid of the people it needs.
- 6.10 Also intrinsic to sustainability is equality and diversity. Criminal legal aid has historically been, and remains, an important career opportunity for those from less advantaged backgrounds, and a major contributor to a socially and ethnically diverse legal profession and society. When fees are low, that has a disproportionate adverse effect on smaller firms which often have more people from a minority ethnic background. More importantly perhaps, by force of circumstances a relatively high proportion of defendants come from less advantaged or minority backgrounds. Trust and communication in the CJS are enhanced if legal aid providers reflect the social and ethnic balance of society as whole.
- 6.11 The question whether the present level of funding overall is sufficient to sustain criminal legal aid firms cannot be divorced from the question of how the fee schemes operate. I discuss that in Chapter 7 which should be read together with this chapter.

The Case Made to the Review

- 6.12 Almost all those who gave evidence to the Review from the perspective of criminal legal aid firms contended that after no pay increases since the 1990s and the fee cuts in 2014, the profession of criminal legal aid solicitors is in such a parlous state that its demise is inevitable, probably sooner rather than later, given also the impact of the pandemic. The sector is “standing on a cliff edge”¹⁰⁸ or “on the brink;”¹⁰⁹ firms’ cannot match the salaries offered by the CPS to which they are losing staff, the salaries they can offer are insufficient to sustain a pipeline of new entrants, the profession is aging, in many parts of the country the duty solicitor schemes cannot be properly staffed, and when the present cohort of seniors bows out there will be no-one to replace them. If the Review concluded that little or no increased funding was required then, when the LAA goes out to tender with the next SCC, many firms would simply cease trading. According to the Law Society the scenario “where the justice system can no longer function because there simply will not be enough criminal lawyers to provide access to justice”,¹¹⁰ draws ever closer.
- 6.13 These arguments are set out in detail in the evidence annexed and have been supplemented by the further online responses received by the Review, numerous roundtables, meetings, and many other sources including some valuable academic input.

Analysis of the Evidence

- 6.14 The evidence is analysed under four main topics: (1) The decline in the number of providers (2) The impact of present fee levels and past cuts (3) Recruitment and training and (4) Profitability and Financial Stability. These threads are then drawn together to reach (5) Conclusion on Sustainability.

(1) The Decline in the Numbers of Providers

Firms

- 6.15 The Law Society states that in 2010 there were 1861 criminal legal aid firms. In 2019, there were 1271; in June 2020, 1147; and in April 2021, 1090.¹¹¹
- 6.16 It is difficult to be precise about the exact numbers of firms, because the figures held by the Law Society do not quite correspond with those of the LAA. Taking the last seven years, the LAA published figures show that there were 1510 firms doing some criminal legal work in 2014/15, and 1140 in March 2021. However, the figure of 1090 in April 2021 was given in reply to a Parliamentary Question on 12th April 2021. On that basis there has been a decline of around 28% in criminal legal aid firms in the past seven years.

¹⁰⁸ [Law Society response to the Review](#), paragraph 13.

¹⁰⁹ [London Criminal Courts Solicitors’ Association response to the Review](#), paragraph 2.

¹¹⁰ [Law Society response to the Review](#), paragraph 3.

¹¹¹ [Law Society response to the Review](#), paragraph 19.

- 6.17 There is also a parallel decline in the number of offices by around 20% over the same period,¹¹² the office being a legal aid defendant's main point of physical access to their legal representative. This has been acute in certain areas, notably in Wales.
- 6.18 To an extent, these figures reflect the decline in expenditure for criminal legal aid already referred to in Chapter 1.¹¹³ I was told that a number of larger firms left the market around 2015/16, following the cuts in 2014, and a particular trend is multi-practice firms closing their criminal law departments. In smaller firms, as older partners retire, there is often no one to carry on the business.
- 6.19 On the other hand, there is now every prospect of increased demand, and that is a central feature supporting my conclusions below.

Solicitors and duty solicitors

- 6.20 In 2014/15 133,370 solicitors held practising certificates, of which 14,790 worked for a Criminal Legal Aid (CLA) firm.¹¹⁴ In 2018/19 145,530 solicitors held practising certificates, of which 11,760 worked for a CLA firm. In other words, while the rest of the profession has been expanding, the criminal legal aid sector has contracted. In 2019/20, there were 149,920 practising certificate holders. Although the data on solicitors working for CLA firms only goes up to 2018/19, it is likely that the number of solicitors working for CLA firms also fell in 2019/20 given the drop in the number of CLA firms in 2019/20 and also the drop in the number of duty solicitors in 2019.
- 6.21 Around half of CLA firms have business in other legal areas, so a solicitor working for a CLA firm may not necessarily be working in criminal legal aid. The key metric in the present context is not the total number of solicitors in CLA firms (many of whom may be doing other work) but the number of duty solicitors. The number of duty solicitors was around 4,360 in May 2021.
- 6.22 The duty solicitor role will often involve unsocial hours, and whether for that or other reasons the male/female gender balance among duty solicitors is roughly 65/35. In many areas, including conurbations like London, significant travelling time, included in the police station fixed fee, will also be involved.
- 6.23 According to the Law Society's "heat map",¹¹⁵ 32 duty schemes out of a total of 212 now have seven duty solicitors or fewer, seven solicitors each covering 24 hours being the minimum necessary for 24/7 cover. At least one other scheme, Pembrokeshire, will shortly be in the same position. Seven schemes have three or fewer duty solicitors. The details are at Annex B to the Law Society's submission.

¹¹² *Legal Aid Statistics, Criminal Legal aid statistics England and Wales completions by provider and area data to March 2021*

¹¹³ See para. 1.19 above

¹¹⁴ A Criminal Legal Aid (CLA) firm can be defined as a solicitor's firm that holds a current Standard Crime Contract with the LAA and completes at least some criminal legal aid work.

¹¹⁵ [Criminal duty solicitors in England and Wales \(carto.com\)](#)

6.24 Duty solicitors show an increasingly aging profile. In 2019, 62% of duty solicitors were 45 or over, and the average age increased by one year in each of the years 2017 to 2019, from 47 to 49. As the Law Society set out in its response to the Review:

“Some areas were particularly badly affected in 2018; we anticipate that the situation will have got worse since then:

- *In Dorset, Somerset, Wiltshire, Worcestershire, West Wales, Mid Wales, over 60 per cent of the solicitors are aged over 50.*
- *In Norfolk, Suffolk, Cornwall and Worcestershire there are 0 criminal law solicitors aged under 35, with only 1 in West Wales and Mid Wales, and only 2 in Devon.*
- *In a significant number of regions less than 10 per cent of solicitors in this field are under 35.”*

6.25 In the South West for example 76% of duty solicitors are over 45, against a national average of 62%. The Review understands London to be relatively well supplied for the moment, but the London Criminal Courts Solicitors' Association (LCCSA) points out that, even in London, 59% of duty solicitors are over 45, only marginally below the national average.

6.26 The situation so far has been managed by solicitors from neighbouring areas helping out where possible and, it seems, by greater use of accredited representatives, who increased in total numbers from around 2640 in January 2019 to 2990 in February 2021. In my view neither of these represent feasible long-term solutions.¹¹⁶

6.27 In addition, the increase in expected demand for police station attendances as a result of the recruitment of further police officers will place further demands on duty solicitors. It is in my view unlikely that this demand can be met without further funding to revitalise the sector.

(2) The Impact of No Fee Increases for Many Years and Cuts

6.28 The basic income of a solicitors' firm has three main publicly funded streams, the Police Station fees, the Magistrates' Court fees, and the Crown Court fees from the LGFS.

6.29 Leaving aside the distorting effect by PPE under the LGFS,¹¹⁷ one can make a comparison between the levels of the various fees payable under the schemes as they are in 2021, and the level set when they were last increased, or first introduced, as the case may be.

¹¹⁶ See Chapter 8 below

¹¹⁷ This distorting effect is caused by some cases generating a large fee due to having a high page count, see Chapter 12 below.

6.30 In the Magistrates' Court the standard fees were last increased on 1st April 1996 but were reduced by 8.75% in 2014. The Police Station fees assumed their present form in 2008, but based on the then hourly rates which had themselves not been increased for some years. The police station fees were also reduced by 8.75% in 2014. In one or two cases where there is historical continuity one can trace the LGFS fees back to 1996 or 2008. The following comparisons include the fee reduction of 8.75% in 2014.

Comparisons over time

6.31 As regards the Police Station fixed fees, to take a few examples in 2008 in round figures these were £144 for Hartlepool, £195 for Manchester and £237 for Croydon. The corresponding fees in 2021 are respectively £131 for Hartlepool, £178 for Manchester and £216 for Croydon. In real terms the Police Station fixed fees in 2021 are around one third less than they were in 2008, as well as 8.75% less in cash terms.

6.32 In the Magistrates' Court, in 1996 preparation was paid at £47.25 per hour in London, and in 2021 is paid at £45.35 per hour; advocacy by a senior solicitor in London was paid at £64.50 per hour in 1996 and is £58.86 per hour in 2021. In real terms, these rates are slightly under 50 per cent less than they were 25 years ago.

6.33 Under the LGFS, the basic Crown Court fee for a Category C case (less serious violence) was £801 in 2008 and is £739 in 2021. The basic fee for a Category D case (sexual offences) was £1529 in 2008 and is £1394 in 2021. That is a reduction of 8.75% in cash terms and a reduction of approximately one third in real terms since 2008.

6.34 There must be few other examples where publicly funded work is paid less than it was in 2008, or indeed 1996, as the case may be. It is true that in the late 1990s and well into the 2000s, Conservative, Labour and Coalition Governments were concerned about the cost of criminal legal aid, and a potential weakness in the 1996 comparison is whether that baseline represents a reasonable starting point if the then fees were already "too high". That argument however is difficult to apply to a baseline of 2008. Even in 2006 the Carter Review stated that "legal aid firms consistently report they are at the edge of profitability" even though "legal aid firms are amongst the most efficient of legal firms particularly those that are crime only firms".¹¹⁸

6.35 Since 2008 fees in real terms have fallen by one third, which is already remarkable, and if one takes 1996, by around 40-45%. Even if one takes 2014, as a base line there has been a de facto reduction in real terms of around 15% over the past seven years.

¹¹⁸ Legal Aid, *A market-based approach to reform*, Lord Carter's Review of Legal Aid Procurement, P42. [\[ARCHIVED CONTENT\] \(nationalarchives.gov.uk\)](https://nationalarchives.gov.uk)

Indicative CPS rates

- 6.36 A further cross-check is the published schedule of the costs the CPS would normally seek against convicted defendants if the CPS is successful. In its guidance¹¹⁹ which dates from 2009, the CPS considers that in applying for costs an average hourly rate for a CPS lawyer is £69 per hour, and for a paralegal £51 per hour. In contrast to those rates, the fee payable to the defence solicitor for preparation in the Magistrates' Court is £45.35, and the special preparation fee in the Crown Court for a senior defence solicitor in London is £50.87, in both cases less than the CPS considers appropriate for a paralegal.
- 6.37 To take the point further, for example, for a committal for sentence the CPS would seek costs in the range £340-£510, and for a trial in the Magistrates' Court for an either-way offence £770-1150. By contrast, for a committal for sentence the defence solicitors' fixed fee is £232.98, and a Magistrates' Court trial is £345 – £779.
- 6.38 These examples, showing the defence rates to be some 30-55% below those considered reasonable by the CPS, further underline how far the rates allowed to the defence have fallen below a reasonable yardstick. These rates also demonstrate the imbalance that has developed between the resources of the prosecution and those of the defence, seriously undermining the principle of equality of arms.

Consequences of fee decline and stagnation

- 6.39 Rates of remuneration approximately one-third less in real terms than they were 13 years ago, accompanied by a prolonged period of stagnation in pay, have three broad consequences:
- The effort of trying to pay 2021 salaries and other outgoings out of an income fixed by reference to 2008 is inherently a losing battle which gets worse as each year goes by and will inevitably lead to providers simply giving up if nothing is done about it
 - Younger or newly qualified lawyers considering their options see a market that apparently has no future and seek out alternatives
 - Owners or potential owners of firms see a market where returns are squeezed year on year and are therefore less prepared to invest, or take the risks inherent in a partnership in a criminal legal aid firm.
- 6.40 The evidence to the Review is that each of these predictable consequences have in fact occurred.

¹¹⁹ [Costs - Annex 1 | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/costs-annex-1)

(3) Difficulties in Training, Recruitment and Retention

The Problem Begins at University

- 6.41 Most lawyers in Wales and England enter the profession via a graduate route. If they study law, they may move directly into the professional examinations, and if they have not studied law, they first do the Graduate Diploma in Law (GDL) before their professional studies. Quite apart from normal student debt, these further professional qualifications are expensive to obtain. The solicitors' Legal Practice Course (LPC) has been replaced by the less expensive Solicitors Qualifying Exam (SQE), an exam complemented by qualifying work experience, but this reform will take some time to work through.
- 6.42 The evidence to the Review is that many university students are idealistic, and initially open to the prospect of a career in criminal legal aid. However, by their final year many reach the conclusion that the sector is underfunded, and not worth it. For example, in a survey by the Young Legal Aid Lawyers (YLAL) in 2019 the majority said that they would not go into criminal legal aid work because of poor remuneration. An online survey by Durham University in 2018 reached similar conclusions. In their evidence Dr Thornton at Nottingham Trent University and Dr Welch at Sussex University made similar points. The Review was told that at Birmingham University a career lecture on criminal defence work would be strongly supported if the students were in their first year, but very sparsely attended once students were in their third year. Leading academics at Cardiff University have publicised the same concerns, and explained the ethical dilemma academics face when advising their students on a career in criminal legal aid:

“either they encourage their students to enter the profession with few opportunities for social mobility and progression, or they advise against, in which case “without new blood” the profession is most certainly going to perish in 10-15 years’ time if not less.”¹²⁰

- 6.43 The Review conducted an online survey of students in May 2021. 587 replies were received: please see Annex G. The main conclusion from this survey is that more than half the respondents said they did not want to work in criminal legal aid because of the low pay (e.g. “Having heard from those in the profession who have said it is a ‘dying profession’ very hard work for little pay”) while others refer to the difficulties of the working conditions (e.g. “Low pay for a gruelling, emotionally draining job”). In answer to the question “What is your opinion of criminal law as a career?” the most common response reflected the problem of pay, e.g. “It is something I would like to do however I am concerned that the pay is extremely poor, and this may affect my chances of providing for my family and getting on the property ladder”.

¹²⁰ Nicola Harris, Roxanna Dehaghani & Daniel Newman (2021) Vulnerability, the future of the criminal defence profession, and the implications for teaching and learning, *The Law Teacher*, 55:1, 57-67, DOI: <https://www.tandfonline.com/doi/full/10.1080/03069400.2021.1872872>

Lack of Training Opportunities

- 6.44 The normal route for qualification as a solicitor is via a training contract. In private work, many firms will offer training contracts and indeed pay the qualification expenses of those that obtain one. In criminal legal aid, training contracts are few and far between. A sector that is not in a position to offer traineeships cannot be regarded as sustainable.
- 6.45 In 2017, the SRA found that only 3% of trainees were working in criminal legal aid. It has been difficult for the Review to identify a precise figure for trainees doing criminal legal aid work, since trainees noted as training with a firm doing some criminal legal work may be working in other parts of the business. Nonetheless, taking 2018/19, it can be noted from the Data Compendium that around 80% of firms doing some criminal legal aid work had no trainees at all (table 3.2). If one takes 2016/17 it can be seen that only 70 trainees were in firms doing mainly criminal work (Table 3.7 read with Table 3.5). The total cohort of trainees in that year was 5720, of which 4570 trained in a firm matched in the Data Compendium (Table 3.1), meaning that firms doing mainly criminal aid work accounted for around 1.5% of trainees. Similarly, of the total cohort of trainees in 2014/15, around 1% of those trainees went on to work in a mainly criminal law firm (Table 3.13 and 3.15 read with Table 3.1).
- 6.46 There is no reason to think that the position has changed over the last few years.

Retention

- 6.47 The evidence to the Review is that young and energetic lawyers may well start off embracing criminal defence work with all its frustrations, but by the time the late 20s or early 30s are reached many realise the difficulty of seeing a long-term future.¹²¹ That is borne out by the evidence above of the aging of the profession and the decline in the number of duty solicitors, the bedrock of criminal legal aid.
- 6.48 The Law Society supplied the Review with a survey in 2020 by Douglas Scott Recruitment Consultants which shows that in every region of England criminal lawyers' salaries are lower than in other types of legal work. In broad terms in the four regions considered (London, the North, the Midlands and the South) that survey seems to show that the "low" salaries are around £25,000 pa, "average" salaries are around £35,000 pa and "high" salaries roughly in the range £50- £65,000 pa. The Law Society further indicated that the starting salary in a criminal defence firm would be around £16 -£18,000 outside London, approximating to the statutory minimum wage, and £20-£25 000 in London. A duty solicitor with three to five years Post Qualified Experience (PQE) might expect to earn £26-£30,000 pa outside London and £33-35,000 pa

¹²¹ Dr Thornton of Nottingham Trent University, Evidence to the Review.

in London. According to the Law Society, an experienced criminal solicitor would have difficulty in aspiring to more than £50,000 per annum.

- 6.49 The evidence given to the Review in the Financial Survey described below is broadly consistent with these figures: please see Annex J. Of the 100 firms who completed the survey the most frequent responses on salary were: Freelance Consultants £30-£40,000; Solicitors £30-£40,000; Chartered Legal Executives £20-30,000; Paralegals £20-£30,000; Trainees £20-£30,000.¹²²
- 6.50 For further background, Annex I is a survey from published information of various public sector salaries. It is difficult to make useful comparisons across different types of occupations and “take home pay” may be affected by many factors. Of crucial importance is that the public sector salaries also include a pension (to which of course the employee has to make a contribution) and often relatively generous in-work benefits unlikely to be matched by a criminal legal aid firm beyond the statutory minimum. Nonetheless, Annex I supports the view that at all levels, whether it is starting salaries, mid-career remuneration or remuneration of senior staff, the pay of criminal legal aid solicitors is generally below the levels enjoyed elsewhere in the public sector by those who might be loosely considered a peer group, taking also into account the civil service pension scheme or its equivalents.
- 6.51 Of particular importance is a direct comparison in pay between those who prosecute and those who defend. Respondents to the Review frequently argued that current levels of legal aid remuneration did not permit criminal legal aid firms to match the salary levels of the CPS, to whom it is said criminal legal aid lawyers have been leaving “in their droves” on the grounds “the pay is better, the work-life balance more manageable and the support far superior”.¹²³ This point was put to me anecdotally in almost all the roundtables, often on the basis that the CPS could afford to pay salaries £10,000 or even £15,000 more than the criminal legal aid firm could. Two examples quoted by the Law Society are typical of the problem: (a) an experienced solicitor 18 years qualified said “As people left to do other things, they were not replaced, and there were less and less of us left...I did not have a pay rise for 11 years...having now moved to the CPS, I have a better sense of job security...the pay is also better...and the pension scheme is also a bonus” (b) a firm in Yorkshire recently lost two fee earning solicitors to the CPS, one with 2 years PQE earning £30,000 per annum, and the other with 10 years PQE earning £38,000 per annum. The solicitor with 2 years PQE now earns £48,000, and the solicitor with 10 years PQE now earns £52,000, both as Senior Crown Prosecutors with the CPS.
- 6.52 Information obtained from the CPS showed that in 2020-21 working for the CPS as a Crown Prosecutor earned on average between £38,000 to £40,000

¹²² As shown above, the Review has not been able to identify many trainees working in criminal legal aid

¹²³ London Criminal Courts Solicitors’ Association (LCCSA) Response to the Independent Review of Criminal Legal Aid Call for Evidence, paragraph 4.

and a Senior Crown Prosecutor earned on average between £51,000 to £55,000. On the evidence to the Review, the salaries of most solicitors with are in the range £30-£40,000,¹²⁴ although a duty solicitor may earn somewhat more. These figures are without a pension scheme equivalent to that of the CPS. In the Case Study Interviews, losing staff to the CPS was mentioned as a major problem many times. This situation, combined with the other points made above, poses a significant retention challenge for criminal legal aid, targeted most at the experienced solicitors the sector can ill afford to lose.

(4) Profitability and Financial Stability

6.53 The question of the profitability and financial stability of criminal legal aid firms has to be approached with caution, since inevitably information has to be obtained from a sample; firms' accounting systems differ; internal structures vary (e.g. some firms may have only a small number of equity partners and many salaried partners, or vice versa); some equity partners may draw a salary and others not; and when criminal legal aid is only one part of the business, there has to be an allocation of overheads.

6.54 Even if a firm on one view is "profitable" it does not follow that the situation is satisfactory, if for example "profitability" can only be achieved by working excessively long hours or by providing an indifferent service, or quality or because of quirks in the fee schemes, of which the payments made under the LGFS in high PPE cases is the most prominent example.

The Otterburn Report

6.55 In February 2014, Otterburn Legal Consulting (Otterburn) produced a report which found that on average criminal legal firms were achieving a 5% net profit margin.

6.56 Otterburn's approach to measuring profitability was to take the income of each firm, less employee's salaries and overheads (office rent, insurance etc) and then to allocate as a cost a notional allowance for interest on partner capital and a notional salary for equity partners. The latter was based on the median salary of the highest paid fee earner plus 15% to cover employment costs. In round terms Otterburn used a figure of £52,000 as the notional salary of an equity partner to arrive at a net margin. This approach enables a comparison to be made across different firm structures, whether sole practitioners, traditional

¹²⁴ It will be appreciated that from the employer's point of view a fee earner needs to be able to bill a multiple of their salary to cover NI, statutory pension, a contribution to overheads and some profit for the business. The higher the salary, the more the fee earner needs to bill. The Law Society considers a multiplier of three to be appropriate, it seems to the Review that a multiplier of between two and three would be a minimum. On that basis a fee earner paid £40,000 needs to generate a minimum of say around £100,000 per annum in fees. The other variable is chargeable hours. 1200 hours per annum could be one estimate but in a criminal legal aid firm a good deal of time is not chargeable. Assuming for argument's sake an average fee rate under the schemes of £50 per hour then by way of illustration 1200 hours per year would yield £60,000; on this basis one can see why salaries are low in many criminal legal aid firms. The fee schemes effectively cap the salaries it is economically feasible to offer.

partnerships or Limited Liability Partnerships (LLPs). On this basis Otterburn determined that the median profit margin in criminal legal aid was 5%, with larger firms generally being less profitable than smaller firms. Otterburn calculated that would give a median equity partner a “profit” of £23,000, which combined with the notional salary of £52,000 would yield in theory an income of £75,000, varying by the size of the firm. That, however, does not necessarily equate to “take home pay” because most firms are financed by a fixture of bank overdraft and retained profit, so part of the notional profit may remain in the business to fund the needs of the firm.

Comparison with the Otterburn Report

6.57 The Financial Survey conducted by the Review, the details of which are at Annex J tried to elicit similar information as the Otterburn Report. A questionnaire was sent to 400 randomly selected firms, of which 100 responded (a 25% participation rate),¹²⁵ and follow up conversations took place where necessary. The responses cover a broad mix of firms, small medium and large. Adopting similar assumptions as Otterburn, its findings were consistent with a notional salary of £52,000 and making the same allowance for interest on capital, the Review’s Financial Survey found that average profit margins in 2018/19 and 2019/20 were between 0% and 5%. The position is as follows (including also 2020/21 where the figures are distorted by the pandemic and the data is less reliable – see Annex J for further detail):

Table 3.1: Adjusted CLA Net Profit Margin by specialisation in CLA

	Mainly Criminal (CLA turnover 80%+)			Some Criminal (CLA turnover <80%)		
	2018-19	2019-20	2020-21	2018-19	2019-20	2020-21
Average (%)	0 to 5	0 to 5	-10 to -5	5 to 10	5 to 10	-15 to -10
Lower quartile (%)	-10 to -5	-10 to -5	-25 to -20	-5 to 0	-5 to 0	-15 to -10
Upper quartile (%)	15 to 20	10 to 15	5 to 10	15 to 20	20 to 25	15 to 20

6.58 Making the same notional calculation as the Otterburn Report the average figure would yield a notional return on equity capital of approximately £17,000 which, combined with the imputed salary of £52,000 would yield approximately £69,000 as notional income. In other words, making a like for like comparison as best one can, the available information shows a decline in profitability of approximately 8% in cash terms, and over 20 per cent in real terms since the Otterburn Report in 2014.

¹²⁵ Otterburn was based on 157 firms, which represented a 10% participation rate. Otterburn Legal Consulting, *Transforming Legal Aid: Next Steps, A Report for The Law Society of England and Wales and the Ministry of Justice*, 2014. <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf>

Comparison with Law Society Law Management Survey

6.59 If one compares these results with the equivalent comparison made in the Law Society’s 2020 Law Management Survey the equivalent margin across the legal sector as a whole is reported as 9.4 % in 2018, and 8.8% in 2019, while firms with a turnover of less than £2 million (which most closely resemble by size criminal legal aid firms) earned a margin of 12%. That compares with average margins of 0% to 5% for criminal legal aid firms in those years. Criminal legal aid appears to be well below the rest of the sector.

Unadjusted profit figures

6.60 Turning from adjusted to unadjusted figures, the unadjusted profits per equity partner or shareholding director for 2018/19, 2019/20 and 2020/21 resulting from the Financial Survey are shown here:

Table 3.2: CLA Profit per Equity Partner or Shareholding Director in Mainly Criminal firms

	Mainly Criminal Firms (CLA turnover 80%+)		
	2018-19	2019-20	2020-21
Average (£)	60k to 65k	55k to 60k	30k to 35k
Lower quartile (£)	20k to 25k	25k to 30k	10k to 15k
Upper quartile (£)	85k to 90k	70k to 75k	50k to 55k

6.61 It is difficult to translate these unadjusted figures into “take home pay” for partners or shareholders, since profit may need to be retained to fund the business, in other cases in addition to the equity profit, the partner may be partly remunerated by a salary. However, in the Review’s Financial Survey the most commonly reported salary element was less than £20,000, with some evidence suggesting the most common salary to be £12,500 (equal to the tax-free allowance).

6.62 On this basis, it seems reasonable to assume that on average in 2019/20 an equity partner in a criminal legal aid firm may be earning in the region of no more than about £60,000 per annum, to cover personal income, fund any further investment and obtain a return on capital sufficient to justify the risks inherent in the ownership of the business. That is corroborated by the Law Society’s view that most criminal aid firms are likely to be in the lower quartile shown in its 2020 Benchmarking Survey where average (unadjusted) profit per equity partner is £54,000. While it is true that the upper quartile of partners in firms specialising in criminal law may be above that in a normal year (£70-75,000 in 2019/20) many other firms are below that figure (the lower quartile in that year being £25-30,000).

6.63 Given that the average criminal legal aid salaries are below those of the CPS, as shown above, and that the returns on criminal legal aid are well below the rest of the legal sector, it is unlikely in my view that the returns available to

equity holders will enable this sector to be sustainable for much longer, let alone encourage any further investment.

Financial Stability

- 6.64 As important as the issue of overall profitability, is the question of financial stability. The first risk to financial stability is the low returns already discussed. But the evidence to the Review demonstrates a further risk, namely the apparent dependence of many firms on high PPE cases under the LGFS. The evidence to the Review in meetings and roundtables, in the Case Studies and the Financial Survey is that Police Station, Magistrates' Court, and routine Crown Court work is barely profitable or loss making, and that making an acceptable profit is often dependent on securing a number of high PPE LGFS cases each year. The revenue from those cases subsidises other work and enables the firm to turn an overall profit.
- 6.65 This aspect of the LGFS is discussed in more detail in Chapter 12. For present purposes, it is not satisfactory if a firms' profits are dependent to a significant extent on one uncertain income stream, in circumstances where what one would normally regard as the "bread and butter" work of a criminal legal aid firm is hardly more than break even or loss-making. It is true that this can be addressed to some extent by a reform of the schemes, as I recommend in Chapter 12 below, but even so the evidence above demonstrates that the overall level of profitability of the sector is so severely constrained, that it is difficult to see how the sector can be sustained and re-invigorated without substantial increased funding overall.
- 6.66 Through the Case Studies, firms also highlighted that there were no business loans available for criminal legal aid firms, due to banks being unwilling to invest as the future of the firms are uncertain. During the pandemic, the only loans available were the Government's bounce back loans which were widely available. This makes it difficult for firms to raise capital that they can use to invest in their firms, for instance, upgrading the IT.

How has the sector managed to survive hitherto?

- 6.67 An obvious question is, if things are so bad, how has the sector survived so far, and are not some providers at least making a reasonable living? The evidence to the Review is that the pressures described above tend to lead to firms being forced towards the following strategies:
- (i) Do the bare minimum. Thus, at the police station, where a simple shop-lifting case is paid the same as a murder, it is more profitable to take several of the former than to spend many hours or even days on the latter. In the Magistrates' Court, juggling half a dozen cases in a day "on the hoof" may be profitable but whether that allows time for preparation and considered advice to defendants is another matter. A consistent theme of the evidence from those working in solicitors' firms was that they often felt

under pressure to do the bare minimum, when it would have been in the client's best interests to spend more time on the case.

- (ii) Avoid time consuming cases where the fee is minimal.
 - (iii) Rely on a small number of high page count cases under the LGFS to make up for losses on other work.
 - (iv) Outsource work, for example to accredited police station representatives, use outside consultants (to avoid employment costs) and at least in London instruct junior barristers in the Magistrates' Court at very low rates.
 - (v) Work longer hours. The evidence to the Review is that working long hours and/or through the weekends is a principal route to survival in a criminal legal aid firm. A duty solicitor clocking up 30 hours work in a 48-hour period seems not uncommon. A 60-hour week was quoted in roundtables.
 - (vi) Pay lower salaries and accept lower quality.
- 6.68 None of the above can be described as delivering an acceptable criminal legal aid service, from the point of view of suspects, defendants, or indeed victims, or the public interest. On the positive side, firms have also increased efficiency, the system is now largely digitalised, and overheads have been reduced to a minimum. But essentially the system has survived so far because of the dedication of the professionals currently working within it. That is unlikely to last much longer.

Will the expected increase in demand relieve the pressures?

- 6.69 A legitimate further question is whether, after a period of declining demand, the expected increase in demand over the next few years would relieve these pressures. It is true there is some sketchy evidence of some spare capacity but in general it is many years since this sector could afford to carry spare capacity. Moreover, the essential service delivered by the sector is on a "one-to-one" basis so there is very little room for economies of scale: each extra client needs extra capacity, not less. In consequence, to cope with more demand it will be necessary for firms either (a) to hire more people, or (b) to work even longer hours, (c) to spend even less time per case, or (d) to turn the work away. In view of the difficulties already set out above, including the steady decline in duty solicitors, (a) will not be possible without additional funding; (b) is unlikely to be possible, even if providers were prepared to increase the workload; and (c) and (d) are contrary to the public interest, simply leading to an increase in underprepared cases or unrepresented defendants.

