

Legal Aid, Legal Representatives and Expert Witnesses. The impact of legal aid cuts on expert witness instructions & reports

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Executive Summary

This small scale exploratory project involved two focus group sessions with expert witnesses. Some participants also managed teams of expert witnesses. The catalyst for this project came from findings of a large scale ESRC-funded project, *The Criminal Cases Review Commission: Legal Aid and Legal Representatives*.¹ The work was funded as part of Research England's Strategic Priority Funding call for evidence based policy making. The conclusions, in summary, are:

1. Legal aid payments rates are so low that both the quality and sustainability of publicly funded expert witness work appears to be in jeopardy. The disparity in payment rates inside and outside of London did not make sense to the participants in this focus groups.
2. Low payment rates are compounded by increased business overhead costs, and concerns around the need for accreditation, in light of stagnant fees in the face of inflation.
3. Low payment rates also make other areas and types of work more attractive to expert witnesses, resulting in potential long term significant sustainability issues.
4. Experts who participated in these focus groups expressed serious concerns about a lack of understanding of what their work involved at the LAA, alongside concerns that the LAA is overly focused on price rather than the quality or expertise required.
5. Concerns over low morale became apparent as expert witnesses discussed feeling demeaned or undermined by the public funding regime.
6. Relationships between expert witnesses and defence lawyers were at risk of being strained over when and how payment should be made.
7. Ultimately, participants raised concerns surrounding quality, sustainability, and equality of arms in relation to commissioning expert witness work.
8. In light of the above, we make three recommendations:
 - a. Payment rates should be reviewed with a view to being increased, and the need for different rates inside and outside London should be reconsidered
 - b. Communication should be improved between expert witnesses, the LAA and defence lawyers. This could be partially achieved by expert witness payments being made directly by the LAA rather than through solicitors.
 - c. Payments for expert witness work should have greater focus on quality than price, though experts should not be expected to bear all the costs associated with quality assurance.

¹ R Vogler, L Welsh, A Clarke, S Wiedlitzka and L McDonnell 'The Criminal Cases Review Commission: Legal aid and Legal Representatives. Final Report' (Brighton, University of Sussex, 2021)

Research Background

This report details the findings of a small exploratory study into the impact of legal aid cuts on expert witness instructions and reports. The study was funded by Research England's Strategic Priorities Fund. It was conducted alongside an Economic and Social Research Council funded project that examined the impact of legal aid cuts on CCRC applicants, their lawyers and the CCRC: *Criminal Cases Review Commission: Legal Aid and Legal Representatives*.

The study's aim was to enhance understanding about the impact of legal aid cuts and, in particular, to explore whether/how legal aid cuts have affected the way(s) in which expert witness instructions are being arranged, and reports being prepared. In meeting this aim, we were guided by some of the findings from the CCRC project. That project found that where represented applicants to the CCRC raised concerns about expert advice, their lawyers had not necessarily commissioned further reports. Exploring the issue through a survey, lawyers indicated that experts appeared to be less willing to prepare reports at legal aid rates, meaning that fewer experts were available for instruction. Subsequent in-depth interviews with lawyers revealed different reasons why an expert report might not have been commissioned by a lawyer, including where the Legal Aid Agency (LAA) refused to fund the report and where a lawyer decided to ask the CCRC to commission an expert, rather than doing so themselves. More broadly, and supporting the survey data, several interviewed lawyers suggested that experts had become less willing to prepare reports at legal aid rates since expert witness fees were reduced in 2013.² They also suggested that this reluctance was compounded by experts' desire to avoid controversial areas of expertise, and the fact that experts may not be paid for long periods of time (this was a particular problem in appeal and CCRC cases because of the inability to receive interim payments from the LAA in such cases).

Literature Review

Research on the impact of legal aid cuts on the behaviour of publicly funded criminal defence lawyers has identified several common themes, including reductions in the amount of work performed on individual cases in favour of volume processing,³ reductions in client care activities (including face-to-face time spent with clients),⁴ routinisation of case procedures resulting in de-skilling,⁵ increased financial/business uncertainty, and decreased morale.⁶ However, there has hitherto been no empirical research directly focused on the impacts of public funding rates and systems on the way that expert witnesses and defence lawyers work with each other. This small scoping study seeks to contribute to that gap by investigating the impact of legal aid cuts on expert witness instructions and reports. In this way, we sought to begin building a picture of the reality of practice for expert witnesses.

In conducting the analysis of this data, we have adopted the stance highlighted by Foley, that funding defence experts has positive implications beyond the immediate defence. Proper funding of defence experts would enable prosecution errors to be detected early, allow the resources of

² Criminal Legal aid (Remuneration) Regulations 2013

³ C Tata and F Stephen 'Swings and roundabouts: do changes to the structure of legal aid remuneration make a real difference to criminal case management and case outcomes?' (2006) *Criminal Law Review* 722-741

⁴ Ibid. See also C Tata and F Stephen 'When Paying the Piper gets the Wrong Outcome: The Impact of Fixed Payments on Case Management, Case Trajectories, and 'Quality' in Criminal Defence Work' in P Pleasence, A Buck and N Blamer (eds) *Transforming Lives Law and Social Process* (Legal Services Research Centre, TSO, 2007)

⁵ R Young and D Wall 'Criminal Justice, Legal Aid and the Defence of Liberty' in Young, R. and Wall, D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996)

⁶ L Welsh 'The effects of changes to legal aid on lawyers' professional identity and behaviour in summary criminal cases: a case study.' (2017) *Journal of Law and Society*, 44 (4). pp. 559-585.

prosecuting authorities to be redirected where necessary, investigations could be reignited before cases turn cold, thus increasing public safety and the chances of catching the correct perpetrator.⁷ In these ways, adequate funding for experts to assist the defence contributes to overall procedural fairness in criminal cases.⁸