Conclusion on the Sustainability of Criminal Legal Aid Firms

- 6.70 Criminal legal aid firms can neither attract sufficient new blood, because the fee levels restrict the salaries that can be offered, nor retain experienced practitioners because of the higher salaries offered by the CPS. Fee levels

have been cut, and there has been no increase for many years. In real terms fees have declined by about one third from 2008, and many fees have remained the same for 25 years. Profits too have declined, to a level well below those in other areas of legal practice and are at present unlikely to incentivise new investment in the sector or compensate the business owners for the risks to which they are exposed.¹²⁶

- 6.71 This situation has also led to a significant imbalance between the resources available to the defence as compared to the prosecution, undermining the principle of equality of arms. Dehaghani and Newman¹²⁷ have argued that the stagnation of the criminal legal aid sector has not only weakened the resilience of criminal legal aid firms but has by the same token increased the resilience of the prosecution. This in turn skews the balance within the wider CJS.
- 6.72 I therefore recommend that the remuneration of criminal legal aid firms under the Regulations be substantially increased as soon as practicable.
- 6.73 It is however essential that an increase in remuneration of criminal legal aid firms goes hand in hand with modernisation of the schemes. The next Chapter deals with that issue, as well as the overall level of funding required.

¹²⁶ I do not overlook the additional LGFS funding agreed in 2020 under the accelerated measures referred to in Chapter 4 above, related largely to considering unused material. It appears that whether because of the pandemic or otherwise that reform has so far had little effect, and if the LGFS is reformed as I suggest in Chapter 12, considering unused material will I envisage become absorbed in the new fee structures as the CLSA suggest in their response to the Call for Evidence.

¹²⁷ Dehaghani and Newman, *Written Evidence to Justice Committee Inquiry The Future of Legal Aid*, 2021 <https://committees.parliament.uk/writtenevidence/12878/html/>

CHAPTER SEVEN: CRIMINAL LEGAL AID FIRMS: ACTION REQUIRED

- 7.1 The conclusion set out in Chapter 6 above is that the service provided by criminal legal aid solicitors is not sustainable in its present form. The next question is: what is the best way forward? That question in turn sub-divides into further questions:
- a) What are the options going forward, both immediately and in the longer term?
 - b) If (as I consider) the best immediate option is to retain the present structure, what is the best approach to sustainability and what does that cost?
 - c) If the fee schemes are retained (as I recommend) how should those schemes be best structured?
 - d) How should additional funding be best used, in terms of the CJS as a whole and in the interests of defendants, victims and the taxpayer?

The Immediate Options

- 7.2 For ease of analysis, I start at the point where the citizen first enters the criminal justice process. How is the service of criminal legal aid best provided from the outset, namely to the client arrested or called for voluntary interview, or turning up unrepresented at the Magistrates' Court? In terms of the volume of claims handled by the LAA, some 80% relate to the police station and Magistrates' Court stages. If the initial stages of the process are properly handled, then the later stages of the process are likely to work better, to the benefit of defendants, victims and the public interest.
- 7.3 Since the enactment of PACE in 1984, the mechanism for providing that advice and assistance has been to use private lawyers, organised on a 24/7 rota under the duty solicitor scheme, that system being supplemented by the Magistrates' Court duty solicitor scheme.
- 7.4 One can envisage other ways of providing this service: there could be a publicly funded service provided by salaried lawyers employed by the State, or a system whereby private providers were franchised and paid by the State to provide the service, either on the basis of an overall contractual sum for a contractual period, or per item of work, or a mixture of the two.¹²⁸ If the matter went beyond the police station the defendant could be represented either by a salaried

¹²⁸ Other variations could be envisaged: the Thomas Commission for Justice in Wales at paragraph 3.86 suggested a system of private providers acting as public defenders appointed by the courts, as in some Nordic countries. The timetable of the Review has not permitted a detailed study of other jurisdictions. In general terms, the more inquisitorial systems of civil law jurisdictions are in my view too different to permit useful comparisons. In Australia and New Zealand there is a mixture of public defender and private lawyers providing criminal legal aid, but again the historical and geographical circumstances are different. I however refer in Chapter 15 to some newly emerging models in the United States (where the systems are essentially based on a public defender concept).

Government lawyer, or by a private provider holding a State franchise, depending on the system chosen. The present system is one of private providers paid by the State per item of work, but there is no “franchise” in the sense of limiting the number of providers or awarding the available contracts on a competitive tendering basis. That was attempted to be introduced between 2011 and 2015 but did not proceed, as explained in Chapter 4, in my view for good reasons.

- 7.5 Taking first the option of a public defence service provided by salaried public employees largely taking over from private providers, in effect the equivalent of the CPS but on the defence side, that option would have major constitutional, practical and cost consequences which could not be adequately considered in this Review, given also my timetable, even if that option were within the Review’s terms of reference. No response to the Call for Evidence and no interested party advocated such a solution, nor suggested that the present small-scale PDS should be expanded. Nonetheless that is a possible option.
- 7.6 From a personal point of view, I would have serious reservations about such an option, involving as it does the State directly taking “both sides” of the case, given the strong adversarial tradition of the CJS, and whether in terms of cost and efficiency the State could do a better job than the private sector. Nonetheless, had I considered the present system to be so fundamentally defective that some kind of nationalisation of the defence should be considered, I would have said so.
- 7.7 That, however, is not my view. In my opinion the present system for assistance and advice in the police station and representation in the Magistrates’ Court and Crown Court is sound in concept but suffering from severe underfunding. However, I see considerable scope for re-booting and improving the schemes and arrangements as explained in Chapters 8 to 15.
- 7.8 In my view it is better for the moment to persevere with improving the present system rather than attempting radical change.
- 7.9 No response to the Review advocated trying again with a competitive tendering model of the kind abandoned some years ago, and I do not think such a model would now make sense. The problem on the solicitors’ side is not too many providers, but too few coming into a profession seen as having little future compared with other careers. It is not obvious that there is some textbook model which would better accommodate the diverse needs of the sector at reasonable cost to the taxpayer. The essential service is necessarily a one-to one relationship tailored to the needs of a particular client, the essence of which is personal trust, and different communities have different needs. Criminal legal aid firms are already fragile, and in my view some sort of “top-down” Government-imposed reorganisation would be counterproductive.
- 7.10 But what of the longer term? Even if my recommendations are accepted, it is not a given that the private sector will be able to provide the necessary police station and Magistrates’ Court coverage in all parts of the country indefinitely, or

deal with particular challenges for different types of offenders or different kinds of work. I discuss some of the possible models and options going forward in Chapter 15 below.

7.11 In my view the best immediate option to deal with the issue of sustainability of criminal legal aid is to properly fund the present system, and reform the fees schemes as indicated below.

The Overall Level of Funding Required

7.12 The next question is what overall level of funding is likely to be required to sustain the present system. As seen above, the Review is required to consider fee schemes which:

“support the sustainability of the market, including recruitment, retention, and career progression within the professions and a diverse workforce”

7.13 Conceptually, the question is not straightforward. First, until the preparation of the Data Compendium and the evidence obtained by the Review, little reliable data was available about earnings in criminal legal aid firms, or indeed about the issues of recruitment, retention, career progression or diversity, albeit that for some years the Law Society has rightly been warning of the consequences of low criminal legal aid fees. Structural underfunding in the CJS as a whole has made a major contribution to the difficulties.

7.14 When it comes to specific prices under particular schemes, there is very little data about time spent on particular cases, since the use of fixed fees means that the time spent has not been recorded reliably, or at all. Similarly, one effect of the PPE proxy is that there is no necessary relationship between the fee charged and the work actually done, and very little reliable data available.

7.15 It is also difficult to determine in the abstract the “right” price for a particular piece of work, or a “correct” hourly rate. The Magistrates’ Court scheme fees may have borne some relationship to market rates when they were first set 25 years ago, later reduced in 2014, but exactly what that relationship was is now impossible to determine. The police station fees were apparently set by reference to local hourly rates as they were some 15 years ago (hence the different rates for different police stations), again reduced in 2014, but that is not much to go on either. In the LGFS there are basic fees and complex schedules for determining PPE cut offs and different incremental fees per page, but if these were once related to estimates of time and cost, it is not now clear what those were, and the PPE proxy has become progressively detached from the work involved.

7.16 The Law Society has suggested that criminal legal aid fees are probably now about one third of private market rates but others have told the Review that the rates are considerably less than that. What the relationship should be between private and public rates is again a difficult issue. In any case, the different fee schemes are intertwined: in a given case, the solicitors’ firm in a police station

case may (but then again may not) also earn a fee if that case leads on to a Magistrates' Court case, and possibly a Crown Court fee under the LGFS.

7.17 In judging sustainability in my view, it is better to think in terms of the overall income needed to sustain the business and provide a return on investment. What seems to me to be key, is the ability of criminal legal aid to attract and retain providers of sufficient numbers, quality and experience to provide the service required, within a system that is financially viable, and capable of providing a career path that bears comparison with others. This has been indeed the founding principle since the outset. As the Royal Commission said in 1993:

*“the fee levels must be “[capable of] attracting sufficient numbers of competent solicitors, properly trained, to perform this important work”.*¹²⁹

7.18 It seems to me that a relevant yardstick, and at the moment a source of acute difficulty for private providers, is sufficient funding to enable criminal legal aid providers to offer salaries at approximately the same level as the CPS. I appreciate the CPS “package” is more than just the salary, since there is the pension and other entitlements. On the other hand, there are many who for whatever reason prefer to remain in the private sector. In a situation where one has necessarily to take a broad-brush approach, CPS salary levels seem to me to be at least one reasonable comparator in the circumstances.

7.19 Again, I attach particular importance to the equality of arms, which means in this context that State resources should not unduly favour the prosecution over the defence. At present that has come to be the case, since the CPS tends to be better paid than the generality of criminal legal aid solicitors. I recommend that that imbalance be remedied as quickly as possible.

7.20 Calculations by analysts in the Review team indicate that a sum of at least £100 million per annum is required to enable criminal legal aid providers to offer more competitive salaries and come nearer to achieving a more level playing field as between the prosecution and the defence. This is based on illustrative modelling which has been carried out to assess, in broad terms, how much criminal legal aid fees would have to increase by so that the gross salaries of solicitors and equity partners/shareholding directors working in CLA firms could become broadly equivalent to those of the CPS. For the latter, this is based on notional salary plus profit. This exercise indicated that an increase of approximately £100 million per annum could result in gross solicitor salaries becoming broadly comparable to those in the CPS.¹³⁰ This approximates to an increase of 15% above 2019/20 spend plus the modelled increase resulting from the accelerated items. This increase in funding could be distributed in a number of ways to achieve the desired outcomes. Although the MOJ cannot

¹²⁹ Lord Mackay of Clashfern expressed the same view (see Chapter 4 above)

¹³⁰ This excludes remuneration under the AGFS as discussed in Chapter 13 below.

prescribe how revenue is distributed within firms, in my view that increase should give firms significant ability to improve salaries and invest in the future.

7.21 This indicative modelling is based on high-level illustrative analysis and is not a precise estimate. An exact mapping of salary levels between the CPS and CLA firms is not possible due to the limited data and that roles in the CPS and solicitor firms are not exactly the same. Two key assumptions underpinning this analysis are (i) that the split between employee-related expenses and partner or shareholding directors' profits remains unchanged, and (ii) that other non-employee related costs remain unchanged in nominal terms. This latter assumption, if correct, would mean that the 15% increase in fee income could translate into a higher increase in solicitors' gross salaries. A note to Annex J provides a list of assumptions and caveats.

7.22 Taking a baseline of 2019/20, plus the modelled impact of the accelerated measures, that would represent an overall additional increase in funding of some 15% on the solicitor's side. As a cross check, MOJ calculations indicate that it would cost some £61 million per annum to reverse the fee reduction of 8.75% dating from 2014, from which the taxpayer has had substantial benefit in the meantime. But simply reversing the 2014 pay cut would not in my view ensure sustainability, given the costs and other pressures arising since that fee cut nearly 8 years ago.

7.23 I emphasise that a sum of the order of a minimum of £100 million per annum does not necessarily put the criminal defence side "on a par" with the CPS in any precise sense. The private sector has to take risks and make investments. On that basis, one could legitimately argue for a higher sum than the minimum that I recommend. Moreover it is not certain that the sum I suggest will suffice. I consider £100 million to be no more than a minimum starting point, to be kept under review going forward.

7.24 As indicated in the Introduction above, there is in my view no scope for delayed implementation of this recommendation, given particularly the expected increase in demand and the pressures of the back-log.

The Structure of the Schemes

7.25 On the basis that additional funding is made available, it is essential that the structure of the fee schemes be efficient and give the taxpayer value for money. When it was announced, the Review was asked to consider the reform of the fee schemes so that among other things they:

- *"fairly reflect, and pay for, work done.*
- ...
- *are simple and place proportionate administrative burdens on providers, the Legal Aid Agency (LAA), and other government departments and agencies"*

7.26 It is not easy to reconcile these objectives. “Payment for work done” requires that the time spent on that work should be recorded, that there be a mechanism for determining that the work was in fact done, and that it is reasonably claimed for. That creates a tension with the objective that the fee schemes should be “simple” and easily administered. One of the advantages of the present fee schemes is that claims for fixed or easily ascertainable amounts can be made and approved without an undue administrative burden for either the provider or the LAA, nor the exercise of subjective judgment as to what is reasonable. Whether or not the level of the fixed fee is correct, at least it is a known quantity. No responses to the Review advocated for a return to a system based entirely on hourly rates.

7.27 On the other hand, a system based on fixed fees, such as those which apply to the police station, may not capture the work done in particular cases. It is said, in my view fairly, that on the whole a fixed fee regime encourages the doing of as little work as possible on individual cases, as well as taking on as many simple cases as possible, while avoiding more difficult and time-consuming cases.

7.28 Some of the foregoing issues are addressed in the Magistrates’ Court scheme, based as it is on lower, higher, and non-standard fees. Thus, for example, as explained in more detail in Annex M, and using round figures, the lower standard fee for a guilty plea in an either way case in an undesignated area¹³¹ is £195, the lower standard fee limit is £272, the higher standard fee is £412, and the higher standard fee limit is £472. Whether these various limits are reached depends on the time recorded at the prescribed hourly rate, and the number of letters/phone calls made. In other words, the Magistrates’ Court scheme is a mixture of hourly rates and semi-fixed fees. The underlying theory – I emphasise theory – is that many cases can be done at or below the lower standard fee of £195: if the work done is under £195, nonetheless the standard fee is payable. On the other hand, work done that is above the lower standard fee of £195 is not paid until the lower standard fee limit of £272 is reached, at which point the higher standard fee of £412 kicks in, whether or not the time spent/activity has actually reached £412. The fee then remains at £412, until the time spent/activity reaches £472, above which a non-standard fee may be claimed.

7.29 In my view, the Magistrates’ Court scheme represents a workable compromise between hourly rates, and ease of administration, while leaving flexibility for accommodating more time-consuming cases using the higher standard fee and non-standard fee mechanisms. It is perhaps a classic “swings and roundabouts” mechanism¹³² but in my view it achieves a much better balance between the

¹³¹ i.e. a Category 1A case, where travelling and waiting time is allowed.

¹³² The expression apparently comes from the fairground, meaning that if less money is made on some offerings, such as the swings, this is made up on other more expensive attractions such as the roundabouts. Although hardly appropriate in a criminal justice context, I use the expression here as convenient shorthand.

swings and the roundabouts than the police station or LGFS schemes as presently constituted.

7.30 The figures available to the Review are that of the claims made under the Magistrates' Court fees scheme, approximately 80% of claims over the last five years have been for the lower standard fee. That suggests that the Magistrates' Court scheme does indeed lead to ease of administration in many cases, while accommodating cases where extra work is needed.

7.31 I therefore recommend that the principles of the Magistrates' Court scheme should be applied to the police station scheme and to the LGFS, as discussed in more detail in chapters 8 and 12 below, so that there is consistency of approach across each of the main schemes affecting criminal legal aid firms.

Where Should Additional Funding Be Best Directed?

7.32 Even assuming the fee schemes are restructured as recommended above, there remains the further question of where within the CJS process the funds are best directed, in the wider interests of the CJS, suspects, defendants, victims and the taxpayer.

7.33 In my view each of the three main stages of the process involving criminal legal aid firms, namely police station work, Magistrates' Court work and Crown Court work should be broadly sustainable in its own right, that is to say not dependent on undue cross-subsidy from other work streams. While such an approach cannot be hard and fast or set in stone, I take the view that if one part of the business is unduly loss-making, or the reverse, unduly profitable, that risks distorting the service and/or advice to the client, however conscientious the lawyer may be. So far as possible, each fee scheme should stand "on its own two feet" in order to avoid a situation where commercial gain or loss may, even sub-consciously, affect the advice to the client.

7.34 Sir Brian Leveson rightly placed emphasis on getting it right first time, case ownership, early engagement, and proper preparation. To meet these objectives, I consider that the additional funding is best directed towards the earlier stages of the CJS, in other words to "front load" the system while better reflecting payment for work actually done. In due course this should reduce the overall pressure on the CJS, particularly on the Crown Court. In particular, I would see better engagement at the police station stage, and defence funding for engagement throughout the phase leading to the first hearing in the Magistrates' Court, as key to the better functioning of criminal legal aid, as now discussed in Chapters 8 and 9.

7.35 Lastly, I attach importance to supporting the survival of smaller, often high street firms, who may often be in the lower quartile of earnings, but play an essential role in their communities, whether in Wales or England, often helping clients from minority ethnic backgrounds to have access to justice.

CHAPTER EIGHT: THE POLICE STATION SCHEME

8.1 Most of the submissions to the Review about the police station scheme related to the structure and level of the fees. However, a number of parties, including Dr Vicky Kemp, who is also a member of the Review Panel, have drawn attention to a number of other issues. I deal first with the structure of the police station scheme, and then with the further issues arising.

The Structure of the Police Station Scheme

- 8.2 If a suspect is arrested or asked to attend a voluntary interview, they must be informed of their right to consult a lawyer, either the duty solicitor or a lawyer of their choice.¹³³
- 8.3 Specifically, and subject to exceptions not here relevant, PACE Code C, paragraph 6, requires that all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available.¹³⁴ Whenever legal advice is requested, the custody officer must act without delay to secure the provision of such advice. If the detainee has the right to speak to a solicitor in person but declines, the officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right, the officer should ask them why and any reasons should be recorded on the custody record or the interview record as appropriate.¹³⁵ Reminders of the right to legal advice must be given at various stages of the process.
- 8.4 In the case of a person who is a juvenile or is vulnerable, an appropriate adult should consider whether legal advice from a solicitor is required. The appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person.
- 8.5 A person cannot be forced to see the solicitor if they do not wish to do so.¹³⁶ A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such legal advice.¹³⁷
- 8.6 If a suspect in the police station requests a solicitor, the police must pass the request to the Defence Solicitor Call Centre (DSCC) which is a call centre run on behalf of the LAA by an outside contractor, to which all calls from the police station must be directed. This is so even if the suspect asks for a named (own client) solicitor rather than the duty solicitor. The Review has received

¹³³ It has been suggested to the Review that this is sometimes put to the suspect by the police in a way that might imply that nominating a lawyer of their choice involves payment, whereas police station advice and assistance is free whether supplied by a duty solicitor or a lawyer of choice.

¹³⁴ Code C, paragraph 6.1

¹³⁵ Code C, paragraph 6.5

¹³⁶ Code C, paragraph 6.5A

¹³⁷ Code C, paragraph 6.6

numerous complaints about the DSCC and the delays and mishaps which are said to occur.

- 8.7 When the solicitor on duty receives the call from the DSCC, the solicitor has a contractual duty to be able to attend the police station within 45 minutes. However as indicated above, the suspect has the right to speak on the telephone to the solicitor. Normally the solicitor will physically attend prior to the police interview, although this may not take place until several hours after the arrest. It is not clear to what extent telephone advice is also given in the meantime.
- 8.8 The fee the solicitor receives is fixed separately for each police station and remains the same however long the attendance in question, or indeed whether there is more than one attendance or follow up interviews. The fees were fixed in 2008 but were subject to the general reduction of 8.75% in 2014 and have not been revised since. There is a so-called "escape fee" intended to accommodate more complex cases, but this is set at three times the fixed fee, and in practice is claimed in only very few cases. Even if the escape fee is payable, the solicitor's time is paid only from the point at which the escape fee kicks in. Travel and waiting time is included in the fixed fee, although travel disbursements may be claimed. Although police station attendance may be required at any time 24/7 there is no allowance for being "on call".
- 8.9 To give an example, the CLSA points out that the fixed fee for Leicester is £177.94 and the escape fee trigger is £552.15. The escape fee hourly rate is £47.45 per hour. At that rate, however, a solicitor would need to have done over 11½ hours work before they reached the escape fee. If the Solicitor did 11 hours work, and so did not qualify for the escape fee, they would be paid the same fixed fee of £177.94 for 11 hours work as they would be paid if they only did 30 minutes work. The only work paid for beyond the fixed attendance fee is work done above the escape limit. Thus, in this example, if the solicitor did 13 hours work in total, they would be paid the fixed fee of £177.94 plus a further 90 minutes work at £47.45 per hour (£71.17). This is a total of £249.11 for 13 hours which represents an hourly rate of £19.16 per hour. This does not seem to me a sensible way of remunerating serious work.
- 8.10 The fundamental problem with this structure is its inability to distinguish between straightforward cases, and those that are more serious or difficult. A straightforward shoplifting case is paid the same as a murder, which gives the solicitor no incentive to devote more time to the serious cases. Indeed, the incentive may positively favour the solicitor doing as many simple cases as possible in the time available and eschewing the more difficult cases.
- 8.11 It could be said that such an underpayment could be partly counterbalanced by the possibility that time invested in a more serious case at the police station might later be balanced by less time on other simpler cases or rewarded by subsequent fees in the Magistrates' and Crown Court. In my view that is no longer a sustainable approach. Work done should be properly paid for, and

remuneration should not be overly dependent on the chance - and it is only a chance - of recoupment in other cases or further down the line. Otherwise, there is a risk that the advice to the client may be influenced by the hope of making up the “loss” in the police station by further work later on. Police station work, perhaps long underrated, is too important to be seen as “a loss leader”. It should be properly rewarded for the time spent when the service is provided.

- 8.12 Although it will differ between urban and rural locations, police station work may also be extremely complex, taking many hours or days: the offence in question may range from a simple shoplifting to a charge of murder, from a complicated drugs conspiracy to causing death by dangerous driving, from sex offences involving children to acts of terrorism. The client may well be a vulnerable adult with mental health or drugs problems, or a child suspect under 18, or from a very different cultural background, possibly with a limited command of English. Many clients will have a history of family breakdown, marital difficulties or educational problems, a disordered lifestyle and quite possibly a pattern of previous out-of-court disposals or convictions. Many will be on benefits and been unable to find employment. Quite apart from legal knowledge, the solicitor will need many other skills, such as knowledge of anger management techniques, treatments for drug abuse and other addictions, and how to handle young persons, to give only a few examples.
- 8.13 This is not only stressful and challenging work; the first interview with the police will often be critical in determining the whole later course of the case. Good advice may make all the difference, whether from the suspect’s point of view or the police point of view, to the ultimate outcome. In addition, representations as to what, if any, charge might be preferred, as to possible out of court disposal, including advice to the client on whether to accept a caution, or on any bail conditions may also be important. In my view “getting it right first time” applies as much to the defence as it does to the police. I also see proper police station representation consistent with the general theme of encouraging early engagement, see Chapter 9 below.
- 8.14 I therefore recommend that the structure of the police station scheme be reformed along the lines of the Magistrates’ Court scheme with lower standard fees, higher standard fees and non-standard fees for exceptional cases.
- 8.15 An indication of how such an approach could work already exists in the hardly used escape fee table set out in paragraph 2(3) of Schedule 4 of the Regulations, which distinguishes between own or duty solicitor; unsocial hours or not; serious offence or not; and allows claims for travel and waiting time. It would however be necessary to introduce a further weighting to reflect the seniority of the lawyer involved, so that experienced lawyers were remunerated for dealing with serious cases.¹³⁸

¹³⁸ This principle is accepted for example under the LGFS in relation to special preparation, consideration of unused material and confiscation proceedings: see paragraphs 20, 20A, 26 and 27 of Schedule 2 to the Regulations.

- 8.16 Although further information and modelling will be needed, if the lower standard fee were pitched in a manner likely, indicatively, to account for say 70% - 80% of the volume, as in the Magistrates' Court, that would limit the extra administrative cost. I would see the more serious cases as typically attracting the higher standard fee, leaving the non-standard fee for the most serious, difficult or time-consuming cases. In the latter situation, I draw attention to my recommendation in Chapter 15 that the LAA should adopt a less restrictive approach to claims generally.
- 8.17 It seems anomalous that there should be different fees for different police stations, that for example Blackpool should be at £126.58, but Blackburn, less than an hour away, should be at £177.94. Brighton & Hove is at £183.41, but within a 20-mile radius Eastbourne is at £173.18, Crawley at £228.32, but Worthing is at £164.25, and so on. I recommend that these differences should be phased out, in favour of arrangements along the lines of the Magistrates' Court scheme.
- 8.18 I recommend that the general uplift in solicitors fees should be appropriately weighted towards the police station stage, so that the latter is properly funded without needing to rely on cross-subsidy from later stages of the CJS process.
- 8.19 However, I emphasise that these recommendations, if implemented, should be supplemented by the further steps outlined in the next section, and overseen proactively by the Advisory Board or equivalent arrangements.

Further Issues Affecting Police Station Work

- 8.20 The recommendations set out above are intended to presage a major shift of focus to the "front end" of the CJS, on the premise that if the system follows correct procedures and suspects have good and responsible advice early on, there should be important benefits – and costs savings – further down the line.
- 8.21 However, the Review cannot be satisfied on the evidence that the Police Station scheme is currently working well enough.¹³⁹ Accordingly, in addition to the above I would recommend that the Advisory Board has a general remit to review and oversee the working of the Police Station scheme going forward, with a view to monitoring the implementation of the proposed reforms and in particular taking action in respect of the following matters.

Lack of Data

- 8.22 First, although the cost of the police station scheme is approximately £125 million and involves some 0.6 million claims annually, very little seems to be known about what actually happens in the police station. Apart from the research by Dr Kemp and others, there is little information in the public domain

¹³⁹ See also the LAA's *Peer Review* guidance (February 2021) noting concern about the inappropriate use of inexperienced case workers in serious cases in the police station.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966765/Crime_Guide_Quality_February_2021_2_.pdf

about the quality of the service provided, whether and to what extent the rights of suspects are in practice safeguarded and, from the taxpayers' point of view, how far the service is provided in a cost efficient and modern manner. Data is lacking on how much time is typically spent on different cases, what different patterns there are if any between different police stations in different parts of the country, and the apparent absence of any regular system of feedback, nationally or local, to enable the participants, whether police, suspects or defence lawyers, to voice concerns or suggest improvements.

Low Take Up of Police Station Advice

- 8.23 Dr Kemp has suggested that probably only around 56% of arrested suspects request free legal advice.¹⁴⁰ Given the need for custody records to record this information, further research should be able to arrive at a more accurate figure. It is of concern that the take up of legal advice is not higher, given the gravity of the suspect's situation.
- 8.24 The anecdotal explanations for this low take up given to the Review include: a fear that asking for legal advice implies guilt; that waiting for a lawyer to arrive may mean staying longer in custody; lack of trust in a lawyer being paid by the State, especially among young minority ethnic suspects; simply not understanding the choice being offered; and in the case of children or other vulnerable suspects, often having very little grasp about what is going on or how best to respond. Although a child or vulnerable person is entitled to have an appropriate adult (often a parent) present, the appropriate adult may not fully understand the suspect's best interests either.
- 8.25 The Review further understands from Dr Kemp that there is little information as to how many voluntary interviews are undertaken by the police and to what extent voluntary interviewees have prior legal advice.
- 8.26 I would think it important for the Advisory Board to work with the police and defence representatives to get to the bottom of this low take up. If as police representatives have told the Review, the police view early engagement as of particular importance, I would have thought it was in the interests of police and suspects alike to encourage the availability of legal advice as early as possible, and improve the take up of advice at the police station level. That would also be consistent with the National Case Progression Commitment referred to above.
- 8.27 Dr Kemp makes the further point that the right to legal advice includes the right to speak to a solicitor on the telephone. If a suspect declines legal advice then under PACE Code C the custody officer is required to inform the suspect of their right to speak to a solicitor on the telephone before finally deciding, and to record the reasons if legal advice is still declined. There is no information as to

¹⁴⁰ Kemp, V, Submission of Written Evidence to Parliament (Figures for 2017): <https://committees.parliament.uk/writtenevidence/12784/pdf/>.

¹⁴¹ See Chapter 5

how far this procedure is in fact followed, and according to Dr Kemp's research a number of suspects would have taken up the offer had they known of the possibility of a telephone consultation.

- 8.28 According to Dr Kemp, there is also some evidence that solicitors do not routinely telephone, preferring to wait until the police interview, and that if a solicitor does telephone, difficulties may be encountered in getting through to the custody suite or speaking to the client. There is also the problem of securing the confidentiality of the phone call. It would seem to me that early and secure telephone contact with a lawyer is likely to be of particular importance to many suspects, even if the lawyer's physical attendance is later, for example, because the police interview is delayed for operational reasons.
- 8.29 A separate issue is whether in the case of young or vulnerable suspects, the system should be adapted to an "opt-out" rather than an "opt-in" procedure, i.e. that a lawyer is automatically contacted unless a suspect definitely refuses. I understand that this change is to be piloted in certain areas and I welcome that development. I would hope that such a pilot might be accompanied by developing additional ways of informing suspects of their rights – Dr Kemp has referred to the development of an app or by the suspect using a tablet or screen in the police station. Such measures are also needed to help build trust between suspect and adviser, an issue highlighted by Mr Lammy.
- 8.30 Given the problems of dealing with young or vulnerable suspects it would seem to me that specific training for dealing with them in the police station, and in due course some form of accreditation, should be built into the qualifications for doing police station work. This should extend to dealing with neuro-diversity issues.¹⁴²

Difficulties with DSCC

- 8.31 The Review has received a volume of complaints about the next stage of the process, namely the inefficiency of the DSCC, including delays in contacting the relevant solicitor, contacting an incorrect solicitor, and having difficulty when asked to contact the suspect's own lawyer. If these complaints are well founded, this is not an acceptable state of affairs. While the underlying principle of an objective rota is understandable, not least to avoid favouritism or queue jumping, the Review hopes and expects solutions to be found urgently to problems with DSCC.

The 14-hour rule

- 8.32 The Review received a great deal of comment about the "14-hour rule", a requirement of the LAA that duty solicitors undertake 14 hours of criminal defence work per week. This does not include supervision. The main criticism is that this rule makes it difficult for those with caring responsibilities to be duty solicitors, particularly women or part-time workers. It may also lead to the

¹⁴² [Neurodiversity in the criminal justice system: a review of evidence \(justiceinspectorates.gov.uk\)](https://www.justiceinspectorates.gov.uk/neurodiversity-in-the-criminal-justice-system-a-review-of-evidence/)

inefficient use of resources. I understand that a modification of the 14-hour rule has been introduced. However, I recommend that the LAA revisits this issue in the light of the evidence to the Review.

The Use of Accredited Representatives

- 8.33 The next issue on which only sketchy information is available, is who actually attends at the police station. Although in many cases this will be a duty solicitor in person, the attendance may in practice be by another person in the solicitors' firm, qualified as an accredited police station representative under the Police Station Representatives Accreditation Scheme (PSRAS). Accredited representatives are also supplied to solicitors' firms by outside agencies.
- 8.34 The Review understands from MOJ figures that in 2019 there were approximately 4600 duty solicitors on the LAA rota and some 2600 accredited representatives. This suggests that an important proportion - perhaps up to 40 per cent – of police attendances are carried out by accredited representatives. Many of these are likely to be from the relevant duty solicitor's firm, for example, solicitors, consultants, legal executives or paralegals who do not, or chose not, to meet the full LAA requirements for duty solicitors but are none the less qualified as accredited representatives.¹⁴³ The MOJ figures suggest that in terms of gender balance, whereas for duty solicitors the proportion of male/female is approximately 65:35, for accredited representatives the balance is approximately 50:50.¹⁴⁴
- 8.35 In 2019, some 1600 duty solicitors supervised at least one accredited representative, and the ratio of accredited representatives to duty solicitor supervisors was 1:65:1. That ratio would not at first sight seem unreasonable from the point of view of effective supervision. However, by February 2021 the number of accredited representatives had increased to nearly 3000, and the ratio of accredited representatives to supervisors was 1:72:1, the increase in accredited representatives also to some extent mirroring the decline in the number of duty solicitors.
- 8.36 Given that the police station is the main catchment area for obtaining a new client, it seems to me that in most cases it will be in solicitors' best interests to do the police station attendance through their own firm, rather than employ an outside agency, and that point was made to the Review in several discussions. Nonetheless in some circumstances where the firm is short-handed or for example the available staff are engaged in court, or there is no-one available out of hours, resort may be had to an outside agent. It is understood that the

¹⁴³ For example, given the LAA requirement for a duty solicitor is to undertake 14 hours of criminal defence work per week, and for lawyers with caring responsibilities or those working part time it may be easier to operate as an accredited representative rather than maintain the full duty solicitor qualification.

¹⁴⁴ It has been suggested that this difference may be attributable to female lawyers preferring to avoid some of the commitment's incumbent on duty solicitors, for example availability at unsociable hours. This is a matter for the LAA to consider further.

cost to a solicitors' firm of employing an accredited representative is between £70 and £100.

- 8.37 On the other hand, there is some evidence, which would need further investigation, of an over-use of accredited representatives. The LAA records one solicitor supervising 23 accredited representatives. Anecdotally, the Review was told of one case where the solicitors' phone was routinely switched through to an accredited representative so the solicitor themselves was never in contact with the client, although this was picked up and apparently corrected on peer review. In another case, the firm told the Review that they almost always used accredited representatives, because the use of a more senior solicitor could not be economically justified. Almost certainly these practices, if and to the extent they exist, have up to now been heavily influenced by the low level of the police station fees.
- 8.38 In my view, the Advisory Board and/or the LAA should review the appropriate balance between the use of duty solicitors and accredited representatives. While a qualified accredited representative of appropriate experience may very well be suitable in many cases, the SCC requires that the accredited representative be properly supervised. Overuse of accredited representatives may weaken that supervision, and it is not clear to me how supervision is supposed to work effectively if outside agencies are used.
- 8.39 One such issue for further consideration is the effectiveness of the training for solicitors and accredited representatives, particularly in dealing with young and vulnerable (including neuro-diverse) suspects or minority ethnic individuals. I would recommend that both the PSRAS system for acquiring accreditation, and the requirements of continuing professional development are reviewed and strengthened from that perspective. In view of the importance of police station work, the LAA should consider, in conjunction with the professions, whether a system of re-accreditation at defined intervals should be introduced.
- 8.40 In addition, no agencies supplying accredited representatives to solicitors responded to the Call for Evidence. The role of such agencies is potentially a matter to be considered in the future by the LAA and the Advisory Board, particularly from the perspective of effective supervision.

CILEX members as Duty Solicitors

- 8.41 CILEX pointed out that to be formally accepted as a duty solicitor, the LAA requires accreditation under the Law Society's CLAS. This in turn requires that the person is both an accredited representative under PSRAS and has passed the Law Society's Magistrates' Court Qualification scheme (MCQ). CILEX argues that its own CILEX Advocacy Qualification is comparable to the MCQ and should be acceptable to the LAA as an appropriate qualification to undertake the duty lawyer role, either separately or by way of being "passport" into CLAS. This has not however been agreed, although it is not clear to me exactly what the obstacle is. As a result, CILEX members find themselves in the anomalous position of being able to be partners in solicitors'

firms, but unable to be formally duty solicitors without this further Law Society qualification. One particular implication is that such a CILEX member cannot act as a supervisor to other accredited representatives, the role of supervisor being limited to duty solicitors. A CILEX partner in this position may need to be “supervised” by a fellow partner. Nor can such a CILEX member be ‘counted’ when duty solicitor slots are allocated.

8.42 Given the difficulty of recruiting duty solicitors, the need to encourage a diverse profession and the contribution made by many CILEX lawyers, this issue needs to be resolved. I recommend that the LAA and the Law Society review the position again with CILEX. If it cannot be resolved, the Advisory Board would seem well placed to tender appropriate advice.

Duty solicitors based in police stations?

8.43 One important change in the organisation of police stations is the closure of many smaller stations and the establishment of much larger police stations, often some way from city centres. With this trend has come increasing centralisation of custody facilities, often capable of holding 40 plus detainees, replacing many of the cells at smaller police stations.

8.44 Dr Kemp has suggested to the Review that local police forces working closely with the defence community could come to arrangements to facilitate a duty solicitor being based permanently in some of the larger police stations. The advantage of such an arrangement is that the custody sergeant would not need to go through the DSCC, there would be no delay in the solicitor reaching the police station, and perhaps most important of all, there would be little or no delay in legal advice being available to the suspect. Since delay is often a key reason for a suspect declining legal advice, this could in principle be a major step forward in making legal advice available and promoting early engagement. I would recommend that local arrangements be piloted where possible, with certain police stations being physically attended for much of the 24 hours.

Remote technology in police stations

8.45 During the height of the pandemic much police station advice and assistance was delivered remotely under a temporary interview protocol agreed between the relevant parties.¹⁴⁵ It is understood that the situation has now mainly returned to the previous pattern of physical attendance by duty solicitors and accredited representatives.

8.46 The question of the remote delivery of legal support to detainees in police stations is an issue of general public importance beyond the scope of this

¹⁴⁵ <https://www.cps.gov.uk/legal-guidance/coronavirus-interview-protocol-between-national-police-chiefs-council-crown>

Review. This is, if I may say so, a classic instance where the CJS has difficulty in formulating coherent policy: individual police forces have different approaches, in the end the Home Office has to pay for the equipment, but funding of the defence lawyer, and the quality of service, falls to the LAA/MOJ. I would hope that a collaborative approach to this issue can be progressively developed across the CJS as a whole.

- 8.47 As far as criminal legal aid solicitors are concerned, the views expressed to the Review differed, but one opinion was that in some circumstances, particularly less serious offences, remote advice would suffice, and that this would save time and reduce delay, particularly in remoter geographical areas; it was suggested that it should be up to the solicitor to decide whether physical attendance was required or not.
- 8.48 From a criminal legal aid perspective, measures which save time and costs, and reduce delay do merit attention. In my view, early confidential telephone contact between defence lawyer and suspect is highly desirable, and should happen routinely wherever possible. If technology were available in police stations to enable that to happen visually, that too would be an important step forward.
- 8.49 However, my present view is that the police interview is a different matter. That is a very important point in the life of a case, and I would not myself favour moving away from the principle of physical attendance by the defence lawyer at the interview, unless there were very compelling reasons to the contrary. In many ways the thrust of my proposal to re-fund and restructure the police station scheme is to make the police station process more meaningful and useful from the point of view of both sides. In my view that is facilitated by the physical, rather than virtual, presence of the defence lawyer. That is particularly the case for young or vulnerable persons, first time suspects, and those accused of serious offences.
- 8.50 Behind this discussion, however, there lurks an even more fundamental question, which is how far the physical areas on which the duty solicitor scheme is constructed, based on the post code of the relevant office, should continue unadjusted in the light of advances in remote technology. Indeed, this question touches on how far the LAA requirement to have a physical “office” in a specific location will continue to make sense in an online world. My own view, expressed above, is that physical attendance for the police interview should be the norm, absent special circumstances, and on that basis I can see the sense of duty rotas continuing to be based on geographical areas. But how technology develops in the future, and whether for example area boundaries should be more fluid to facilitate remote working, are issues that the LAA and the Advisory Board should keep under review.

Minority Ethnic Trust in the System

- 8.51 In his Report referred to above, the Right Hon David Lammy MP makes very important observations about the position of minority ethnic defendants in the

CJS, and in particular about a lack of trust in the system which leads some young minority ethnic suspects to decline legal advice in the police station. Among other points he raises the possibility of the suspect having some choice as to the lawyer to be supplied, including the possibility of asking for someone from a similar cultural or ethnic background, and earlier access to a barrister.¹⁴⁶

- 8.52 I wholly agree with Mr Lammy that the issues he raises need to be tackled. One of the purposes of the additional funding I recommend, and the emphasis that this Review places on the police station, is to encourage greater participation in police station work by minority ethnic, including CILEX qualified, lawyers. In addition, the procedures of the duty solicitor scheme should support, not direct the service needed by the particular client, and if there are ways in which defence lawyers in local areas can work with community intermediaries and the police to address the points Mr Lammy raises, the system of criminal legal aid should support that process. The pilot schemes for opt-out, rather than opt-in in the case of young suspects, will likely assist in addressing these problems.
- 8.53 One concrete suggestion, discussed further in Chapter 15, is for the MOJ to consider block grants to “not for profit” community interest companies, based in the more deprived areas, with a particular remit to develop expertise in dealing with young defendants of all backgrounds. One purpose would be to increase the supply of lawyers, particularly from a minority ethnic background, prepared to invest in finding solutions to the difficulties Mr Lammy refers to.
- 8.54 I have already recommended above that special training in dealing with young or minority ethnic individuals or vulnerable persons in a police station should be built into the police station scheme. I hope these measures would assist in overcoming the problems to which Mr Lammy refers.

The No-comment Interview

- 8.55 Finally, police representatives engaging with the Review have expressed frustration about “no comment” interviews advised by defence lawyers when, as it would seem to the police, it could well be in the suspect’s best interests to be more forthcoming. From a police point of view this is understandable. On the other hand, the right to silence is a fundamental defence right and if the exercise of this right is in the client’s best interests it is the duty of the defence lawyer to so advise.
- 8.56 However, whether in a particular case such advice is in the client’s best interests is another matter, given for example the possibility of adverse judicial comment on late explanations, or foregoing possible mitigation. The idea that the police station work can be commoditised into an automatic or invariable “no comment”, without at all considering the facts or the specific circumstances of the client is in my view at odds with the advisor’s professional duty to consider

¹⁴⁶ A barrister can act as a police station representative. The possibility of involving a barrister in the police station stage of the process should also be considered. See also Chapter 9 below on early engagement.

carefully the client's best interests in each specific case. A responsible solicitor or accredited representative should be well aware of the pros and cons of giving "no comment" advice and weigh carefully the appropriate considerations according to the individual client. If it were to emerge in peer review that a solicitor or accredited representative seemed to be on "autopilot" when it came to advising the client, that would be of concern. I hope that a restructuring of the fee scheme along the lines I suggest would help eliminate any "autopilot" approach, although it goes without saying that the client always has the absolute right to remain silent.

CHAPTER NINE: EARLY ENGAGEMENT

9.1 The next phase of the process after the police station is the period up to the first hearing in the Magistrates' Court. At present, whether the suspect has been charged or not, this period is a "dead period" from the criminal legal aid point of view. Little or no engagement takes place between the defence and the police, and no effective funding for this period is available.¹⁴⁷ Under the system of RUI, there may be a prolonged period when little or nothing is heard about the case until a postal requisition is received containing the charge and notifying a date for the first hearing in the Magistrates' Court. Even then the evidence is not served on the defence. This Chapter recommends better criminal legal aid funding for the period between the police station and the Magistrates' Court.

Pre-Charge Engagement

- 9.2 The first issue is engagement pre-charge. At the end of 2020, the Attorney General published revised guidelines, with a view to encouraging pre-charge disclosure, on the basis of an agreement between the Police and the defence. One of the drivers of this was the difficulties arising from the volume of digital material, particularly in cases of alleged sexual offences, where it may be one person's word against another and the task of trawling through phone downloads, social media or other background in the search for corroboration (or not) is daunting. If, for example, the defendant was in possession of exculpatory evidence, making that known early on could both save resources and lead to an earlier resolution for both the defendant and the complainant.¹⁴⁸
- 9.3 The MOJ announced in 2021, following a consultation, its intention to introduce a new unit of work for legal aid advice and assistance in connection with pre-charge engagement. This would be based on a "self-grant" of legal aid by the solicitor, and calculated at the hourly rates applicable to the escape fee under the police station scheme up to a limit of £273.75¹⁴⁹ (i.e. around 6 hours work, to be kept under review).
- 9.4 In June 2021 the Law Society, while generally in favour of the proposal, expressed the view that, for pre-charge engagement to be effective, the solicitor had to do preparatory work, which was not remunerated under the MOJ proposal. Without the preparatory work, the solicitor cannot determine whether early engagement is in the client's best interest or not.
- 9.5 I see force in the point the Law Society has been making. For a pre-charge discussion to be meaningful, the defence needs to know the prosecution case,

¹⁴⁷ Although there is provision under Schedule 4, paragraph 3(1) of the regulations for free standing advice and assistance up to a limit of £273.75, this appears to be little used.

¹⁴⁸ See generally [Annex B to the Attorney General's Guidelines on Disclosure](#), effective from 31 December 2020, setting out a disclosure framework for early engagement.

<https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020>

¹⁴⁹ i.e. the same upper limit as for free standing advice and assistance under Schedule 4, paragraph 3(1) referenced above.

to study the evidence and to take instructions before deciding whether it is in the client's interest to engage. If for whatever reason the client declines to engage, that is the end of the matter: but the work must be done on both sides before it can be decided whether early engagement is useful or appropriate.

- 9.6 It seems to me that the sequence of events should be that the police first provide the defence with a sufficient evidence base to understand the case sought to be made, the defence are then funded to examine that evidence, take the client's instructions, and decide whether engagement is appropriate or not. At this point the defence would still be fully entitled to decline to go further. In the absence of ground rules along these lines, early engagement could too easily be perceived as "a way of funding the defence to help the police".
- 9.7 Subject to that, I support the MOJ's proposal on pre-charge engagement. I would myself hope that such engagement should not be limited to cases involving large amounts of digital evidence. It seems to me in many cases where a charging decision is yet to be taken, pre-charge engagement is likely to be beneficial from many points of view. The proposed fees should be in line with the general uplift of criminal legal aid fees that I have already recommended.
- 9.8 I would have thought that rather than a fixed fee with the possibility of applying for an uplift, it would be better to treat this work as an extension of the police station scheme, with lower and higher standard fees subject to ex-post audit if necessary. I so recommend.

Engagement Post-charge

- 9.9 In his Report in 2015 already referred to, Sir Brian Leveson recommended, among other things:

*"Case ownership – for each case, in the police, the CPS and the defence, **there must be one person who is (and who is identified to be) responsible for the conduct of the case...** (emphasis added)*

*Duty of direct engagement– the identified representatives should engage **at the earliest opportunity and in advance of the first hearing**; what matters is early direct engagement, whether by telephone, email or otherwise."¹⁵⁰(emphasis added)*

- 9.10 I would entirely support these recommendations, but for one reason or another, including lack of funding, it seems that Sir Brian's vision has not yet been fully realised in practice.
- 9.11 First for the defence to "engage" with the prosecution, or vice versa, there must be a responsible person to engage with, and a proper basis on which to do so. If early engagement is to take place, then there must a responsible police officer and/or CPS lawyer whose contact details are provided and who has

¹⁵⁰ See also the Criminal Procedure Rules

authority to discuss the case, and vice-versa on the defence side. However, the evidence to the Review is that the exchange early on of simple contact details, whether by phone or email, between the parties, seems for whatever reason somewhat difficult to achieve. On the police side, however the National Case Progression Commitment has emphasised the importance of early engagement with the defence.¹⁵¹

- 9.12 The Review is told that it is often difficult to have an informed discussion with a responsible person at the CPS until very late in the process, and that this is hardly ever possible before the first hearing in the Magistrates' Court. Self-evidently, to be effective post-charge, early engagement should take place in good time before the first hearing in the Magistrates' Court. That means that a substantially complete IDPC needs to be served well beforehand, as the CPR rules contemplate, with the contact details of the lawyer in the CPS who is responsible for the case and has authority to discuss it with the defence.
- 9.13 It may well be that until contacted by the defence the CPS does not know whether the defendant is represented, and if so by whom, although such information may (or may not) be on the police records. The Review understands that the present computer systems do not permit the defence to access the IDPC unless the defence has requested details from the CPS beforehand, so there is sometimes a situation where the CPS and the Magistrates' have the IDPC, but the defence has not.¹⁵² On the defence side, it is also possible that legal aid has not yet come through or simply that the solicitor is late in taking the necessary action. On the other hand, it may be that it is the CPS/police processes that are holding up a complete service of the IDPC until too late in the day for effective engagement to take place before the first hearing.
- 9.14 I reach no conclusion on what gives rise to these delays, very likely a combination of circumstances. Whatever the root causes, however, the evidence to the Review is that at the first hearing in the Magistrates' Court, many cases are taken "on the hoof" with the defence representatives trying to absorb what may be quite complex facts and take instructions from the client, with very little time to do so, while the client, who has not previously seen the evidence either, is under pressure to decide on a plea at that first hearing in order to earn the maximum credit. Adjournments the Review understands are rarely granted.
- 9.15 From the criminal legal aid point of view, it is an inefficient use of public funds for taxpayers' money to be spent coping with these kinds of difficulties and the defendant, guilty or innocent, is surely entitled to better treatment by the system. In my view the taxpayer's money would be well spent on sensible early engagement, prior to the first hearing, which has the potential to relieve these

¹⁵¹ National Case Progression Commitment [National Case Progression Commitment \(cps.gov.uk\)](https://www.cps.gov.uk). See Chapter 5 above

¹⁵² I understand that the Common Platform will attempt to remedy this.

pressures, in particular enabling a better, more considered, approach to the first hearing in the Magistrates' Court.¹⁵³

- 9.16 I would urge renewed effort by the police, the CPS and the defence, to investigate ways of disclosing the full prosecution case to the defence in a timely manner so as to enable a sensible exchange of views before the date of the first hearing. Most probably liaison at local level in different areas will be most effective.
- 9.17 In my view, to enable further progress, the defence should be properly funded to engage in effective post charge engagement before the first hearing in the Magistrates' Court. Accordingly, I recommend that there should be additional criminal legal aid funding to support post charge engagement as well as pre-charge engagement.
- 9.18 In the case of post-charge engagement, I would envisage that the funding should be sufficient to remunerate substantive discussion between the defence and the prosecution prior to the first hearing in the Magistrates' Court, including remunerating the preparation necessary for such discussion, for example, any reasonable requests relating to disclosure. If that were fully implemented, I would envisage substantial savings in time and costs further down the line, as with pre-charge engagement. Again, I would have thought that such engagement could be remunerated on the principles of the Magistrates' Court scheme, at the same rates. It could not then be said that post-charge engagement could not happen for lack of defence funding.
- 9.19 If my recommendations on such engagement are accepted, then it would be important for the police and CPS to reciprocate, and I am sure they would. For example, if the defendant has been subject to RUI, and then receives a postal requisition (summons), perhaps the evidence relied on could be served together with the postal requisition, also giving contact details of the relevant officer/CPS lawyer.

Young defendants

- 9.20 I would see the issue of early engagement as particularly important in relation to defendants in the Youth Court, discussed in Chapter 11.

The role of the probation service

- 9.21 Finally, there is a potentially important role for the probation service in preparing a Pre-Sentence Report (PSR) prior to the first hearing in the Magistrates' Court. If early engagement could result in a plea at the first hearing, the probation service would need time to prepare the PSR. The early engagement timetable should also accommodate the need for the defence to notify and/or liaise with the probation service to have time to prepare the PSR. I envisage that liaison with the probation service (and indeed social services or

¹⁵³ The National Case Progression Commitment cited above supports this position

other relevant agencies) prior to the first hearing (or sentence, if later) should also be funded by criminal legal aid to an appropriate extent.

CHAPTER TEN: THE MAGISTRATES' COURT

General Observations

- 10.1 I have already observed that the Magistrates' Court scheme, described in Annex M, is the best available model for the reform of the police station scheme discussed in Chapter 8. I will make the same recommendation in relation to the LGFS in Crown Court discussed below in Chapter 12. I do not therefore think it necessary to recommend structural changes to the scheme currently operational in the Magistrates' Court.
- 10.2 It follows however from my conclusions in Chapters 6 and 7 above that the Magistrates' Court criminal legal aid rates should rise substantially. That in turn should enable an improvement in quality, and better outcomes, in the Magistrates' Court.
- 10.3 However, as already mentioned in Chapter 9, much of the evidence to the Review expressed concern about the functioning of the Magistrates' Courts on a day to day basis.
- 10.4 For example, the LCCSA stated that "too often defence lawyers are left waiting around at court for most of the day", there were failures by the police to supply evidence to the CPS, and by the CPS to provide evidence to the defence, who "often receive 50-page IDPC bundles the same day. The evidence cannot be fully absorbed or analysed and time with the defendant is short and rushed". The LCCSA contend that even with NGAP cases "too often the most important evidence is left out of the bundle". Other matters raised refer to difficulties with listing, with organising interpreters, and with getting a response to emails and phone calls.
- 10.5 I draw attention to such evidence – which is in line with many other comments to the Review - not to criticise but again to urge the defence, the CPS and the police to reboot timely communication with each other, so that as much as possible is done before the first hearing in the Magistrates' Court, as suggested in Chapter 9.
- 10.6 For hard pressed Court staff struggling with impossible tasks of listing, again I hope that HMCTS can play its part, with further recruitment and training, so that all participants in the CJS, including the defence, can better communicate, particularly at local level, in addressing these issues.
- 10.7 Whatever the pressures, a defendant is entitled in my view to reasonable treatment by the CJS. When it comes in particular to the question of what discount a defendant is entitled to receive on sentence, and whether they could reasonably have been expected to plead, or indicate an intention to plead, guilty in the Magistrates' Court, and if so to what offence, I would respectfully hope that the often chaotic conditions described by respondents to the Review are fully taken into account by the sentencing Court. In my personal view, it would be highly regrettable if the underfunding and other difficulties of the CJS

were to lead inadvertently or indirectly to a weakening of the golden thread of the common law, that it is for the prosecution to prove its case.¹⁵⁴ To my mind at least a defendant is entitled to know the evidence relied on and have time to consider it before they can be reasonably expected to decide on plea.

Junior Barristers in the Magistrates' Court

- 10.8 A particular concern of the Young Bar section of the CBA, known as the Young Bar Committee (YBC) is work in the Magistrates' Court. In London, a protocol agreed between the Bar Council, Law Society and LCCSA¹⁵⁵ suggests £50 for first appearances including bail applications and sentences; £75 for half day trials where billable time¹⁵⁶ is less than 3 hours; £100 for hearings other than trials in excess of three hours; and £150 for full day trials in excess of three hours.
- 10.9 According to the YBC these fees in no way reflect the work involved and are often paid late and may be still outstanding a number of years later. The first appearance in the Magistrates' Court involves great pressure due to the impact of the sentencing guidelines, but instructions are mainly received at the last minute. There is a great deal of waiting around, the defendant being met at court for the first time may be a child or a vulnerable witness, and a detailed note has to be written up afterwards. From these low fees, travel and chambers expenses also have to be paid, as well as normal living costs.
- 10.10 These fees also apply in Youth Court cases, although the stakes are very high, and the work is highly skilled and demanding. The YBC's principal suggestions are that Magistrates' Court, including Youth Court, fees be increased, and that these should be billable directly to the LAA rather than to the solicitors.
- 10.11 In my view the YBC is correct that the rates suggested by the above Protocol for work in the Magistrates' Court are unreasonably low for the work involved. I anticipate that with the increases I recommend in the rates paid under the Magistrates' Court scheme, should give headroom for solicitors to substantially improve upon the fees they pay to junior barristers appearing in the Magistrates' Courts. Moreover my recommendations in Chapter 11 below are intended to increase Youth Court fees.
- 10.12 Similarly, my proposals as to earlier engagement discussed above in Chapter 9, are intended to reduce where possible the last-minute pressures that seem to prevail in aspects of Magistrate Court work, at least in some areas.
- 10.13 As to the issue of work paid late or not at all, payment of junior barristers instructed by solicitors in the Magistrates' Court is the responsibility of the solicitor in question. There would appear to be no justification for late payment by the solicitor to the barrister, still less for non-payment, in breach of the

¹⁵⁴ [Woolmington v DPP | \[1935\] UKHL 1 | United Kingdom House of Lords | Judgment | Law | CaseMine](#)

¹⁵⁵ [2019-Magistrates-Court-Protocol-final.pdf \(barcouncilethics.co.uk\)](#)

¹⁵⁶ "Billable time" is only time at court, and does not include preparation, travel or waiting.

Standard Crime Contract, particularly Clause 10.50.¹⁵⁷ That would seem particularly so if my recommendations for increased Magistrates' Court fees is accepted.

- 10.14 I recommend that, absent any reasonable excuse or exceptional circumstances, any such delay in payment beyond 90 days, should be considered by the LAA as a Fundamental Breach of the Standard Crime Contract, the next version of which should explicitly so provide. Similarly, it should be a requirement of the Standard Crime Contract that contracting solicitors providing publicly funded services agree to observe HM Government Prompt Payment Code.
- 10.15 It has been suggested to the Review that some barristers' chambers allow the junior members to find themselves in the position of having unpaid fees for publicly funded work, while apparently in some instances other members of the same chambers continue to accept instructions from the solicitors in question. If that were the case, the question would arise as to whether a sufficient degree of pastoral care was being shown by the chambers towards the junior members.¹⁵⁸
- 10.16 In all these circumstances, I do not feel able to recommend a separate statutory scheme for advocates in respect of criminal legal aid work in the Magistrates' Court. To the extent the problem exists, I see the root cause as breach of the SCC by the solicitors in question, and that is not in my view a sound basis for statutory intervention. If there continues this kind of malfunctioning of the system going forward, I would expect audit by the LAA to reveal that, and appropriate action to be taken under the SCC.

Appeals to the Crown Court

- 10.17 A right of appeal by way of re-hearing lies to the Crown Court from the Magistrates' Court against conviction or sentence or both. Many defendants may not have qualified for legal aid in the Magistrates' Court but may qualify for legal aid on such appeals where the Crown Court eligibility rules apply. Whether or not the defendant has been represented, they may seek legal advice on appeal, possibly from a different firm, but this is subject to an upper limit of £273.75 under Regulation 8(a) of the Regulations.¹⁵⁹ For an appeal itself, there are fixed litigator fees under paragraph 19 of Schedule 2 to the Regulations of £155.32 and £349.47 for appeals against sentence and conviction respectively.
- 10.18 The evidence from the LCCSA and others is that this work is uneconomic, especially if the solicitors' firm is being asked to take on a new client and do the work from scratch. The LCCSA refers to defendants being turned away by numerous firms on cost grounds. If correct, this is of concern, given that many

¹⁵⁷ 10.50 in the SCC 2017 Specification: [Crime Specification \(2017\) \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614447/crime-specification-2017.pdf)

¹⁵⁸ [Part 2: Code of Conduct \(barstandardsboard.org.uk\)](https://www.barstandardsboard.org.uk/part-2-code-of-conduct/)

¹⁵⁹ This limit may be increased under the terms of the SCC.

defendants may not have been legally aided, or even represented, in the Magistrates' Court. While no one would wish to encourage unmeritorious appeals, an inability to take advice on an appeal would be an unfortunate gap in the system.

- 10.19 In line with my overall recommendations, I would envisage that all solicitors' fees in relation to appeals should be increased. In relation to advice on appeal, there is already some lee-way to increase the upper limit. However, my preference would be for advice on appeal to benefit from a lower and higher standard fee structure, so as to take account of different circumstances. The higher fee structure could apply in particular cases where there is at first sight a real question as to whether the Magistrates' Court reached the right decision.
- 10.20 As to litigators' fixed fees in relation to the conduct of an appeal in the Crown Court, I would recommend that these be brought into line with the reforms I suggest in Chapter 12 below, to the general effect that a lower and higher fee structure should operate across the board, so as to take into account the range of different circumstances that may arise in different cases.

Committals for sentence from the Magistrates' Court

- 10.21 For litigators, committals for sentence from the Magistrates' Court to the Crown Court are paid at a fixed rate of £232.98. The CLSA argues that this fee is lower than the basic fees applicable in many cases in the Crown Court, even for a guilty plea in the Crown Court. This situation may lead to a conflict between the solicitors' interest in possibly obtaining the higher Crown Court fee and the client's interest, which may be best served by pleading as early as possible. It seems to me that the fee for dealing with a committal for sentence in the Crown Court should be broadly in line with other fees in the Crown Court, so as to remove the problem the CLSA identifies.
- 10.22 Furthermore, in committals for sentence the client is at risk, since the Magistrates' consider their powers inadequate, notwithstanding the guilty plea; in all probability the client is facing a substantial prison sentence. One can envisage circumstances where the sentencing exercise in the Crown Court is complex, for example with medical or psychiatric reports, and in my view the fee scheme should accommodate these kinds of cases.
- 10.23 I would therefore recommend a system of higher and lower standard fees in committals for sentence, to accommodate the more difficult cases I have described.
- 10.24 The CLSA makes a further, different, point in relation to committals for sentence. If a client who does not qualify for legal aid in the Magistrates' Court pleads guilty and is committed for sentence, they continue to be subject to the Magistrates' Court rules on eligibility, and thus do not qualify for legal aid for the sentencing hearing in the Crown Court. However, if they plead not guilty in the Magistrates' Court and are sent for trial in the Crown Court, they then qualify for legal aid, subject to a possible contribution, albeit that they may lose credit for

not having pleaded at the earliest opportunity. This anomaly may incentivise more clients to plead not guilty in the Magistrates' Court, although placing the defendant in the invidious position of having to choose between being unrepresented in the Crown Court and earning the maximum discount for pleading guilty at the earliest opportunity.

10.25 There is, in my view, force in the CLSA contention, not least since appeals to the Crown Court from the Magistrates' Court against conviction and sentence to qualify for legal aid according to the Crown Court criteria. I would invite the MOJ to consider putting a defendant involuntarily committed to the Crown Court for sentence on the same footing as a defendant voluntarily pursuing an appeal to the Crown Court, namely that the Crown Court rules for eligibility for legal aid should apply to all cases heard in the Crown Court, including committals for sentence from the Magistrates' Court.