Nonetheless, the House of Lords recently reported that the “quality and delivery of forensic science in England and Wales is inadequate” as a result of “simultaneous budget cuts and reorganisation, together with exponential growth in the need for new services such as digital evidence”.⁹ As Roberts notes, “publicly funded defence forensics in English criminal proceedings have lately experienced the shock of austerity”.¹⁰ The resulting market has been recognised as suffering under extreme pressure, with particular concerns arising about “equal and fair access for defendants”,¹¹ market instability having been recognised as a key threat to quality since 2015.¹² Roberts described the closure of the national Forensic Science Service in 2012 as “a terrible blunder” that “shows the irrationality of applying rigid market models and solutions to spheres of human activity that cannot be understood or appreciated in purely economic terms.”¹³ Tully also regards funding constraints, weaknesses in case management and commissioning as challenges to both the quality and reliability of expert witness evidence.¹⁴ Persistent issues with low rates of legal aid funding and competition for work based largely on price (with little consideration of quality standards) have also been raised in the reports of the Forensic Science Regulator.¹⁵ In 2021, the Forensic Science Regulator reported that problems with legal aid funding for experts continue to hinder aims to establish standards at which work should be reviewed, particularly for the defence, and that some heavily criticised experts continue to be instructed “almost certainly” through legal aid.¹⁶

Against this background, the House of Lords expressed concern that crimes might go unsolved, and that miscarriages of justice could increase, while tightened “funding constraints, the viability and resilience of free market competition in forensic science provision [...] are identified as continuing areas of concern” in relation to expert evidence.¹⁷ A key recommendation of the Science and Technology Committee was that the Forensic Service Regulator should review the structure of the market with the objective of determining

a procurement model which balances price, quality and market sustainability; ensures a level playing field between private and public sector providers avoids undue shocks to the market [...]; and which maintains the capabilities of small providers in niche disciplines¹⁸

⁷ B Foley ‘Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science with Storytelling’ (2013) 43 Tulsa L. Rev. 397

⁸ P Roberts and M Stockdale Introduction: forensic science, evidential reliability and institutional reform in P Roberts and M Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony. Reliability through Reform?* (Edward Elgar, 2018)

⁹ House of Lords *Forensic science and the criminal justice system: a blueprint for change* HL Paper 333 (Science and Technology Select Committee 3rd Report of Session 2017–19, 2018); 3

¹⁰ P Roberts ‘Making sense of forensic science evidence’ in P Roberts and M Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony. Reliability through Reform?* (Edward Elgar, 2018)

¹¹ House of Lords (n8) 3

¹² Roberts (n10)

¹³ Roberts (n10) 59

¹⁴ G Tully ‘Regulating Forensic Science’ in P Roberts and M Stockdale (eds) *Forensic Science Evidence and Expert Witness Testimony. Reliability through Reform?* (Edward Elgar, 2018)

¹⁵ G Tully *Annual Report 17 November 2017 – 16 November 2018* (Forensic Science Regulator, 2019); G Tully *Annual Report 17 November 2018 – 16 November 2019* (Forensic Science Regulator, 2020)

¹⁶ G Tully *Annual Report 17 November 2019 – 16 November 2020* (Forensic Science Regulator, 2021) 34

¹⁷ Roberts and Stockdale (n8) 10

¹⁸ House of Lords (n9) 47

It seems clear that serious concerns exist about the way in which public funding affects the ability of expert witnesses to conduct work. Worryingly, there are related concerns about both market sustainability and the quality of justice that can be delivered under the current funding regime.

Method

Data collection consisted of two online focus groups, conducted online via Microsoft (MS) Teams software during a Covid-19 lockdown. Eight people volunteered to participate, of whom seven took part in the research.¹⁹ Of the seven focus group participants, three were psychologists and four were forensic scientists (including digital, biological and fire investigation). The focus groups were designed around key themes including legal aid payment rates, the LAA, and post-conviction appeal and CCRC/Appeals work. While we structured the focus groups around these central themes, we also left space for new ideas and issues to be raised, and allowed time to assess the main issues and explore suggestions for change.

The focus group schedule consisted of five main sections: introduction and ground rules, legal aid payment rates, dealing with the LAA, CCRC/appeal work, and possibilities for change. The schedule was the same for both focus groups. The moderators, however, worked flexibly to adapt the schedule if something was raised at another time. The focus groups were designed to last no more than 75 minutes and to be dual moderated to prevent fatigue.

Participants were recruited purposefully with invitation emails sent to a range of consultancies and expert witness agencies along with some basic information about the project and a copy of the participant information sheet and consent form.²⁰ Once the focus groups had been organised, participants were also provided with a technical information document containing information about joining their focus group. The eight volunteer participants were divided into two focus groups of four according to their availability. All participants joined with their videos on and in both groups the conversation flowed easily.

The focus groups were transcribed then the transcripts were checked and anonymised by the researchers and sent to the participants for their records. Anonymised transcripts were coded thematically using NVivo software. Codes were based on the ideas derived from previous research with lawyers and the CCRC and were added to iteratively during the coding process to reflect the content of the focus groups.

Focus groups are, by their nature, qualitative. While they are useful to explore feedback, perceptions and common-sense understandings within a group, they are not intended to produce either statistically significant or generalisable results. Given this, we do not attempt to quantify opinions or generalise out from the focus groups. Instead, we treat the data as potentially indicative of thoughts and feelings among expert witnesses. Where possible, we make links to our previous research to support these indicative findings.

Limitations

The focus group data may be affected by self-selection bias as participants were all people who had volunteered to take part. We do not know what led participants to volunteer and, therefore, cannot be sure what these biases were. It could be, for example, that people with stronger views about legal aid were more strongly represented among the participants. Given that the focus

¹⁹ The eighth volunteer had to withdraw because of a short report deadline, something that was mentioned by other participants.

²⁰ The information sheet stressed that participation was completely voluntary, that their data would be treated as anonymous and handled in accordance with the General Data Protection Regulation (GDPR) 2016, that they would not be able to withdraw their data after the focus group, and that they should treat the comments of other participants as confidential within the focus group.

groups were not intended to be representative, this is not a serious concern, although it was something we kept in mind when analysing the data.