CHAPTER ELEVEN: THE YOUTH COURT

- 11.1 I have already referred in Chapter 8 to young suspects in police custody, the points made by Mr David Lammy MP,¹⁶⁰ and to the approach currently being piloted by the MOJ of an “opt-out” rather than an “opt-in” approach to legal advice and assistance in the police station, for which I express my support. This section deals with the next stage of the process, namely the Youth Court.
- 11.2 The Youth Court is a specialised Magistrates’ Court that has jurisdiction to try children aged between 10 and 17, even if the offence is indictable only or triable either way, except for very serious offences.¹⁶¹ The general presumption is that children should be tried in the Youth Court wherever possible. The maximum sentence available in the Youth Court is a two years Detention and Training Order. Crimes typically tried in the Youth Court include knife crime, theft, robbery and burglary, and less serious drugs offences as well as sexual offences. Legal aid for persons under 18 is not means tested, but the cases are remunerated under the Magistrates’ Court scheme.
- 11.3 I draw attention once again to some of the difficulties affecting the effective operation of the Youth Court, including long delays between the offence and coming to court, delays on the day of the hearing, late service of documents and other issues raised by respondents to the Review, referred to in Chapters 9 and 10. I hope that serious attention is given to these issues. This Chapter concerns the question of remuneration for Youth Court work.
- 11.4 Numerous respondents, including the Law Society, LCCSA, Bar Council, CBA, YBC, YLAL, Youth Practitioners Association (YPA) and Transform Justice, as well as academic and other individual respondents, argued that Youth Court work was particularly difficult and important, but seriously undervalued and not sustainable at current fee levels. This work requires serious specialised knowledge dealing with highly vulnerable children, often with learning difficulties and behavioural disorders, who may themselves be victims of social or family deprivation or even modern slavery. Building up trust and understanding is time consuming and challenging, yet the fee levels are such that youth cases may be undertaken by junior or inexperienced lawyers, who may have sometimes received the papers only shortly beforehand and have only a very short opportunity to meet the client, try to explain what is going on and win the

¹⁶⁰ [Lammy review: final report - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

¹⁶¹ Section 24(1) of the Magistrates’ Court Act 1980, as amended by section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, excluding trial in the Youth Court for certain specified crimes such as murder and other grave offences. In practice much may depend on whether the sentencing powers of the Youth Court of up to two years detention and training are likely to be sufficient: *R (on the application of H, A, and O v Southampton Crown Court* [2004] EWHC 2912. *R (on the application of the DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin). Additionally, the availability of the power to commit for sentence after conviction (s. 3B Powers of Criminal Courts Sentencing Act 2000 (as amended by section 53 Criminal Justice and Courts Act 2015) enables Youth Courts to try serious cases and commit the case to the Crown Court for sentence where it subsequently transpires the offending was more serious than had been understood. This has I understand led to an increased numbers of cases being retained in the Youth Court.

client's trust and understanding.¹⁶² It is also argued that there should be specialised training for Youth Court work and a system of accreditation, given evidence as to variability in the quality of advocacy in the Youth Court.¹⁶³

- 11.5 I also draw attention to a recent report by the Institute for Crime and Justice Policy Research (ICPR) entitled "*Time to get it right: Enhancing problem-solving practice in the Youth Court*"¹⁶⁴ which among other things recommended that the BSB and the SRA set standards of accreditation for youth advocacy, and that there should be higher legal aid remuneration for those who have obtained accreditation. The ICPR report details the many studies and reports that have considered youth justice over the years, the importance of the "problem-solving" approach in the Youth Court and the contribution of the Youth Offending Teams (YOTs).
- 11.6 From a criminal legal aid perspective, in my view it is very important that the Youth Court is given priority in the use of resources. Great efforts have been made to divert children away from the criminal justice system, Youth Court case numbers having fallen by around 75% in the last 10 years. The cases that remain are therefore the most serious, and the Youth Court may well represent the last opportunity of preserving a child's life chances. The work is specialised, not least in winning the trust of, and communicating with children in such a demanding setting. The CPS already gives particular attention to Youth Court prosecutions which must be authorised by a Youth Offender Specialist who is a Senior Crown Prosecutor and has taken the Youth Offender Training Course.¹⁶⁵
- 11.7 In my view the criminal legal aid fees payable in the Youth Court should be increased to reflect the importance of this work and the seriousness of the young defendant's situation. Most offences tried in the Youth Court would, but for the defendant's age, be tried in the Crown Court, either as an indictable only offence or an either way offence where an adult could have elected trial in the Crown Court. On the issue of remuneration, one approach would be to ensure that Youth Court fees should be no less than the equivalent fees that would have been payable in the Crown Court.¹⁶⁶ A second approach would be to maintain the current situation whereby Youth Court work remains payable under the Magistrates' Court scheme, but allow an enhanced fee for Youth Court work, bearing also in my mind the general increase in Magistrates' Court fees which I recommend. Which is the better of these routes to the objective of increasing Youth Court fees would need further consideration, not least to avoid anomalies arising. It would seem to me however, that aligning Youth Court

¹⁶² I have already referred in Chapter 10 above to the particular difficulties of last-minute situations in the Youth Court.

¹⁶³ E.g. the Bar Standards Board *Youth Proceedings Advocacy Review* (2015) [yparfinalreportfinal.pdf](https://www.barstandardsboard.org.uk/wp-content/uploads/2015/09/ypr-final-report.pdf) ([barstandardsboard.org.uk](https://www.barstandardsboard.org.uk))

¹⁶⁴ Institute for Crime and Justice Policy Research [time to get it right final.pdf](https://www.justiceinnovation.org/wp-content/uploads/2020/06/time-to-get-it-right-final.pdf) ([justiceinnovation.org](https://www.justiceinnovation.org)) published in 2020 and sponsored by the Nuffield Foundation.

¹⁶⁵ See generally [Youth Offenders | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/youth-offenders)

¹⁶⁶ In principle this would be the LGFS/AGFS fee, albeit that solicitors doing Youth Court work do not require higher rights of audience.

work with the relevant Crown Court fees would signal the cultural change that I believe is needed, given the complexity and seriousness of Youth Court work. Such an approach would also avoid complicating the Magistrates' Court scheme.

- 11.8 In any event I would recommend that cases in the Youth Court that would otherwise be triable in the Crown Court (i.e. all offences except summary offences) should, save in exceptional circumstances, qualify for a certificate for counsel, and that paragraph 16 of the Criminal Legal Aid (Determinations by a Court and choice of Representative Regulations) 2013¹⁶⁷ should if necessary be amended accordingly.
- 11.9 In my view however it is not sufficient simply to increase Youth Court remuneration, and may indeed be counterproductive, without ensuring that those fees are payable to those who have the requisite training or experience to undertake this work. As I understand it, the BSB has published standards on Youth Proceedings Competences¹⁶⁸ and barristers doing Youth Court work are required to self-declare that they meet those competences.¹⁶⁹ The SRA decided in 2020 not to require Youth Court practitioners to have higher rights of audience, but intends to work with solicitors to gain assurance and understanding of how they maintain their competence.¹⁷⁰ The ICPR report, however, suggests that standards of advocacy in the Youth Court are not yet of a consistently high standard. While solicitors with regular experience of this work will generally be competent, in other respects the ICPR research suggests that the advocacy may be patchy.
- 11.10 I therefore recommend that the BSB and the SRA work with the Bar Council and Law Society, and the Youth Justice Board as appropriate, to develop a training and accreditation scheme for Youth Court work.¹⁷¹ The CPS, I understand, already provides training in Youth Court work. Another possible parallel is the Law Society's Children Law Accreditation in civil cases.¹⁷² Once a youth court accreditation scheme is up and running, the higher rates I recommend for Youth Court work should be available only to those who have the necessary accreditation. There could presumably be a mechanism for existing experienced practitioners to be passported through, but that would be a matter for the BSB and SRA. This approach could also be facilitated by

¹⁶⁷ 2013 no 614

¹⁶⁸ [bsbyouthcompetencies2017forwebsite.pdf \(barstandardsboard.org.uk\)](https://www.barstandardsboard.org.uk/bsbyouthcompetencies2017forwebsite.pdf)

¹⁶⁹ [Registration of Youth Court work \(barstandardsboard.org.uk\)](https://www.barstandardsboard.org.uk/Registration-of-Youth-Court-work)

¹⁷⁰ [SRA | Ensuring high standards in solicitor advocacy | Solicitors Regulation Authority](https://www.sra.org.uk/ensuring-high-standards-in-solicitor-advocacy)

¹⁷¹ I understand that the Inns of Court College of Advocacy is developing a training programme and that training is already available from the Youth Justice Legal Centre.

¹⁷² My understanding is that this arises under various accreditation arrangements on the civil side, the mechanism being the Standard Civil Contract between the LAA and the provider firm. What the mechanism would be for the Youth Court would need further consideration.

supporting not-for-profit or similar organisations intending to specialise in young defendants' work, as discussed in Chapter 15.¹⁷³

11.11 I would hope that such training and accreditation would include awareness of the particular challenges of young minority ethnic defendants to which the Lammy Report refers,¹⁷⁴ and that obtaining accreditation would also prove a means of increasing the supply of minority ethnic lawyers working in the Youth Court.

11.12 The aim of focussing on Youth Court work and raising standards can however still be torpedoed by other aspects outside the scope of legal aid. These include late service of prosecution documents, late returns of briefs, insufficient preparation by the defence, and court organisation and listing, referred to by one observer of the Youth Court quoted in the ICPR Report as "structural mayhem". I would express the hope that all participants, working also with the Youth Justice Board, can co-ordinate to give the Youth Court the priority it should have.

¹⁷³ Please note that I also recommend specific training in relation to young suspects in respect of the police station scheme, as discussed in Chapter 8 above. This could be combined with Youth Court training.

¹⁷⁴ Please see Chapter 4 above

CHAPTER TWELVE: THE LGFS AND RELATED ISSUES

The Structure of the LGFS

- 12.1 The intention of the LGFS is to remunerate solicitors' preparation of cases in the Crown Court. The LGFS constitutes the largest single item of criminal legal aid expenditure, at some £358 million in 2019/20.
- 12.2 The mechanism of the LGFS is explained in detail in Annex M and I summarise it only briefly here. The calculations are extremely complex, but the key point is that the main driver of the litigators' fee is the PPE irrespective of the work actually done on the case.
- 12.3 Taking first trials, the LGFS first defines a basic fee for a range of different offences specified in eleven Classes. So, for example the basic trial fee for a murder case (Class A) is £1467.58. In cases of dishonesty involving more than £100,000 (Class K), the basic fee is £1031.82, but for burglary for example (Class E) the basic fee is £352.72.
- 12.4 If the PPE is low, below what is called the PPE cut-off, the litigators' basic fee is adjusted by a length of trial proxy, which applies where the trial exceeds two days. Thus, in a trial of two days in a Class A case where the PPE is below the relevant PPE cut-off (80 pages) there is no adjustment for the length of the trial. If, however, it is a six-day trial and the PPE is below the cut-off for that length of trial (186 pages) the length of trial proxy is set at £1,761.17. That sum added to the basic fee of £1,467.58, would make a total of £3,228.75. The PPE cut-offs vary according to the offence and the length of the trial.
- 12.5 If the PPE exceeds the PPE cut-off as so defined, then a different approach is applied. First, there is an "initial fee" which increases according to the amount of PPE. Broadly speaking, this is the same as the "basic fee" just described until the PPE reaches a certain level, for example in a Class A case up to 249 pages, in a Class E case up to 69 pages. Thereafter the initial fee increases according to the PPE. For example, in a Class A case with PPE of 2000 pages, the initial fee is £22,295.42, as against the basic fee of £1,467.58 where the PPE is below the cut off.
- 12.6 In addition to the initial fee, there is an incremental fee per page which varies according to the number of pages. For example, for a Class A case for PPE between 80 and 209 pages there is an incremental fee per page of £16.58 for the pages above 80. For a Class A case of more than 2000 pages the incremental fee per page is £8.42 for the pages above 2000.
- 12.7 Similar approaches apply to cracked trials and guilty pleas, although the rates are lower, and in the case of guilty pleas substantially lower than the trial rates. The LGFS produces very different results depending on whether there is a trial (i.e. a jury is sworn) even if the defendant changes their plea to guilty shortly afterwards. The team supporting the Review have provided me with the

following illustrative calculation, assuming a fraud case falling under Class B with a page count of 5000 pages:

- A guilty plea would be calculated as an initial fee of £8,640.11, plus an increment per page of £1.06 multiplied by the pages above 4600 (400), making £9,064.11 in total.
- A plea in a cracked trial (i.e. where the defendant has originally pleaded not guilty, but changed their plea to guilty before the jury is sworn) would be calculated as an initial fee of £13,646.46, plus an increment per page of £2.05 multiplied by the pages above 4600 (400), making £14,466.46 in total.
- A plea in a trial (even if the defendant changes their plea to guilty shortly after the jury is sworn) would be calculated at the initial fee of £39,525.82. An increment per page of £7.09 would be paid for anything above 5000 pages.

12.8 It is very difficult to see how these differences can be justified. The LGFS does not incentivise early guilty pleas; indeed, there is an underlying incentive for the litigator to refrain from advising in favour of an early guilty plea.

The Central Weakness

12.9 It is understandable that, at the time, it was felt that the LGFS system would be easy to administer, and that PPE would be a reasonable proxy for the work. On the contrary, what has grown up is what the CLSA describes as “a perverse system of incentives and inefficiencies which do nothing to assist either supplier firms or the criminal justice system as a whole”. In my view the central weakness of the LGFS is that it is based very largely on the pages served, not on work done or even on whether the pages are read or not. This does not incentivise providers to do the actual work they are supposed to do but rather incentivises firms to try to obtain cases with a large amount of served material, and then delay the outcome until the trial begins.

12.10 Moreover, the PPE proxy does not necessarily reflect the work the defence actually have to do, in terms of obtaining instructions and witness statements, instructing experts and considering their reports, liaising with counsel, and considering the defence documents, the latter of which do not count towards the page count.

High Case Costs Driven by PPE

12.11 This central weakness of the LGFS has financial consequences. As appears from Annex C, a small number of cases account for a large proportion of LGFS expenditure. Thus, out of some 14,010 LGFS trial claims in 2019/20 some 1,510 claims were for over £80,000 each, and of those some 730 were over £100,000. Total expenditure on claims over £80,000 each was £154 million. Around 58% of LGFS trial expenditure goes on about 11% of the trials. By way of comparison, a case of burglary (Class E) costs on average £1,900 under the

LGFS and a dishonesty offence involving less than £30,000 (Class F). costs on average £3,100.

- 12.12 It can also be seen from Annex C that in high PPE cases there is a large disparity between the litigators' fee under the LGFS and the barristers' fee under the AGFS, even though the latter has the lead responsibility for arguing the case: see Figures 7 and 8 in Annex C.
- 12.13 This is also reflected in increasing costs. Although the total number of LGFS claims fell, from 101,400 in 2016/17 to 82,220 in 2019/20, annual expenditure on the LGFS rose, from £337 million in 2016/17 to £358 million in 2019/20.

Resource Costs of Deciding "What is PPE?"

- 12.14 The CLSA further points out that solicitors spend much time debating with the LAA what counts as PPE, rather than debating whether time on the case was reasonably spent or not. The arguments include what constitutes a page; whether the page was served; whether the page duplicates another page; whether the material was relevant to the defence; and whether the material is "served electronically" or is "electronic material".
- 12.15 As I understand it, if a documentary or pictorial exhibit is served "in electronic form" and has never existed in paper form, then the work is remunerated less favourably at the hourly special preparation rate under paragraph 20 of Schedule 2, unless the LAA considers it appropriate to include the exhibit in the PPE. Whether and to what extent it is appropriate to include such electronic material (e.g. a phone download) in the PPE, rather than consider it under the rubric of special preparation, has been much debated and appears to depend on whether the electronic material "is pivotal to the case" and on various other factors, discussed at length in Appendix D to the LAA's *Crown Court Fee Guidance*.¹⁷⁵ That *Guidance* runs to 15 pages of explanation as to when PPE may or may not be claimed, and refers to some 30 decisions by different Costs Judges.
- 12.16 Claiming PPE is thus by no means the objective and straightforward exercise originally envisaged in 2008. A system which requires the defence and LAA staff to be diverted to deciding what is or is not PPE, rather than considering whether the litigator's work was reasonably done, is not a good use of public resources.

Unfortunate Consequences

- 12.17 In addition, the LGFS has had a number of other unfortunate consequences, although in fairness it must be said that the low level of other fees, has put

¹⁷⁵ LAA's Crown Court Fee Guidance:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947606/CCFG - Version 1.12 - October 2020.pdf

some criminal legal aid firms under pressure to use high PPE cases to cross-subsidise other unprofitable work, as explained in Chapter 6.

- 12.18 The Review was told anecdotally of cases involving applications to the Court to transfer a legal aid certificate in order to gain the LGFS revenue, or a client ceasing to be legally aided and then reapplying for legal aid having instructed another firm for the same underlying motive; applications for further disclosure apparently made with a view to an increase in the PPE; and a client changing a plea to guilty shortly after the start of the trial, thus triggering a much increased fee under the LGFS than would have been payable in the case of an earlier guilty plea. A fee scheme should minimize the possibility of conflict between the client's best interests and the interests of the provider but the LGFS has not done so.
- 12.19 It also has been suggested that the emphasis on PPE under the LGFS may inadvertently affect CPS decisions about disclosure. The LCCSA suggests, for example, that exhibits are sometimes served informally without the requisite covering letter, which means they may not count as PPE. Regardless of whether these suggestions are founded they underline the potential for the LGFS to cause distortions and wrong incentives.
- 12.20 Finally, barristers submitting evidence to the Review, while generally understanding of the difficult financial situation of criminal legal aid firms, expressed the view that the LGFS did not incentivise solicitors to do the preparation work, with the result that the barristers were finding themselves having to do more work not envisaged under the AGFS. Not having a proof(s) of evidence, nor the draft defence statement, nor any real preparation of the case, and having no support at Court were among the matters mentioned. In certain high PPE cases the solicitors' firm was being paid considerably more than the barrister who, it was felt, was doing most of the work.

Other Fees too Low

- 12.21 By contrast, many solicitor respondents criticised other Crown Court fees as too low in cases not benefitting from a high page count. Particular concern was expressed about the level of the basic fee, notably in Classes E to I, where the basic fee is around £355. Similarly other fees, such as those applicable confiscation proceedings under the POCA were said to be too low. Some of these rates date back to the 1990s, and the only change to rates made since the Carter Review in 2006 has been the cut of 8.75% in 2014.

Recommended Reform of the LGFS

- 12.22 In my view the over-reliance on PPE under the LGFS has given rise to misaligned incentives as summarised above. It results in fees that are too high in some cases and too low in other cases. Taken overall, this contributes to the rising costs of the LGFS.

- 12.23 The CLSA argues that the LGFS should be replaced by a scheme similar to the Magistrates' Court scheme. That solution is also supported by the LCCSA and the Law Society, although the latter in its evidence also referred to a 2016 paper submitted to the MOJ based on 'units of prosecution evidence'.
- 12.24 I have already recommended the introduction of the principles of the Magistrates' Court scheme for police station work.¹⁷⁶ As explained above, that scheme balances incentivising the lawyers to do the work, administrative convenience, and a workable mechanism for controlling the costs to the taxpayer. For these reasons, I recommend that the LGFS in its present form is replaced by a scheme based on lower standard fees, higher standard fees, and in exceptional cases non-standard fees, along the lines of the Magistrates' Court scheme. At the same time the fees for litigators should be sufficient to assure the profitability of Crown Court work, for the reasons given in Chapters 6 and 7.
- 12.25 The metrics under these new arrangements would need careful definition in order to avoid the above problems arising in a different guise. The purpose of this reform is not to avoid paying properly the fees in complex Crown Court cases where the work done is necessary and properly executed. Such cases as I see it would earn the higher standard fee and if appropriate the non-standard fee. The object of the reform is to bring the fees in line with the work actually done, rather than simply paying the proxy figure thrown up by the page count mechanism. I also again draw attention to my recommendation in Chapter 15 that the LAA should adopt a less restrictive approach to claims generally.
- 12.26 It is not my intention to render Crown Court work unprofitable from the solicitors' perspective. On the contrary, with correct incentives this work should be sustainable in its own right.
- 12.27 To give an example cited by the LCCSA, under the Magistrates' Court scheme, the higher standard fee payable for a guilty plea is higher than the lower standard fee for a contested trial, and indeed a guilty plea can attract a non-standard fee if the work justified it. I would suggest a similar approach in the Crown Court. Whereas under the present LGFS a guilty plea is automatically paid substantially less than if the case is contested, the scheme I recommend should leave scope for complex guilty pleas – requiring much document study, experts reports, and negotiations with the CPS for example – to be appropriately remunerated, instead of leading to an automatic fee reduction as at present. That would support early case resolution. Similarly, the Magistrates' Court scheme pays a trial that has been fully prepared but results in a plea of guilty on the day, the same as a contested trial. A fee should not depend on whether a plea is taken before or after a jury is sworn, but on the work done.
- 12.28 Under a new scheme, there would seem to be scope for reducing the 11 classes of offence currently specified, since four classes of the most serious

¹⁷⁶ Please see Chapter 8 above

offences (A, B, J and K) are already paid very similar basic fees, as is the case for the remaining classes covering less serious offences. I would envisage that separate fees for special preparation and considering unused material would no longer be necessary under these new arrangements, as the CLSA suggests in its response to the Call for Evidence.

- 12.29 It would seem to me important to incorporate into the new structure proper rates for more senior and experienced solicitors to be taking on the more demanding work, following the examples of the present fees for special preparation, considering unused material, confiscation cases, and VHCC cases.¹⁷⁷
- 12.30 Where litigators' time in the Crown Court is properly spent in engaging with the prosecution with a view to an early resolution, I would expect that time to count in determining which fee level is applicable, in accordance with the general theme of this Review to better encourage engagement between the parties.
- 12.31 For the avoidance of doubt, I envisage that the system of higher, lower and non-standard fees should apply to litigators' fees in appeals from the Magistrates' Court, and to committals for sentence, as already indicated in Chapter 10.
- 12.32 Finally, I would envisage that, as with the Magistrates' Court scheme, the lower and higher standard fees would be pitched at a level as to accommodate the bulk of LGFS claims by volume, reducing administrative costs and the need for subjective appraisal. The CLSA proposal that such claims for lower and higher standard fees would be assessed in the audit process, as in the Magistrates' Court scheme, rather than being individually appraised when submitted, would seem to me sensible.

Confiscation Proceedings

- 12.33 The CLSA argues that this work is complex and that the present fee levels are wholly inadequate. The CLSA refers to a recent report by the Law Commission¹⁷⁸ pointing out that there is some £2 billion outstanding in unenforced confiscation orders, that the process does not work well, including early engagement. The Law Commission also drew the Review's attention to providers' views that fees for confiscation work were too low.¹⁷⁹
- 12.34 This seems to me a classic instance where the legal aid rates should support wider public policy objectives. There are likely to be particular benefits in properly funding criminal legal aid in confiscation proceedings with a view to facilitating better processes for the proper recovery of monies due. I

¹⁷⁷ If these reforms are implemented it is not clear how far separate arrangements for solicitors' fees in VHCC cases would still be needed, but I leave that point open.

¹⁷⁸ [Confiscation under Part 2 of the Proceeds of Crime Act 2002 | Law Commission](#)

¹⁷⁹ The Law Commission also raised the question whether typically wealthy defendants should be permitted to use restrained funds to pay priority for legal representation, a point which is outside the scope of this Review.

recommend that rates for confiscation proceedings should be increased, and that in setting the rates the points made by the Law Commission should be taken into account.

The Fixed Fee Exception

- 12.35 Under Part 3 of Schedule 2 to the Regulations a fixed fee of £330.33 is payable in the Crown Court if a defendant has elected trial in the Crown Court and subsequently pleads guilty, if the Magistrates' Court has previously determined the case to be suitable for summary trial. This exception, introduced in 2016, is apparently designed to discourage a litigator from advising a client to elect trial.
- 12.36 This limitation will become unnecessary under the reforms I propose. In any event, in my view this limitation is not justified in principle. The client has the right to elect trial, even if the magistrates feel the case could be dealt with summarily, and there are many valid reasons for exercising that right. The client's election is not necessarily solely due to the solicitor's advice, and even if it were, that may well have been the right advice at the time. The rule apparently makes no allowance for subsequent events such as further disclosure, or the client later pleading guilty to a lesser charge, or what may be complex work on sentencing issues. If and to the extent the rule is intended to influence the lawyer's advice to the client, this also raises constitutional issues. I therefore recommend the abolition of this provision.

Conclusions on the LGFS Recommendations

- 12.37 The LGFS should be reconstituted along the lines of the Magistrates' Court scheme. The overall level of fees should be sufficient properly to remunerate Crown Court work. What are currently basic fees should be raised accordingly. Upwards fee adjustments including in relation to confiscation proceedings should be made as necessary to ensure the profitability of Crown Court work. Part 3 of schedule 2 of the regulations should be abolished.

The Relationship of the LGFS with the AGFS

- 12.38 The existence of the AGFS and the LGFS side by side, with somewhat different mechanisms, both dealing the same client in the same case, may seem anomalous. The historical reason for the existence of the two schemes is the split between solicitors and barristers. In my view, the core reasons for retaining a cadre of experienced criminal advocates who specialise in advocacy are valid, and discussed in more detail in Chapter 13 below. I do not in this Review recommend a single scheme for Crown Court work, and such a major step would need much more detailed work than is possible in the present Review.
- 12.39 However, the two schemes must be complementary and should not get in the way of each other. An important aspect of my recommendations on the LGFS is to ensure that the preparatory work envisaged by the LGFS is done by the solicitor, and not left to be done unremunerated by the barrister under the

AGFS. Under my recommendations, if the work is not done by the litigator to justify the LGFS fee claimed, then the fee claimed by the litigator is not due.

12.40 On the other hand, if as is very likely in modern conditions, there is pre-trial work that is properly done by the advocate who is to present the case, that should be remunerated under the AGFS. It may be that in many cases it would be sensible for the litigator and the barrister to agree who was to do what, which would clarify what was to be remunerated under the LGFS and what was to be remunerated under the AGFS. Efficient teamwork between litigator and advocate should not be inhibited by former demarcation lines that may have once existed when these two fee schemes were first devised.

Solicitor advocates

12.41 Finally, one point of direct overlap between the two schemes is the position of solicitor advocates, whose advocacy is remunerated under the AGFS, whereas the solicitor firm's preparation (possibly by the same person) is remunerated under the LGFS. This is admittedly somewhat anomalous particularly since the distinction between preparation and what is advocacy is blurred given particularly the increase in written advocacy.

12.42 I do not doubt that solicitor advocates perform valuable work in England and in Wales, not only in the Crown Court but in the Magistrates' Court and other tribunals. The continuity provided for the client by having the same lawyer throughout the court process will be important in many cases. The increases I recommend under the AGFS in Chapter 13 below apply also to solicitor advocates.

12.43 In the evidence to the Review, however, a certain amount of unease was expressed about the possibility of a conflict of interest when the solicitors' firm came to decide between using its in-house advocate or instructing a barrister. In this regard, under the SCC the solicitor has to advise the client as to the choice of advocate.¹⁸⁰ I have no doubt that in the vast majority of cases the choice is properly put to the client, and that the solicitor advocate is not for extraneous commercial reasons put in a position inappropriate to their expertise. I would caution that the obligation in the SCC is there as a safeguard for the client. It is important that the choice of the client's advocate should be beyond reproach, and proper records kept.

¹⁸⁰ [Standard Crime Contract \(SCC\) 2017 Clauses 7.3 and 7.5:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029948/Specification - version 10 current version effective from 1 November 2021 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029948/Specification_-_version_10_current_version_effective_from_1_November_2021_.pdf)

CHAPTER THIRTEEN: THE AGFS AND THE CRIMINAL BAR

13.1 I take the issues affecting the Criminal Bar in four stages, brief description of the AGFS; the case made to the Review; the main evidence; and my analysis and recommendations.

Brief Description of the AGFS

- 13.2 At the heart of the AGFS (described in more detail in Annex M) is a system of fixed fees, namely the brief fee for the offence in question, supplemented by a fixed daily rate if there is a trial. The brief fee depends on which “band” the offence falls into, and the many different bands come from understandable efforts to relate the brief fee to the perceived seriousness of the offence. There seems to be no data to determine how historically the individual brief fees were calculated, or how, if at all, the different fees for different offences relate to costs. The reforms of 2018 reduced the use of PPE as a proxy for determining the fee, except for fraud and drugs cases mainly. One of the inherent difficulties of this approach is that if one tweaks one fee, some other fee will seem out of line. It is almost impossible to avoid anomalies.
- 13.3 For historical reasons the AGFS is geared to the concept of the trial, with the consequence that a trial is paid considerably better than a guilty plea, presumably on the assumption that the latter will involve far less work.¹⁸¹ Because the anchor concept has historically been the trial, it is the advocate who does the trial who gets paid; if another advocate has prepared the case but has to return the brief, they do not generally get paid, a claim for wasted preparation based on hours spent being allowable only in limited circumstances. Under the AGFS payment is only made once the case is disposed of by a plea or a trial. Especially in current conditions of the backlog, when cases are being listed for a year or even more away, that can mean a long wait for payment.
- 13.4 A mechanism under the AGFS that can allow the brief fees to be augmented in cases of particular complexity, roughly analogous to the escape fee in the police station scheme, is a claim for special preparation. The provision governing special preparation is very narrowly worded, the underlying concept is that the brief fee is intended to cover all preparation except in very limited circumstances. Another ‘escape’ mechanism is a fee for considering unused material introduced in 2020 which is a fixed amount to cover the first three hours, and then an hourly rate thereafter at the special preparation rate.
- 13.5 In addition the AGFS has certain fixed fees for particular pieces of work at a daily rate, such a standard appearance (typically a “mention”), various preliminary hearings about evidence, the PTPH, sentencing hearings, appeals

¹⁸¹ A guilty plea here is a plea entered at the first available opportunity, typically the PTPH. A cracked trial is where the initial plea of not guilty is changed to guilty after the PTPH. Since the reforms of 2020 cracked trials and trials (1-day) are paid the same.

to the Crown Court from the Magistrates' Court and committals for sentence. These do not vary according to the complexity or otherwise of the matter, and are essentially related to the concept of a "hearing".

The Case Made to the Review

The Bar Council

13.6 The Bar Council makes five main points: (i) retention of experienced barristers is a significant problem (ii) the full time practising Bar has an aging population (iii) remuneration of junior barristers is insufficient and unsustainable (iv) in real terms they estimate barristers' profits have declined since 2015/16, by 5% for junior barristers, and 8.8% for those under 13 years of experience (v) there is inequality of income distribution between men and women, and between ethnic groups with white practitioners earning more than other groups, and black women earning least of all.

13.7 According to the Bar Council, after long years of underfunding the criminal Bar is now barely sustainable: junior practitioners, particularly those from less privileged backgrounds, struggle to earn a living in their first two or three years. Most have significant educational debt. While typical incomes of junior barristers rise during the early years, they tail off after about 8 years, and then flatline from 12 years onwards. The Bar is seeing an exodus in the middle of the profession, particularly of female practitioners. Working hours are getting longer, with a significant proportion of work unpaid. Barristers doing criminal work earn less than their counterparts in other areas, and barristers specialising in criminal work earn least of all.

13.8 According to the Bar Council, the fee schemes are in urgent need of reform, and have failed to adapt to the changing demands on criminal advocates. The Bar Council is particularly concerned about those from less advantaged, including minority ethnic, backgrounds and many women leaving the criminal Bar through low rates of pay.

The Criminal Bar Association (CBA)

13.9 The CBA argues that there is an overwhelming need for increased funding, otherwise the haemorrhaging of talented barristers will continue; a career at the criminal Bar is no longer viable, particularly for those with student debt, women and those from an minority ethnic background. The AGFS no longer reflects the fact that much work has to be done outside Court.

13.10 The CBA points out that special preparation hourly rates have barely risen since 1997. The CBA refers to various judicial decisions on costs, to guideline rates for summary assessment in private civil work and the rates for exceptional preparation in Northern Ireland, various comparisons with CPS Crown Advocates, the rates paid to experts under Schedule 5 of the Regulations, hourly rates paid by other public authorities for criminal work, and rates paid to trades people such as plumbers.