Other limitations may result from the online nature of the focus groups. Conducting focus groups online is not common within social science research and there is therefore little to suggest in what ways our data may be affected by online data collection. Within the literature that does exist, it is suggested that conducting focus groups online may lead to more distractions (related to connection, software and hardware issues),²¹ higher attrition rates,²² and fewer interactions between participants (because conversation may be less flowing, dynamic and deep where people are not in a room together and are less able to read visual cues).²³ In our research these features do not appear to have been significant, perhaps because of the rapid increase in the use of online meeting software from March 2020 as result of the Covid-19 pandemic. We also worked to limit online fatigue by keeping the focus groups to a maximum 75 minutes in duration.

²¹ K Abrams, et al. 'Data Richness Trade-offs Between Face-to-Face, Online Audiovisual, and Online Text-Only Focus Groups.' (2015) *Social Science Computer Review* 3: 80-96; N Daniels, et al. 'STEER: Factors to Consider When Designing Online Focus Groups Using Audiovisual Technology in Health Research.' (2019) *International Journal of Qualitative Methods* 18.

²² Daniels (n21)

²³ J Gothberg, et al. 'Is the Medium Really the Message? A Comparison of Face-to-face, Telephone, and Internet Focus Group Venues.' (2013) *Journal of Ethnographic & Qualitative Research* 7: 108-127.

Results

This section reports the results of the research in six parts, including illustrative quotes from the focus groups. Part one reports participants' views of the legal aid payment rates for expert witness work and the impact of rate cuts on instructions and reports. Part two looks beyond payment rates to examine participants' comments about the hours allowed by the LAA and the effects of LAA decisions on expert witness work. Part three presents participants' views about the LAA and explores a perceived lack of understanding within the LAA about expert witness work and specialisms. Part four examines issues of market withdrawal and sustainability within the expert witness market, and part five discusses participants' experiences of claiming and receiving payment via solicitors. Finally, part six presents other criminal justice issues that were not, or only tangentially, related to rates or the LAA.

1. Legal aid payment rates

The psychologist participants explained that the standard rate for psychologists working with adults was £93.60, with a higher rate for work with children and a lower rate for psychologists working in London. One participant also pointed out that psychologists who work for an agency are paid at a considerably lower rate (around at £65-70, resulting from deducting the agency's own fees). In digital forensics the standard legal aid rate was £72, and in fire investigation and biological forensics there were two rates: £72 and £90.40. In all cases, the rates were lower in London.

In situations where there were two payment rates depending on the work required, participants reported that the LAA is reluctant to approve quotes at the higher rate. Participants explained that this had a significant negative impact on their work:

- R1: We run as a normal forensic lab, the same as the main providers do. If we can only charge £72 an hour, that doesn't cover our costs to allow us to do that comfortably, especially for the more complex casework [...] From a pure rates thing, it causes us huge issues as a company to maintain the standards that we need to do it properly.
- R4: [...] you'll put an estimate in at £90, but legal aid will come back and say it's £72, even though it's not because it's actually a different forensic category. [...]. And then the odd thing is that DNA, which very much is forensic science, it's highly specialised, bizarrely, is at £72 when it should be at £90.

No matter the payment tier, participants expressed universal concern about the rates at which fees for legally aided work is paid. One participant noted that companies could potentially mitigate the low rates by artificially inflating their hours. However, that participant, in concert with others, viewed such behaviour as dishonest and explained that they resisted temptation to inflate hours in this way.

Participants were aware of the 2013 cut to expert fees, although not all of them could remember exactly when the cut occurred.

- R3: I think we were on a higher rate until ... I don't know, time just passes by, doesn't it, and I can't, without going back and looking at it, remember exactly which year it was, but there was a review, which actually reduced our fees.

Nonetheless, participants in both focus groups felt that payment rates were too low, especially when seen in light of both the 2013 fee cut and the real term cuts resulting from inflation. Much like lawyers funded through legal aid, experts' fees have stagnated while other business costs have risen. These factors combined to place significant strain on working practices:

- R2: All of our work is at £72 an hour that's legal aid funded. Now, that fee has been very much fixed for around eight years now. [...] the administrative overheads of running a business has increased with time. So, I think if you ask anyone, we will all say £72 is not enough. Back in 2013, we probably said £72 is not enough. But I think the fact that it hasn't even moved with inflation for eight years now, it does cause us some degree of concern that somewhere something has to give at some point.
- R4: The £72 rate is less than what we could get in 1999 in terms of its value. So, actually, as every year goes by, the value of the legal aid rate goes down with inflation because it's also not index linked. [...] The meaning of that, well, we're having to do work for less and less every year on a rate that's already far below what it needs to be.

As the above quotes suggest, participants intimated that the resultant financial pressures on expert witnesses, and the firms they worked for, had potential to cause severe effects on the quality of work done and could result in requests from business managers to cut corners. This was in part because the low payment rates made expert witness work unviable for larger companies, and for companies who had to pay out large sums to maintain their accreditation:

- R1: It [legal aid payment] favours very small, perhaps independent individuals, who have no overheads, but therefore don't have the peer review. Like, every report we do is peer reviewed by a colleague who's also qualified. They don't necessarily have the accreditation – some will – but, in the area we work in, will not necessarily have that support structure around them to give the level of quality, hopefully, or the assurance of the level of quality, because it will depend on the individual. But that all costs money, and that all builds into the overheads.

Participants in both focus groups summed the situation up by saying that the LAA does not pay for expertise or quality:

- R7: I think rate-wise, my kind of summary would be, it doesn't reflect the expertise.²⁴
- R4: If you want quality people, they're going to cost more. [...]. In forensic science, we have to have the entire laboratory or office or everybody to a UCAS standard, and a single UCAS score can cost over £10,000 to get implemented, because we have to pay these people to do the inspections, and they're not cheap. So, what happens is, the legal aid doesn't pay any more money. They just pay the lowest quote. So, actually, if you want quality, you won't get it with the current legal aid system, so the criminal justice system doesn't get quality based on legal aid. It gets the cheapest.

A related issue, which was concerning to several of the participants, was that legally aided expert witness work did not pay enough to retain high calibre expertise. In this sense, the low rates of remuneration had a secondary effect on skills and sustainability as good experts were tempted away from publicly funded defence work to better paid prosecution work, or to work in better paid sectors. With the former issue there were important implications for equality of arms, but with both there are serious implications for skills and sustainability in the long term. Participants felt that these concerns intensified in London as a result of the lower rates paid to expert witnesses there. The lower rates paid in London were something none of the experts we spoke to felt

²⁴ One participant (R6) disagreed that there was a link between the rates and the level of expertise, noting that some alternative work (e.g. NHS work) was less well remunerated than expert witness work. They went on to suggest that the issue was more about people putting forward experts who were not experienced or specialised enough in the area required.

made sense, and was seen as an example of ‘discrepancies’ in the rates that ran across all fields of expertise.²⁵

When we asked participants what the most important issue was for them, several referred to the rates. This was also something they felt required change:

- R1: [...] we really need the £90 rate in order to continue to provide the service with all the quality standards in place. That would be our biggest thing.
- R2: I mean, we’ve highlighted loads of things, but a lot of them could be mitigated by increasing that rate. I think that’s a lot of it. Even just at inflation, for it to have sat stagnant for almost a decade is quite concerning.
- R5: It’s the rates and the discrepancies between the rates [...]. It doesn’t make any sense. And when things like that don’t make any sense, it’s really difficult to see how they’ve arrived at those rates and why on earth we end up getting offered £52 an hour, or whatever it is, for work that is clearly worth a lot more.

2. LAA decision-making practices

As well as struggling to be granted the higher payment rates (where there was one), participants reported difficulties getting the LAA to approve an adequate number of hours to conduct the work. They articulated a constant need to justify the hours required, alongside LAA efforts to reduce the hours down:

- R3: I think the biggest issue that I’ve had is in terms of getting it approved. [...]. It’s about the time taken, the time that’s actually allocated.
- R2: We tend to go for a while and not a lot of our work gets queried as it goes through, and then all of a sudden we will have, for months, I feel like I’m constantly battling and going back to our admin team and saying, “This is what we need. This is why we need this money.” [...] we’ll go ages and nothing gets questioned, and all of a sudden I’ll go for months and nearly every order going through, I think, “Why are they picking this up?”
- R7: There’s lots of quibbling about fees. [...] With criminal stuff, it’s not as straightforward because of the prior authority issue.²⁶ [...] they’ll either approve it or they won’t approve it, but at least we’ve then got the CRM approval to show that it was approved. But even with that, the Legal Aid Agency can still say, “We’ve decided it takes less.”

One participant noted that, while there is benchmark remuneration guidance in family legal aid, in criminal practice there is no such guidance and quotes are based on the facts of each case. Participants explained that this meant that inexperienced, or differently qualified, experts could put in “ridiculously” low quotes and the LAA would simply approve the cheaper quote:

- R7: we’ll put a quote in for a case based on the facts. But they might have contacted another expert, who’s very inexperienced and has put a ridiculously low quote in, and they’ll obviously approve it at that, and we’ll say, “Well, we can’t touch it at that because it’ll take much longer.” But that’s because there is no sort of benchmark guidance

Another participant raised a similar issue about other firms submitting low quotes:

²⁵ Other examples of discrepancies mentioned included the different rates for psychologists working with adults and those working with children. As one participant put it: “they’re training has been as many years, and it’s been as much to get the expertise in whatever niche. Whether it’s working with sexual offenders or working with children, it’s just a different area, so I can’t understand why the rates differ at all” (R7).

²⁶ When a defence firm seeks to instruct an expert through legal aid funding, they must – where the fee will be more than £100 – seek ‘prior authority’ from the LAA to incur the fees. Authority is granted by the LAA using form CRM4.

R5: Somebody will have done a quote. Who these people are, I do not know. It gets approved by legal aid and then, for whatever reason, they decide they're not doing it, or somebody at some stage makes that decision. And we'll get contacted and say, "Right, I've had this quote, I've got this approved, can you do it for 500 quid?" "No, can't do that." "I can't spend 20 hours looking through 2,000 pages to do with this for 500 quid, that's ridiculous. It's going to take me far too long. And that's just the reading part, never mind the actual thinking and writing and everything else that you're going to ask me to do." [...]. So, there is a tendency for somebody somewhere to underquote, get the authority and then it ends up on somebody else's desk. Obviously, you can't do a case for significantly fewer hours because then you're not able to work on other cases. And when this is your income, when this is what you do fulltime, you can't do that. It just isn't viable.

Relatedly, one participant explained that the LAA's reluctance to grant the hours requested and required often meant doing work for free. The unpaid work necessitated by LAA reluctance to fund required time was a very significant problem for many participants which fed into overall financial sustainability and quality issues.

R6: I take them on with whatever hours the agency's agreed to and then I do many more hours for free [laughter], and we don't list it. [...] it didn't make sense why [a particular case] had so few hours allowed and then another one, which was more straightforward to me, was allowed the right number of hours. [...] I just felt, for this client, I would do it [...] and it was double the amount.

R3: [...] the hours that they've set for some of the work are just not realistic. And I'm sure my colleagues here will actually, you know, probably feel the same way. I hear my colleagues say all the time, "We work for less than the minimum wage, really, when you consider the hours that we do to do a proper job." It's not something you can turn around in a day. It's a long piece of work. You're looking at, you know, probably four or five, maybe even eight or nine days to do a decent report, and you're being squeezed into these 20 hours.