- 13.11 The CBA suggests that the brief fee should be defined as covering reading the papers, advice on evidence/experts, the first conference and the first day of trial: all additional written work should be covered by “bolt-ons”, either paid at a suitable hourly rate or a mixture of a fixed fee to cover a basic amount of work up to say 3 hours, with hourly rates thereafter. High PPE cases are under remunerated. Special preparation fees do not solve the problem because the thresholds are too high, the exceptions too narrow, and the fees too low.
- 13.12 The CBA argues for a presumption that all interlocutory hearings except the PTPH should be heard remotely, benefitting from the experience of the pandemic, and that more routine Court orders could be made remotely and online. The PTPH should be re-thought, to take place later in the process when the proof(s) of evidence and the defence statement have been served and prepared.
- 13.13 The CBA also strongly criticises warned lists as “a blight on the criminal justice system”. Preparation of warned list cases that for one reason or another are heard when the barrister who has prepared the case is no longer available, should be properly paid for.
- 13.14 In a further submission, the CBA made more detailed proposals for reform of the AGFS, including increased fees for the PTPH, and higher fees for certain more serious and complex cases. The Chair of the CBA particularly drew my attention to his concerns about (i) the withdrawal of CVP facilities in certain Crown Courts which was incurring wasted travel and time, and was particularly hard on those with caring responsibilities; and (ii) the adverse impact of listing decisions, particularly, he said, taking trials out of the list at the last moment with little or no consultation.

The Young Bar Committee of the Criminal Bar Association (YBC)

- 13.15 The YBC suggests that a significant fee increase is needed to ensure the continuation of the independent criminal Bar and refers to a “swell of anger at the most junior end of the profession”. The underlying feeling is that young barristers have been “taken for granted” and expected to do more and more without remuneration. The YBC argues that young barristers are continuing to leave, and highlighted the stories of eight recent leavers from the criminal Bar, all but one being women. Many young men and women consider the criminal Bar unworkable from the point of view of family life.
- 13.16 A main concern of the YBC is the Magistrates’ Court and the Youth Court, already dealt with in Chapters 10 and 11 above. As to the AGFS, the YBC highlights the problem of the warned list system, often involving junior barristers drafting, say, the defence statement, and then not getting paid. Claims to the LAA are often “knocked back” and cash flow is difficult when payment has to await the conclusion of a trial.

Other Respondents

- 13.17 Most of the individual responses to the Review emphasised the underfunding of the AGFS and the issue of retention. While there were young and talented people applying for criminal pupillages, typically they would move away from criminal law after a few years. Moves to family law or regulatory law or outside the independent profession, was a typical pattern. Most chambers reported fewer barristers doing criminal work than a few years ago. For those that continued, the general picture painted was one of constant pressure, with Court appearances followed by working long into the evening and through weekends.
- 13.18 Further points raised included: (i) the fees received by solicitors in high page count cases were grossly disproportionate compared to barristers' fees; (ii) barristers were doing more work than contemplated by the structure of the AGFS; (iii) listing arrangements often meant that an already prepared case was not paid for; (iv) cases suitable for juniors, particularly guilty pleas, were taken by solicitor advocates, the briefing decision not being necessarily based on quality;¹⁸² (v) the fees for senior and middle ranking barristers were too low; (vi) there was a tendency for more senior barristers to take cases below their seniority, limiting "trickle down" to juniors; (vii) barristers putting in the work to secure a guilty plea were worse off than had the case gone to trial; (viii) fees were particularly low for committals for sentence, POCA cases, and cases typically done by juniors such as burglary, whereas at the other end of the scale murder cases had lost out in the AGFS reform of 2018.
- 13.19 On issues of diversity, respondents said it was extremely difficult for those with caring responsibilities to contemplate a career at the Bar; the fee structure favours a profession that is culturally and socially non-representative of the society it serves; a career at the Bar is particularly difficult for those with an minority ethnic background, given also the high costs of the GDL and Bar Professional Training Course, and the difficulty of surviving the early years on low income.
- 13.20 On remote technology, most individual responses favoured remote hearings in cases concerning administrative measures or where the presence of the defendant was not required, emphasising the advantages to those with caring responsibilities and the avoidance of wasted time and costs in travel.

The Main Evidence

- 13.21 Drawing on the various sources available, this section considers the evidence in regards to (i) trends in AGFS work volumes (ii) trends in numbers of criminal barristers (iii) criminal barristers' pre-expenses fee income in 2019/20 (iv) criminal barristers' post-expenses income in 2019/20 and (v) criminal barristers' incomes compared to the Bar generally.

¹⁸² An additional point here was the instruction on occasions of an inhouse "straw junior" in the role of a junior barrister to be led by a QC.

13.22 This section is admittedly somewhat dense, but the threads are drawn together in the analysis beginning at 13.51 below, which some may prefer to read first.

(i) Trends in AGFS work volumes 2015/16 to 2019/20

13.23 Between 2015/16 and 2019/20 (the latter being the last year before the figures are distorted by the pandemic) volumes of work under the AGFS declined significantly. Total bills fell from 110,950 in 2015/16 to 82,450 in 2019/20 (-26%). Over the same period trial bills fell from 23,180 to 16,170 (-30%) cracked trials from 25,010 to 20,000 (-20%) and guilty pleas from 41,240 to 22,920 (-46%). These reductions were caused by fewer cases reaching the Crown Court, and in the latter part of the period, restrictions on sitting days.¹⁸³

13.24 The decline in the amount of work in the period 2015/16 to 2019/20 had a significant impact on the market. Thus, the total cost of the AGFS fell from £227 million in 2015/16 to £208 million in 2019/20, around 8%. At the same time, however, AGFS trial costs have been rising, from an average of £6,250 in 2016/17 to £9,235 per trial in 2019/20, a rise of some 48%, perhaps reflecting a change in the mix of cases.

13.25 By contrast, average costs for a cracked trial were around £1,700 in 2015/16 and around the same level in 2019/20. Average costs of a guilty plea have remained in the range £800- £900 over the period. These figures imply a fall in real terms for guilty pleas and cracked trials, although since the accelerated measures of 2020 cracked trials have been paid the same as trials.

13.26 The most recent figures available for the pandemic period are for 2020/2021 and the first three months of 2021/22. AGFS activity generally was well down in 2020/21, for obvious reasons. Overall AGFS spend for Q1 2021/22 was £46 million compared to a quarterly average of £52 million in 2019/20. The figures for Q1 2021/22 show the highest number of trials per quarter since Q3 2017/18. For cracked trials, there is some evidence that higher fees are being paid; the average AGFS fee for a cracked trial was £1,784 in 2020/21 and £2,030 in Q1 2021/22. This may reflect the accelerated measures agreed in 2020. Guilty plea fees were £875 per case in 2020/21, broadly the same as in recent years.

13.27 To complete the picture, the proportion of total AGFS costs accounted for by solicitor advocates fell from 22% in 2015/16 to 13% in 2019/20, or in cash terms from about £51 million to £28 million. Nonetheless solicitor advocates account for just over 30% of guilty pleas and other non-trial applications heard in the Crown Court.

(ii) Trends in numbers of criminal barristers

13.28 It is not straightforward to determine trends in the numbers of barristers practising in publicly funded criminal work, which includes both defence and prosecution. In the Data Compendium, the results of which are summarised at Annex K, three measures were used to determine the number of self-employed

¹⁸³ Figures provided do not include bills submitted under legacy remuneration schemes from pre-2005

barristers in England and Wales who were paid for completing publicly funded criminal work over the period:

- “Any Crime” (AC) are those barristers who did any public criminal work in a particular year. This includes many who did only a small amount of work, so caution is needed. A barrister might do a couple of criminal cases one year, and then none the next, but it could be misleading to infer that the profession had “lost” a serious criminal practitioner.
- Implied Full Practice (IFP), an indicative estimate of criminal specialists between 2015-16 and 2019-20. These are defined as those barristers whose income from crime is at least 80% of the lower end of the band in which they reported their income to the Bar Council in a particular year. So if for example a barrister reports gross income in the band £30,000-£60,000 per year, their public criminal fee income must be at least £24,000 (80% of £30,000). This again is an imprecise measure, first because it may contain barristers who are only partly practising in crime (as in this example) and secondly because it may be quite variable, depending on the “mix” and timing of the barrister’s income. If in a subsequent year for example, the barrister’s income was in the band £60,000 to £90,000, and their income from crime had risen to £40,000, they would now fall outside the IFP Group, (£40,000 being less than 80% of £60,000). So again, this measure needs caution.
- Self-declared Full Practice (SFP); this is a subset of the AC group, consisting of barristers who have declared to the Bar Council that at least 80% of their gross fee income in the relevant year was criminal work. It is probably the most reliable of the three measures, and although it contains a lower number of barristers than those in the AC group, it represents about 90% of AC revenue. However, figures for this group are available only for 2018/19 and 2019/20.¹⁸⁴

13.29 On the basis of the figures available, between 2015/16 and 2019/20 the AC group declined in number by about 6% (from 3,930 to 3,680) and the IFP Group declined by some 9% (from 2,490 to 2,270).¹⁸⁵ In the SFP Group, between 2018/19 and 2019/20 the number declined from 2,780 to 2,690, about 3%. This is against the background of an overall drop in AGFS claims between 2015/16 and 2019/20 of some 26%.¹⁸⁶ These figures, in my view, tend to suggest that

¹⁸⁴ Note that all three groups may also have revenues generated by privately paid criminal work, though this is not captured in any of the data tables to which the text refers.

¹⁸⁵ The fall in IFP barristers between 2015/16 and 2019/20 is tempered by a rise in the figure during 2015/16. Were the comparison to start in 2016/17 the decrease would be 11%. Please note that all the relevant figures have to be interpreted with care. For example, for AC barristers, the underlying MOJ data indicates that 796 junior barristers who were working in 2016/17 were not working in 2019/20. However, there were 676 junior barristers who were working in 2019/20 who had not been working in 2016/17. In this example, the net decline is 120, about 4%.

¹⁸⁶ In the same period Magistrates’ Court claims also fell from 352,000 to 257,000, some 27%, no doubt affecting those juniors doing Magistrates’ and Youth Court work.

the overall decline in numbers of criminal barristers is less, relatively speaking, than the fall in the amount of work.

- 13.30 Drilling down a little further, however, on the AC figures for the junior bar, it appears that between 2015/16 and 2019/20 there were reductions in the number of practitioners in the 8-12 years of practice band (from 530 to 280, - 47%), in the 13-17 years band (580 to 480, -17%), and in the 18 to 22 years band (from 500 to 450, - 10%). On the other hand, numbers consistently rose in the 23+ years band (850 to 960, +13%).
- 13.31 The number of AC junior barristers in the 0 to 7 years band also consistently rose in the same period from 950 in 2015/16 to 1100 in 2019/20 (+16%), despite the overall fall in work over the same period. According to the Bar Council, criminal law pupillages have remained oversubscribed by about 10:1.
- 13.32 Specifically in relation to QCs, the AC figures show a decline between 2015/16 and 2019/20 from 520 to 400, some -24%, with a particularly large reduction in QCs in the 18-22 years of practice range (140 to 40, a 67% decline). SFP QCs stood at 340 in 2019/20. IFP figures show a decline from 266 QCs in 2015/16 to 207 in 2019/20, a reduction of 22%.¹⁸⁷
- 13.33 A further source of data is the information provided to the Bar Council by barristers renewing their authorisation to practise certificates. This shows that in 2018/19 there were 5,110 barristers who indicated they did criminal work, of which 2,670 described themselves as criminal specialists – that is they self-report working (or intending to work) solely on criminal matters.¹⁸⁸ In 2019/20 there were 5060 self-reported criminal barristers, of which 2600 described themselves as criminal specialists. This later number fell to 2440 in 2020/21, although those reporting a mix of crime and other work rose from 2460 to 2580, making 5020 self-reported criminal barristers overall. For 2021/22 (i.e. post the height of the pandemic) the figures are not yet complete, but so far 2420 barristers self-reporting as criminal specialists, and 2500 reporting a mixed practice including crime, have renewed their certificates.
- 13.34 These figures, which admittedly depend on a rather loose self-reporting measure, suggest provisionally that the pandemic has had less of an overall impact than previously feared.
- 13.35 It is important to bear in mind that with a significant fall in work between 2015/16 and 2019/20, there would be bound to be a contraction of the labour force. Generally speaking the overall numbers do not seem to have declined as much as one might have expected, given a 26% drop in volume in the number of AGFS¹⁸⁹ cases, and around an 8% drop in AGFS expenditure overall.

¹⁸⁷ If one examines the underlying MOJ data it appears that 125 QCs who were in the IFP group in 2015/16 were not in that group in 2019/20. However, 66 QCs who were not present in the IFP group in 2015/16 were present in 2019/20, giving a net decrease of 59, namely a reduction of 22%.

¹⁸⁸ These are similar too but by a definitional quirk, are not quite the same as SFP barristers. For comparison, the Bar Council's "criminal specialists" for 2018/19 and 2019/20 numbered 2670 and 2600, whereas the figures for SFP barristers in those years were 2460 and 2330 respectively.

¹⁸⁹ Cases in the Magistrates' Court also declined, also potentially affecting junior barristers.

Numbers entering the profession in the band 0 to 7 years have remained on a gently upward trend, and applications for pupillages well exceed the supply of places.

13.36 However, on the evidence taken as a whole, there does seem to have been a significant fall in criminal barristers concentrated in the 8 to 22 years of practice group. The latter part of this group includes a significant reduction in the number of QCs, apparently in the earlier stages of their career as QCs. It is true that these barristers are not necessarily “lost for ever” to the criminal Bar, since they may still be in independent practice at the Bar. However, whatever the reasons, over recent years the criminal Bar has lost an important pool of talent and experience in what I would regard as the main “engine room” of the profession.

13.37 A feature of the reduction appears to be female barristers leaving independent practice. As discussed in more detail below, according to the Bar Council for many years the gender balance at the point of entry into the profession has been approximately equal. Table 32 in Annex K shows that whereas in 2019/20 the male/female gender balance at 0-2 years call was 47:53, by 8-12 years call the balance has moved to 65:34. The female proportion thereafter broadly declines until at 23 to 27 years the balance is 75:25. The Bar Council, the CBA and the YBC all emphasise the trend of women leaving the Bar. This issue was also raised with me in Circuit meetings, where the difficulty of combining the criminal Bar with family life was particularly noted, given also the low fees. This pattern may also be related to issues of ethnicity, as further discussed below.

(iii) Criminal barristers’ pre-expenses fee incomes in 2019/20

13.38 Most of the information about incomes in the Data Compendium is on the basis of barristers’ fee incomes before deduction of expenses. However self-employed barristers have expenses, and that must be remembered when considering the pre-expenses data below. The following data is based on the SFP barristers as shown in the Data Compendium.

13.39 Barristers’ public criminal fee income (before expenses) of SFP barristers, by years of practice, is shown in Table 13.1:

Table 13.1: Distribution of SFP barristers' fee incomes (pre-expenses) in 2019-20, by years of practice

Years of practise	Number of barristers	Lower quartile, £	Median, £	Upper quartile, £
0 to 2	220	11,600	25,100	42,700
3 to 7	350	43,700	65,000	88,300
8 to 12	200	56,300	81,600	109,000
13 to 17	380	61,100	85,600	111,900
18 to 22	400	60,200	88,800	115,400
23 to 27	420	67,000	97,400	130,000
28+	700	54,500	83,800	118,900
All	2,690	49,300	79,800	110,600

13.40 An important point to note is the wide variations in fee income, particularly among juniors, earned by criminal barristers. Looking more particularly at the pattern through a career for all SFP barristers' income pre-expenses, the 2019-20 data shown above suggests 0-2 years of practice yields a median of £25,100; at 3-7 years a median of £65,000; and at 8-12 years a median of £81,600. Then there is something of a plateau between £80,000 - £90,000 from 13 to 22 years, rising to £97,400 between 23 and 27 years, and then dipping down again.

13.41 To this picture should be added the distribution of barristers' public criminal fee incomes (pre-expenses) in 2019/20 by gender and by ethnicity, as shown in Tables 13.2 and 13.3 below.

Table 13.2: Distribution of SFP barristers' fee incomes (pre-expenses) in 2019-20, by gender

Gender	Number of barristers	Lower quartile, £	Median, £	Upper quartile, £
Male	1,860	56,400	86,300	117,100
Female	810	35,100	64,500	94,000
Prefer not to say/ no information	20	42,400	82,000	107,400
All	2,690	49,300	79,800	110,600

Table 13.3: Distribution of SFP barristers' fee incomes (pre-expenses) in 2019-20, by ethnicity

Ethnicity	Number of barristers	Lower quartile, £	Median, £	Upper quartile, £
White	2,180	50,400	80,600	110,900
Asian or Asian British	140	37,000	76,300	103,800
Mixed or multiple ethnic groups	70	41,600	69,000	97,700
Black, African, Caribbean, or Black British	70	28,600	61,000	102,400
Other ethnic group	30	42,700	73,700	107,200
Prefer not to say/ no information	190	57,600	84,300	115,900
All	2,690	49,300	79,800	110,600

13.42 These tables show that female barristers tend to earn less than male barristers from public criminal work, and the same is true for BAME barristers, relative to white barristers. I consider this in more detail below.

(iv) Criminal barristers' public criminal fee incomes post-expenses in 2019/20

13.43 In my view it is not realistic to rely on public criminal fee incomes pre-expenses, since barristers must incur the expenses of their practices, including chambers rent and overheads, IT expenses, travel costs, indemnity insurance, accounting, practising certificate and compliance costs, professional subscriptions and other costs. On the information available these expenses are typically 20-30% of fee income gross of expenses (from all sources) although it is difficult to verify this figure in detail: see generally Annex L.

13.44 Table 13.4 shows the median fee incomes (pre and post -expenses) of criminal barristers from doing public criminal work by years of practice. Tables 13.5 and 13.6 show the same information by gender and ethnicity. Post-expenses income is presented in likely ranges:

Table 13.4: SFP barristers' median public criminal fee incomes (pre- and post-expenses) by years of practice in 2019/20

Years of practice	Median fee income before expenses	Likely range of fee income after expenses
0	12,800	9,000 to 10,300
1	23,700	16,600 to 19,000
2	42,900	30,000 to 34,300
3 to 7	65,000	45,500 to 52,000
8 to 12	81,600	57,100 to 65,300
13 to 17	85,600	59,900 to 68,500
18 to 22	88,800	62,200 to 71,000
23 to 27	97,400	68,200 to 78,000
28+	83,800	58,700 to 67,100
All	79,800	55,900 to 63,900

13.45 Median public criminal fee income pre-expenses as well as a likely range of public criminal fee income post-expenses is shown by gender in Table 13.5, for 2019/20.

Table 13.5: SFP barristers' public criminal fee income (pre- and post-expenses), by gender in 2019/20

Years of practice	Median male fee income before expenses	Median female fee income before expenses	Likely male fee income after expenses	Likely female fee income after expenses
0	17,900	10,900	12,500 to 14,300	7,600 to 8,700
1	26,900	15,300	18,800 to 21,500	10,700 to 12,300
2	42,900	43,700	30,000 to 34,300	30,600 to 35,000
3 to 7	71,100	59,000	49,800 to 56,900	41,300 to 47,200
8 to 12	89,000	68,600	62,300 to 71,200	48,100 to 54,900
13 to 17	93,400	75,500	65,400 to 74,700	52,900 to 60,400
18 to 22	93,500	75,400	65,500 to 74,800	52,800 to 60,300
23 to 27	101,200	79,000	70,900 to 81,000	55,300 to 63,200
28+	85,200	77,500	59,700 to 68,200	54,200 to 62,000
All	86,300	64,500	60,400 to 69,000	45,100 to 51,600

13.46 Table 13.5 shows that overall, in 2019-20, the median public criminal fee income of male barristers was 34% higher than for female barristers, although this disparity varied by years of practice. It is particularly notable that for the same seniority female barristers consistently earn less on average than their male counterparts.

13.47 Median public fee income in 2019/20 pre and post expenses by ethnicity is shown in Table 13.6:

Table 13.6: SFP barristers' public criminal fee income (pre- and post-expenses), by ethnicity for 2019/20

Years of practice	Median White fee income before expenses	Median BAME fee income before expenses	Likely White fee income after expenses	Likely BAME fee income after expenses
0	12,700	16,200	8,900 to 10,100	11,300 to 12,900
1	24,200	14,300	16,900 to 19,400	10,000 to 11,400
2	45,900	27,200	32,200 to 36,700	19,100 to 21,800
3 to 7	66,900	54,000	46,800 to 53,500	37,800 to 43,200
8 to 12	81,600	75,600	57,100 to 65,300	52,900 to 60,500
13 to 17	85,900	79,600	60,100 to 68,700	55,700 to 63,700
18 to 22	89,400	86,300	62,600 to 71,500	60,400 to 69,000
23 to 27	98,600	82,800	69,100 to 78,900	58,000 to 66,300
28+	83,500	84,500	58,500 to 66,800	59,100 to 67,600
All	80,600	72,400	56,400 to 64,400	50,700 to 57,900

13.48 Table 13.6 shows a substantial gap in favour of white barristers in years 1 and 2, which continues, although narrowing, until years 18-22, when the gap almost closes, widens somewhat at years 23 to 27 and is roughly equal at years 28+. In overall terms, the range of BAME public criminal fee income (after expenses) is about 10% below the equivalent white income, but that overall figure will mask differences between different ethnic groups and gender within those groups. In my view, tables 13.5 and 13.6 should be considered together, since low earnings by female barristers from minority ethnic backgrounds may contribute to the lower median earnings of female barristers generally.

(v) Criminal barrister fee incomes compared to the Bar as a whole

- 13.49 The Bar Council also submitted figures from the Bar Mutual,¹⁹⁰ covering average criminal fee incomes pre-expenses adjusted for inflation over a 20-year period from 2000 to 2020. Although inevitably broad brush, the Bar Mutual figures suggest that in 2020 pre-expenses earnings for male and female barristers in criminal practice averaged £101,000 and £62,000 respectively. That compares with reported average male and female earnings for the Bar as a whole of £89,000 and £55,000 respectively. By way of comparison, in family law (children), where there are more female barristers than male in the ratio 59:41, gross fee income for both male and female barristers was around £80,000 in 2020. However, in 2020 in family law (other) where again there are more female than male barristers, the position was the other way around, with female barristers earning on average £34,000 and male barristers around £59,000. In employment law, to take another example, in 2020 male barristers were earning on average £66,000 and female barristers £55,000. Although in some other areas such as commercial law, average earnings were much higher, the Bar Mutual figures, for what they are worth, seem to suggest that criminal barristers' earnings are not out of line with the Bar as a whole, or with other areas such as family law or employment law. On the other hand, the Bar Mutual figures do not distinguish earnings by seniority or between publicly funded and private work.
- 13.50 What however the Bar Mutual figures do indicate is that in 2000 criminal barristers' earnings adjusted for inflation (i.e. in today's terms) were £107,000 and £52,000 for male and female barristers respectively. Between 2000 and 2005 those incomes rose significantly, with male barristers in 2005 earning on average £150,000 and female barristers £80,000, compared with the then Bar average of £67,000 and £41,000 respectively. Following Government concerns at that time about the growing cost of legal aid, the Carter Review in 2006 set out to moderate public expenditure on criminal legal aid, as described in Chapter 4. Criminal practitioners' average fee incomes fell substantially after 2005. On Bar Mutual figures by 2016 average fee incomes for criminal barristers were £105,000 for male barristers and £65,000 for female barristers, although still above the average earnings for the Bar as a whole of £82,000 and £48,000 respectively. Since 2016 criminal barristers' gross incomes adjusted for inflation have, on Bar Mutual figures, declined in real terms by some 5% for female barristers and by around 4% for male barristers, although still above the average for the Bar.

Analysis

- 13.51 The central issue is whether, in the light of the above, the criminal Bar is sustainable at present levels of remuneration. If not, should the fees under the AGFS be increased, and if so by how much and in what manner? These questions need to be considered from a public interest point of view. I take first the issue of a general increase in fees, and then turn to the structure of the

¹⁹⁰ *Barrister earnings data by sex and practice area 20-year trends report, September 2021*. As the Review understands it, these figures are based on self-estimated average incomes submitted to the Bar Mutual for insurance purposes. N.B. no deductions for expenses are made in this dataset.

AGFS. As already discussed in relation to criminal legal aid firms, the main question is the capacity of the criminal Bar to attract and retain the talent and experience necessary to sustain the criminal justice system, not least in the context of expected increased demand and the current back-log.

Preliminary Observations

- 13.52 I can well understand the often strongly expressed feelings of the criminal Bar, shared by many others, about the underfunding and general difficulties of the CJS, and above all the massive impact of the pandemic, leading to low morale and a general feeling that no-one values the efforts of criminal lawyers to uphold the interests of justice.
- 13.53 I record my view that the work of criminal lawyers working in legal aid should be highly valued, both by the Government and the general public. For the reasons I come to shortly I propose to recommend a general increase in AGFS rates, as indeed I have already recommended in terms of the fee schemes that mainly affect criminal legal aid firms.
- 13.54 That said, in my view one should not overlook two elements which are an important part of the difficulties the profession, namely a fall until recently in demand for criminal work; and continuing issues of diversity.

The fall in demand for criminal work

- 13.55 As set out above, over the period from 2015/16 to 2019/20, AGFS work fell by around 26% overall, with 30% fewer trials, and 44% fewer guilty pleas. That feature, unrelated to the criminal legal aid rates, would be bound to have a serious impact on any profession. In most normal markets the supply would contract sharply. Looked at in the round, however, the data suggests that the decline in numbers overall was somewhat less than might have been expected. Indeed, the number of barristers with 0-7 years of practise rose by 16% between 2015-16 and 2019-20. The Data Compendium figures only go back to 2015/16, but it is not without interest that Sir Bill Jeffrey pointed out in 2014 that “there are many more advocates than there is work for them to do”.¹⁹¹ Since then, volumes of work have further declined.
- 13.56 In my view a major problem for the criminal Bar at least from 2015/16 until recently, has been an overall diminution in the work, particularly with the restriction on sitting days in 2018/19. While it is entirely understandable that a profession in this position should press for higher fees to redress an overall decline in income, one of the main underlying problems in the past has been a mismatch between supply and demand.
- 13.57 In this context, it seems to me that Sir Bill Jeffrey put his finger on an important point, remarking on barristers’ chambers “**when the available work reduces, the devices available to managed businesses in the private and public sectors – and in particular the shedding of longer-established people to**

¹⁹¹ [Review of the provision of independent criminal advocacy \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414447/Review_of_the_provision_of_independent_criminal_advocacy.pdf), page 48

make way for new talent – are not available” (emphasis in the original).¹⁹²

That, it seems to me, partly explains why in recent years there may have been less “trickle down” from senior barristers to more junior barristers, although many good chambers strive to do their best.

13.58 However, we are now in a different situation, with demand likely to increase over the next few years, and with the current backlog in the Courts. These latter factors are central to my analysis.

Age, Gender and Ethnicity

13.59 A second area of complexity is diversity. A main argument put forward for raising criminal legal aid rates is that the Bar is an aging profession, that too many women leave criminal work after a few years, and that those from minority ethnic backgrounds struggle particularly in the early years. One question is how far these trends are attributable to, or can be resolved by, criminal legal aid rates.

13.60 As to the ageing profession, a recent Bar Standards Board Report¹⁹³ concluded that the Bar as a whole has aged over the past 30 years, the average age rising from 38.5 years in 1990/91 to 46.5 years in 2019/20. 40% of practising barristers are now over 50, and 15% now over 60. Those under 35 have fallen over the same period from around 40% to around 18%. Table 5.11 in the Data Compendium is presented on a slightly different basis but shows that in 2019/20 for SFP barristers around 44% of the criminal Bar were over 45 and those under 35 comprised about 13%. The median age for SFP barristers as of 2019-20 was, I understand, 47 and the mean 46. This suggests to me that the criminal Bar shares aging characteristics with the Bar as a whole.

13.61 The fact that the ageing profession is not unique to the criminal Bar suggests other factors are at work, rather than solely criminal legal aid rates.

13.62 As far as women leaving the criminal Bar is concerned, the same Bar Standards Report points out that the proportion of women leaving the Bar generally is higher than might be expected, the main reason being the difficulty of combining a career at the Bar with caring responsibilities.¹⁹⁴ For the criminal Bar combining caring responsibilities with criminal practice is, I was told, particularly difficult, in part due to the unpredictability of listing arrangements, the difficulty of receiving late instructions, and the general pressures of the work. Again, in my view the criminal legal aid rates in themselves are likely to be only one factor in a complex mix.

13.63 As to relative earnings, the 2019-20 data suggests female barristers on average earn less than men with the same years of practice, and that minority ethnic barristers also tend to earn less than their equivalent white counterparts. Again, a Bar Standards Board Report *Income at the Bar by Gender and*

¹⁹² [Review of the provision of independent criminal advocacy \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), at page 50.

¹⁹³ [Trends-in-demographics-and-retention-at-the-Bar-1990-2020-Full-version.pdf](https://www.barstandardsboard.org.uk/trends-in-demographics-and-retention-at-the-bar-1990-2020-full-version.pdf) ([barstandardsboard.org.uk](https://www.barstandardsboard.org.uk))

¹⁹⁴ *Ibid.* p.11

*Ethnicity in 2020*¹⁹⁵ confirms that this situation exists in the Bar as a whole. Further, a major Report by the Bar Council *Race at the Bar A Snapshot*¹⁹⁶ published shortly before this Review was completed, has confirmed the Bar Council's view that barristers from minority ethnic backgrounds face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar.¹⁹⁷

13.64 These latter findings are indeed serious and disturbing but I struggle to see criminal legal aid rates as the underlying cause of disparities which apparently affect the Bar as a whole. A general increase in criminal legal aid rates would, I accept, lessen the pressures that arise from these disparities but would not, in my view, address the disparities themselves. The latter reveal a serious problem. In my view, the Bar Council and the Bar Standards Board must urgently get to the bottom of what is going on and put it right, as further discussed in Chapter 15 below.

The Reasons for Increasing Funding for the AGFS

13.65 Nonetheless, in my view, the funding available to the AGFS should be increased, and I turn to my reasons for that conclusion.

The measures of 2018 and 2020

13.66 I need first to bear in mind that, as pointed out in Chapter 4, in 2018 the MOJ agreed with the Bar, in the context of a threat of disruptive action, to an injection of further finance into the AGFS valued at the time at an annual cost of £23 million;¹⁹⁸ and that in August 2020 the adoption of the accelerated measures was estimated to generate an increase of £19- 26 million compared to 2019/20.

13.67 Before all of these changes could come through the system the pandemic intervened. Cracked trials are better paid now than formerly but claims for reviewing unused material are fewer than anticipated.¹⁹⁹ In these circumstances, and especially in view of the significant damage done by the pandemic, and the distortion of work patterns involved, it is not at this point clear how far the 2018 and 2020 measures will in the end potentially affect the “take home pay” of criminal barristers. In my view, it is unsafe to rely on the

¹⁹⁵ [Income-at-the-Bar-by-Gender-and-Ethnicity-Final.pdf \(barstandardsboard.org.uk\)](#)

¹⁹⁶ [Race-at-the-Bar-Report-2021.pdf \(barcouncil.org.uk\)](#)

¹⁹⁷ See Key Findings, page 8.

¹⁹⁸ [Amending the Advocates' Graduated Fee Scheme - GOV.UK \(www.gov.uk\)](#)

¹⁹⁹ The CBA Monday Message, dated 27 September, called for more of its members to claim this fee “A gentle reminder to make sure you claim the fixed fee for reading unused material (0-3 hours). It applies to all (non-guilty plea) cases in the Crown Court where the Representation Order was granted on or after 17.09.20. Fewer than half of advocates are currently claiming their entitlement even though no supporting information needs to be provided and you just have to tick three boxes. I know that we are all exhausted and the pace of listings means that we barely get time to catch our breath these days, but every little bit helps.”

2018 or 2020 measures as a panacea for resolving the situation of the criminal Bar.