In a couple of cases, participants also implied that the LAA's desire to reduce hours could, in some cases, affect an expert's strategy, or whether an expert was used at all. This had potential implications for quality and justice:

R2: [...] we would quote a for a job [...] and quite often, the legal aid will come back and say, "No, can you not take a different approach?" Now, the bit that makes me slightly uncomfortable with that is that, I can't say for certain, but I'm pretty confident the person at the legal aid making that decision is not a forensic specialist who can formulate a forensic strategy. It concerns me that that's then shaping our forensic strategy we're deploying on cases. It's never happened, but if we were to be picked up in court as to why have we chosen that strategy, my investigators are going to have to say, "Well, that's what the legal aid would fund, but we would have preferred to have done this."

R4: We also had one kickback from legal aid – this is a new one to watch out for – saying that they denied the estimate for legal aid because they didn't think an expert was needed, because the prosecution had used an accredited lab to do the work. Now, they actually made a legal determination in that case, which... That was a hell of a worrying trend, that someone out there said that was okay to do that.

Participants were very concerned that forensic strategy was being shaped by LAA decision making processes regarding funding. This not only constrained experts' professional autonomy, but also had the potential to significantly shape the way cases were prepared and later presented in court.

All of these points were exacerbated by less direct problems with funding approval, such as factoring in travel time and the potential for appointments or meetings to be cancelled (sometimes at short notice). One participant explained that the LAA had refused to cover travel time in cases where a journey was made but no assessment could be carried out. Another noted that the LAA would often only agree to fund part of the travel time, even though '[n]o one has experts in their back garden, and so you have to travel' (R4).

One further participant noted that the LAA does not allow urgent charges, which is particularly important given what participants had to say about the increasingly last-minute nature of the work. They attributed this trend to pressure to resolve cases quickly, with a perception that more defendants are being pushed toward plea deals to avoid going to trial to prevent further court backlogs:²⁷

R1: And the only other thing I notice as well is we are not allowed to charge urgent charges to legal aid. So, if we get a genuinely urgent case where you have to do the work within 24 hours sometimes, or DNA profiling – now, we outsource our DNA to the providers that do it for the police forces, but they automatically charge an urgent rate. So, any work we put through them would get a £500 urgent rate for them to do it offline. We cannot do that through legal aid [...] there are the ones that are properly last minute, that you're working over the weekend, you're opening up your labs. And that, again, we're expected to do the work, but legal aid will not fund it, and that seems an anomaly.

3. LAA understanding and recognition about experts' work

When asked about things that could be changed or improved, the first focus group highlighted an issue about recognition of expert witness work, and what goes into it, within the LAA. This is illustrated in the extract below:

R3: Some of it is, I think, thinking as well not just about the recognition of the hours it takes, but the fact that you do need the time to do it, and not to have someone coming to you saying, "I need this by two weeks on Tuesday," and you see him on Monday [laughter].

R1: I think it's a recognition of the value – which is both time, I guess, and cost. It's a recognition that you do have to pay and give a certain amount of time in order to get a quality product by the end of it.

R2: Yeah, and I'm really in agreement with that point. It's just that recognition of what it takes to actually deliver what they want to a suitable quality, to mitigate any potential miscarriages of justice, because that's the worst-case scenario, isn't it, really.

This also emerged in the second group, where participants suggested that training of LAA staff, or improved communications, might be necessary. Participants' comments seemed to suggest that the difference in rates on offer (in and out of London) were seen to be reflective of a lack of understanding about the market structure at the LAA, which impacted on their sense of recognition. Participants felt that the LAA did not always understand the nature of their work, which seemed to frustrate the participants in our focus groups, as in the examples below:

R7: So, for example, they might think that we [psychologists] would see someone for the same length as a psychiatrist. In my experience, psychiatrists might see someone for up to an hour for an assessment. We would spend five hours, six hours in some assessments to be able to answer our instructions. And I wouldn't expect someone at the

²⁷ See, e.g., H Siddique 'Crown court backlog has reached 'crisis levels', report warns' *The Guardian* 30 March 2021

LAA to know the difference, but it obviously affects the funding, so perhaps I should expect them to know the difference.

- R5: So, we communicate our quote to them, our reasons behind our quote. They say, “No, we’re not doing that, we think it’s worth less,” but they never say why. There’s never a reason for it. And if they came back with a why, then at least you could say, “Well no, because...” Without that ‘why’ back from the Legal Aid Agency, as far as I’m concerned, it’s because somebody else put in a lower quote and they’re just matching that and that’s it.

The feeling that the amount of work required to prepare an expert work was not recognised by the LAA was exacerbated by the participants’ understanding that the LAA expected work would be done to a high quality. However, funding was not adequate to pay for that kind of quality. As one participant explained:

- R1: For both the police work and the defence work, at the point when you get to court, it is expected that you will have done a thorough and proper job as an expert witness. It is not really very easy, as an expert witness, to then say, “Oh sorry, I wasn’t paid so I didn’t do it.” The judge doesn’t care about that at that stage [all laugh]. It is you that’s in court and it’s you that’s answerable to court. [...] You do it anyway because you have to for court, so they can almost get away with therefore not paying you so much and cost cutting, and I think that’s not fair.

In one extreme case, a psychologist spoke about a case where the judge had made a decision in court that their report did not have the value that it had been paid, and therefore reduced it so that the money had to be returned, noting that a similar thing had happened to multiple colleagues. They went on to explain that these colleagues had become anxious about doing publicly funded work because they were worried that they were going to do it, be paid and then a judge would determine payment differently.

Although they noted that funding was a much broader issue, widespread lack of recognition and understanding, to some extent typified by the low funding rates, appeared to leave participants feeling ‘demeaned’ as experts:

- R3: The bottom line is, as I said earlier, you know, it is public money and everywhere is suffering cuts [...] but as a professional, as an expert witness, you know, you can feel a bit demeaned and like you’re not really valued.

4. Market withdrawal, sustainability and quality

During the focus groups we sought clarification about lawyers’ suggestions (made during the wider CCRC project) that a lot of expert witnesses will no longer accept instructions that involve legally aided work. All of the participants in our focus groups were actively engaged in conducting legally aided work. They were, however, aware of experts in their respective fields turning away from work funded by legal aid.

- R3: I’m aware of a number of colleagues who have said, “This is just not in my interests anymore. It’s too much work for too little pay, and so I’m going to do therapies instead.”
- R5: I know people who refuse to do legal aid work because it’s just not worth asking their people to do it. Financially speaking, you could work on a case for 12 hours for legal aid and make as much as you might make in a couple of hours for a civil case. It’s just not worth their time, so they just won’t do it.

While most of the participants did not suggest that they would withdraw from legal aid work in the near future, one explained that it was becoming increasingly difficult to justify doing publicly funded work:

R1: We have to justify why we should continue to do legal aid work, which we want to do because it's the interesting, complex, scientific work. [...] But we have some police work through our firearms team where we just swab firearms, and it's the most basic – and we can charge £90 an hour for that. And you can see our finance director [...] looking at that and thinking, "Well, why don't we just do that, maximise that?"

There was also some evidence that even where people were doing legal aid work, better paid private work took priority:

R2: We have a good core business that's built on legal aid work. That said, the same team of people that deliver our legal aid rate also deliver all of our private and corporate work as well. I can't honestly say that, at times, because it's at a higher rate, that that doesn't take priority over stuff that's legal aid funded.

More broadly, participants raised concerns about skills shortages, particularly in fields where there were alternative careers were able to offer much better salaries. Given the low fees on offer for expert witness work, some participants explained that this led to problems with both sustainability and quality:

R4: The prosecution can buy experts at a high rate, which means the experts are unwilling to do defence work and tend to go off and do prosecution work instead, so we start to run short of defence experts. [...] It's also very hard to hire people, because we can't compete with the salaries that the prosecution are offering.

R5: We see people going to the insurance side in fire investigation and the civil work, and that is significantly better paid than anything in the criminal justice system.

R2: Digital investigators are also quite well suited for other disciplines, which are very closely linked. [...] Now, the salaries associated with those jobs are miles higher [...] which is quite a draw, as you can imagine, when you have your digital forensic scientist, who is probably paid less than half of what that salary actually is. So, I guess from my perspective, the other thing is that I think in the long term, for labs that are doing legal aid work, we are going to eventually start to suffer in the quality of the work. We won't have long-serving digital forensic scientists because there are these other opportunities open to them, and we can't be competitive because we're limited by a rate.

Three further participants – in fire investigations, psychology and forensics – also explained that insurance or other privately funded forms of investigation were better paid, and that this affected both whether experts will accept legally aided work and the quality of experts who perform that work. As these points make clear, the low rates of remuneration for legal aid work were thought to threaten the sustainability of defence experts in the long-term but were also understood to risk quality and standards. Quality concerns and funding were thus viewed as inextricably linked:

R7: The problem is getting a good expert. And I have genuinely seen – in the last few months – two complaints into our regulator about expert reports [...] because whatever they did seriously breached ethical and quality standards. [...] Here were reports that were not detailed, time was not spent on them. They were quite generic. They weren't tailored, and people had cut corners within the types of assessment used [...]. So, the standards, in my professional opinion, are seriously compromised by these rates.

5. Payment arrangements

A particular problem reported by the experts – described as “one of the major issues that we have” by one participant (R2) – was around the arrangements for payment. In both groups participants explained that they had little direct engagement with the LAA since communications about funding went through solicitors:

R7: I suppose we don't actually deal with them [the LAA] direct, that's the main thing. When I tailor a quote, it's relevant to legal aid rates, which we're aware of, but we don't deal with them direct, and therein lies the problem payment-wise. [...] It's a problem for me at the end of the case and regarding payment that that's not direct, that that's through a third party.

When it came to payment, participants explained that their indirect relationship with the LAA caused serious issues for expert witness, who described difficulties in receiving payments via solicitors.²⁸ In one case, the participant had had to complain to the LAA in respect of solicitors who had not paid, something they explained was "not unusual actually" (R3):

R5: It's difficult to get the money out of some solicitors, some are easy. That's where we sit. And whether or not that blockage is at the solicitor or at the Legal Aid Agency, we have no way of knowing that and no way of dealing with it wherever it is anyway.

In such cases, participants explained that they were often left without payment and had to absorb those costs internally. This could put considerable financial pressure on companies and increased the risk profile of legally aided work, which was not well-paid enough to make such risks worthwhile. Participants also reported that significant time and effort had to be put in to chasing payment from solicitors, with staff having to be employed specifically for that purpose:

R1: We had to hire one man to come in once a week just to chase up solicitors, and all you would ever hear if he was in the office with us was, "Have you applied for fees on account?" "Have you applied for fees on account?"

In the case above the participant went on to suggest that the problem was particularly severe for small defence firms. This was supported by other participants, two of whom pointed to the particular pandemic-induced strains of 2020-2021.

Although some participants noted that the issues around payment via solicitors had "always been an issue" (R1), there were some suggestions that the risks involved for expert witnesses had increased at various times, including as a result of collapsing legal aid defence firms:

R2: It doesn't happen very often, but we did go through a phase, probably four or five years ago,²⁹ where it seemed like a lot of smaller solicitors' firms seemed to be struggling, and quite a few closed down, yet when they went under, presumably they had our payments from legal aid, because again we used to ask for payment on account from legal aid. And they kind of went under and we delivered our work, and we never got to see the money.

R7: If they go into administration, we will not be paid, and there is no recourse. They've gone into administration because they've got no money and, in my experience, no one's got money out of that. So, there is a huge risk.

Reflecting these concerns about payment, participants suggested changes to the way that legal aid payments are made, with opportunities to be paid directly by the LAA. It was also pointed out by three of seven participants out that this was the situation in Ireland and should therefore be possible.