Fee incomes of criminal barristers' post-expenses

- 13.68 In my view the best guide to assessing barristers' fee income from publicly funded criminal work is the likely ranges of fee income post-expenses shown in Table 13.4 above. Essentially for criminal barristers as a whole, and taking for convenience the mid-point in the range, the 2019-20 figures suggest very low fee incomes (post-expenses) in years 1 and 2, rising to around £30,000 after 2 years, which is for a barrister aged around 33, given the evidence that the average age for starting practice is now around 30. At 3 to 7 years, i.e. up to the later 30s, the equivalent figure is around £49,000; for 8-12 years – i.e. moving into one's 40s – around £60,000; and thereafter broadly flat-lining around £65,000 between years 13 to 27, (i.e. to around 60 years of age;) and then declining. For a QC "taking silk" after around 20 years of practice, the mid-point is an initial fee income of around £95,000 (post-expenses), rising to £115,000 or so before dipping down again.
- 13.69 In my view incomes of this order are not generous by comparison with other public sector emoluments in the various peer groups as set out in Annex I. That is particularly so bearing in mind that the above remuneration does not include any pension, sick pay, maternity leave, paid holiday or other benefits. Younger barristers will also have considerable student debt, an important factor to bear in mind.
- 13.70 If one then looks at female barristers, Table 13.5 above shows that after the first two years, female barristers' fee income for similar years of practice is less than that of male barristers, and is in consequence less than the median fee income figures referred to above. The same is true for BAME barristers, as shown in Table 13.6, particularly in the earlier years of practice. I have no reason to doubt the Bar Council's view that the income of BAME, notably black, females, is at the bottom end of the scale. While as discussed above, these differences of gender and ethnicity are affected by factors other than the criminal legal aid rates themselves, the fact remains that an important part of the criminal legal aid workforce is paid even less than the median averages referred to in Table 13.4 above. That is a particular difficulty when it comes to retention.

Sustainability in the public interest

- 13.71 The issue from a public interest perspective is whether fee incomes of this order are likely to be able to sustain the legally aided criminal Bar going forward if no increase in funding is forthcoming. In that connection, the question is not simply whether there are "enough" barristers to go round. The need is to attract and retain barristers of the quality needed to do difficult and demanding work, carrying a very heavy responsibility for the life chances of an individual and a possible loss of liberty. Given the central role of the justice system in society as a whole, as I see it there is a high public interest in criminal legal aid being able to attract the brightest and the best.

- 13.72 As pointed out in Chapter 1, in my view it is a mistake to think of criminal legal aid in narrow terms as simply “funding the defence”. As far as advocates are concerned, criminal legal aid lawyers both prosecute and defend; the CPS relies to a significant extent on recruiting experienced criminal lawyers from defence solicitors and advocates; the same is true of many other public authorities; practising lawyers with a background in criminal law are the main pool for the recruitment of district judges, recorders, and Crown Court judges, many if not most of whom will have gained their experience doing criminal legal aid work.
- 13.73 The CJS in turn depends on the existence, and constant replenishment, of a cadre of skilled and experienced advocates to handle the more complex cases. Such cases necessarily include the serious offences involving loss of life, rape, serious violence, fraud, drugs and so on. Moreover difficult issues, for example as to admissibility of evidence, basis of plea, sentencing, dealing with young or vulnerable defendants, and many other matters, are by no means limited to cases of exceptional gravity. This means that the system needs a sustainable pool of advocates of all levels of experience capable of dealing with all kinds of cases, gradually progressing in due course to heavier and more time-consuming cases that require great attention to detail and much preparation.
- 13.74 In most cases under the AGFS the consequences of error are very grave for the defendant. Apart from being very expensive,²⁰⁰ miscarriages of justice undermine faith in the system as a whole. I am in no doubt that the public interest is served by maintaining a healthy cadre of independent criminal specialists, capable of both prosecuting and defending and in due course providing a pool of experience from which the judiciary may be drawn.
- 13.75 It is from that perspective that it is a matter of serious concern that the Bar should be losing talent and experience in what ought to be the height of the barrister’s career, in the range of 8-22 years and somewhat beyond. The apparent loss of QCs in the 18-22 years bracket is equally concerning, given that this appears to relate to the younger QCs who one would view to be the mainstay of the profession going forward. As indicated above, what should be the central “engine room” of the profession appears to be faltering.
- 13.76 It is true that this situation may be influenced by factors other than fees, including the difficulty of combining a career at the Bar with family life, the pre-pandemic decline in work and the general difficulties of underfunding that have beset the CJS in recent years. Nonetheless, this exodus from the middle, as the Bar Council describes it, is in my view caused to a significant extent by a perception that there is “little future” in criminal legal aid. In my view, if the CJS is to function in its present form, let alone thrive, that perception has to be corrected.
- 13.77 There is a further factor which in my view tips the balance decisively. In normal circumstances, if one were to increase fees in a market that was static or in

²⁰⁰ An example is the current sub-postmasters’ case, where the potential compensation is reportedly some £230 million.

decline, one would run the risk of oversupply, which would be counterproductive. That is not, however, the current situation. The current situation is that demand is likely to increase for the foreseeable future, certainly as compared with 2019/20, as a result of the decision to recruit more police officers and other factors. In addition, there is the imperative of tackling the backlog in the Courts. To meet that demand, one needs a good supply of criminal advocates. If further funding for the AGFS were not available, the risk is that there will not be enough criminal advocates to meet the increased demand. Taking the evidence as a whole, I do not feel I can recommend the Lord Chancellor to take that risk.

13.78 Accordingly, I recommend a substantial increase in funding for the AGFS.

Implementing Increased Funding for the AGFS

13.79 How should such an increase be effected to ensure the proper use of funds in the taxpayer interest, and how much should that increase be? To answer these questions, I follow the general principles already explained, namely paying for work done; incentivising preparation; and promoting earlier engagement in the CJS. I particularly bear in mind Sir Robin Auld's lament that the AGFS does not encourage effective preparation.²⁰¹

Structural issues that need correction

13.80 In my view, the structure of the AGFS has become out of kilter. First, "advocacy" has changed over the last 25 years with much more emphasis on written, pre-trial work: drafting defence statements, skeleton arguments, sentencing notes, editing transcripts, pre-submitting proposed cross-examination in certain cases, and so on. This partly reflects the move to closer case management in the Crown Court, which in itself has added to the work of the advocate. The AGFS pay structure, geared to the traditional oral presentation of a trial or a "hearing", no longer fully reflects the written work now necessary for a case or an application to be "heard".

13.81 Added to this, matters such as the proliferation of mobile phone, social media and other material, handling child and other vulnerable witnesses, increased mental health issues among defendants, responding to a more "hands-on" judicial approach, and dealing with the much increased amount of documentation, including disclosure issues and the review of unused material, has added significantly to the responsibility of the modern advocate.

13.82 In addition, as already indicated in Chapter 12 above, the pay structure of the LGFS has not encouraged solicitors to always take on the trial preparation that that scheme envisages. Although many solicitors can and do ensure that Crown Court cases are properly prepared, the evidence is that in many cases – notably but not exclusively those with high PPE - more preparation work has fallen to the barrister, with proofs of evidence for example not being provided,

²⁰¹ Chapter 4 above

or properly prepared. The point is that the work should be properly paid, and the AGFS does not currently reflect this.

- 13.83 Moreover, as argued throughout this report, every fixed price scheme needs to have a safety valve to accommodate the more complex and demanding cases, otherwise the latter are not properly done. The safety valve of special preparation under the AGFS is in my view too narrowly drawn to fulfil this role adequately. Similarly the scope for payment for “wasted” preparation is also very narrow. This combined with the difficulties of listing, and in particular the warned list system, disincentivises preparation.
- 13.84 Nor do the various fixed fees accommodate those cases that are not “run of the mill”, difficult and complex sentencing cases being one major example.
- 13.85 Finally, very little in the AGFS seems geared towards incentivising pre-trial resolution of a case. The assumption that a guilty plea at the PTPH should be paid significantly less than the cracked trial or trial fee may be valid in routine cases, but it does not always reflect the pre-trial work that may be necessary for an early guilty plea. The latter may very well require detailed consideration of the evidence, medical experts’ reports, discussions with the prosecution and careful advice as to which offence a plea may be appropriate. The PTPH fee itself at £126 per day does not vary, whether what is achieved is little more than some box-ticking and a further adjournment to another day, while in other cases the PTPH may involve serious consideration of the real issues and bringing the parties together to consider seriously pre-trial resolution. In my view the AGFS should incentivise pre-trial resolution in appropriate cases.

Specific recommendations on the structure of the AGFS

- 13.86 Conceptually, one could replace the AGFS with the system I propose for the LGFS,²⁰² based on lower standard, higher standard and non-standard fees, differentiating between serious, very serious and most serious offences. While that has attractions from a consistency point of view, I think that would be too big an upheaval in the immediate future, although it could be a possibility to keep under review.
- 13.87 The second option would be simply to increase AGFS brief fees across the board, with some further definition of what exactly the brief fee is intended to cover, to reflect the additional work referred to above. One could also attempt to target an increase towards certain groups such as junior barristers say. From past experience, however, I am somewhat sceptical of targeting, attractive though the idea is, since that might simply result in an oversupply of advocates doing the “targeted” work, whether solicitor advocates or more senior barristers attracted by the higher fees for doing simpler work.

Brief fees

- 13.88 For my part, I prefer a third option, which is to improve particular aspects of the AGFS, in combination with a general increase in fees. A fixed brief fee plus a

²⁰² See chapter 12 above

“refresher” for each day in court seems to me a sound principle from the point of view of controlling costs and ease of administration and these should be increased generally.

- 13.89 In that regard, the first issue is the mechanism for arriving at the brief fee. In a Review such as this I cannot reach a conclusion on how fees for different offences should relate to each other, but the guiding principle should, I would have thought, be the gravity of the offence, the concomitant responsibility borne by the advocate, and the complexity and difficulty of the case. While the PPE may be one indicator of these factors, and is still important in determining the AGFS fees in fraud and drugs cases, my own view is that PPE is not in itself a reliable guide to seriousness or complexity, as already discussed in relation to the LGFS.
- 13.90 Under the existing structure, a case of murder for example, widely regarded as the gravest offence where the advocate carries the heaviest responsibility, may well be paid less than a drugs conspiracy, simply on the basis that the latter had a higher page count. That does not seem to me a good balance. Further examples would be a case of rape, or sexual offences involving children, where the absence of significant PPE might again mean that such cases were paid less than a higher PPE fraud or drugs case. Again that would not seem to me to be a good balance, given the difficult and sensitive nature of such cases.²⁰³ Whilst there are administrative advantages in simply counting pages, it seems to me that PPE should not automatically be the predominant factor in determining the gravity or complexity of the case for the purpose of setting the brief fee.²⁰⁴
- 13.91 In the light of the above, I recommend that the MOJ should further review the relationship of the various brief fees with each other, potentially to ensure that the PPE element is not causing unjustified distortions.

A new approach to special preparation

- 13.92 That takes me on to the issue of how to ensure that additional work in particular cases is properly paid for, in circumstances where it may reasonably be demonstrated that the work necessary was over and above what would ordinarily be regarded as covered by the brief fee. As I see it, the route to this objective is a revised approach to special preparation, currently dealt with under paragraph 17 of Schedule 1 of the Regulations.
- 13.93 As a first step, I recommend that paragraph 17(1)(a) of Schedule 1 of the Regulations should be amended to be more broadly expressed in terms of the principle of paying for additional preparation properly done. For example, the words a very unusual or novel point of law or factual issue, are in my view over-restrictive. These words should be illustrative but not exhaustive. If, for

²⁰³ In the case of children in particular, pre-recorded cross examination under Section 28 of the Youth Justice and Criminal Evidence Act 1999, poses particular challenges.

²⁰⁴ It has also been suggested to the Review that the higher fees paid in the high PPE fraud and drugs cases, traditionally done by male barristers, may be contributing to the income disparities between gender noted above. That would be a matter for further consideration by the MOJ.

example, in a murder case, a plainly additional amount of work is involved with many conferences, forensic evidence and so forth, so that the junior brief fee plainly does not reflect the amount of work, then extra preparation should be claimable without difficulty. Similarly, for a guilty plea over and above the norm, for example, involving medical evidence, extensive research and detailed negotiations, again that additional preparation should be claimable.

- 13.94 Similarly in paragraph 17(1)(b) of Schedule 1, I seriously wonder whether the seemingly arbitrary amounts of PPE there set out are a reliable guide to the amount of extra work needed in a particular case.²⁰⁵ In any event those amounts, if retained at all, should be illustrative not determinative. I appreciate that PPE is convenient administratively but in my view it is too crude a mechanism to reflect the complexity of the work done, particularly in serious or complex cases where the PPE is low.
- 13.95 To replace these crude mechanisms, what I anticipate is needed in paragraph 17(1)(b) is, as the CBA suggests, a non-exhaustive list of “complexity markers” which if met would lay the ground for a claim for extra preparation “in excess of the amount normally done for cases of the same type” to use the existing wording of paragraph 17(1)(a). Such complexity markers could include unusual facts, points of law requiring particular attention, an unusually high number of witnesses for a case of that type, vulnerable witnesses and/or defendants, multiple parties and other factors requiring special preparation. The PPE, assuming it is actually read, is one such factor but not determinative.
- 13.96 This approach will require good and detailed time recording to show from the outset the work done, but I would have thought in most cases the fact of doing the work and carefully recording the time spent would give rise to a presumption that the work was properly done.
- 13.97 I would expect the LAA²⁰⁶ to consider these claims in a reasonable way. I again draw attention to my recommendation that the LAA should have a less restrictive approach to claims generally. On the other hand it would be incumbent on providers to limit themselves to reasonable claims and the LAA would be fully entitled to reject claims in breach of that obligation.
- 13.98 In addition, I recommend that the hourly rates for special preparation, which have hardly changed for many years, be increased. This is intended to incentivise experienced advocates to undertake the most serious and complex cases. The same applies to the fees for considering unused material.

Payment for wasted preparation

- 13.99 On a related issue, in my view, the present system whereby an advocate does not generally get paid for preparation work that is reasonably done in anticipation of a trial that does not take place through no fault of the advocate, does not incentivise proper preparation. Intentionally or not, this is a possible

²⁰⁵ That is particularly so if there is a dispute as to whether documents are “served in electronic form” or comprise “electronic material” as already discussed in relation to the LGFS.

²⁰⁶ For the LAA, see also Chapter 15 below.

example of “cost shifting” from one part of the CJS to another, and can operate unfairly. In my view claims for wasted preparation should be properly remunerated. That will also support the principles of case ownership and early preparation. I recommend that paragraph 18 of Schedule 1 of the Regulations should be amended by deleting paragraph 18(2) and in paragraph 18(3) replacing the word “eight” by (say) “two”, with the intention that wasted preparation in excess of two hours should normally be remunerated.

Earlier Payment before the trial

- 13.100 It is extremely unusual for a business these days to wait to be paid for a prolonged period after work is done, as seems to be the case under the AGFS. Preparatory work properly done and interlocutory hearings undertaken should, I would have thought, be claimable and payable within (say) 90 days at most. I understand arrangements for some interim payments have already been introduced during the pandemic and I would suggest that similar arrangements should be made permanent to alleviate the cash flow problems of many, particularly junior, advocates.

The PTPH fees

- 13.101 To encourage better preparation for trial, and case ownership, I would recommend a review of the fixed fee of £126 per day for the PTPH set out in paragraph 24 of Schedule 1 to the Regulations. In order to incentivise better engagement and pre-trial disposal, I would recommend an enhanced fee for a substantive PTPH, or a further case management hearing, which deals in detail with the issues in the case, and its possible disposal. Again, this would need further definition – and possibly a certificate by the judge, but I trust the underlying idea is clear enough.
- 13.102 It has been suggested to me that in many cases the PTPH comes too early in the process, but that is a matter for the Judiciary. From the point of view of criminal legal aid, my recommendation is intended to support and incentivise preparation for the more substantive pre-trial hearings which seek to define the issues in the case and explore any possibilities there may be for pre-trial disposal.

Appeals and committals from the Magistrates’ Court

- 13.103 In line with the foregoing, the fee(s) for appeals and committal for sentence to the Crown Court from the Magistrates’ Court under paragraph 20 of Schedule 1 already provide for the appropriate officer to allow reasonable additional fees. I would recommend that provision to accommodate all reasonable requests for additional work. As to the fixed fee for sentencing hearings set out in paragraph 24 of Schedule 1, I would recommend an enhanced fee for sentencing hearings of particular complexity or difficulty.

Other fee revisions

- 13.104 There are in addition fixed fees for various “hearings” under paragraph 24 of Schedule 1, including on the admissibility of evidence, ground rules hearings, withdrawal of plea and various other matters. In my view, firstly the fee in

question should reflect the written work that these days is intrinsic to most hearings, and secondly for complex matters a special preparation fee should be claimable if the circumstances so warrant, along the lines already discussed above.

- 13.105 As already indicated in relation to the LGFS, considerable concern was expressed to the Review, including by the Law Commission, about the difficulty of obtaining advocates to conduct confiscation hearings at the rates provided under paragraph 14 of Schedule 1. I recommend that the fees for confiscation hearings be increased to incentivise experienced practitioners to undertake this typically complex work.
- 13.106 I also recommend the abrogation of a fixed Crown Court fee under the AGFS in a case deemed suitable for summary trial, in line with a similar recommendation in relation to the LGFS.
- 13.107 My general intention is to deliver an updated and modernised AGFS while maintaining sufficient checks and balances to ensure that public expenditure is disbursed appropriately. I am sure the profession, the MOJ and LAA will be able to work collaboratively to arrive at any necessary definitions to implement the foregoing in a sensible way.

Implementation and cost

- 13.108 I am advised by the Review team that further modelling will be required to identify the likely costs of specific amendments to the AGFS recommended above. That modelling will I anticipate enable a decision to be taken as to the appropriate split between an increase in brief fees overall and the specific changes I recommend above. I stress that an overall increase in brief fees should be accompanied by the changes I suggest, which are intended to move the AGFS away from its current focus on the “trial” to properly rewarding work done, in particular pre-trial work, thus making the whole process more efficient.
- 13.109 It is also imperative that the issues of diversity referred to above are urgently tackled, as further discussed in Chapter 15, given notably that public monies are involved.
- 13.110 I cannot on the information available carry out a detailed cost/benefit analysis, not least because the intangible benefit of a better functioning CJS, although vast, cannot in my view be quantified in monetary terms. As to the likely amount needed to sustain the present system and bring about these efficiencies, this is I anticipate a matter for judgment. On the basis of the AGFS spend in 2019/20 and the modelled impacts of the accelerated items, I estimate that a percentage uplift of the same order as I recommend for criminal legal aid firms, that is to say an additional annual spend of 15%, or in cash terms some £35 million per annum, in steady state, would be a minimum estimate of the annual amount by which the AGFS spend should be increased. A proportion of this amount will remunerate solicitor advocates. Nonetheless, I would see an AGFS increase of this order as the minimum necessary to sustain the criminal Bar going forward, to encourage retention and demonstrate the continued value of a career in

criminal legal aid. How that sum is split between an overall uplift of brief fees and the more targeted efficiency amendments I suggest will require further modelling. For my part, I would suggest that the primary focus should be on the efficiency gains likely to result from encouraging case ownership, better preparation and pre-trial disposal.

CHAPTER FOURTEEN: OTHER CRIMINAL LEGAL AID EXPENDITURE

14.1 This Chapter deals briefly with four other areas of criminal legal aid expenditure: Appeals, Prison Law, VHCCs and Experts' fees.

Appeals

- 14.2 Initial advice on a possible appeal on conviction or sentence from the Crown Court to the Court of Appeal²⁰⁷ is wrapped up in the fees paid to litigators and advocates under the LGFS and AGFS respectively. If that advice is negative, no further fee is payable. If advice on appeal is positive, legal aid is available in the Court of Appeal at the rates set out in Schedule 3 of the Regulations, under paragraphs 7 (litigators) and 9 (advocates) respectively. However, permission to appeal is required, and legal aid is available only if a single appeal judge, or a full court of three appeal judges, gives permission to appeal, either against conviction, or sentence, or both. If a single judge refuses permission, or the full court refuses permission on a renewed application, legal aid is, I understand, not available. Legal aid in the Court of Appeal is granted and administered by the Court of Appeal office (CAO) under the Registrar of the Court of Appeal, rather than by the LAA.
- 14.3 The cost of legal aid as administered by the Court of Appeal was some £2.6 million in 2019/20 payable in respect of some 2,600 appeals.²⁰⁸
- 14.4 If the appeal to the Court of Appeal is rejected, in practical terms²⁰⁹ the last domestic recourse is to the Criminal Cases Review Commission (CCRC). Legal aid for applications to the CCRC is administered by the LAA. The fees are laid down under paragraph 8 of Schedule 4 of the Regulations, up to a maximum of £425.25. This upper limit can be increased by the LAA.²¹⁰ The LAA received some 159 such applications in 2019/20, at a cost of just over £300,000.²¹¹
- 14.5 If at the start of the above process, before any appeal to the Court of Appeal has been lodged, a prospective appellant seeks advice on an appeal from a different solicitor, a fee for that advice is separately payable up to a maximum of £273.75 under paragraph 8 of Schedule 4 to the Regulations: again the LAA

²⁰⁷ Appeals from the Magistrates' Court to the Crown Court have already been discussed above.

²⁰⁸ Legal aid statistics quarterly: April to June 2021:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021431/legal-aid-statistics-main-data-apr-jun-2021.csv

²⁰⁹ Appeals to the Supreme Court on a point of law in criminal cases are infrequent.

²¹⁰ The general provisions on upper limits are set out in paragraphs 5.8 to 5.19 of the Standard Crime Contract Specification.

²¹¹ Legal aid statistics quarterly: April to June 2021.:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021431/legal-aid-statistics-main-data-apr-jun-2021.csv

has power to increase this. I have already dealt with this in Chapter 10 above and do not repeat those observations here.²¹²

The evidence to the Review

- 14.6 A number of respondents to the Review, including the CCRC, Criminal Appeal Lawyers Association (CALA), CLSA, LCCSA, YPA, YLAL, The Howard League and others expressed concerns about the low level of fees for appellate work in the Court of Appeal.
- 14.7 CALA and others argue notably that where a Representation Order has been granted by the Court of Appeal:
- (i) the remuneration allowed to the litigator is normally very little, legal aid normally extending to the advocate only;
 - (ii) if permission to appeal is refused, and the application is renewed before a full court, the work on the renewed application will be paid only if the appeal succeeds;
 - (iii) if the court hears argument on the merits and refuses permission to appeal, there is no payment, whereas if the court grants permission but nonetheless dismisses the appeal, the advocate can claim payment;
 - (iv) litigators' fees (where allowable) are extremely low, and have not changed since 1996, except for the reduction of 8.75% in 2014;
 - (v) in consequence, very few firms are prepared to take on this work;
 - (vi) advocates' appeal fees are very low even compared to other criminal legal aid work;
 - (vii) the advocates' fee structure does not distinguish between cases where the appeal is done by the same advocate that did the trial, and cases where the advocate is newly instructed and may have had to spend many hours assimilating the case;
 - (viii) if advice is sought on the prospects of an appeal where the firm did not do the trial, the fees are so low that few firms will do this work;
 - (ix) fees for applications to the CCRC are far low and again fewer and fewer firms are prepared to take on this work.
- 14.8 The CCRC further refers to a substantial fall in in the number of applicants who have legal representation, so that now only about 10% of the applications it

²¹² Although it is not clear how many claims under this provision relate to appeals from the Crown Court to the Court of Appeal, as distinct from the Magistrates' Court to the Crown Court, as a result of an electronic fault in the relevant portal, it is probable that claims under paragraph 8(a) of Schedule 4 mainly relate to the Magistrates' Court where the cases are much more numerous, and the likelihood of defendants not being legally aided at the time of their conviction is much higher. But the considerations I have set out in Chapter 10 above apply equally to claims following conviction in the Crown Court.

receives are from legally aided defendants, compared with one-third in 2008. As a result, most of the applications it receives are poorly prepared by unrepresented defendants, and some are lodged mistakenly with the CCRC rather than the Court of Appeal. The CCRC is much assisted when applications are properly prepared and considers that the low level of legal aid fees hinders its work and there are risks of miscarriages of justice. The CCRC refers to a report by the Westminster Commission on Miscarriages of Justice in February 2021 recommending an increase in the legal aid fees for CCRC work²¹³ and also a report by the University of Sussex²¹⁴ in March 2021.

Legal aid administered by the Court of Appeal

- 14.9 Overall, I have no reason to doubt the evidence that there are few solicitors left specialising in appeal work in the Court of Appeal, and that the appeal fees are low. While I can fully understand a reluctance to unduly fund appeal work, in my view an overly restrictive approach to legal aid for appeals in the Court of Appeal does risk being counter-productive if taken too far. A healthy system needs an effective appeal process not only to do justice in the individual case, but to maintain standards generally. If cases do not reach the Court of Appeal through lack of funding, or are not properly prepared, that Court cannot play its essential role in maintaining legal discipline, articulating the law and determining sentencing. There is then inconsistency at lower levels of the system and a significant risk of injustice. More importantly, at least in my view, the availability of an appeal to the Court of Appeal is a very significant factor in maintaining public confidence in the CJS generally. As already indicated in Chapter 3, in my view even if a defendant is ultimately unsuccessful on appeal, the very fact of having had one's say, enables adverse decisions to be more easily accepted.
- 14.10 Many appeals to the Court of Appeal from the Crown Court will be conducted by the trial advocate, who will have drafted the application to appeal. Most such appeals will be based on the Crown Court record, for example a point of law, an alleged error in the summing up, or a mis-application of the sentencing guidelines. For these appeals, the practice of the COA of mainly limiting the Representation Order to the advocate is understandable.
- 14.11 Nonetheless, even in such appeals the litigator still has a role, including explaining to the client in person what is going on, and supporting the advocate generally. I cannot on the evidence come to any view on the existing practice of the COA as regards limiting the Representation Order to the advocate; I would simply suggest that this aspect be kept under review, and that any reasonable representations to the COA from litigators on this point are taken into account, as I have no doubt they would be.
- 14.12 As to the appellate fees generally, the logic of views already expressed applies equally to work in the Court of Appeal, and accordingly in my view the fees in

²¹³ [2021_03_02 Westminster Commission Report FINAL \(criminaljusticehub.org.uk\)](https://www.criminaljusticehub.org.uk/2021/03/02/westminster-commission-report-final/)

²¹⁴ [Microsoft Word - FINAL REPORT \(sussex.ac.uk\)](https://www.sussex.ac.uk/microsofword-final-report/)

paragraphs 7 and 9 respectively of Schedule 3 to the Regulations should be increased in line with the general increases I recommend elsewhere. I note in particular that the litigators' fees in paragraph 7 of Schedule 3 do not appear to have been revised since 1996, except for the reduction of 8.75% in 2014.

- 14.13 In relation to appeals where permission to appeal is granted and a new advocate and/or firm has taken over, there is self-evidently more work involved in preparing the case, and the same is true in cases where new evidence has come to light, perhaps even a long time after the original events. I would assume that in such circumstances the Representation Order would cover the litigator. Subject to that, I would have thought that in principle paragraph 7 of Schedule 3, combined with the uplift power in paragraph 8 (which authorises up to double the prescribed rate in certain circumstances) should enable the COA to remunerate the litigator for work properly done. Similarly, paragraph 9(4) enables the COA to increase the advocate's fee in exceptional circumstances if the amount otherwise payable under that paragraph would not provide reasonable remuneration. I would venture to hope that the powers under Schedule 3 would not be interpreted overly restrictively.
- 14.14 CALA suggests that an appeal may in fact be fully argued on an application for leave, which is ultimately refused, so that the lawyers go unremunerated. While no one would wish to encourage weak or even frivolous appeals, there is perhaps a difference between such appeals and appeals which are reasonably arguable although ultimately unsuccessful. In line with the points I make above, I would attach importance, from the point of view of the public interest, in lawyers not being discouraged, for fear of being unpaid, from taking on appeals that may be evenly balanced. Among other things, that would tend to deprive the Court of Appeal of its critical supervisory role. I would venture to suggest that if CALA's point is right on the facts, it is worthy of further consideration, especially if the matter were to turn on the form of the order made when dismissing the appeal.
- 14.15 In general terms it is in the public interest that there be a sufficient number of litigators prepared to do appellate work, and ways of ensuring this could be considered further by the Advisory Board. I refer also to the submissions by the charity Appeal in Chapter 15 below.

Criminal Cases Review Commission

- 14.16 According to the LAA's Standard Crime Specification²¹⁵ advice and assistance on applications to the CCRC is intended to be an "initial screening process", primarily to screen out weak claims that do not meet the CCRC criteria, it being for the CCRC to determine the merits of the matter. However, the figures quoted above indicate that on average the LAA has allowed claims of around £1900, well above the upper limit of £456.25. That suggests that the LAA allows a certain leeway in its approach to the upper limit. However, there does seem to be ambiguity as to where legally aided advice and assistance stops,

²¹⁵ Paragraphs 11.19 to 11.22

and whether the substantive work is intended to fall on the LAA budget or the CCRC budget. I am unclear about the basis for the LAA's assumption that the legal aid funding is for an initial screening process only, and where the demarcation line is.

- 14.17 The CCRC is a public body and it has to consider the applications it receives whether the applicant is legally advised or not. Limitations on legal aid for applications to the CCRC tend in my view to impose more costs on the latter, and this seems a further example of one part of the system making life more difficult for another part of the system without anyone clearly articulating a system-wide view. In my view, better legal aid funding for advice on applications to the CCRC will likely weed out unfounded cases earlier, assist the CCRC in dealing with its workload, and lead to higher public confidence in the justice system generally, even if such an approach goes somewhat beyond the concept of "initial screening".
- 14.18 I therefore recommend an increase in the fees for advice and assistance on applications to the CCRC, in line with the general fee increases I recommend, together with the introduction of a lower, higher and non-standard fee structure for this work, along the lines of the Magistrates' Court scheme. On the demarcation issue, I would have thought the general interest is likely to be better served by funding a structured submission to the CCRC in an appropriate case, rather than limiting legal aid to an "initial screening" as the SCC Specification currently envisages. Further work is needed on where the line is to be drawn, given the conclusions of both the Westminster and University of Sussex reports cited above.
- 14.19 This aspect, and clarification of the extent to which enhanced legal aid funding can properly assist the CCRC, would in my view be an important aspect for the Advisory Board to study further and keep under review.
- 14.20 Similarly, it would be for the MOJ and the Advisory Board to monitor the reforms I suggest with a view to maintaining a sufficient cadre of experienced appellate litigators, and ensuring that advice on prospects of appeal is and remains reasonably available to aggrieved persons reliant on public funds.

Very High Cost Cases (VHCCs)

- 14.21 Separate arrangements are made for certain VHCCs. Essentially VHCCs are cases likely to exceed 60 days in trial and are mostly complex fraud cases. To conduct a VHCC, certain eligibility criteria must be met. The LAA must be notified of a possible VHCC and will then issue a contract to the solicitors' firm and advocate(s) involved.
- 14.22 In the case of solicitors, preparation, court attendance and travel and waiting time are paid at the hourly rates set out in part 3 of schedule 6 of the Remuneration Regulations. These fees reflect a reduction of 30% which came into effect at the beginning of 2014 and have not changed since.

- 14.23 In the case of advocates (almost entirely barristers) a different arrangement has applied since 2014, known as the Interim Fixed Fee Offer (IFFO) scheme. This fixed fee is subject to negotiation, and the LAA uses the rates set out in part 3 of Schedule 6 and other information about the case to calculate an offer using the LAA's IFFO model calculator. If this calculation does not produce a fee which properly reflects the nature or value of the case, the relevant LAA senior case manager has discretion to increase (or decrease, though I understand this is not usual) the fee taking into account various criteria. The Review understands that, in practice, there is a negotiation between the barrister(s) concerned and the LAA until a fee is agreed, and an IFFO contract is then signed. The Review understands that the agreed fee is regularly in excess of the first calculation produced by the LAA model calculation. Once agreed, the fee is paid in instalments.
- 14.24 The pattern of VHCCs has been changing in recent years. According to figures supplied by the LAA, in 2014/15 there were 139 completed VHCCs. Total solicitors' fees charged on VHCCs were £30.7 million, while total barristers' fees were £22.5 million, totalling £53 million. In 2018/19 there were 28 VHCCs completed, with total solicitors' fees of £3.4 million, and total barristers' fees of £8.5 million. In 2019/20 only 8 VHCCs were completed with total solicitors' fees of £526,000 and total barristers' fees of £2.4 million, making a total expenditure of just under £3 million.
- 14.25 Although the figures will vary, because VHCC cases may last more than one year, and payments made in a year are not directly related to cases completed in that year, there has been a shift in the balance of remuneration for VHCCs from solicitors to barristers since 2014. According to figures supplied by the LAA, average litigators' costs for a VHCC case over its life have declined from £875,541 in 2014/15 to £570,984 in 2019/20, a fall of 35%. Over the same period average barristers' costs per case have risen from £762,550 over the life of the case in 2014/15 to £2,121,908 in 2019/20, a rise of 278%. An important aspect of this is a rise in the number of multi-party cases involving several barristers. On the other hand, there have been fewer VHCCs overall.
- 14.26 According to the LAA, QCs have been involved in 54 IFFOs spanning 51 VHCCs between 2014 and 2021. The average QC offer over the first 27 of these cases (between 2014 and October 2017) was some £205,400. The average QC offer over the most recent 27 cases (between December 2017 and October 2021) was some £296,460, an increase of some 44%. According to the LAA, the top ten fees paid to individual barristers over the last ten years range from £345,000 to £586,000, and in two cases above that. These fees may of course reflect work on the case in question over two years or more. These cases are nonetheless costly from the taxpayers' point of view, particularly if the same case has several defence QCs.
- 14.27 The Review has received very little evidence about VHCCs, and they have been for some time a diminishing proportion of the overall legal aid spend. In response to my questions about VHCCs, the LAA expressed concern that there are a number of potentially very heavy VHCC cases in the pipeline. The LAA has also noted that barristers' VHCC fees have been increasing and those of litigators falling. However, the main point that concerns the LAA is that the

present IFFO arrangements contain no mechanism for resolving a dispute over barristers' fees prior to a contract being agreed. That, according to the LAA, creates a difficult situation, since the LAA is extremely reluctant to risk jeopardising the defence in a major criminal trial through a failure to agree the fees sought by a barrister. The LAA suggested that the introduction of a dispute resolution mechanism with an independent decision maker would alleviate this problem.

- 14.28 I am not in the context of this Review able to form any view as to the reasonableness of barristers' fees in VHCCs; although some of the above figures do seem high in the context of public sector services, they typically reflect work over long periods. Given that barristers' VHCC fees have apparently been increasing, I can see the point that the LAA is making, namely the possibility, however remote, of having little alternative but to accept a fee request which the LAA considers too high, or run the risk of a complex trial collapsing with all the consequences that entails.
- 14.29 I would have thought that the introduction of a statutory provision for VHCC cases²¹⁶ that, in the event of disagreement over fees, the parties would be bound by an independent dispute resolution mechanism, would be a reasonable step from the point of both the public interest and the parties themselves. I so recommend.
- 14.30 On a related point, given the terms of Regulation 12A of the Regulations, I am somewhat unclear as to the legal basis on which the LAA negotiates fees for advocates different from those set out in Table 2 of Part 3 of Schedule 6 of the Regulations, given also that the LAA applies Table 1 of that provision in determining litigators' fees. I would recommend that the legal basis for this be clarified in the Regulations, which should also take into account the dispute resolution mechanism I recommend.
- 14.31 An alternative of course would be to bring VHCC cases within the framework of the revised and updated LGFS and AGFS which I recommend elsewhere in this Review, a step which would resolve the somewhat anomalous situation of the IFFO arrangements. Going forward, the Advisory Board would be well placed to monitor future developments in relation to VHCCs and make recommendations accordingly.
- 14.32 Finally, in relation to litigators' fees under Schedule 6, Part 3, Table 1 of the Regulations, these will require upwards adjustment in line with my overall recommendation to raise solicitors' remuneration. If the IFFO arrangements continue, I would myself not see the increase in special preparation rates I recommend under the AGFS as itself a reason for increasing VHCC fees further, given the already high costs of VHCC cases, but the overall reasonableness of the fees will be a matter for negotiation in the individual case and dispute resolution if necessary. I do not therefore recommend any increase in barrister remuneration under the IFFO arrangements.

²¹⁶ [VHCC Arrangements 2017 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Prison Law

- 14.33 Under paragraph 11 of Schedule 4 of the Regulations, legal aid is available for advice and assistance, and advocacy, in relation to sentence cases, disciplinary cases and Parole Board cases.²¹⁷ Sentence cases relate essentially to the calculation of the prisoner's release date, which can be a complex matter depending on the legislation applicable, the time spent on remand (and for which offence), the length of the original sentence (with different rules for sentences under 12 months), whether sentences for different offences are consecutive or concurrent, eligibility for release under licence or home detention curfew, and other factors. Disciplinary cases include, for example, matters such as the possession of unauthorised items or drug use, and are determined by Independent Adjudications, normally a District Judge, and may lead, for example, to additional time being added to the sentence.²¹⁸ Parole Board cases include determining whether prisoners recalled to prison for breach of licence conditions should remain in jail, and whether those serving life sentences, extended sentences or Imprisonment for Public Protection (IPP) sentences should be released on parole. Particular parole provisions also apply to young defendants.
- 14.34 Under paragraph 11(1) of Schedule 4, advice and assistance is payable at a fixed fee of £200.75, with an escape fee threshold of £602.25, whether this sum is reached being calculated at the hourly rates set out in paragraph 11(2), the preparation rate being £42.80 per hour. Essentially this is the same principle as the police station scheme: time spent until the escape fee is reached is paid only the fixed fee, and the hourly rates are paid only for additional time over and above the escape fee threshold.
- 14.35 For advocacy assistance in the conduct of sentence and disciplinary cases, the scheme set out under paragraph 11(3) of Schedule 4 is essentially on the same basis of the Magistrates' Court scheme, that is to say a lower standard fee, a higher standard fee, and a non-standard fee. The lower standard fee limit is £357.06, the higher standard fee is £564.16 and the higher standard fee limit (beyond which a non-standard fee would be claimable) is £1691.69. The hourly rates for determining which fee is applicable are £51.24 for preparation and £62.28 for advocacy, roughly 10% higher than the Magistrates' Court rates.
- 14.36 Under paragraph 11(4) of Schedule 4, a similar scheme applies to advocacy assistance in Parole Board cases, at the same hourly rates, but the lower standard fee limit is £933.93, the higher standard fee is £1454.44, and the

²¹⁷ Strictly speaking, this is means tested, effectively prisoners are required to have no income (which is usually the case) and capital of less than £1000 (for advice and assistance) or £3000 (for advocacy assistance). Most prisoners satisfy these requirements.

²¹⁸ Other adjudications before the Prison Governor, for example disobeying the order of a prison officer, do not qualify for legal aid unless the "Tarrant" rules apply, essentially depending on the seriousness of the allegation and the likely consequences: see *R v Home Secretary ex parte Tarrant* [1985] QB 251.

higher standard fee limit is £4362.54, again substantially higher than other fees set out in Schedule 4 of the Regulations.

- 14.37 In recent years the legal aid spend on prison law has been around £17 million, with about 19,000 claims annually. In 2019/20 there were around 7,000 claims for Free-Standing Advice and Assistance (with a value of some £3.5million), 6,800 for Prison Discipline/Sentence Advocacy (£2.1 million), and 5,500 for Parole Board Advocacy (£12million).²¹⁹
- 14.38 The main evidence to the Review on prison law was provided by the Howard League for Penal Reform, who argued that the current legal aid system is harmful and unsustainable and fails to meet the needs of prisoners, victims or the public. With the prison population rising, more young defendants in prison, and mental health issues increasing, this is a serious matter, not least because prisoners are vulnerable to abuse of power and few understand their legal rights. Among other statistics, the Howard League draws attention to a Youth Justice Board report in 2021 to the effect that 70% of young defendants in prison have mental health problems or struggle with speech, language or communication.²²⁰ Similarly over half the young defendants in prison are from a minority ethnic background. It is essential that more support is provided to those in prison, with an emphasis on rehabilitation from the outset.
- 14.39 The Howard League suggests that the present system disincentivises lawyers, forcing them to choose between doing the bare minimum and working for nothing. The more vulnerable the prisoner, and the more complex the case, the less the lawyer will be paid. The emotional pressures of prison work are very great, inadequate funding and high caseloads take a heavy toll on junior lawyers, turning them away from the profession. According to LAA figures, the number of providers doing prison law dropped by 70% between 2012/13 and 2019/20. In addition, one effect of LASPO has been to remove advice on sentencing planning and access to offending behaviour programmes from the scope of legal aid; restoring that at modest cost would have a wide public benefit, bearing in mind that the average cost of a prison place is around £44,000 and £101,000 in a young offender institution.²²¹
- 14.40 Practitioner respondents to the Review mainly highlighted the difficulties of gaining access to clients in prison, with numerous delays in phone or video conferences, lack of video conference facilities, difficulties in communicating with prisons and waiting times when making personal visits. The Law Society pointed out that none of this time is remunerated. The CBA referred to the absence of facilities for the defendant to have digital access to the case papers. On remote Parole Board hearings during the pandemic, The Howard League

²¹⁹ Legal Aid Statistics Tables April-June 20201

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021430/legal-aid-statistics-tables-apr-jun-2021.ods

²²⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968700/experime

²²¹ [Prison performance statistics 2019 to 2020 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/968700/experime)

pointed out difficulties in taking instructions during the hearings, and giving the necessary legal and emotional support to young defendants asked to deal remotely with past traumas in their lives.

Analysis

- 14.41 In my view, the arrangements for advice and assistance under paragraphs 11(1) and (2) of Schedule 4, should be reformed along the lines of my recommendations for the police station scheme and in accordance with the current arrangements for the Magistrates' Court scheme. In other words, there should be a lower standard fee, a higher standard fee and a non-standard in accordance with the principles already discussed in Chapter 8. This enables work that properly needed to be done to be carried out without the penalty of working for nothing in more difficult cases as the present escape fee mechanism requires.
- 14.42 At the same time, the rates applicable – which have remained the same for many years except for the reduction in 2014 – should be increased in accordance with my general recommendation in Chapter 7.
- 14.43 The scheme for advocacy assistance in sentencing, disciplinary, and Parole Board cases already operates on the basis of lower, higher and non-standard fees, so in my view no structural change is called for. Again, however, the rates should be increased in accordance with my overall recommendation in Chapter 7 above.
- 14.44 More generally, legal aid for prison law stands at the junction of several interlocking strands, including prison administration, sentencing policy, the rehabilitation of offenders, and youth justice; once again legal aid provides a thread that runs through all of these. Given the experience of legal aid lawyers working in prison law and of charities such as the Howard League, one cannot help thinking that better provision of trained legal advice to prisoners, including especially young offenders, would lead to better outcomes, particularly in terms of sentencing calculations and decisions of the Parole Board, in turn reducing the pressure on the prison estate. In my view a key task for the Advisory Board, working with other agencies such as the Youth Justice Board, would be to reach a better understanding of how legal aid advice on prison law is made available and delivered, what the take-up is (or not) in terms of different prisons and different types of offenders, where the problems are, what the outcomes are, what the alternatives might be, whether additional training may be needed, particularly when dealing with young offenders, and how to maintain a sufficient number of lawyers with knowledge of prison law to meet the need. This would also enable a more informed assessment to be made of the scope of prison legal aid, possibly with a view to expanding that scope as suggested by the Howard League in its evidence.
- 14.45 I would suggest that given the high cost of prison, and in particular of young offender institutions, further investment in legal aid in prisons is likely to be well

worth it in terms of reducing numbers in prison and reducing re-offending. But more data is needed in order to test that proposition.

14.46 Finally, in terms of access to prison facilities, whether for physical visits to a client in prison or video conferencing, no doubt due to lack of resources and the difficulties of hard pressed prison staff, once again one part of the system, here the prisons, can easily impose costs on another part of the system, here criminal legal aid. I am sure it is appreciated that better means of communication between defence lawyers and clients in prison saves time and resource for the whole CJS, even if it is a cost on the prison budget. Again, I am sure that the investment in improvements already made, and investment in further improvements, will prove well worth it in terms of the better functioning of the CJS as a whole.

Expert Witness Fees

14.47 Schedule 5 of the Regulations sets out fees for expert witnesses in criminal legal proceedings. These have not changed for many years, but were reduced by 20% in 2014. I understand the disbursements to experts in 2019/20 were approximately £30 million, which sum is already included in the cost of the various fee schemes.

14.48 The Expert Witness Institute argued that the fees for expert witnesses were too low, such that many expert witnesses were reluctant to take on legal aid work. Given the reduction in 2014, and no increase since, the current rates do not allow experts to cover their costs. This has also led to a deterioration in the quality of expert evidence, sometimes with catastrophic results in trials collapsing or verdicts having to be overturned on appeal.

14.49 The LCCSA commented that, unlike the situation in the Crown Court, disbursements for experts in the Magistrates' Court are reimbursed by the LAA only at the conclusion of the case, causing cash-flow problems to providers, particularly in respect of youth court cases where the evidence of psychologists and psychiatrists was often required. Research by Dr Lucy Welsh indicated that late payment by providers of expert witness fees was a serious problem for the latter, who suggested that they could be paid directly by the LAA.

14.50 The founder of Forensic Resources Ltd made a number of similar points, and referred to the LAA's policy on seeking quotes for expert witness work, it being suggested that the LAA always seem to approve the cheapest expert and have a top-heavy and inconsistent procedure for granting prior authorisation.

14.51 In my view expert witnesses play a key role in the administration of justice, and legally aided defendants should have access to expert witnesses who are reliable, of good quality, and have a thorough understanding of their role to assist the Court, honestly and objectively. That is particularly so with medical and similar evidence, but by no means limited to that sphere. In my view this is an area where over-economising on expert witness legal aid fees is likely to be counterproductive and lead to negative outcomes.

- 14.52 Rates payable to expert witnesses in criminal proceedings match those employed for civil matters, save for a provision to exceed the limits “in exceptional circumstances” for the latter.²²² Both sets of rates were subject to a 20% cut in 2014.
- 14.53 Given the importance of the role expert witnesses play in the administration of a fair CJS, and the fact that more than seven years has passed since the reduction in 2014, I recommend that expert witness fees be substantially increased in line the recommendations elsewhere in this Report.
- 14.54 As to the cashflow issues, I am not sure why there are different LAA rules for reimbursing disbursements in the Magistrates’ Court later than in the Crown Court. I would hope the LAA system could be adapted to secure earlier payment of disbursements to the provider, so that the latter can promptly pay experts’ fees incurred in the Magistrates’ Court.
- 14.55 On the issue of the quotes, the overall fees are fixed under the Regulations and presumably there will be many cases where the time normally required can be reasonably estimated. In an area such as expert witness work, I would be uneasy about any appearance of invariably only authorising the cheapest quote, although I fully understand the desire to safeguard public funds. I suggest the LAA review its prior authorisation procedures with a view ensuring they are proportionate to the need.
- 14.56 A system change involving direct payment by the LAA to the expert would have wide ramifications for both criminal and civil legal aid, and I have not explored that option further. I hope however my recommendations for a general increase in legal aid fees paid to solicitors will also ease any past cash-flow problems there may have been.

²²² Civil Legal Aid (Remuneration) Regulations 2013, Schedule 5, para. 2

CHAPTER FIFTEEN: WAYS FORWARD AND OUTSTANDING ISSUES

15.1 From the perspective of criminal legal aid this Review has necessarily had to cover a broad range of topics on many aspects of the CJS, as well as points of mechanics and detail. Inevitably, in the time available it has not been possible to cover in depth every aspect of the Terms of Reference. This final Chapter highlights my views on the future direction of travel, pulls together a number of issues mentioned above and addresses some outstanding issues.

The Advisory Board

15.2 As explained in Chapter 4 above, the history of legal aid over the last 20 years has been far from ideal. The schemes have difficulty in keeping up with either the needs of the CJS, or the changing concerns of providers. When providers encounter difficulties, negotiations with the MOJ tend to be conducted bilaterally without the involvement of other stakeholders.

15.3 In my view an independent Advisory Board, reporting at regular intervals to the Lord Chancellor, would be able to take a wider view, and in particular help develop a more joined-up approach to criminal legal aid in the CJS. I would understand a reluctance to have yet another “body” involved in the process but put forward the following reasons for this proposal.

15.4 First, the system of criminal legal aid will not be rebuilt overnight, and it will take some time to implement the recommendations of the Review, to the extent that they are adopted. I see a central role for the Advisory Board in monitoring and nurturing that ongoing process, taking into account the functioning of the CJS as a whole.

15.5 Secondly, I see the independent Advisory Board as a change from the traditional model based on bilateral negotiations directly between the MOJ and providers. The Advisory Board would be independent, and in a position to keep well in mind the interests of users, and those of the CJS as whole.

15.6 Thirdly, I would see the Advisory Board as a forum where other stakeholders, including the Home Office, Police, CPS, HMPPS and the Courts can discuss issues of common interest, for example early engagement and case ownership, so that the impact of changes to criminal legal aid is fully understood throughout the CJS, and vice-versa. As Sir Brian Leveson observed, it is only by bringing all the participants together, including the defence, that solutions can be found.²²³

15.7 Fourthly, I would see the Advisory Board as supporting policy making. Policy, in my view, should be firmly with the MOJ, but a Board able to give on-going advice on the basis of input from all stakeholders across the CJS, including of

²²³ *Review of Efficiencies in Criminal Proceedings* (para. 5, p. 3), Rt. Hon. Sir Brian Leveson (2015)

course the LAA, would I suggest put the whole system on a firmer footing, and hopefully avoid the need for Reviews such as this every 10 or 15 years.

- 15.8 I would hope also that the Advisory Board could encourage better engagement within the CJS at local level. Perhaps the local Criminal Justice Boards would be the right organisations for this purpose, certainly the evidence from the Hampshire & Isle of Wight CJB explaining the local arrangements has been helpful to the Review. The exact type of local arrangements no doubt varies, but the more that can be done to air common problems, including those of the defence providers, at local level so much the better.
- 15.9 Finally, but by no means least, the Advisory Board could guide and assist the MOJ to collect the data presently lacking to judge how far the criminal legal aid system is in fact serving the needs of users and modern society. For example, why is the take up of legal advice in the police station not higher? Does this differ in different parts of the country, or different offences or offenders, and if so why? Are there sufficient lawyers with skills to deal with young defendants or win the trust of minority ethnic suspects or address issues of neuro-diversity? Are there gaps in the system, for example, sufficient lawyers for prison law, appeals, or POCA cases, or trained in Youth Court work, and if not how is this to be remedied? The assumption that, unaided, the present private model will always service all the needs of the multiple users of the system is not to be taken for granted, as discussed in the next section.

Structural Developments

- 15.10 With low morale and financial difficulties among existing providers, with the need for the CJS to keep functioning, in particular to tackle the back-log, it did not seem to me sensible to prioritise root and branch reform of the current system of criminal legal aid.
- 15.11 For the reasons I explain in Chapter 7 above, it seems to me better to work first to improve the present system. Apart from the constitutional and institutional consequences of major change, a principal lesson from the failed attempts at reform in the period 2010 to 2016 is the difficulty of devising “top down” solutions on such a complex market. The criminal legal aid system has to be able to cope with a huge variety of cases, ranging from a highly sophisticated international fraud such as Encrochat down to a fracas in a pub, with significant differences between the needs of different areas in England and in Wales, and the varied needs of diverse communities, particularly those from a minority ethnic background .
- 15.12 I would therefore favour an evolutionary approach going forward, with the following among other possibilities in mind, all of which would require further reflection and pilots. It may well be that once it is appreciated that the details of the present system are not necessarily set in stone, potential providers and others will come forward with further propositions.

Non-profit?

- 15.13 First there is a “non-profit” model. One respondent to the Review, Commons Law, explained that they were formed as a Community Interest Company (CIC) set up by a small numbers of lawyers who had agreed to cap their salaries and work as a community law firm. Commons Law, based in South London, works on a holistic basis, in that a client in a criminal matter will typically have a range of problems, whether being unable to get a job, or housing, immigration or domestic issues. Commons Law deals with a client’s criminal matter like a normal law firm, but also provides continuing support for the client in dealing with their wider problems, for example, making referrals or liaising with health professionals, social workers, care providers, local Councils, and charities to tackle the underlying issues that may have given rise to the criminal behaviour in the first place. Commons Law, in its response to the Review, was critical of the silos set up by the different regimes for civil and criminal legal aid, which are said to get in the way of the holistic model. Commons Law is derived from Bronx Defenders in New York, a public defender funded largely by public funds.
- 15.14 Even with the reforms I recommend, it is not a given that the private sector will always be able to provide adequate criminal legal aid coverage in all areas. Particular difficulties arise for one reason or another in parts of Wales, the Isle of Wight, South West England and East Anglia, although there may also be problems in some inner cities as well. To fill these gaps, it would be open to the MOJ to invite tenders from CICs or similar bodies to fill these gaps, and it may be necessary for such non-profit providers to be grant-aided in order to encourage take up. On this model the entities concerned would provide criminal legal aid services in the same way as other providers, as Commons Law does. Clearly further thought needs to be given as to how this would work alongside existing providers, but this is an option for areas not well served by the private sector.

A holistic structure?

- 15.15 The further point that Commons Law makes about the “holistic” model seems to me a fair one. There are many cases where the individual concerned has many problems, which result in criminal behaviour, but simply dealing with the defence to the crime does not tackle the underlying issues. That would seem to point to CICs or similar bodies not being limited to crime, but able to deal with civil cases as well, possibly grant aided to work in areas of insufficient supply. That then takes one into the much wider issue of whether the separate schemes for civil and criminal legal aid should mesh together better, or even evolve into a single scheme. That question is outside the scope of the Review, but is perhaps for future consideration as a way of focussing on the particular individual rather than whether the problems are to be classified as “civil” or “criminal”.
- 15.16 In the criminal legal aid context, the availability of additional funding for the defence solicitor to engage, pre- or post-conviction, with the relevant support

services, including the probation service or the local Youth Offender Team, would seem worthy of serious consideration and perhaps piloted as necessary. It would be a logical extension of the funding I have already recommended for pre- and post-charge engagement in Chapter 9 above.

Different firms targeted at different parts of the market?

15.17 The structure of the present SCC seems implicitly to assume that its requirements are suitable for every kind of firm doing criminal legal aid, irrespective of what the firm is actually doing. In practice, most firms will cover the range of work, through the police station, the Magistrates' Court and the Crown Court, but one could envisage different models whereby some firms, for example, did not aspire to do the more complex cases, or in one form or another limited themselves only to less serious "run of the mill" work, or to the Magistrates' Court only, for example. One could then adjust the regulatory and compliance framework accordingly, imposing less administrative costs (and insurance costs) on firms offering what one might describe as a "limited" as distinct from a "full range" offer. One effect of this would be to lower entry costs, and facilitate entry, for example by CILEX firms operating simpler models. My recommendation that each of the main criminal legal aid work streams should be self-supporting, as distinct from the present position where loss making work has to be cross-subsidised by other work, could render this suggestion more feasible, and result overall in lower costs to the taxpayer.

15.18 One can see many practical difficulties, but if there were evidence of a demand for this kind of approach and providers prepared to contemplate it, it would in my view be worth exploring further. Such an approach could lead to cost savings while also promoting diversity.

Particular providers for particular needs?

15.19 Related to the above discussion, another respondent to the Review, Appeal, describes itself as charity and a law firm, with a legal aid contract limited to appeals and reviews by the CCRC. Appeal argues that the present legal aid structure is built on the implicit assumption that firms will have a relatively high throughput of many different cases; it does not easily cater for niche providers specialising in particular areas, such as Appeal which concentrates on appellate work on a non-profit basis. Appeal draws attention to non-profit organisations in the US which specialise in a particular class of case, for example cases affecting particular ages, genders or minorities, or cases having particular aspects such as mental health issues or substance abuse.

15.20 Again it seems to me that the emergence of new kinds of firms, supported by block grants from the MOJ, specialising in particular kinds of work, young offenders for example, or neglected areas such as appeals or prison law discussed in Chapter 14 above, is an approach that should be seriously considered with a view to possible pilots, as a means of addressing possible gaps that the market cannot adequately address.

15.21 Appeal also draws attention to another feature of the present system already mentioned above, namely the lack of any clear data on the basis of which to target the need. Appeal suggests for example that a detailed study of appeal cases might well throw light on where the problems are. I would have thought many niche areas would benefit from similar research.

Support for trainees and young entrants

15.22 The Justice Committee's recent report²²⁴ recommended the MOJ to consider enabling the LAA to provide specific funding to legal aid providers to bring in trainees, targeted to areas where there is a particular shortage of specialist advice. I support this recommendation.

15.23 As far as the Bar is concerned, there seems little doubt that it is difficult for those from less advantaged backgrounds to survive the entry years of practice, particularly in London. One could say that this is simply the play of market forces, but on the other hand this seems a structural state of affairs which tends to perpetuate a situation where the criminal legal aid Bar lacks diversity. This falls particularly hard on those from socially disadvantaged backgrounds, including minority ethnic lawyers. I would suggest for consideration that individual chambers, or the Inns of Court, or the MOJ, make available top up grants to ensure that young criminal legal aid barristers are not excluded from the profession for purely financial reasons in the initial period after expiry of a pupillage award and establishing a regular income.

The structure of the barristers' profession

15.24 Sir Bill Jeffrey in 2014 suggested that instead of the present system, whereby a young lawyer has to choose at the outset whether to be a barrister or a solicitor, and follow the different training routes provided, there could be advantages in a general career pattern in which most young lawyers went into solicitors' firms initially, earning a salary, learning the ropes, and gaining advocacy experience in the lower courts, and then if so minded progressing to the Bar at a later stage. I can see strengths but also weaknesses in this suggestion, not least in already aging chambers having even fewer younger members. However, the SRA's new SQE may open wider possibilities for qualifying as a solicitor. Over time, once qualified, a transfer to the Bar by an already qualified solicitor could become a more common alternative to the traditional pupillage and I hope that would be welcomed by the publicly funded Bar.

Diversity

15.25 Many diversity issues, whether age, social background, gender or ethnicity have already been referred to in previous Chapters. The issues affecting young suspects and defendants, especially those of a BAME background, have already been discussed in Chapter 8 (the police station), Chapter 11 (the Youth

224 The Future of Legal Aid (para.153, p.65) - House of Commons Justice Committee -

[The Future of Legal Aid \(parliament.uk\)](https://www.parliament.uk)

Court) and Chapter 14 (prison law) above. Similarly issues affecting CILEX members, who reflect considerable diversity, have been raised in relation to the duty solicitor qualification (Chapter 8) and the possible development of a different and reduced cost business model (this Chapter above). Generally speaking, the valuable role that CILEX members play should be encouraged throughout the criminal legal aid sector.²²⁵

- 15.26 In terms of social, gender or ethnic diversity, a common point made to the Review, for example by CILEX, the Black Solicitors Network, the Muslim Lawyers Advisory Group, and in the Focus Groups (Annex E) was that the low level of criminal legal aid rates generally made it very difficult for smaller firms that traditionally offered career opportunities for lawyers from disadvantaged social or minority ethnic groups to continue to do so. That meant there were fewer lawyers from these backgrounds entering the system. Given the relatively high proportion of socially disadvantaged or minority ethnic defendants in the CJS, that meant among other things a shortage of lawyers who could relate to these defendants, and vice versa, which was in turn eroding trust in the system.
- 15.27 I hope first that the general increase in legal aid rates which I recommend will make it easier for smaller firms, and indeed criminal legal aid firms generally, to invest and offer a career path to individuals with energy and potential, whatever their background. In relation particularly to an unmet need as a result of a cultural mis-match between the background of many minority ethnic defendants and that of the criminal lawyers available to advise them, this point is also made by Mr Lammy. As discussed also in Chapter 8, this is an issue that needs to be seriously addressed, for example by considering targeted initiatives, supported by Government or charitable grants, in particular areas to better match the supply with the need, and strengthen trust in the CJS. From a legal aid perspective, any rigidities in the system should not get in the way of finding solutions, for example any necessary adaptation to the duty solicitor scheme should be considered. I would hope that the MOJ would actively consider, in conjunction with local communities, and with the support of the Advisory Board, possible ways of addressing these issues.
- 15.28 Turning more generally to criminal legal aid firms, the Data Compendium shows that gender levels are approximately equal across the profession as a whole, strongly in favour of women until about 45 years or so, and then the proportion moves steadily in favour of men. However, in terms of duty solicitors the balance according to the Data Compendium shows a 65/35 split overall in favour of men, possibly as a result of the increasing average age of the latter. As noted in Chapter 8 above, the same situation is not found in relation to police station accredited representatives where the split is approximately 50-50.

²²⁵ CILEX has also raised with the review the difficulty of becoming a Crown Prosecutor with the CPS without cross qualifying as a solicitor, although CILEX members work for the CPS as Criminal Advocates and Associate Prosecutors. This issue is outside the scope of the Review although I note the need to increase diversity throughout the CJS and to meet the demands of the back-log.

- 15.29 In my view it is important for the MOJ, working with the LAA, and solicitor representatives, to understand why there is this gender imbalance in favour of male duty solicitors. It has been suggested to the Review that this may be partly attributable to the 14-hour rule discussed in Chapter 8 above. Although I understand the LAA has modified this rule, it is important to establish that there is nothing in the criminal legal aid system that is contributing adversely to a diversity issue of this kind. If that were the case, action should be taken to remedy it.
- 15.30 In relation to barristers, there appear to be a number of issues. The first is the fact that the profession gets progressively less diverse as a barrister's career develops, turning from approximate gender equality at the outset of career, to 65:35 (male: female) some 8-12 years later.
- 15.31 Secondly, there is the fact that women barristers earn less than their male counterparts in the same years of practice, see Table 13.5 in Chapter 13. It is not at all clear how this latter situation comes about, but at first sight it would appear that male barristers for whatever reason receive better paid criminal work than female barristers of the same seniority.
- 15.32 Thirdly, a similar phenomenon arises when comparing earnings between white barristers and those of a non-white background. Although the gap narrows, for BAME barristers who remain in the profession, in years 1 to 7 BAME barristers seem to be significantly worse off than their white counterparts: see Table 13.6 above.
- 15.33 The Bar Council reports referred to in Chapter 13 above on gender and ethnicity suggest that these features are common to the Bar as a whole, and in particular that barristers from an ethnic background face systemic obstacles in forging a career at the Bar.
- 15.34 From the perspective of criminal legal aid, I would hope that the general increase in fees under the AGFS that I recommend would to some extent alleviate the situation, and similarly that the increase in Magistrates' Court and Youth Court fees that I recommend for solicitors would enable the latter to raise the fees those solicitors pay to barristers. Nonetheless, this does not address these underlying disparities.
- 15.35 Criminal legal aid is public money, and as I understand the position, the way public funds are dispensed or allocated is a matter within the Equality Act. But whether or not that is the case in law (and I express no view), it is plainly unacceptable if public money is being distributed disproportionately on the basis of gender, ethnic, or social origin. For example, if better work were going to some barristers for no better reason than their gender or race, with no sufficient objective justification, that would need to be corrected. The Focus Group evidence at Annex E suggests that there may be typecasting at work, at least sub-consciously, and at least some participants questioned the transparency of some clerking practices, although others pointed out the difficulties that clerks find themselves in and refer to the importance of

education in changing cultural habits. For all those concerned, I would suggest that the Focus Group evidence should be read in full.