One participant suggested other benefits of direct communication and payment from the LAA, including the ability for experts to be able to appeal and justify the rate and number of hours

²⁸ One participant did not seem to have experienced such difficulties. They explained: "If we put out an estimate, we're prepared to undertake the case on the basis of that estimate. If Legal aid approves the estimate then, generally speaking, in most cases we don't have a problem getting paid, because the funds are preapproved." (R4)

²⁹ It is worth reflecting here that legal aid fees were cut, and LAA contracting criteria changed for defence solicitors, in 2014 and 2015 – i.e. 6 years ago. The findings of the CCRC project do suggest that 2014 was a watershed moment for defence firms conducting legal aid work (Vogler et al, (n1)).

agreed, if necessary, and saving time and money for solicitors. Another participant also implied that more direct communication with the LAA would generally be helpful, explaining:

R5: There is something there, where we aren't able to have that interaction to say, "I don't know who told the Legal Aid Agency this was going to work for this kind of case, but it's not." All we have is a solicitor, who, in the nicest possible way, probably has absolutely no knowledge whatsoever.

6. Wider issues

During the course of both focus groups, it became apparent that other aspects of experts' work (beyond funding or tangentially related to funding) were affecting their working practices. The first of those was **accreditation**, which was a significant financial overhead for experts, particularly in the context of the financial pressures of doing legal aid work.³⁰ Some participants described a temptation or incentive to avoid accreditation, although they recognised the possible impact on quality:

- R1: There's also an argument as well, not just for leaving the industry but for stopping your accreditation and your quality. Because currently we do not need accreditation for defence work, but you do for prosecution. [...] And you can see that financial pressures could also persuade companies to cost save in those areas.
- R2: Digital forensics [...] are being dragged kicking and screaming to being accredited by the Forensic Science Regulator and to 17025, but it is because up until tenders started putting it on as a requirement, there was no business incentive to do it.
- R4: On the one hand, the regulator's pushing for reform [through accreditation], but you can't afford reform because no one else is going to pay you any money if you then get accredited. You'll just be poor. [...] It's been heavily loaded on the prosecution's favour. And doing a lot of defence work, we see time and time again where people are wrongly arrested [...].

A second wider issue, which related to concerns about quality and accreditation, was the relationship between **doing work for the prosecution in comparison to doing legally aided work for the defence**. Participants raised concerns about inequality of arms between the parties, but had slightly different views on the differences between prosecution and defence work.³¹ In some cases, participants in both groups explained that prosecution work provided opportunities to get paid a higher rate, but in other cases they felt there was a "race to the bottom":

- R2: I've seen it two ways with prosecution work. I've seen where they've put it out to tender, and some people go, "This is my opportunity to get more than £72 an hour," and if you're lucky, you will get it. I've also seen it go the other way though, and everybody's bidding on it [...] So, some people will go, "Okay then, I'm going to do it for less," and all of a sudden it becomes a race to the bottom of who can do it for the cheapest to win the contract.

One participant, who did defence and prosecution work suggested that, besides the higher rates on offer, various things made prosecution work easier:

³⁰ Roberts has noted that "a durable system of expert accreditation would have to be funded by the state, either directly as part of a ministerial department or indirectly as a semi-independent agency" (Roberts (n9) 58)

³¹ In terms of the CCRC, one participant suggested that the Commission work on higher rates: "The Review Commission will work on higher rates because they're more driven by the government and the prosecution. [...]. There's just a bit more money in the pot, as it were (R4).

R5: It's significantly easier if you're getting a phone call, you're getting to go out to a scene that nobody else has had a kick around in.[...] In terms of payment, it's easier because there's actually contract physically set there. In terms of the amount you get paid, in fire investigation, which is all I can really talk about, the prosecution side, the police side pays more than legal aid [...] We never have to pre-quote, so we never have that limit in the same way as you do when you're quoting for the Legal Aid Agency.

There was also a suggestion that the different rates and payment arrangements for defence and prosecution work was potentially disadvantaging the defence:

R7: So, if, you know, we had limited supply and the demand is a police case or a defence case at a higher rate for the psychologist and better payment terms, there is no question about which the psychologist will wish to do. So, it disadvantages the defence.

However, where prosecution work was not well paid there were also implications for defence, in terms of the number or quality of items submitted:

R1: The companies have to go rock bottom to win them, and the pressure put on reporters to get cases out quickly, no thinking time, there're huge issues in that. And I think that then impacts on us, because often within prosecution forensics, very few items are submitted, very targeted.[...] That means, by the time it gets to us, we may only have one item looked at. One trainer in a kicking case where you should have both. So, there's huge issues with fragmentation and cost cutting in prosecution that then impacts the defence, because there's a lot more for us to look at and a lot less information for us to take.

A third tangential issue concerned **access to exhibits**, which, as implied above, could hinder the nature and extent of an expert's ability to conduct the necessary work. When asked about getting access to exhibits, some participants noted that it had often been difficult to get items and exhibits sent to them because of an expectation that experts would travel to examine items in prosecution laboratories, increasing the time and costs involved, as in the examples below:

R1: We have issues generally in that, because our laboratory is accredited, we do police work in our laboratory, we work for the forensic providers that work for the police and we do their work in our laboratory. It's very hard sometimes for us to get items released to us in our laboratories.³²

R3: The only time I can think of, and it was an appeal case, was getting access to the trial information. So, it wasn't transcribed, and it was a case of having to go to the court to listen to it physically, and that took a bit of organising because, you know, they weren't willing to assist with transcribing it, even though I'm sure it was transcribed somewhere. But it was literally, you know, "You must come along. You must sit in the offices of the court."

Another participant noted that where there were often delays and blockages in getting evidence, but that the blockage was not with the experts:

R5: What you end up with is, for example, you get five photographs, and you know there are more than five photographs, and it takes until the day before you end up in court for you to get the other 100 [laughter]. And it is a real fight, and where that blockage is, I've no idea, but it's not in the experts [laughter], I know that much.