- 15.36 The first step, it seems to me, is for the Bar Council and the Bar Standards Board to establish the root causes of this situation, and then progressively work to resolve it. From the perspective of criminal legal aid, the principle of equality in the distribution of public funds is in my view paramount. In due course, and in the absence of solutions, it would be the responsibility of the MOJ and LAA to ensure that public monies were not being disposed in ways which jeopardised the principles of equality.

Quality

- 15.37 On issues of quality I have already referred to issues which arise in relation to police station work (Chapter 8) and recommended steps to be taken to improve quality in the Youth Court, including a system of accreditation (Chapter 11). Concern was expressed to the Review that the low legal aid rates in recent years had led to “deskilling” in a number of areas, for example Magistrates’ Court work and Crown Court preparation by solicitors. A major purpose of the increased funding I recommend is to raise quality where needed. As far as solicitors are concerned, it seems to me that the system of peer review,²²⁶ developed with the assistance of the Institute of Advanced Legal Studies, is an important part of the system. I would for myself put more emphasis on that kind of quality control than on more “box-ticking” exercises that might arise on audit for example. I would invite the LAA to consider, in consultation with the profession, whether the lightening of other administrative burdens, as further discussed below, would permit the three-year interval between peer reviews to be shortened (to two years say).
- 15.38 In terms of quality control on the advocates’ side my understanding is that since the ending of QASA there is no formal system of quality control for advocacy. In relation to publicly funded work, that is a gap in the system. Both the Bar and the SRA take advocacy standards very seriously and commissioned a report on advocacy standards by ICPR and Birkbeck College in 2018,²²⁷ which expressed some concern about advocates taking on cases beyond their competence. The SRA as I understand it proposes to revise its standards for solicitors exercising higher rights of audience and introduce improved assessment procedures, as well as providing more resources to help solicitors meet its advocacy standards.²²⁸ In its response to the Review, the LSB referred to its *State of Legal Services 2020* Report which expressed concern about the ending of QASA, their ongoing work in assuring lawyers’ Ongoing Competence post-qualification, and its intention to introduce new requirements for regulators in that regard. The CPS I understand operates a system of grading.

²²⁶ See Chapter 4 above

²²⁷ criminal-advocacy.pdf (sra.org.uk)

²²⁸ Assuring Advocacy Standards Consultation Response, July 2020

15.39 From a criminal legal aid point of view, it is obviously important that advocates do not take on work beyond their ability or experience. It is also important that there be systems of feedback, even informal, so that advocates can learn and be aware of areas for improvement. Since much advocacy work is now written, it may be easier to assess competence than in the past. In the context of this Review, it seems to me that this is a matter for on-going work by the relevant Regulators, to be reviewed after the publication by the LSB of its expectations regarding Ongoing Competence understood to be scheduled for December 2021.

Transparency, Data and Competition

15.40 As indicated above, a major gap in the present system is the lack of data on how well or badly the criminal legal aid system is able to respond to user (as distinct from provider) needs. Thus, how well the system is responding to need in particular geographical areas or whether a different approach may be needed in different locations (in Wales for example, or the Isle of Wight) cannot reliably be determined without more granular data. Similar lacunae exist in relation to the needs of different kinds of offender or areas of work, as discussed above. The underlying assumption that the “invisible hand” of the market will always supply the need, cannot be safely relied on in relation to criminal legal aid. My overall recommendation is that the MOJ should consider ways in which it can better keep its finger on the pulse and, working with providers and other agencies, collect where necessary the data needed to inform policy choices. I would see a role here for an Advisory Board.

15.41 Specifically, as I see it the Advisory Board and/or the MOJ needs first reliable, objective and on-going data about the provider base.²²⁹ An annual or biennial workplace survey conducted independently and confidentially, with details to be agreed with the Advisory Board, would be one option. In addition, there is at present a general lack of sufficient data to assess how far the provider base is meeting the needs of the system, in particular in terms of geographical areas, particular classes of user, or different kinds of work. There is little data on the journey of defendants through the system, and how far this differs, for example according to geographical or demographic factors or types of case. The existing programmes of digital reform in the CJS, including the roll-out of the Common Platform, provide an opportunity for the MOJ/ Advisory Board to identify and remedy gaps in relevant data, working also with the police, the Home Office and the Courts, to secure better outcomes.

15.42 Specifically, on transparency, there are respects in which the present system is not very transparent. Detailed comments on the police station stage have already been made in Chapter 8. Of equal concern is to understand better why

²²⁹ For an example of a survey of this kind see: Ministry of Justice (2015) “Survey of Not for Profit Legal Advice Providers in England and Wales”) available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/485636/not-for-profit-la-providers-survey.pdf A telephone survey methodology is recommended in order to reduce the burden on providers and maximise response rate.

aspects of the system do not seem to work as well as they might, why for example (if it be the case), early engagement does not happen as effectively as it might, if difficulties arise with the service of the IDPC, or with listing arrangements, or why differences of earnings exist on the basis of gender or ethnicity. The process surely is to establish what the facts are, if there is a problem why that is so, and then what steps can be taken to put it right. This Review cannot resolve the problems, but it can urge openness and collaboration between all parties identifying why problems arise and find ways of tackling the underlying issues.

- 15.43 As to competition, which is one of the matters mentioned in the Terms of Reference, there is here a monopsonist buyer, prices are set by legislation, on the solicitors side there are the unavoidable costs flowing from the SCC, demand is outside providers' control, and the timing of delivery of "the product" (advice or representation as the case may be) is largely set by external forces. In these circumstances there is little scope for competition in the sense understood in consumer markets, given also that here the "consumer" is an involuntary user of the services.
- 15.44 Nonetheless in my view there are real competitive forces at work in terms of quality, service and reputation. In general terms most providers will prosper on the basis of their hard work, attention to detail, and service to the client, and those are powerful forces to protect the user and the public interest. I do not at present see scope for introducing additional free market-based mechanisms into the supply of criminal legal aid.
- 15.45 As indicated above, I do however see scope for the "buy side", i.e. the MOJ, to encourage through grants or other mechanisms new kinds of provider to meet unmet needs. Unlike most markets, where an entrepreneur may spot a gap and develop a new product to fill it, I would have thought that in this market, like most structured public service markets, the ability to incentivise change is largely in the hands of the buyer.
- 15.46 From a competition perspective, however, the central problem facing criminal legal aid is a quite different kind of competition, the competition for talent. That is the central competition problem that needs to be resolved, as my recommendations seek to do.

Listing

- 15.47 The problems of listing mainly arise because of the difficulties of predicting how long cases are going to take and the ever-present possibility that for one reason or other cases will be ineffective or "crack" at the last minute. Listing officers, quite understandably, consider that the Court cannot run the risk of being left with a lack of work, particularly in view of the imperative to reduce the backlog.
- 15.48 Listing procedures vary, and in some Crown Court centres there are it seems a higher proportion of fixtures or "fixed floaters", which helps with predictability. In

some Courts however there is a “warned list” which indicates that a case may come into the list within a certain period but on an unspecified date. From the advocates’ point of view, it may be difficult to take on other work which might clash with the warned list period, but then there is always the risk that the case may not after all be heard within the “warned” period. I was also told that in both Magistrates and Crown Courts cases were “over listed” on the assumption that a proportion of cases will be resolved without needing a full hearing. This, it was said, leads to victims, witnesses, and the lawyers concerned turning up, only to find that their case is not effective and that they have to come back another time.

- 15.49 The evidence to the Review fully recognised that the Courts face very difficult problems in dealing with listing, particularly in relation to the backlog. It was pointed out however that the warned list system had been strongly criticised by both Sir Bill Jeffrey in 2014, and Sir Brian Leveson in 2015. The CBA described the warned list as a “blot on the system of criminal justice” and the YBC stressed the difficulties the warned list system caused for junior lawyers. A principal point made to the Review was that the advocate may conscientiously prepare the case, only to find that it comes into the list unexpectedly when the advocate is not available, in which event under the AGFS as it presently stands the advocate does not get paid. Often, it was said, cases mysteriously disappear from the list with very little notice.
- 15.50 It was said to the Review that the situation generally leads to under-preparation, either because the advocate dare not take the risk of preparing a case that is not heard, or because a late return to another barrister means the latter has not had time to prepare either, leading to the “hand to mouth” approach referred to by Sir Bill Jeffrey. The Chair of the CBA has indicated to the Review that in some areas there is little communication between listing officers and the advocates instructed, with the result it is very difficult to service clients or plan diaries. I was told of substantial cases, predicted to last two or three weeks, or even more, being removed from the list with little or no prior communication.
- 15.51 From a criminal legal aid perspective, it is important to incentivise preparation and case ownership. Accordingly, I have already recommended in Chapter 13 above that wasted preparation in excess of (say) two hours should be remunerated, if the advocate through no fault of their own, is not able to do the hearing in the case. Otherwise, it seems to me, the AGFS risks penalising those who prepare the cases conscientiously. Claims for wasted preparation should in due course lead to a better assessment of the costs involved. The present system of non-payment also leads to under-preparation and to serious disenchantment with criminal legal aid work, among junior and senior advocates alike. That in turn undermines the future sustainability of the criminal Bar.
- 15.52 Listing is a judicial function, and not within the remit of this Review. However, from a criminal legal aid perspective, if I may say so case ownership and proper

preparation are fundamental to the system of criminal legal aid. Late listing changes, over listing, or lack of predictability in listing seem to me to undermine those objectives. From a legal aid point of view, it is not a matter of “the convenience of counsel”, but rather the continuity of representation from the user’s point of view, in particular where the defence advocate has already had possibly several conferences with the defendant. When listing decisions are taken, I would venture to hope that the criminal legal aid perspective be borne in mind and that good communications between listing officers and advocates be maintained in joint efforts to find solutions wherever possible.

Remote Technology in the Courts

- 15.53 Related to the above is the issue of remote technology following the experience of the pandemic. Unsurprisingly, many respondents to the Review argued that the use of remote technology where appropriate, saved costs and time, particularly travel time, encouraged case ownership, for example enabling the trial advocate to do pre-trial applications, would previously have been delegated to a different advocate. While not suitable for trials and other occasions where the presence of the defendant was necessary, it was said that there were other mainly administrative matters that can conveniently be dealt with remotely. The use of timed slots in particular enabled greater efficiency. One respondent to the Review spoke for many in suggesting “The days of a 4-hour round trip for a ten-minute mention in the Crown Court must never return”. Other respondents stressed that those with caring responsibilities benefitted particularly from remote technology.
- 15.54 The Chair of the CBA also expressed concern to me that with the pandemic seemingly past its peak, some Courts were reverting to a policy of mainly requiring a physical presence, even for applications that could be conducted remotely. Practice in this regard seems to vary between Courts.
- 15.55 Decisions on the issue of remote technology is a matter for Courts, under the leadership of the Lord Chief Justice,²³⁰ not for the Review. I would however venture to suggest that when these decisions come to be taken the criminal legal aid perspective should be considered. If particular matters can be properly disposed of remotely, that saves time, and avoids costs to the public purse. Criminal legal aid providers are paid from public funds and their time too is a public resource. If that time can be used more efficiently that is a saving for the system as a whole. Time spent in often expensive travel and in waiting time is “dead time” which itself is a cost to the system. If remote technology enables better case ownership, one of the major objectives of the CJS, that too is a consideration. Ways in which remote technology can assist in addressing the important issues of diversity discussed above are also part of the mix from a

²³⁰ [Lord Chief Justice – Legal Wales Conference closing keynote speech | Courts and Tribunals Judiciary](#), 8 October 2021.

criminal legal aid perspective. I would respectfully hope that these matters are not overlooked or undervalued.

The LAA

15.56 The LAA is an agency that is formally part of the MOJ and the framework of its operations is set by the MOJ.²³¹ The Permanent Secretary of the MOJ approves the LAA's business and corporate plans before they go to the Lord Chancellor, and is the principal accounting officer. The Lord Chancellor is responsible to Parliament for the LAA, and approves the appointment of the CEO, who is formally the Director responsible on behalf of the Lord Chancellor for approving the grant of criminal legal aid in accordance with LASPO. The LAA is responsible for reimbursing providers, and also sets the terms of the SCC (following the direction set by Ministers), organises the contract tendering process, and oversees the system of peer review under the SCC. The LAA's costs of administration in 2019/20 were some £95million, of course for both civil and criminal legal aid.

15.57 Essentially the LAA is responsible for the administration of criminal legal aid, while the MOJ is responsible for policy. Where the line is between "administration" and "policy" may sometimes however be somewhat blurred since the SCC for example reflects aspects of both.

The evidence to the Review

15.58 Much of the evidence to the Review, including that of the Law Society, the CLSA, Birmingham Law Society, and CILEX, as well many individual responses, expressed frustration at some of the operational aspects of the LAA. It was said that the regulatory structure of the SCC was too heavy, with the requirements to maintain quality marks, audit, peer review and other checks amounting to overkill; that too often claims were pushed back, there being allegedly a cultural of refusal, and an inconsistency of decisions; and that the unpaid time spent dealing with the LAA requirements was an unreasonable extra burden on already struggling businesses. Other points made, dealt with elsewhere in this Report, included the effect of the 14-hour rule, the difficulty of CILEX members becoming duty solicitors, the process for getting quotes for instructing expert witness, and delay in payments in the Magistrates' Court and under the AGFS.

The Justice Committee Reports

15.59 The House of Commons Justice Committee, in its Reports of 2017/2018²³² and more recently 2020/21²³³ considered of the LAA. The latter report, dealing with both civil and criminal legal aid, concluded in particular:

²³¹ [LAA framework document \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

²³² [Criminal Legal Aid \(parliament.uk\)](https://parliament.uk)

²³³ [The Future of Legal Aid \(parliament.uk\)](https://parliament.uk)

“the Government and the Ministry of Justice need to reevaluate the Legal Aid Agency’s priorities. By asking the Agency to prioritise the “error rate” over other considerations, particularly access to justice and the sustainability of providers, the Government risks missing the wood for the trees...The Government should ensure that providers are not required to conduct disproportionate amounts of unpaid work to apply for funding. (Paragraph 150)

...

The Government should consider creating a system of earned autonomy that places more trust in the decision making of providers with strong records of high-quality decision making. The Agency’s processes should have some incentives for providers to work towards gradually reducing the burden of administrative requirements. Given the difficulties facing legal aid providers, placing greater trust in their ability to decide on eligibility would expand their capacity which would be beneficial for access to justice. (Paragraph 150) ...

Observations

- 15.60 It is understandable that, until instructed otherwise, the LAA should take the view that its priority should be to safeguard to the maximum extent the expenditure of public money. The LAA is itself potentially exposed to criticism from the National Audit Office (NAO) (who qualified the LSC’s accounts in consecutive years from 2008/09 to 2011/12 (inclusive)), or the Public Accounts Committee, if it appears that its procedures have become too lax and unjustified claims are slipping through. Unfortunately not all providers are rigorous in the care with which they submit claims, which makes life more difficult for the careful majority. On routine matters, such as the granting of applications²³⁴ and the time to pay claims, the statistics suggest the LAA meets a number of its objectives, and its response during the pandemic was complimented in the House of Commons Report cited above.
- 15.61 From a wider system perspective, however, an over-heavy bureaucracy shifts costs on to the majority of providers who are submitting claims they believe to be reasonable. Providers’ unpaid time dealing with the LAA’s procedures is a cost to the system, albeit invisible, particularly if it is uneconomic for providers to challenge decisions of refusal. It is these aspects that must be balanced against the “saving” of public money that a strict approach may achieve. Too much bureaucracy, possibly driven by the focus on cost saving, which was the original driving force behind LASPO, may weaken the resilience of providers. The result is then counterproductive.
- 15.62 In my view the first priority is for the MOJ to give clearer guidance to the LAA as to what its priorities and objectives should be, including an agreed flexibility which works in the interests of the recommendations I have made and maintains the confidence of taxpayers. I would recommend that, given the overall situation of criminal legal aid providers, the primary objectives of the LAA should be to support the resilience of the system of criminal legal aid, to reduce bureaucratic burdens on providers, and not “to save the pennies at all

²³⁴ A continuing problem however seems to be evidence needed for the grant of legal aid for self-employed defendants where assembling the detail needed is more time consuming.

costs". With that aim in mind, I suggest the LAA and the MOJ work together through the SCC (including the KPIs) and the LAA procedures to see where the system could be updated and streamlined.

- 15.63 It may be that on the reforms I propose for police station, Magistrates' Court and LGFS work, claims for the lower and higher standard fees can be reviewed by sample on audit rather than using a heavier procedure. Many AGFS claims could be approached the same way; although there is no audit as such for barristers' claims, the systems ought to be able to pick up any pattern of unusual claiming which can then be investigated ex post. One would also hope that the Common Platform would reduce the need for the LAA to have to double check whether, for example, a particular application was in fact made to the Court on the day claimed. In any event in most cases I would think it unlikely that providers would be making claims for Court work that had not in fact happened, so perhaps more can be taken on trust than may be currently the case. Quite possibly, in my view, a relatively high proportion of cases could be processed on the basis of random ex post checks. That would be for the LAA to consider further, in conjunction with the MOJ. All this would be facilitated by better time keeping by providers.
- 15.64 However, I would for myself agree with the CEO of the LAA, in her response to the House of Commons Committee, that a system of "earned autonomy" in which some providers were "trusted" more than others, could be invidious and not necessarily effective. I would have thought that the system could be "lightened" without going down that road.
- 15.65 In trying to make the system "less heavy", one aspect should, however, be recognised. The reforms I suggest will likely involve more claims for non-standard fees under the LGFS, and more claims for special preparation and wasted preparation under the AGFS. This will require two things. First, on the part of providers, meticulous time recording, and proper description of the work done. Most modern time recording systems facilitate this, and digital time sheets would I assume be submitted in support of claims. Second, on the part of the LAA these reforms may well involve more and better training for LAA staff to deal with the more complex claims. If that has an effect on the LAA budget, as I recognise it might, I would see that as money well spent in the interest of the CJS as a whole.
- 15.66 Finally in the event of dispute, the present procedure under paragraph 28 of the Regulations is for the provider to seek a redetermination by the LAA, followed if necessary by an appeal to the Costs Judge under paragraph 29. This may be a relatively heavy and time-consuming procedure also leading to delays in payment. I would suggest that among the matters to be reviewed further is whether this procedure can be stream-lined, and whether in particular the expertise of the Cost Judges should be available earlier in the process than is currently the case.

CHAPTER SIXTEEN: SUMMARY OF RECOMMENDATIONS

Recommendation 1: An Advisory Board (Chapter 15)

- 16.1 An independent Advisory Board should be established to advise the Lord Chancellor at regular intervals on the arrangements for the delivery of criminal legal aid. The remit of this body should include (i) participation by other stakeholders, including the Police, the CPS, and the Courts, as well as providers, to foster transparency and understanding of how decisions on criminal legal aid affect the wider CJS, and vice-versa; (ii) on-going consideration of the criminal legal aid system, identifying specific problems as they arise, and possible further reforms, including new ways of working; (iii) advising the MOJ on the data needed to ensure that criminal legal aid is efficient and responsive, in all areas of England, and in Wales, and (iv) and fostering diversity and equality of opportunity.

Recommendation 2: Finding local solutions (Chapter 15)

- 16.2 The MOJ should encourage and facilitate local arrangements, whether through local Criminal Justice Boards or otherwise, for improving lines of communication between the defence, the Police, the CPS and the Courts, with a view to understanding common problems and finding solutions in the interests of the CJS as a whole, while respecting the different constitutional roles of the various stakeholders.

Recommendation 3: Unmet needs and new ways of working (Chapter 15)

- (i) The MOJ should consider, in conjunction with the Advisory Board as appropriate, the extent of unmet need in criminal legal aid in Wales or England, for example in terms of particular geographical areas (whether rural locations, small towns or inner cities), particular types of user (such as young suspects/defendants, or those with mental health issues), particular communities (such as those from a minority ethnic background) or particular areas of work (such as appeals or prison law); and if so, how those needs should be met, in particular by support grants to not-for-profit or similar organisations, or other measures, with a view to pilot schemes. Such consideration should include new possible ways of working as discussed in Chapter 15, including “holistic models” that span both criminal and civil needs, focussing on the needs of the user,
- (ii) The MOJ should consider training grants to support more trainees in criminal legal aid firms.

Recommendation 4: Data (Chapter 15)

- 16.3 The MOJ should invest in and significantly improve the availability of data to enable better assessment of the efficiency, incentives, costs and effectiveness of criminal legal aid and the various fee schemes, including the effect of

decisions in different parts of the criminal justice system on the provision and cost of criminal legal aid.

Recommendation 5: A general uplift of the remuneration of criminal legal aid firms (Chapters 6 and 7)

16.4 There should be a substantial increase in the remuneration available to firms doing criminal legal aid work, better to enable criminal legal aid firms to invest in recruitment, compete for talent, maintain quality, provide training, and ensure retention. Additional funding of at least £100 million per annum (an overall increase of some 15%) is required, not least to enable criminal legal aid firms to offer remuneration broadly commensurate with the CPS,²³⁵ and to ensure equality of arms. To increase efficiency and protect the taxpayer, such an increase should be accompanied by reforms to the structure of remuneration set out below.

Recommendation 6: Structural reform of fee schemes mainly affecting criminal legal aid firms (Chapter 7)

16.5 The general principles for reform of the solicitors' remuneration schemes should be that (i) work done should be properly paid (ii) perverse incentives be removed and (iii) administration costs be minimised. The best available compromise for meeting these objectives is the present remuneration scheme for the Magistrates' Court, which is a system of lower standard, higher standard, and non-standard fees, permitting most routine work to be carried out at a fixed cost, while allowing reasonable claims for more complex cases. I recommend that the Magistrates' Court scheme be also the basic model for criminal legal aid work in the police station and the Crown Court. For the avoidance of doubt, the remuneration model should reflect the seniority of the solicitor where appropriate. The remuneration should also incentivise case ownership, early engagement with the police/CPS, and proper preparation. In principle, each main component of the work, namely the police station, the Magistrates' Court and the Crown Court, should not be reliant on cross-subsidy from other work.

Recommendation 7: Police station remuneration (Chapter 8)

16.6 The remuneration payable for police station advice and assistance should be restructured along the lines of the Magistrates' Court remuneration scheme namely a lower standard fee, a higher standard fee, and a non-standard fee in exceptional cases, so as to reflect better the different circumstances of cases, improve quality, and ensure that proper advice and assistance is available as early as possible. Such restructuring should be based on the matters specified in paragraph 2(3) of Schedule 4 currently used to calculate the escape fee, but also reflect the seniority of the solicitor concerned. The remuneration rates

²³⁵ This excludes any income under the AGFS.

should increase as recommended above, and should as soon as practicable phase out different rates based on individual police stations.

Recommendation 8: Other aspects of police station work (Chapter 8)

16.7 The MOJ should, in conjunction with the Advisory Board as appropriate, and in collaboration with the police and Home Office, initiate a detailed study of the operation and effectiveness of advice and assistance in the police station, including assembling more detailed data, for example on whether the take-up of such advice by suspects can be improved, the quality of the service given, the means of delivery (physically or remotely), the possibility of basing duty solicitors in larger police stations, the use of accredited representatives and their effective supervision, and improvements in training and/or accreditation needed generally, and in particular in relation to young or vulnerable suspects, and those from a minority ethnic background.

Recommendation 9: Pre-charge engagement (Chapter 9)

16.8 Pre-charge engagement should be remunerated. The preparation necessary to determine whether pre-charge engagement is appropriate or not should be remunerated irrespective of whether pre-charge engagement subsequently takes place. Similarly work reasonably necessary to maintain contact with the police and/or the client in the period between the initial police station arrest/interview and the charging decision should be remunerated, irrespective of the extent of any substantive pre-charge engagement, and whether ultimately there is a charge or not. This remuneration should be treated as an extension of the police station scheme, as reformed as recommended above.

Recommendation 10: Post-charge engagement (Chapter 9)

16.10 To encourage as much communication as possible between the police/CPS and defence prior to the first hearing in the Magistrates' Court, criminal legal aid funding should be available to remunerate discussion between the defence and the prosecution prior to that first hearing, including remunerating the preparation necessary for such discussion, for example any reasonable requests relating to the disclosure of the initial details of the prosecution case or unused material. This remuneration should be based on the same structure as the present Magistrates' Court scheme.

Recommendation 11: The Magistrates' Court (Chapter 10)

- (1) The existing Magistrates' Court scheme should be retained, but remuneration increased in line with the general uplift in remuneration recommended above,
- (2) There should be a system of higher and lower standard fees for appeals and committals for sentence from the Magistrates' Court to the Crown Court,
- (3) Committals for sentence should not be remunerated at less than the equivalent remuneration for a guilty plea in the Crown Court,

- (4) I suggest for consideration (but I cannot formally recommend) that legal aid for a defendant committed for sentence to the Crown Court should depend on the Crown Court eligibility criteria rather than on the Magistrates' Court criteria for eligibility.

Recommendation 12: The Youth Court (Chapter 11)

- (1) The MOJ should generally prioritise devoting additional resources to the Youth Court, in particular by raising the fees either to the level that would apply were the case to be tried in the Crown Court, or generally in relation to other Magistrates' Court fees, and provide that there be certificates for counsel for youth court appearances,
- (2) An appropriate system of accreditation with appropriate training should be developed for advocates appearing in the Youth Court.

Recommendation 13: Restructuring the Litigators' Graduated Fees Scheme (Chapter 12)

16.11 The LGFS should be restructured, on the understanding that the intention is not to reduce solicitors' remuneration overall, to the contrary, but to rebalance such remuneration to better reflect work actually done and to facilitate the general increase in fees recommended above.

16.12 The restructuring of the LGFS should proceed along the following lines:

- (i) The principle of lower standard fees, higher standard fees and non-standard fees used in the Magistrates' Court, and recommended above for police station advice and assistance, should be extended to the LGFS, with different fees applicable to different classes of offences set out in the LGFS Table of Offences, the latter to be simplified as appropriate,
- (ii) The preparation and other hourly rates and amounts upon which the lower standard, higher standard and non-standard LGFS fees will be based should reflect the need to properly remunerate the work done, ensuring that taken overall litigators' Crown Court work may be viably undertaken,
- (iii) The rates for confiscation proceedings dealt with under paragraph 26 of the LGFS should be increased so as to incentivise sufficient litigators to take on this work,
- (iv) The provisions of Schedule 2, Part 3 of the LGFS providing for a fixed fee in the Crown Court in certain cases should be abrogated.

Recommendation 14: General uplift in remuneration under the AGFS (Chapter 13)

16.13 In accordance with my recommendation in Chapter 13, advocates'²³⁶ remuneration under the AGFS should be increased overall by some £35

²³⁶ This includes both barristers and solicitor advocates

million (15%) partly through an overall increase in fees, and partly through a restructuring of the AGFS as recommended below.

Recommendation 15: Structuring the AGFS (Chapter 13)

16.14 The restructuring of the AGFS should include a general uplift in fees and the following changes:

- (i) The relationship between the brief fees for different offences should be reviewed, in particular to determine whether fees for murder and serious sexual offences adequately reflect the gravity and complexity, and whether PPE is having a distorting effect,
- (ii) Greater flexibility in the provisions governing special preparation so that work reasonably done be properly remunerated,
- (iii) The fees for special preparation and considering unused material be increased,
- (iv) Wasted preparation where an advocate cannot attend a trial through no fault of their own should be claimable in all cases of wasted preparation in excess of 2 hours,
- (v) Work reasonably undertaken should be claimable and payable within 90 days without the need to await the conclusion of the trial before claiming payment,
- (vi) Fixed fees under the AGFS including those provided for the PTPH should benefit from the possibility of enhanced payment, through a claim for special preparation or otherwise, so as to reflect the work necessarily done in the particular circumstances,
- (vii) The fees for confiscation matters should benefit from the general uplift in a way that sufficiently incentivises advocates to take on this work,
- (viii) Part 4 of Schedule 1 of the Regulations be abrogated, as for the LGFS above.

Recommendation 16: Other Criminal Legal Aid Expenditure (Chapter 14)

16.15 The recommendations set out in Chapter 14 above in relation to appeals, references to the CCRC, IFFOs, prison law and experts' fees should be carried into effect, particularly as regards:

- (i) The overall increases in remuneration there recommended,
- (ii) The restructuring of remuneration for advice and assistance on CCRC work with lower, higher and non-standard fees,
- (iii) In relation to IFFOs, amending the Regulations to clarify the statutory basis and provide a mechanism for dispute resolution,
- (iv) In relation to prison law, the restructuring of advice and assistance work with lower, higher, and non-standard fees.

Recommendation 17: Diversity (Chapter 15)

- (i) I recommend that the LAA work with the MOJ, and solicitors' representatives, to determine why the gender balance in relation to duty solicitors is in favour of male solicitors, and if so what steps should be taken to achieve a more equal gender balance,

- (ii) The MOJ, the Bar Council and the Bar Standards Board should establish to what extent, and if so why differences exist in the publicly funded incomes earned or the work undertaken by criminal legal aid barristers on the basis of gender or ethnicity, with a view to taking any necessary corrective action, having regard to the principles of equality in the expenditure of public monies,
- (iii) The MOJ working with the Bar Council and Bar Standards Board as appropriate consider whether further support for young barristers after pupillage is appropriate with a view to increasing diversity within the profession and if so, how that should be achieved.

Recommendation 18: CILEX members as duty solicitors (Chapter 8)

16.16 I recommend that the LAA and MOJ review the provisions regarding the acceptance of CILEX members as duty solicitors.

Recommendation 19: The LAA (Chapter 15)

- (i) The MOJ should reconsider and re-frame the objectives of the LAA to the effect that the LAA's primary objectives should be to support the resilience of the criminal legal aid system and reduce unnecessary bureaucracy, while maintaining proportionate control over costs,
 - (ii) The MOJ, the LAA and relevant stakeholders work through the existing terms of the SCC and the LAA's related procedures with a view to simplifying and reducing administrative burdens where proportionate to do so,
 - (iii) The LAA review its staff training programmes with a view to implementing the more flexible approach to claims for reimbursement recommended in this Review while mindful of the need to reject unreasonable claims and safeguard the taxpayer,
 - (iv) The LAA consider the various specific matters raised in this Report in particular in relation to the DSCC (Chapter 8), the working of the police station scheme including accreditation (Chapter 8), the 14-hour rule (Chapter 8), earlier payment of advocates' fees (Chapter 13), and reimbursement of experts fees in the Magistrates' Court (Chapter 14), with a view to resolving with the MOJ what action may be appropriate.
- 16.17 Finally I venture to hope that other stakeholders referred to in this Review, notably the police, the CPS and the Courts among others would view this Report as it is intended, a constructive contribution towards solving problems which impinge on criminal legal aid; and that criminal legal aid providers in their turn recognise the pressures under which everyone in the CJS is working and work collaboratively towards solutions.

Christopher Bellamy

29 November 2021