Other issues were raised about digital storage, and about charges for accessing evidence:

³² This participant suggested that post-trial things were often slightly easier: "Appeal case wise, again, it would be fairly similar actually. In some ways, it's actually slightly easier because there's no current prosecution lab, so there's not the same argument that you should look at it in their lab. So, often, people are a little freer with appeal items, "Oh, it's been done, you can take it," and we can get them, as long as they can find them." (R1)

- R2: There's a general issue with data storage in forensics, particularly in digital forensics, because there's so much of it and nobody really knows the best way to deal with it
- R4: When it comes to seeing physical exhibits, usually it's not a problem. We don't have any problems, because we're entitled to see them and everybody knows that. When it comes to digital, GDPR just spooked everybody and they won't give you everything, and then they heavily redact it, and then you end up with a problem of digital media where it's actually uninterpretable. And then you end up with this massive legal fight, sometimes the judge getting involved, saying, "You have to give a defence expert the same material that your expert's relied on, otherwise there's no equity of arms". [...] We can spend hours chasing this stuff.
- R2: The likes of the Met Police will actually charge us for access to the data, so we can't have free access to their exhibits, which again, rightly or wrongly, doesn't quite sit right with me, the fact that someone's evidence that is by law allowed equal.

In general, the psychologists had less issues when it came to accessing exhibits. However, one of the psychologists did raise a possible issue about nondisclosure applications in prison law cases, where they explained that the defence was not given the same level of disclosure as the prosecution.³³

³³ Another participant raised a similar issue in relation to terrorism cases, explaining: "it is more difficult, and getting all the data on a tagging case, for example, they're on the TPIM orders for tagging, you need the raw data to be able to analyse that, but it's highly classified, because you can actually figure out where people live, to their house. So, there is a different level that goes in those kind of cases" (R4).

Conclusions and Recommendations

The findings of these focus groups conducted with expert witnesses indicate that concerns raised by the Forensic Science Regulator, academics, and the House of Lords are reflected in the day to day practices of expert witnesses. In relation to the question of whether/how legal aid rates and cuts impact expert witnesses, the focus group findings suggest that:

- payment rates for legally aided work are too low, especially in the context of inflation and increased overhead costs (including the cost of accreditation);
- low legal aid rates risk the quality of work done and create sustainability concerns, with knock-on implications for equality of arms;
- there is significant risk of further market contraction in terms of the availability of experts to perform legally aided work, especially for the defence;
- expert witness work involves high levels of input (in terms of work required) and stress around justifying, to the LAA, the number of hours required to conduct legally aided work. Experts often perform more work than is funded; and
- relationships between expert witnesses, the LAA, and solicitors are strenuous and strained around funding, especially in relation to the practicalities and risks involved in payment being made via solicitors. These issues feed into diminishing morale and concerns around sustainability.

These findings support the findings of the larger project on legal aid cuts and the CCRC, particularly the finding that fewer experts are available and willing to conduct legally aided expert witness work for the defence.³⁴ They also support the same project's finding that bureaucracy surrounding engagement with the LAA, and negotiating over hours allowed to conduct work is problematic (in this case for expert witnesses). The findings also raise significant concerns around equality of arms, and provide support for the concerns raised by Roberts and Stockdale,³⁵ the Forensic Science Regulator³⁶ and the House of Lords.³⁷

Our findings are strikingly similar to those that have been documented in relation to the impact of public funding cuts on defence lawyers.³⁸ While the exploratory nature of this study means that its generalisability is limited, a broad base of key themes across a range of publicly funded criminal defence work is emerging, most notably concerns around low professional morale, temptations to cut corners, and financial uncertainty. Financial instability has increased business fragility, especially in light of concerns regarding business overheads, including accreditation costs. All of these pressures place greater burdens on financial viability and increase the risks of continued market contraction, resulting in greater problems related to quality and sustainability in the long term. In light of these concerns, we make the following recommendations.

First, legal aid payment rates should be reviewed with a view to increasing them at least in line with inflation, and the propriety of having disparate rates inside and outside London should be reconsidered. Increasing payment rates would hopefully result in improvements in both quality and sustainability of work. It was also significant among our participants that the payment rates did not reflect the expertise involved in conducting the work (which is another parallel with research conducted with legally aided defence lawyers), so an increase in the rate would also have benefits for experts' sense of recognition and morale.

Second, there are a number of ways in which cross-system communication could be improved, which could improve both efficiency and morale (with knock on effects for quality and sustainability). Direct payment from the LAA, rather than via solicitors, was

³⁴ Vogler et al (n1)

³⁵ Roberts and Stockdale (n8)

³⁶ Tully (n16)

³⁷ House of Lords (n9)

³⁸ Vogler et al (n1)

advocated by these expert witnesses to improve efficiency and reduce financial uncertainties/risk. This could also improve relationships between lawyers and expert witnesses, and creates opportunities for greater dialogue between experts and the LAA about what work is necessary, and expertise required, for individual pieces of work. This could improve levels of understanding within the LAA and result in greater professional recognition for expert witnesses, while also easing the burden for defence lawyers.

Third, there should be a shift away from focusing on the price of the work performed by expert witnesses and towards the quality of work performed. In making that shift, particular attention ought be paid to the impotence of equality of arms between the prosecution and defence in relation to the scope and expertise involved in performing expert witness work. The aim should be to ensure a sustainably high level of quality for all parties to be capable of achieving the most just outcomes. However, expert witnesses should not be expected to bear all of the costs associated with quality assurance,³⁹ in line with Roberts's recommendation that the costs of accreditation ought be borne by the state.⁴⁰ Easier and equal access to exhibits and resources could also improve the quality of work done.

³⁹ Again, this is similar to the experience of defence lawyers, who are expected to bear all costs associated with quality mark accreditations, and the indirect costs of time spent ensuring compliance.

⁴⁰ Roberts (n9)